From:	Leriche, Lucy Rose
To:	Spottswood, Eleanor
Subject:	FW: Meagan"s bio
Date:	Tuesday, December 18, 2018 4:42:55 PM
Attachments:	Meagan Gallagher Bio.docx

Here is a super abbreviated version. Still working on tracking down a more detailed resume or bio.
Lucy

Lucy Leriche(she/her/hers)
Vice President of Public Policy Vermont
Planned Parenthood Northern New England
784 Hercules Drive suite 110
Colchester, Vermont 05446
Cell: 802 598-4182
www.ppnne.org<http://www.ppnne.org/>
Lucy.Leriche@ppnne.org

From: Sullivan, Eileen
Sent: Tuesday, December 18, 2018 4:30 PM
To: Leriche, Lucy Rose <Lucy.Leriche@ppnne.org>
Subject: Meagan's bio

From: Lafayette, Amy
Sent: Tuesday, December 18, 2018 4:26 PM
To: Sullivan, Eileen <Eileen.Sullivan@ppnne.org>
Subject: RE: Call for Content for OTM

Here's what I've got!

Meagan Gallagher
President & CEO

Meagan Gallagher is President & CEO of Planned Parenthood of Northern New England (PPNNE), the largest provider of and a leading advocate for sexual and reproductive health services in Maine, New Hampshire and Vermont. With a network of 21 health centers, Meagan leads PPNNE's efforts in providing life-changing care to more than 44,000 women, men and teens each year. Meagan joined Planned Parenthood in 2000 at the Planned Parenthood League of Massachusetts where she served as Chief Financial Officer, Chief Operating Officer and Senior Vice President of Strategic Initiatives and Growth. She joined PPNNE as the Senior Vice President of Business Operations in 2010 and became CEO in 2013. Meagan began her career at PricewaterhouseCoopers after graduating from Tufts University with a degree in mathematics.

From: Spottswood, Eleanor
To: Leriche, Lucy Rose
Subject: call?
Date: Monday, December 17, 2018 11:30:00 AM

Hi Lucy,

I have some time-sensitive questions for you. I tried to reach you on your cell but didn't get through. Can you please give me a call as soon as you have a chance? I am at my desk.

Thanks very much.

Ella

Eleanor L.P. Spottswood
Assistant Attorney General
Vermont Attorney General's Office
109 State Street
Montpelier, Vermont 05609
802-828-3178
eleanor.spottswood@vermont.gov

From:	cwhite@acluvt.org
To:	Leriche, Lucy Rose
Cc:	Jill Krowinski; Diamond, Joshua; jlyall@acluvt.org; Spottswood, Eleanor; Becca Balint; Levasseur, Katherine
Subject:	RE: Doodle for next reproductive rights meeting
Date:	Tuesday, December 11, 2018 9:43:11 AM

Hi all,

Here's the call-in number for tomorrow: 1-605-475-6333. The participant access code is 494407. Talk to/see you all tomorrow at 1 here at the ACLU.

Chloé

From: Leriche, Lucy Rose <Lucy.Leriche@ppnne.org>
Sent: Friday, December 07, 2018 2:13 PM
To: cwhite@acluvt.org
Cc: Jill Krowinski <JKrowinski@leg.state.vt.us>; Diamond, Joshua <Joshua.Diamond@vermont.gov>; jlyall@acluvt.org; Spottswood, Eleanor <Eleanor.Spottswood@vermont.gov>; Becca Balint <bbalint@leg.state.vt.us>; Katherine Levasseur <KLevasseur@leg.state.vt.us>
Subject: Re: Doodle for next reproductive rights meeting

I think we should meet.
Lucy

Sent from my iPhone

On Dec 7, 2018, at 12:52 PM, "cwhite@acluvt.org" <cwhite@acluvt.org> wrote:

> Thank you for that – will we have enough to talk about without updated language, all, or should we try to shoot for another, later time?
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> **From:** Jill Krowinski <JKrowinski@leg.state.vt.us>
> **Sent:** Friday, December 07, 2018 10:46 AM
> **To:** Leriche, Lucy Rose <Lucy.Leriche@ppnne.org>
> **Cc:** cwhite@acluvt.org; Diamond, Joshua <Joshua.Diamond@vermont.gov>; jlyall@acluvt.org; Spottswood, Eleanor <Eleanor.Spottswood@vermont.gov>; Becca Balint <bbalint@leg.state.vt.us>; Katherine Levasseur <KLevasseur@leg.state.vt.us>
> **Subject:** Re: Doodle for next reproductive rights meeting
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> Hi all,
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> That time works for me but I'll have to call in. Also, I'm not sure I'll have updated language by then.
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> Chat soon,
> Jill

Sent from my iPhone

On Dec 7, 2018, at 10:06 AM, Leriche, Lucy Rose <Lucy.Leriche@ppnne.org> wrote:

> I can make either of those times.
> Lucy
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> Sent from my iPhone
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> >
> > Best,

Chloé

Chloé White
Pronouns: she/her

Policy Director
American Civil Liberties Union of Vermont
PO Box 277, Montpelier, VT 05601
802.223.6304x110 | cwhite@acluvt.org
acluvt.org <image001.png> <image002.png>
<image003.png>

From:	Becca Balint
To:	cwhite@acluvt.org
Cc:	Jill Krowinski; Leriche, Lucy Rose; Diamond, Joshua; jlyall@acluvt.org; Spottswood, Eleanor; Levasseur, Katherine
Subject:	Re: Doodle for next reproductive rights meeting
Date:	Monday, December 10, 2018 10:48:58 AM

Wednesday at 1 is best for me. And I will need a call in number.
Thank you!

Sent from my iPad

On Dec 9, 2018, at 10:19 PM, "cwhite@acluvt.org" <cwhite@acluvt.org> wrote:

> No problem. Let's meet, and I'll send a conference number out if there's more than one who need to call in
>
> ---
> Chloé White
> Pronouns: she/her
>
> Policy Director
> American Civil Liberties Union of Vermont
> PO Box 277, Montpelier, VT 05601
> Office: 802.223.6304x110
> Cell: 913.206.7105
> cwhite@acluvt.org
>
> acluvt.org
>
> ---
>
> **From:** Diamond, Joshua <Joshua.Diamond@vermont.gov>
> **Sent:** Sunday, December 9, 2018 10:17:23 PM
> **To:** cwhite@acluvt.org; Jill Krowinski; Leriche, Lucy Rose
> **Cc:** jlyall@acluvt.org; Spottswood, Eleanor; Becca Balint; Levasseur, Katherine
> **Subject:** RE: Doodle for next reproductive rights meeting
>
> I may be running a few minutes late.
>
> Josh
>
> Joshua R. Diamond, Deputy Attorney General
> Vermont Attorney General's Office
> 109 State Street
> Montpelier, Vermont 05609
> 802-828-3175

joshua.diamond@vermont.gov

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Subject: Re: Doodle for next reproductive rights meeting

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Chat soon,
Jill

Sent from my iPhone

On Dec 7, 2018, at 10:06 AM, Leriche, Lucy Rose <Lucy.Leriche@ppnne.org> wrote:

I can make either of those times.
Lucy

Sent from my iPhone

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acluvt.org <image001.png> <image002.png>
<image003.png>

From:	cwhite@acluvt.org
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Subject:	Re: Doodle for next reproductive rights meeting
Date:	Sunday, December 9, 2018 10:19:50 PM

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Chloé White
Pronouns: she/her

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PO Box 277, Montpelier, VT 05601
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Subject: RE: Doodle for next reproductive rights meeting

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Joshua R. Diamond, Deputy Attorney General
Vermont Attorney General's Office
109 State Street
Montpelier, Vermont 05609
802-828-3175
joshua.diamond@vermont.gov

interactions with the Office of the Vermont Attorney General, you are advised to review Title 2, sections 261-268 of the Vermont Statutes Annotated, as well as the Vermont Secretary of State's most recent compliance guide available at https://www.sec.state.vt.us/elections/lobbying.aspx.

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transmitted to you and delete this email from your system.

This email and any files transmitted with it are confidential and intended solely for the use of the individual or entity to whom they are addressed. If you have received this email in error please notify the system manager. Please note that any views or opinions presented in this email are solely those of the author and do not necessarily represent those of the company. Finally, the recipient should check this email and any attachments for the presence of viruses. The company accepts no liability for any damage caused by any virus transmitted by this email.

From:	cwhite@acluvt.org
To:	Jill Krowinski; Leriche, Lucy Rose
Cc:	Diamond, Joshua; jlyall@acluvt.org; Spottswood, Eleanor; Becca Balint; Levasseur, Katherine
Subject:	RE: Doodle for next reproductive rights meeting
Date:	Friday, December 7, 2018 12:52:36 PM

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To: Leriche, Lucy Rose
Cc: cwhite@acluvt.org; Diamond, Joshua; jlyall@acluvt.org; Spottswood, Eleanor; Becca Balint; Levasseur, Katherine
Subject: Re: Doodle for next reproductive rights meeting
Date: Friday, December 7, 2018 10:46:02 AM

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> >
> > Have a wonderful weekend,
> >
> > Chloé
> >
> > ---
> >
> > **From:** cwhite@acluvt.org
> > **Sent:** Friday, November 30, 2018 2:07 PM
> > **To:** 'Diamond, Joshua' <Joshua.Diamond@vermont.gov>; Duff <jlyall@acluvt.org>; 'Jill Krowinski' <JKrowinski@leg.state.vt.us>; 'Spottswood, Eleanor' <Eleanor.Spottswood@vermont.gov>; 'Balint of Brattleboro' <bbalint@leg.state.vt.us>; 'Leriche, Lucy Rose' <Lucy.Leriche@ppnne.org>; 'KLevasseur@leg.state.vt.us'

<klevasseur@leg.state.vt.us>
Subject: Doodle for next reproductive rights meeting

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Best,

Chloé

Chloé White
Pronouns: she/her

Policy Director
American Civil Liberties Union of Vermont
PO Box 277, Montpelier, VT 05601
802.223.6304x110 | cwhite@acluvt.org
acluvt.org <image001.png> <image002.png>
<image003.png>

From:	Leriche, Lucy Rose
To:	cwhite@acluvt.org
Cc:	Diamond, Joshua; jlyall@acluvt.org; Jill Krowinski; Spottswood, Eleanor; Balint of Brattleboro; Levasseur, Katherine
Subject:	Re: Doodle for next reproductive rights meeting
Date:	Friday, December 7, 2018 10:07:00 AM
Attachments:	image001.png image002.png image003.png

I can make either of those times.
Lucy

Sent from my iPhone

On Dec 7, 2018, at 9:56 AM, "cwhite@acluvt.org" <cwhite@acluvt.org> wrote:

> Hello everyone,
>
> Based on the Doodle, it seems that Wednesday the 12th at 1pm is the best so far. Any objections to scheduling that as our time? Noon on Wednesday seems to also be a good time, if that would work better for those who haven't yet participated.
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802.223.6304x110|cwhite@acluvt.org
acluvt.org <image001.png> <image002.png>
<image003.png>

From:	cwhite@acluvt.org
To:	Diamond, Joshua; jlyall@acluvt.org; Jill Krowinski; Spottswood, Eleanor; Balint of Brattleboro; Leriche, Lucy Rose; Levasseur, Katherine
Subject:	RE: Doodle for next reproductive rights meeting
Date:	Friday, December 7, 2018 9:56:23 AM
Attachments:	image001.png image002.png image003.png

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802.223.6304x110 | cwhite@acluvt.org
acluvt.org

ACLU Vermont

From:	cwhite@acluvt.org
To:	Diamond, Joshua; jlyall@acluvt.org; Jill Krowinski; Spottswood, Eleanor; Balint of Brattleboro; Leriche, Lucy Rose; Levasseur, Katherine
Subject:	Doodle for next reproductive rights meeting
Date:	Friday, November 30, 2018 2:07:06 PM
Attachments:	image001.png image002.png image003.png

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PO Box 277, Montpelier, VT 05601
802.223.6304x110 | cwhite@acluvt.org
acluvt.org

From:	Becca Balint
To:	Jill Krowinski
Cc:	Diamond, Joshua; cwhite@acluvt.org; Spottswood, Eleanor; Leriche, Lucy Rose; jlyall@acluvt.org; Levasseur, Katherine
Subject:	Re: Doodle poll for next repro rights meeting
Date:	Tuesday, November 27, 2018 3:15:09 PM
Attachments:	image001.png image002.png image003.png

I'll be joining by phone.
Becca

Sent from my iPad

On Nov 27, 2018, at 3:06 PM, Jill Krowinski <JKrowinski@leg.state.vt.us> wrote:

> Hey all,
>
> I can be there on Thursday.
>
> Thanks,
> Jill
>
> ---
>
> **From:** Diamond, Joshua <Joshua.Diamond@vermont.gov>
> **Sent:** Monday, November 26, 2018 10:42:46 AM
> **To:** cwhite@acluvt.org; Spottswood, Eleanor; Jill Krowinski; Leriche, Lucy Rose; jlyall@acluvt.org; Becca Balint; Katherine Levasseur
> **Subject:** RE: Doodle poll for next repro rights meeting
> Folks,
> I will be out of state on business and need to call in for a meeting this Thursday.
> Regards, Josh
> Joshua R. Diamond, Deputy Attorney General
> Vermont Attorney General's Office
> 109 State Street
> Montpelier, Vermont 05609
> 802-828-3175
> joshua.diamond@vermont.gov
> PRIVILEGED & CONFIDENTIAL COMMUNICATION: This communication may contain information that is privileged, confidential, and exempt from disclosure under applicable law. DO NOT read, copy or disseminate this communication unless you are the intended addressee. If you are not the intended recipient (or have received this E-mail in error) please notify the sender immediately and destroy this E-mail. Vermont's lobbyist registration and disclosure law applies to certain communications with and activities directed at the Attorney General. Prior to any interactions with the Office of the Vermont Attorney General, you are advised to review Title 2, sections 261-268 of the Vermont Statutes Annotated, as well as the Vermont Secretary of State's most recent compliance guide available at https://www.sec.state.vt.us/elections/lobbying.aspx.

From: cwhite@acluvt.org <cwhite@acluvt.org>
Sent: Monday, November 26, 2018 10:06 AM
To: Diamond, Joshua <Joshua.Diamond@vermont.gov>; Spottswood, Eleanor <Eleanor.Spottswood@vermont.gov>; Jill Krowinski <JKrowinski@leg.state.vt.us>; Leriche, Lucy Rose <Lucy.Leriche@ppnne.org>; jlyall@acluvt.org; Becca Balint <beccabalint@gmail.com>; Levasseur, Katherine <klevasseur@leg.state.vt.us>
Subject: RE: Doodle poll for next repro rights meeting

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All the best,

Chloé

From: cwhite@acluvt.org
Sent: Thursday, November 15, 2018 10:44 AM
To: Diamond, Joshua <Joshua.Diamond@vermont.gov>; Spottswood, Eleanor <Eleanor.Spottswood@vermont.gov>; Jill Krowinski <JKrowinski@leg.state.vt.us>; Leriche, Lucy Rose <Lucy.Leriche@ppnne.org>; Duff <jlyall@acluvt.org>; Becca Balint <beccabalint@gmail.com>; KLevasseur@leg.state.vt.us
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Thank you, and have a happy holiday,

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Pronouns: she/her

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PO Box 277, Montpelier, VT 05601
802.223.6304x110 | cwhite@acluvt.org
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From:	Jill Krowinski
To:	Diamond, Joshua; cwhite@acluvt.org; Spottswood, Eleanor; Leriche, Lucy Rose; jlyall@acluvt.org; Becca Balint; Levasseur, Katherine
Subject:	Re: Doodle poll for next repro rights meeting
Date:	Tuesday, November 27, 2018 3:06:09 PM
Attachments:	image001.png image002.png image003.png

Hey all,

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From: Diamond, Joshua <Joshua.Diamond@vermont.gov>
Sent: Monday, November 26, 2018 10:42:46 AM
To: cwhite@acluvt.org; Spottswood, Eleanor; Jill Krowinski; Leriche, Lucy Rose; jlyall@acluvt.org; Becca Balint; Katherine Levasseur
Subject: RE: Doodle poll for next repro rights meeting
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Regards, Josh
Joshua R. Diamond, Deputy Attorney General
Vermont Attorney General's Office
109 State Street
Montpelier, Vermont 05609
802-828-3175
joshua.diamond@vermont.gov

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Sent: Monday, November 26, 2018 10:06 AM
To: Diamond, Joshua <Joshua.Diamond@vermont.gov>; Spottswood, Eleanor <Eleanor.Spottswood@vermont.gov>; Jill Krowinski <JKrowinski@leg.state.vt.us>; Leriche, Lucy Rose <Lucy.Leriche@ppnne.org>; jlyall@acluvt.org; Becca Balint <beccabalint@gmail.com>; Levasseur, Katherine <klevasseur@leg.state.vt.us>
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PO Box 277, Montpelier, VT 05601
802.223.6304x110 | cwhite@acluvt.org
acluvt.org

From:	Diamond, Joshua
To:	cwhite@acluvt.org; Spottswood, Eleanor; Jill Krowinski; Leriche, Lucy Rose; jlyall@acluvt.org; Becca Balint; Levasseur, Katherine
Subject:	RE: Doodle poll for next repro rights meeting
Date:	Monday, November 26, 2018 10:42:50 AM
Attachments:	image001.png image002.png image003.png

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Regards, Josh

Joshua R. Diamond, Deputy Attorney General
Vermont Attorney General's Office
109 State Street
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802-828-3175
joshua.diamond@vermont.gov

From: cwhite@acluvt.org <cwhite@acluvt.org>
Sent: Monday, November 26, 2018 10:06 AM
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PO Box 277, Montpelier, VT 05601
802.223.6304x110 | cwhite@acluvt.org
acluvt.org

From:	Spottswood, Eleanor
To:	cwhite@acluvt.org; Diamond, Joshua; Jill Krowinski; Leriche, Lucy Rose; jlyall@acluvt.org; Becca Balint; Levasseur, Katherine
Subject:	RE: Doodle poll for next repro rights meeting
Date:	Monday, November 26, 2018 10:08:00 AM
Attachments:	image001.png image002.png image003.png

I will need to participate by phone, but otherwise that time is fine with me.

Ella
Eleanor L.P. Spottswood
Assistant Attorney General
Vermont Attorney General's Office
109 State Street
Montpelier, Vermont 05609
802-828-3178
eleanor.spottswood@vermont.gov

From: cwhite@acluvt.org <cwhite@acluvt.org>
Sent: Monday, November 26, 2018 10:06 AM
To: Diamond, Joshua <Joshua.Diamond@vermont.gov>; Spottswood, Eleanor <Eleanor.Spottswood@vermont.gov>; Jill Krowinski <JKrowinski@leg.state.vt.us>; Leriche, Lucy Rose <Lucy.Leriche@ppnne.org>; jlyall@acluvt.org; Becca Balint <beccabalint@gmail.com>; Levasseur, Katherine <klevasseur@leg.state.vt.us>
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From:	cwhite@acluvt.org
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Subject:	RE: Doodle poll for next repro rights meeting
Date:	Monday, November 26, 2018 10:06:34 AM
Attachments:	image001.png image002.png image003.png

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From:	cwhite@acluvt.org
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Subject:	Doodle poll for next repro rights meeting
Date:	Thursday, November 15, 2018 10:44:34 AM
Attachments:	image001.png image002.png image003.png

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PO Box 277, Montpelier, VT 05601
802.223.6304x110 | cwhite@acluvt.org
acluvt.org

From:	Leriche, Lucy Rose
To:	Jill Krowinski; jill.krowinski@gmail.com; Becca Balint; cwhite@acluvt.org; jlyall@acluvt.org; Levasseur, Katherine; Spottswood, Eleanor
Subject:	Resources for potential viability ban/amendment
Date:	Tuesday, November 13, 2018 4:58:45 PM
Attachments:	NH - post-viability talking points .docx lai_factsheet_viability.pdf High-Risk Pregnancy Story (from NY, in Refinery29).pdf 20 Week Ban Legislator Talking Points .docx Fetal Viability and Pain_QA_FINAL (SSTF).docx

---

And some more materials from PPFA on the viability issue:
- talking points for NH on post-viability ban that you can adapt for VT
- tough Q&A on fetal pain (internal resource)
- 20-week ban sample TPs -- much of this won't make sense for a viability ban but I think there are some things you can pull from - e.g., medical groups opposing legislative interference. of course, once you see an actual bill we can work together to adapt these for your circumstances.
- Later Abortion Initiative fact sheet on viability
- compelling article about woman who found she needed an abortion at 32 weeks in NY

Lucy

Lucy Leriche(she/her/hers)
Vice President of Public Policy Vermont
Planned Parenthood Northern New England
784 Hercules Drive suite 110
Colchester, Vermont 05446
Cell: 802 598-4182
www.ppnne.org<http://www.ppnne.org/>
Lucy.Leriche@ppnne.org

Tough Q&A Regarding Fetal Response, Fetal Viability, and Abortion

Fetal Response

Q: When can a fetus feel pain?

A: Rigorous reviews of existing research published in peer-reviewed journals have concluded there is no evidence of pre-viability pain perception. Medical experts and leading medical groups, including the American College of Obstetricians and Gynecologists, support this conclusion.[1]

The anti-abortion proponents of [this legislation] are well aware of these findings and have no regard for evidence-based medicine or science. The real intent here is to take the decision about abortion away from women and their doctors.

Note: Redirect questions of timing back to core messages about political interference and individual circumstances. If not discussing a 20-week ban specifically, you can replace this reference for "…supports the existence of pre-viability fetal pain perception."

Q: If a fetus can't feel pain at 20 weeks, when *can* it feel pain? Shouldn't we ban abortion when that happens?

A: Fetuses cannot experience pain until the physical structures needed to feel pain form; those structures are put into use gradually as fetuses develop. Rigorous scientific studies, such as a 2005 *Journal of the American Medical Association* review of research,[2] conclude that a human fetus probably does not have the capacity to experience pain before the third trimester. Similar conclusions were reached by the Royal College of Obstetricians and Gynaecologists in March 2010,[3] and again in 2012 in an article published in the peer-reviewed *Journal of Maternal-Fetal and Neonatal Medicine*,[4] the official journal of The European Association of Perinatal Medicine.

Q: If a fetus can't feel pain, why do doctors use anesthesia during fetal surgery?

A: Whether fetal anesthesia is appropriate during fetal surgery is a separate and distinct question from the capacity to feel pain. During fetal surgery, fetal anesthesia and analgesia may be appropriate because they serve other purposes unrelated to pain reduction; particularly inhibition of fetal movement and prevention of long-term developmental consequences from the hormonal and circulatory stress responses to surgery.

Q: Fetuses move away from needles; doesn't that prove that they can feel pain?

---

[1] Brief For American College of Obstetricians and Gynecologists and American Congress of Obstetricians and Gynecologists as Amici Curiae in Support Of Plaintiffs-Appellants and Reversal, *Isaacson et al. v. Horne et al*., 716 F.3d 1213 (9th Cir. 2013) (No. 12–16670).

[2] Lee et al., "Fetal Pain: A Systematic, Multi-Disciplinary Review of the Evidence," *Journal of the American Medical Association* 294(8):947-954 (August 2005).

[3] Royal College of Obstetricians and Gynaecologists, *Fetal Awareness - Review of Research and Recommendations for Practice*, (March 2010) https://www.rcog.org.uk/globalassets/documents/guidelines/rcogfetalawarenesswpr0610.pdf.

[4] Bellieni et al., "Use of fetal analgesia during prenatal surgery," *Journal of Maternal-Fetal and Neonatal Medicine* 26(1): 90-95 (Sept. 2012).

A: Opponents of abortion have claimed that because a fetus may exhibit reflex movements and hormonal stress responses to a stimulus, as a result, it can feel pain. This conclusion is erroneous. Scientific studies have shown that these responses do not indicate perception or awareness.

Note: When discussing the topic in general terms, the phrase "fetal response" is preferable to "fetal pain." But if you need to dispute pain specifically, say something like "The best research currently shows that the fetus doesn't have the neurological structures needed to experience pain until significantly later than 20 weeks of pregnancy."

Fetal Viability

Q: When is a pregnancy viable?

A: Viability is a determination made by a medical doctor that a fetus has reached a developmental stage at which it can survive outside the uterus using standard medical support measures. Viability does not occur at a discrete threshold number of weeks and often varies between pregnancies. The determination of viability may vary based on an individual pregnancy and is made by health care providers who specialize in women's health care. Some pregnancies — no matter how many weeks — will never be viable. Women and families rely on health care providers to determine whether their pregnancies are viable. This is why it is important that pregnancy decisions remain left to women in consultation with their health care providers.

Note: When possible, avoid giving an exact gestational age for viability and focus on individual circumstances and the need for doctors to determine the point of viability for each individual pregnancy If pressed, you can say that "in a healthy pregnancy, viability is generally understood as occurring around 24 weeks, but there is there is no point at which viability is clearly established; rather, it is a determination made on a number of factors that vary for each pregnancy" and then pivot back to the core message of leaving this determination to medical doctors made on a case by case basis.

Q: Some news outlets reported that a recent *New England Journal of Medicine* study suggests that fetuses as early as 22 weeks gestation should be considered viable because some babies born at that gestational age survived after intensive treatment. Is this true?

A: In this study, *Between-Hospital Variation in Treatment and Outcomes in Extremely Preterm Infants*,[5] researchers evaluated differences in hospital practices for extremely premature births and whether this affected the outcome. Researchers analyzed data collected for infants who were born at 24 hospitals to identify variation in hospital rates of active treatment[6] and the relationship between active treatment and infant outcomes.

The study found considerable variation in hospital treatment provided for babies born extremely premature (22 to 26 weeks). Although only a very small number of babies survived at 22 and 23 weeks,[7]

[5] Rysavy et al., "Between-Hospital Variation in Treatment and Outcomes in Extremely Preterm Infants," *New England Journal of Medicine,* 372: 1801-1811 (May 2015).

[6] The researchers considered infants to have received active treatment if they received any of the following interventions: surfactant therapy, tracheal intubation, ventilatory support, parenteral nutrition, epinephrine, or chest compressions.

[7] Overall rates of survival for babies born at 22, 23, and 24 weeks were 5.1%, 23.6%, and 54.9%, respectively.

the differences in treatment did result in different outcomes. The survival rate generally increased if babies were provided with active treatment,[8] although only 9 percent of babies born at 22 weeks were able to survive without severe neurodevelopmental impairment after receiving state-of-the-art medical intervention[9]. The vast majority of babies born at 22 and 23 weeks did not survive and if the doctors or parents did not pursue treatment, there was no chance of survival at all.

Q: What does this study mean?

A: This study shows that survival for extremely premature births is possible, but is very rare and largely dependent on the levels of intensive and aggressive care that a hospital is able to offer. Infants who survive after extremely premature births also have a high probability of severe developmental disabilities. The findings show why it is important that a woman facing pregnancy complications can get to the right hospital for the level of care she and her family need.

The American Academy of Pediatrics (AAP) and the American Congress of Obstetricians and Gynecologists (ACOG) currently recommend that clinicians and families should be able to make individualized decisions about treating extremely preterm infants on the basis of individual circumstances, patient values, and best medical practices. and the most recent data available regarding survival and morbidity.[10]

Q: What does this study mean for abortion?

A: This study is not about abortion and it should not impact abortion laws. This study is about the intensive care provided to extremely premature babies born in some hospitals. It was intended to help give ob-gyns and neonatologists improved understanding of early premature delivery. It does not change the fact that viability must be determined on an individual basis and therefore should not impact the availability of abortion.

Bans on Abortion Care

Q: Why do women have abortions after 20 weeks?

A: It is not always possible for a woman to get an abortion as soon as she would like to. Many things can stand in her way, from delays in finding out she is pregnant, or not being able to afford it, lack of a doctor who provides abortion nearby her, or barriers put in place by politicians, such as bans on insurance coverage. Also many serious medical complications and fetal anomalies may not be detected until later in pregnancy.

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[8] Overall rates of survival for babies born at 22, 23, and 24 weeks if they were provided with active treatment were 23.1%, 33.3%, and 56.6%, respectively. The rate of survival without moderate or severe impairment, however, was 9.0%, 16%, and 30.9%, respectively.

[9] Severe neurodevelopmental impairment was defined by the researchers as a cognitive or motor score on the Bayley Scales of Infant and Toddler Development of less than 70, severe cerebral palsy, a Gross Motor Function Classification System level of 4 or 5 (on a scale of 0 to 5), bilateral blindness, or severe hearing impairment that cannot be corrected with bilateral amplification.

[10] Batton DG Clinical report — antenatal counseling regarding resuscitation at an extremely low gestational age. Pediatrics 2009;124:422-7; American College of Obstetricians and Gynecologists and Society for Maternal-Fetal Medicine, *Obstetric Care Consensus Number 4*, June 2016.

Serious medical complications: A number of conditions can seriously jeopardize a pregnant woman's health or even her life, necessitating that she be able to choose abortion. For example, women with certain diseases that can be exacerbated by pregnancy such as cancer, diabetes, and high blood pressure may face dangerous complications later in their pregnancies that can put their health at serious risk. Similarly, some women may develop conditions during their pregnancies that threaten their health and also reduce the possibility of fetal survival, such as premature rupture of membranes and infection, preeclampsia (complications related to high blood pressure), placental abruption (premature placental separation), and placenta accreta (abnormal growth of the placenta). Women under these circumstances may risk extensive blood loss and septic shock that could lead to maternal death. Doctors should never be put in the position of having to wait for a medical condition to worsen and become life-threatening before being able to provide an abortion.

Fetal anomalies: Some fetal anomalies can only be diagnosed near or after 20 weeks and often after multiple doctor's appointments, sometimes with specialists, medical tests, and second opinions. These medical decisions are complex and incredibly difficult and should not be made by politicians.

Abortion restrictions: Importantly, the very politicians pursuing [this ban/legislation] support legislation that would prevent women from accessing abortion earlier in pregnancy, either explicitly or by the nature of closing high-quality abortion facilities. Policies like funding restrictions, forced waiting periods, parental notification or consent requirements, and TRAP laws do nothing to deter a woman from choosing abortion but can delay her from accessing care. Anti-abortion stigma and threats of violence, as well as onerous regulation of abortion providers, have also resulted in fewer available providers and longer distances to travel, leading to increased wait times for an appointment.

Laws that mandate non-medically necessary clinic regulations and cause clinics to close, laws that restrict access to medications that end an early pregnancy, and laws that withhold insurance coverage for abortion – as well as other restrictions – can force a woman to delay accessing abortion care while she finds a clinic and raises the funds to pay for the procedure.

Note: When questioned about circumstances, add in real women's stories if possible, while acknowledging that we can't know everyone's circumstances or reason for choosing abortion. Be careful not to overemphasize the "tragic and heartbreaking" circumstances of a fetal anomaly diagnosis, which can unintentionally frame abortion as the "hero" and disability as the "villain."

Note: When possible, try not to use the term "later abortion," and instead focus on the woman. For example, "throughout her pregnancy, a woman should be able to get the care she needs."

Q: But the proposal does not draw a total ban on abortions after 20 weeks; it allows exceptions for… [legislation-specific exceptions here, such as the life and physical health/impairment of the woman]. Why can't we have a bright-line rule with some exceptions carved out?

A: Laws that ban the provision of abortion after a certain week with limited exceptions fail to take into account the complex range of circumstances that each woman and her family may face. Simply put, physicians must be able to make a case-by-case determination of whether a fetus is viable. Because each situation is different, we should not deny a woman the ability to make her own decisions in consultation with those she trusts the most.

Bright-line rules with carve-outs can require physicians to ignore the best available medical evidence and prove that the pregnancy falls within the limited exceptions written by politicians, who are not generally medical experts. Furthermore, when politicians draft exceptions into law they are typically too narrow or vague for physicians to have confidence that they would avoid prosecution, even if in their medical judgment their patient fits into a stated exception. Therefore, these laws often effectively ban all abortions after a certain cut-off, even when a woman's health is at risk or her fetus is diagnosed with a severe fetal anomaly.

Q: Wouldn't this policy impact only a tiny percentage of abortions?

A: I am concerned about *any* woman or family who would be impacted by politically motivated intrusions into personal, medical decisions. Throughout her pregnancy, a woman must be able to make health decisions that are best for her circumstances, including whether to end a pregnancy, without interference from politicians. However, we feel about abortion at different points in a pregnancy, a woman's health and evidence-based medicine, not politics, should drive important medical decisions. A woman must be able to make her own decisions with a trained health care professional she trusts.

Note: Avoid using the statistic that 90% of abortions occur in the first trimester. Instead of discussing the number of later abortions, talk about individual circumstances and decisions.

Q: Don't most Americans support these types of restrictions?

A: Americans do not want politicians intruding into their personal medical decisions, which is exactly what [this bill] does. The [proponents of this bill/legislators] want to take medicine out of the hands of doctors and decisions out of the hands of women and their families.

20 Week Abortion Ban Legislator Talking Points

Toplines:

- At Planned Parenthood, our top priority is making sure that every woman, no matter where she lives, can make her own personal, private health care decisions without politicians standing in the way. This bill poses a serious threat to women's health, ignoring women's individual needs and circumstances and seeking to ban abortions at twenty weeks. The sponsors of this bill seek to deny a woman the dignity to make personal, private decisions
- However we feel about abortion at different points in a pregnancy, a woman's health should drive important medical decisions – not political agendas. Politicians are not medical experts and this is not an area where they should be interfering. Throughout her pregnancy, a woman must be able to make her own decisions with the advice of the health care professional she trusts.
- Every pregnant woman faces her own unique circumstances, challenges, and potential complications. It is not always possible for a woman to get an abortion as soon as she would like to. Many things can stand in her way, such as delays in finding out she is pregnant, needing time to gather funds to cover the cost of care and travel, a lack of doctors who provide abortion nearby, or barriers put in place by politicians, such as bans on insurance carriers covering abortion or laws that have forced nearby clinics to close. In fact, it is often these harmful and needless restrictions that actually force women to get abortions later in pregnancy. State politicians have passed over 300 such laws over the last five years. And in [STATE], [INSERT EXAMPLES OF RECENT RESTRICTIONS PASSED]. These restrictions have a disproportionate impact on those who already face far too many barriers to health care as people of color, people living in rural areas, and people with low incomes.
- This extreme abortion ban would prohibit *all* abortions after 20 weeks with only narrow exceptions for [INSERT EXCEPTIONS AFTER HAVING BILL REVIEWED]. There are no exceptions for when [INSERT].
- While women should not have to justify their personal medical decisions, the reality is that abortion later in pregnancy is rare and often happens under complex circumstances — the kind of situations where a woman and her doctor need every medical option available. Abortions later in pregnancy often involve severe fetal anomalies and serious risks to the woman's health.
- Doctors oppose these laws because they prevent healthcare providers from giving their patients the best health care possible in an individual situation.
- Abortion in the United States is safe and has an extremely low rate of complications overall, with the risk only slightly increasing as a pregnancy progresses.
- [IF APPLICABLE:] By imposing criminal penalties and allowing civil lawsuits to be brought against doctors, this bill threatens doctors for exercising their best medical judgment and providing the best care they can for women.
- We've seen what happens when politicians stand in the way of women's health and interfere in these deeply personal medical decisions. In states that have passed laws like this, some women and their families have been put into unimaginable situations — needing to end a pregnancy for serious medical reasons, but unable to do so.

[IF APPLICABLE, MUST BE BASED ON SPECIFIC BILL ANALYSIS:]

The bill lacks reasonable exceptions for serious threats to a woman's health, victims of rape and incest, and serious fetal anomalies

- This bill marginalizes the needs of women by only providing extremely narrow exceptions for certain limited threats to the woman's health and to prevent her death, and otherwise allows for abortion only in the instance of rape or incest that has been reported to a law enforcement or child protection agency.
- This bill fails to contain a real health exception, but the reality is that as a pregnancy progresses, there are circumstances when a woman might need an abortion and politicians should not stand in the way of doctors' ability to provide care that is right for their patients
    - For example, women with cancer, diabetes, epilepsy or other seizure disorders, and high blood pressure may face dangerous complications throughout their pregnancies that can put their health in serious jeopardy. Similarly, some women may develop conditions during their pregnancies that seriously threaten their health, such as preeclampsia and placental abruption.
- This bill also fails to contain exceptions for victims of rape and incest who—for one of many understandable reasons—may not have made an official report with the government, and no exceptions for when the woman learns that there are serious fetal anomalies.
- In these situations, it is crucial for women to have the opportunity to think through their options based on their unique situation in consultation with people they trust, including their physicians, loved ones, counselors, religious leaders and others.
- In states that currently ban later abortions, some women and their families have been put into unimaginable situations — needing to end a pregnancy for serious medical reasons, but unable to do so.
    - For example, because of Nebraska's 20-week abortion ban, a woman named Danielle Deaver was forced to continue a pregnancy even after a health crisis meant she was going to lose the pregnancy. At 22 weeks, her water broke prematurely. She had experienced a spontaneous rupture, meaning she'd lost most of the amniotic fluid surrounding the fetus. Her doctor told her that the fetus could not develop or survive. Despite this, she was forced to live through 10 excruciating days waiting to give birth because her doctors feared prosecution under her state's 20-week abortion ban. "That my pregnancy ended, that choice was made by God," Ms. Deaver has said. "How to handle the end of my pregnancy, that should have been private.[…] Nebraska law interfered."[1]
    - In contrast, before the Nebraska's 20-week ban was enacted, a Nebraskan woman named Tiffany Campbell who was 19 weeks pregnant learned that her pregnancy was afflicted with a severe case of twin-to-twin transfusion syndrome. This is a dangerous condition where the two fetuses share blood circulation unequally. It meant that one of the pregnancies had a strained heart and acute risk of heart failure while the other had a blood supply that was insufficient to sustain normal development. Ms. Campbell and her husband were informed that

[1] Matthew Hendley, *Nebraska Woman Lets Jan Brewer Know Proposed Abortion Bill Actually Affects People*, PHOENIX NEW TIMES (April 5, 2012, 11:56 AM). http://blogs.phoenixnewtimes.com/valleyfever/2012/04/nebraska_woman_lets_jan_brewer_1.php

without ending the pregnancy at risk, they risked the loss of both. At 22 weeks, in consultation with their doctors, they made the difficult decision to end one of the pregnancies in order to save the other.[2] This lifesaving procedure would be illegal today under Nebraska's 20-week ban and it would be illegal in [STATE] if there is no fetal anomaly exception.

Leading medical groups oppose 20-week bans that interfere with the patient-provider relationship and allow politicians to impose arbitrary restrictions on pregnancies

- Leading medical groups oppose political attempts to interfere with the doctor-patient relationship.
- The American Congress of Obstetricians and Gynecologists opposes 20-week abortion ban because they "are not based on sound science" and "attempt to prescribe how physicians should care for their patients."
- The American Medical Association "strongly condemn(s) any interference by the government or other third parties that causes a physician to compromise his or her medical judgment as to what information or treatment is in the best interest of the patient."
- Women don't turn to politicians for advice about mammograms, prenatal care, or cancer treatments. Politicians should not be involved in a woman's personal medical decisions about her pregnancy.

These unpopular attacks on women's health are out of touch with American values.

- Once Americans understand the real-world circumstances surrounding abortion at different points in pregnancy, they overwhelmingly oppose these bans.
- Although no woman should ever have to justify her decision about her pregnancy, when people hear about how this plays out in the real world—how rare it is, and the kinds of situations that are often involved—they agree that politicians should not stand in the way of women's important and private medical decisions.

This abortion ban is blatantly unconstitutional and is yet another attempt by extreme anti-abortion politicians to challenge Roe v. Wade

- This ban is an unconstitutional piece of legislation that threatens the health of women in an effort to challenge longstanding Supreme Court precedent regarding access to safe and legal abortion. The U.S. Constitution prohibits a state from enacting a law that bans abortion prior to the point in pregnancy when a fetus is viable.[3] When challenged in federal court, these bans have been blocked.[4]

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[2] *Adopt the Pain-Capable Unborn Child Protection Act: Public Hearing on LB1103 Before the Committee on Judiciary*, 2010 Leg., 101st Sess. 75-76 (Neb. 2010) (testimony of Tiffany Campbell).

[3] *See, e.g.,* Planned Parenthood v. Casey, 505 U.S. 833, 859 (1992). Moreover, even after viability, any prohibition on abortion must make exception for circumstances when abortion "is necessary, in appropriate medical judgment, for the preservation of the life or health" of the woman. Roe v. Wade, 410 U.S. 113, 165 (1973); *Casey*, 505 U.S. at 879; *accord* Whole Woman's Health, 136 S.Ct. 2292, 2299 (2016).

[4] *See Isaacson v. Horne*, 716 F.3d 1213, (9th Cir. 2013), *cert. denied*, 82 U.S.L.W. 3404 (U.S. Jan. 13, 2014) (No. 13-402); *McCormack v. Herzog*, 788 F.3d 1017, 1029 (9th Cir. 2015).

- Attorneys general in both Kentucky and Virginia have questioned the constitutionality of 20-week abortion bans. The Virginia Attorney General stated that because such a law "would contravene settled Supreme court precedent, it would very likely be struck down as unconstitutional."[5] And the Kentucky Attorney General said the 20-week abortion ban "is clearly unconstitutional based on our review of numerous federal appellate rulings, which state that identical statutes in other jurisdictions are illegal under numerous Supreme Court decisions."[6]

This one-size-fits-all ban leaves women in potentially vulnerable and dangerous positions, and does nothing to protect women's health. The [STATE] Legislature must reject this attempt to limit women's access to safe and legal health care.

Potential Difficult Q&A:

Q: When does life begin?

Questions about when life begins are personal, and it's just not that simple. For some it's based on faith, for others it's a matter of science or medicine. One thing I do know is that politicians aren't the experts--and it's not an issue that the American people want to be legislated.

Q: If pressed on whether you support/oppose abortion in specific instances:

It's just not that simple. I don't know a woman's specific situation—I am not in her shoes. Ultimately, decisions about whether to choose adoption, end a pregnancy, or raise a child must be left to a woman, her family and her faith, with the counsel of her doctor. Throughout a pregnancy, a woman's health should drive important medical decisions in consultation with the advice of health care professionals she trusts.

Q: When is viability?

The precise date of viability is inexact and may vary with each pregnancy. In a healthy pregnancy, viability is generally reached around 24 weeks. Some pregnancies — no matter how many weeks — will never be viable.

Can a fetus feel pain at 20-weeks?

Regardless of how one personally feels about abortion at different points in a pregnancy, we can all agree that a woman's health, not misinformation, should drive important medical decisions. Bans on abortions after 20 weeks are often based on unproven assertions about fetal pain**. Medical experts, including the highly respected and trusted American College of Obstetricians and Gynecologists, are in agreement that science does not support these claims**. And from a public health perspective, banning abortion after 20 weeks is dangerous because it could prevent doctors from providing the best care to their patients in an individual situation. Some testing to determine the existence of fetal anomalies is not possible until after 20 weeks, and the results are not something that a woman can plan for.

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[5] Mark R. Herring, Va. Attorney Gen., to The Honorable Charniele L. Herring, Member, Va. House of Delegates. (Jan. 23, 2017), *available at* http://bloximages.newyork1.vip.townnews.com/richmond.com/content/tncms/assets/v3/editorial/d/51/d51a89f8-35f7-5aa0-8a81-e7a9d054c630/58877ab8781cf.pdf.pdf.

[6] Attorney General Andy Beshear, *Beshear's Statement on House Bill 2, Senate Bill 5* (Jan. 10, 2017), http://kentucky.gov/Pages/Activity-stream.aspx?n=AttorneyGeneral&prId=240.

New Hampshire – Post-Viability Ban talking Points

Some general Talking Points:

- Abortion later in pregnancy is a deeply personal decision, often involving difficult circumstances, including serious fetal anomalies.
- Abortion later in pregnancy is extremely rare, but when it does happen, it is often a heartbreaking and tragic situation – the kind of situation where a woman and her doctor need every medical option available. Nearly 99% of abortions in the U.S. occur before 21 weeks' gestation and almost all of those occur in the first three months. Only one percent of women have abortions after 20 weeks, and these very often involve rare, severe fetal anomalies (most fetal anomalies are only detectable at 20 weeks) and serious risks to the woman's health.
- These are often very wanted pregnancies that have gone tragically wrong. In these situations, it is crucial for women to have the opportunity to think through their options based on their unique situation in consultation with people they trust, including their physicians, loved ones, counselors, religious leaders and others.
- New Hampshire communities have a history of respecting our diverse personal and religious beliefs, including differing views about ending a pregnancy.
- Women need access to safe and legal healthcare throughout the course of their pregnancy, whether that is to carry a pregnancy to term, adopt, or end a pregnancy.
- No piece of legislation can account for every woman's health needs. This legislation callously disregards the personal circumstances that surround a woman's decision to end a pregnancy.
- Show your respect for New Hampshire women and their families by keeping these intensely personal decisions between a woman, her family, and her doctor.

I Didn't Worry About Abortion Law — Until I Needed an Abortion at 32 Weeks

ERIKA A. CHRISTENSEN

NOVEMBER 27, 2017, 2:20 PM

PHOTO: SAMUEL CORUM/ANADOLU AGENCY/GETTY IMAGES.

Erika A. Christensen is a patient advocate for reproductive rights in New York state. Read more about her work at RHAVote.com or follow @RHAVote on Twitter. Opinions expressed here are her own.

I got the call from my husband. The genetic counselor he'd spoken to over the phone had shared our files with other geneticists in the obstetrics office who all confirmed our baby's fatal condition. He also said, with confusion and disbelief in his voice, the counselor had mentioned

Colorado as a possible option for obtaining our termination. His voice grew raspy as he said it again into the phone: *Colorado*.

We lived in Brooklyn. Our world-class maternal fetal medicine doctors were in Manhattan.

It is hard to overstate the shock upon realizing your government has the final say over whether or not you can receive a medical procedure and, therefore, what you can do with your body. It is actually a little embarrassing to admit my naiveté now since, as a 35-year-old college-educated woman, *I should have known*.

But to know this kind of thing, you need to be paying attention.

Last month, we learned of a pregnant 17-year-old girl being held in the state of Texas after fleeing to the U.S. from Central America. This young Jane Doe was firm in her decision to seek an abortion, which she was repeatedly denied. And to be clear, she was not asking the government for an abortion. She was simply asking for a brief leave to receive an abortion paid for by private funds. Ultimately, a D.C. appeals court ordered the Trump administration to stop blocking Jane's health care, and she was finally able to receive an abortion, albeit weeks after she first sought it.

“

IT IS HARD TO OVERSTATE THE SHOCK UPON REALIZING YOUR GOVERNMENT HAS THE FINAL SAY OVER WHETHER OR NOT YOU CAN RECEIVE A MEDICAL PROCEDURE AND, THEREFORE, WHAT YOU CAN DO WITH YOUR BODY.

”

It also turns out that Jane is kind of a badass. In a statement, she said, “No one should be shamed for making the right decision for themselves. I would not tell any other girl in my situation what they should do. That decision is hers and hers alone.”

As we watched this situation unfold in horror, we also learned the Trump administration is forcing deliberate anti-abortion policy and that there are more Janes.

While, at first glance, it might seem I have nothing in common with this young girl, and indeed I have absolutely no idea what it is like to flee my home under unfathomably abusive conditions and travel to a foreign country in search of amnesty only to be taken hostage and denied a private, personal medical procedure while a bunch of white men in suits preach to me about Jesus. But I do know what it is like to be denied abortion care by the state, in my case the state of New York. And it is horrifying.

In April of last year I was pregnant for the second time with a very wanted baby boy after my first pregnancy ended in a devastating miscarriage at 10 weeks. I finally reached the third trimester of pregnancy after what felt like an endless litany of complications, an experience I recounted to Jezebel last year. Our baby had bilateral clubbed feet, velamentous cord insertion, and his hands were tightly clenched in every ultrasound. He rarely moved.

As the bad news racked up, we were also given small crumbs of hope in the form of growth — incremental, but growth nonetheless.

At 30 weeks, we went into our high-risk maternal fetal medicine office for a routine appointment, excited that we were getting close. We believed we were finally “out of the woods” and ready to be parents to a little baby boy, who we knew would have some issues, but we were so ready to meet. He was our little fighter already.

But now our doctor found a new, alarming condition. I had developed severe polyhydramnios, or high fluid levels and, most crucially, our baby had stopped growing. Completely. All of the complications taken together told our doctors our baby had a fatal muscular condition that prevented him from being able to swallow. Swallowing is how a fetus practices breathing.

We asked our doctor what this would mean for our baby boy if we made it to term. He explained that the baby would live a very short time, likely minutes, before choking to death.

All of the hope we'd been desperately clinging to for eight months was gone in an instant.

Please hear me: If you have not been in this situation, you have no fucking clue what you would do. If you have never been told that the baby you've been carrying for eight months and want more than anything is so sick that there is no future, no hope, *no life* for him possible, then I assure you: *You have no possible idea what you would do*.

We could not imagine a scenario where I would carry this pregnancy for another two months only to watch a little baby suffer and die. And listen, maybe your religion or your personal philosophy does not allow you to see this situation as we did. But again, are you speaking from a place of first-hand knowledge or a theoretical? Because if it's theoretical, again, *you have no actual idea*.

In "the old days" before my abortion, I'm embarrassed to admit I used to think, *What kind of woman gets an abortion at 6-7-8 months?* Or I would make ignorant, self-righteous statements, such as, "Oh I'm pro-choice absolutely, but I would just never *personally* have an abortion." Now I look back at that dumb-dumb-oh-so-dumb woman and equate it to saying I'd personally never get chemo. *Yeah, bitch? You've never had cancer!*

Or my favorite "old me" uneducated opinion: *Sure, limits sound like a reasonable compromise. People should be able to decide they want an abortion by, say, four months. Yeah, that sounds right*.

You see, at the time I was grappling with abstractions. I was pro-choice theoretically, but I'd never had a crisis pregnancy, or even considered crisis pregnancies in general, so I didn't know

what I was talking about. I was quite literally ignorant.

> WE COULD NOT IMAGINE A SCENARIO WHERE I WOULD CARRY THIS PREGNANCY FOR ANOTHER TWO MONTHS ONLY TO WATCH A LITTLE BABY SUFFER AND DIE.

And thanks to internalized sexism, I'd allowed my brain to contemplate a narrative of the absent-minded woman who up and decides to get an abortion at 40 weeks out of…"convenience." The word "convenience" now makes my skin crawl. I am embarrassed that I would ever sell my fellow women up the river like that, even if just by entertaining the idea.

But now, I know. I know it deep inside my bones. Any "belief system" that relies on you having to cast women as evil, callus, or incapable of making their own decisions is a system hell-bent on selling you a steaming pile of patriarchal bullshit.

After receiving our final, horrible diagnosis, we, along with our doctors, decided that the best course of action would be to terminate the pregnancy. This decision was made to spare everyone involved as much suffering as possible.

But when we went to the maternal-fetal medicine office for what would be our last appointment, the doctor explained that there was a 24-week cut off for abortions in New York State, with no exceptions for the health of the pregnant person or in cases of fetal non-viability. If we wanted to terminate the pregnancy, we would have to travel across the country to Colorado, far away from our regular doctors who had been with us every step of the way.

And that's when it first really hit me: It wasn't enough that we were losing all hope we had to raise this baby boy. I was meant to feel shame too.

If I sound angry, it is because I am. I can always touch that acute, burning sensation of fury I felt in the doctor's office, because it remains so close to my throat. It's just kind of on simmer until I meet yet another woman who had to travel for an abortion, or when I meet a doctor with horror stories about patients who were not as lucky as me and had to carry their doomed pregnancies to term, or when the news introduces us to someone like Jane Doe.

I remain furious that women's health decisions are ultimately being made by dudes-who-aren't-doctors, but who have a whole lot of opinions that, by design, fly in the face of science, medicine, and compassion. And please spare me your compassion for the "unborn child." When anti-choice advocates are waking up at 5 a.m. on a Saturday to throw grotesque little baby dolls and shout, "Shame!" at the men in Congress who have let the Children's Health Insurance Program expire, they might be able to make a credible claim to caring for "life."

It has been a month since Jane received her abortion. So where are we now with the GOP's dangerously aggressive anti-abortion agenda?

Earlier this month the justice department, led by Jeff Sessions, filed a petition to the Supreme Court accusing Jane's ACLU attorneys of "misleading the government over the procedure's timing in an effort to evade a review by the top court." In layman's terms, the Trump administration was out-lawyered by Jane's counsel who knew the justice department was trying every delay tactic in the book to try and get Jane past Texas' 20-week cut off.

The GOP's new tax plan, essentially a cash-grab on behalf of our nation's most wealthy citizens, includes "personhood" language for fetuses, allowing them their own savings accounts. Of course, this has nothing to do with savings accounts and everything to do with sneaking anti-choice language into a tax plan.

And in the federal Senate, there is a push to bring a 20-week abortion ban to the floor for a vote. It is not based on science. It is not based on widely accepted medical knowledge. It is based on fear and ideology.

While this bill has little chance of passing (though I'm not sure how any of us can think that about anything, ever again), it will give Republicans a chance to go on the record as being pro-shame. They'll get to make long speeches and wheel out their ultrasound machines, focusing on the mighty powerful fetus, however small, while women further fade from the conversation.

Like the "before" me, the girl who existed in my body with my name who was ignorant to the invisible thumb of the government pressing against her uterus, we are all starting to see what happens when threats to our rights move from the abstract to the acute.

If we do not fight these attacks with the full weight of our strength as relatively privileged people, our angry daughters will wonder what the fuck we were all doing while the American government was holding teenage girls hostage as tactical practice for their war against all women.

So now, we are all Jane Doe. Whether we know it or not.

NEW YORK ABORTION LAW SEXISM, HIGH-RISK PREGNANCY STORY

ABORTION • ABORTION APOCALPYSE • BODY • HEALTH • HEALTH CARE • HEALTH NEWS

WRITTEN BY

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A.
CHRISTENSEN

PHOTO: SAMUEL CORUM/ANADOLU AGENCY/GETTY IMAGES.

EDITORS' PICKS

If you're planning on bingeing some TV shows and movies on Netflix this Thanksgiving week, we don't blame you. It's great to connect with extended family

Advent calendars are how adults cheat the gift-givir ɐm. Instead of trying to figure out what your second cousin's girlfrie ɹld want for the

There is an infidelity gender gap — and women are ɡ to close it. "Women are cheating more today than they ever have, Esther Perel, a

"It's smoky everywhere, but as I stop for gas in Nov ɔan see that the sky to the east is distinctly orange."

MORE FROM BODY

It's officially the holiday season, and the Girl Scouts have an important reminder: Girls don't owe anyone hugs, even on a special occasion. While

Exploring family is intensely personal to a photograp nd yet, after her last family-focussed project La Casa Rosa, Italian apher Bea de

A former sports doctor accused of molesting at le girls and young women while he worked for USA Gymnastics and Mich ate University pleaded

If you know anything about my 5 day experiments, probably guessed that I'm pretty into testing new, out-of-the-box ways t ove my emotional and

Whether you're in the middle of a deliciously greasy f pizza or right about to drift off to sleep, heartburn always seems e at the worst

In my perfect period app, Judy Blume would pop up phone screen and remind me to clip my sanitary pad to my sanitary be ortunately — life

Call it teasing, constructive criticism, or straight-ur shaming — it's a uniquely sucky feeling when your loved ones put our looks. And

From a very young age, we're trained to think of cho binaries: You have to pick one thing or another, and there's no in-betw ac or PC? Katy or

As a grassroots organizer in North Carolina, Basil S had grown accustomed, if not weary, of fielding the same set of insens uestions about the

Mahogany Phillips likes to describe herself as a "tall n of statuesque stature," but as a transgender woman living in New Yor she says she used

APRIL 2018

The science of "viability"

Ibis Reproductive Health

Overall summary

In the 1973 *Roe v. Wade* decision, the Supreme Court legalized abortion in the United States. The decision made "viability" the delineating line balancing the right of a pregnant person to end a pregnancy with the interests of the State. Roe v. Wade found that after the point of viability, states may restrict access to abortion, as long as they provide an exception for the health and life of the pregnant person.

The Supreme Court has defined viability in the context of abortion as:

> *"when, in the judgment of the attending physician on the particular facts of the case before him [sic], there is a reasonable likelihood of the fetus' sustained survival outside the womb, with or without artificial support. Because this point may differ with each pregnancy, neither the legislature nor the courts may proclaim one of the elements entering into the ascertainment of viability — be it weeks of gestation or fetal weight or any other single factor — as the determinant."* [1]

Both in the law and in medical science, viability is not defined as occurring at a specific gestational age in pregnancy. A recent study of survival of extremely premature infants found that even with active intervention, no infants born at less than 22 weeks of gestation survived.[2] At 23 weeks, survival without severe impairment is less than 2%; at 25 weeks, up to 30% may survive without severe impairment.[3,4]

- Extrauterine viability depends on numerous factors, including gestational age, fetal sex, birthweight, and the technological interventions available
- In determining the appropriate course of care for individual pregnancies, physicians use their best clinical judgment and incorporate published evidence of potential survival with the wishes of the pregnant individual
- Doctors and patients together consider the potential for sustained meaningful life, not just brief survival outside the pregnant person's body, as a critical factor in deciding whether to continue or end each unique pregnancy

Given the poor and variable survival of extremely preterm infants, medical professionals advocate for an individualized approach to counseling and decision-making for families facing very early delivery. The American College of Obstetricians and Gynecologists, together with the Society for Maternal and Fetal Medicine, states that in cases of delivery occurring before 26.0 weeks of gestation, "given the potential for maternal and perinatal mortality and morbidity, the option of pregnancy termination should be reviewed with the patients."[5] Similarly, the American Academy of Pediatrics states that in most cases of delivery prior to 25 weeks of gestation, shared decision-making with the family should include considerations of death or morbidity for the neonate and the parents' desires.[6]

Interpreting the science

Recent data from the United States, France, and England examining survival among extremely premature infants show that survival increases with gestational age.[3,4,7] A subsequent study using the US data examined differences between infants who were given active intervention and those who were not and found that among infants delivered before 22 weeks of gestation, none survived even among those who received active interventions.[2] At 22 weeks, the French study, which was representative of the general French population, reported 0% survival.[3] The English and American studies, which only included infants admitted to neonatal intensive care or delivered at academic centers, respectively, and thus likely overestimates survival of extremely preterm infants from the general population due to the use of more aggressive interventions, reported 7–18% overall survival;[4,7] the US study also assessed morbidity and found that all survivors at this gestational age had what the investigators deemed severe impairment.[4] At 23 weeks of gestation, overall survival was only 1.1% in the French study, with all survivors having severe impairment,[3] and 32–36% in the American and English studies,[4,7] with only 2% survival without severe impairment in the American study.[4] At 24 weeks of gestation, overall survival in the French study increased to 31%, though survival without severe impairment was only 12%.[3] In the American and English studies, overall survival was 59–62%,[4,7] and survival without severe impairment was 7% in the American study.[4]

While overall survival at all earlier gestational ages has improved since the first landmark study in 1995, the same is not true of the proportion of infants surviving without major disability. Increases in the proportion of infants delivered after 25 weeks of gestation who survived to discharge without major morbidity has increased in both the French and American populations, but it has remained steady among infants delivered prior to 25 weeks of gestation.[3,4] A subset of infants from the American study were assessed for neurological impairments at 18–22 months of adjusted age, and a similar pattern of improvements in the proportion surviving without major impairment among those who were delivered after 25 weeks of gestation was found, but there was no marked improvement for those delivered earlier.[8] Regardless of where they are delivered, infants born at early gestational ages require numerous complex and intensive interventions to keep them alive. They survive only due to weeks or months of invasive neonatal intensive care. Because the chance of survival is variable due to a number of factors, including the types of interventions available and the weight and sex of the fetus, there is no "bright line" of viability.

Responses to anticipated questions

Isn't a fetus viable at 24 weeks of pregnancy?

Although common usage often equates viability with a specific number of weeks of pregnancy, this usage is inaccurate. The potential for fetal survivability outside of the body differs for each pregnancy and can only be made by assessing the fetus as well as the pregnant individual. Some factors that can affect potential viability include chromosomal abnormalities, the pregnant person's health status, and the availability of sophisticated neonatology care. In addition, fetal sex can affect survival, with male sex associated with increased mortality among infants delivered preterm.[9–12] Because of these multiple factors, many babies born at 24 weeks will not survive, and most who do survive will have severe disabilities requiring multiple medical interventions.

Because the line of viability continues to become earlier, shouldn't the legal limit for abortion be lowered as well?

Each pregnancy is different. Both in the law and in medical science, viability is not defined as occurring at a specific gestational age in pregnancy and depends on numerous factors, including gestational age, fetal sex, birth weight, and the technological interventions available. Because viability may differ with each pregnancy, doctors and patients together must decide whether to continue or end each unique pregnancy.

Why should the law allow abortion for a potentially viable fetus?

Making a decision to continue or end a pregnancy can be a complex medical and personal decision that is best left to the patient and treating physician. Together they will weigh the medical and personal circumstances of the pregnancy, including the physical and mental health of the pregnant person and the best medical assessment of the survival for the developing fetus if the pregnancy is continued.

Does this mean abortion should be allowed at any point in pregnancy simply because someone wants an abortion?

We cannot know all the personal and medical circumstances behind someone's decisions about their health and pregnancy. Every person's situation is different, and many times there are no simple answers. However we may feel about abortion at different points in a pregnancy, an individual's health should drive important medical decisions, and one must be able to make decisions with the advice of a trusted health care professional, whether the decision is to end the pregnancy or become a parent. Politicians are not medical experts, and this is not an area where politicians should be interfering.

References

1. Colautti v. Franklin, 439 U.S. 379,388 (1979).
2. Rysavy MA, Li L, Bell EF et al. Between-hospital variation in treatment and outcomes in extremely preterm infants. *New England Journal of Medicine*, 2015;372:1801–11.
3. Ancel PY, Goffinet F, EPIPAGE-2 Writing Group. Survival and morbidity of preterm children born at 22 through 34 weeks' gestation in France in 2011. *Journal of the American Medical Association Pediatrics*, 2015;169(3):230–8.
4. Stoll BJ, Hansen NI, Bell EF, Walsh MC, Carlo WA, Shankaran S, et al. Trends in care practices, morbidity, and mortality of extremely preterm neonates, 1993–2012. *Journal of the American Medical Association*, 2015;314(10):1039–51.
5. American College of Obstetricians and Gynecologists (ACOG)/Society for Maternal-Fetal Medicine (SMFM) Obstetric Care Consensus. #6: Periviable birth. *Obstetrics and Gynecology*, 2017:130(4):e187–99.
6. Cummings J. Antenatal counseling regarding resuscitation and intensive care before 25 weeks of gestation. *Pediatrics*, 2015. 136(3):588–95.
7. Santhakumaran S, Statnikov Y, Gray D, Battersby C, Ashby D, Modi N. Survival of very preterm infants admitted to neonatal care in England 2008-2014: time trends and regional variation. Archives of *Disease in Childhood, Fetal and Neonatal Edition*, 7 Sept 2017, [Epub ahead of print].
8. Younge N, Goldstein RF, Bann CM, Hintz SR, Patel RM, Smith PB, et al. Survival and neurodevelopmental outcomes among periviable infants. *New England Journal of Medicine*, 2017;376(7):617–28.
9. Binet ME, Bujold E, Lefebvre F, Tremblay Y, Piedboeuf B; Canadian Neonatal Network™. Role of gender in morbidity and mortality of extremely premature neonates. *American Journal of Perinatology*, 2012;29:159–66.
10. Battin M, Ling EW, Whitfield MF, Mackinnon M, Effer SB. Has the outcome for extremely low gestational age (ELGA) infants improved following recent advances in neonatal intensive care? *American Journal of Perinatology*, 1998;15:469–77.
11. Tucker J, McGuire W. Epidemiology of preterm birth. *British Medical Journal*, 2004;329:675–8.
12. Weng YH, Yang CY, Chiu YW. Neonatal outcomes in relation to sex differences: a national cohort survey in Taiwan. *Biology of Sex Differences*, 2015;6(30).

Ibis Reproductive Health aims to improve women's reproductive autonomy, choices, and health worldwide.

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Ibis Reproductive Health

Spottswood, Eleanor

From: Spottswood, Eleanor
Sent: Thursday, November 1, 2018 5:24 PM
To: Leriche, Lucy Rose
Subject: Accepted: Reproductive Rights

From:	Leriche, Lucy Rose
To:	Diamond, Joshua; Spottswood, Eleanor; JKrowinski@leg.state.vt.us; beccabalint@gmail.com; jlyall@acluvt.org; cwhite@acluvt.org; Levasseur, Katherine; jill. krowinski
Subject:	Fwd: VMS Adopts Policy to Protect Women"s Reproductive Rights
Date:	Tuesday, October 30, 2018 10:41:05 AM
Attachments:	2018 Women"s Reproductive Rights.docx ATT00001.htm

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Please see below some good news from VMS! Looking forward to our meeting tomorrow.
Lucy

Sent from my iPhone

Begin forwarded message:

From: Jill Sudhoff-Guerin <jsudhoffguerin@vtmd.org>
Date: October 30, 2018 at 10:25:25 AM EDT
To: "Leriche, Lucy Rose" <Lucy.Leriche@ppnne.org>, Jessa Barnard <jbarnard@vtmd.org>, Stephanie Winters <swinters@vtmd.org>
Subject: VMS Adopts Policy to Protect Women's Reproductive Rights

Hi Lucy,
I am happy to report that we brought your proposal to our Council this past weekend and they voted in support of joining the coalition with Planned Parenthood to put protections for a women's right to safe abortion into statute and/or into the Vermont Constitution.
They also went a step further and created and adopted a new Council policy to provide more explicit support called, "**Codifying Protection for Women's Reproductive Rights."** This policy states: *The VMS supports protecting women's reproductive rights, including the right to contraception and to safe legal abortion, through Vermont law and/or through a Vermont Constitutional amendment.*
We look forward to working with you on this important effort and welcome next steps.
All the best,
Jill, Jessa and Stephanie

Jill Sudhoff-Guerin
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Codifying Protection for Women's Reproductive Rights

Council Adopted Policy, October 28, 2018

The VMS supports protecting women's reproductive rights, including the right to contraception and to safe legal abortion, through Vermont law and/or through a Vermont Constitutional amendment.

From:	Leriche, Lucy Rose
To:	Diamond, Joshua; Spottswood, Eleanor; jlyall@acluvt.org; cwhite@acluvt.org; Jill Krowinski; jill.krowinski@gmail.com; Becca Balint; Levasseur, Katherine
Subject:	FW: VT ERA research
Date:	Tuesday, October 23, 2018 3:45:58 PM
Attachments:	VT Leg History Memo .docx STATE EQUAL RIGHTS AMENDMENTS REVISITED EVALUATING THEIR EFFECTIVENESS IN ADVANC (2).pdf

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Here is some research from PPFA to help inform our discussions next week.
Thanks!
Lucy
Lucy Leriche(she/her/hers)
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Lucy.Leriche@ppnne.org
From: Sousa, Bethany <bethany.sousa@ppfa.org>
Sent: Tuesday, October 23, 2018 2:30 PM
To: Leriche, Lucy Rose <Lucy.Leriche@ppnne.org>
Cc: Keauna Gregory <keauna.gregory@ppfa.org>; Abigail Wiley <Abby.Wiley@ppfa.org>
Subject: VT ERA research
Hi Lucy,
We did some research on the extent to which VT courts consider legislative history when examining the meaning of constitutional amendments. We were thinking that if you can't include explicit abortion language in the ERA, you could at least create legislative history regarding the inclusion of abortion within the term "sex." We didn't find anything that was especially helpful, but I am attaching the memo anyway. It seems like a VT state court will go beyond the text when needed and may consider some external sources, but it's not clear from this research how you could ensure a certain interpretation.
One helpful point is that "sex" in VT's anti-discrimination statute has been interpreted to include pregnancy. It also may be helpful that there are a couple of other states where the ERAs have been interpreted to include abortion, at least in the context of public funding (CT and NM). State courts in VT have noted that they do look to "sister states" when construing constitutional amendments. So although other state courts in TX and PA explicitly held that prohibiting state medicaid abortion coverage was not a violation of their state ERA, VT courts could choose to look to and follow the states that have found the opposite. To date, state courts have not been asked to apply a state ERA to invalidate another types of abortion restriction as far as we are aware, so we do not have a lot of precedent to rely upon.
If legislators do decide to include abortion language, one note of caution would be that if the language gets stripped out somewhere down the line, it would certainly make it harder to argue that abortion is protected in the original language. So it could be that it is better to start without it than to have it removed from both a substantive and political perspective.

I am also attaching a law review article on state ERAs that is a little old but has some useful background. And below is a little more info on state ERA claims re abortion funding.

Let me know if you want to discuss.

Best,

Beth

State ERAs and Abortion

Outside of ERAs, courts in other states have struck down funding restrictions of abortions based on state constitutional provisions.[1] However, it seems that only Connecticut and New Mexico have specifically relied on their ERAs to find that the funding restriction on abortion constitutes unlawful sex discrimination that must be struck down.

Connecticut and New Mexico have successfully relied on their ERAs to strike public funding restrictions on abortion. In 1986, a Connecticut state court used the state ERA and due process protections to invalidate the state's restrictions on funding medically necessary abortions. *Doe v. Maher*, 515 A.2d 134, 162 (Conn. Super. Ct. 1986). The New Mexico Supreme Court similarly relied on the state's ERA to invalidate New Mexico's public funding restriction on medically necessary abortions. N.M. Right to Choose/NARAL v. Johnson, 975 P.2d 841, 859 (N.M. 1998). Rejecting earlier U.S. Supreme Court reasoning, the New Mexico Supreme Court found that the ERA in its state constitution required the court to give a close scrutiny to laws that made a distinction based on pregnancy. The court reasoned that it is obligated to look to the *purpose* of the law, and whether it operates to disadvantage women. In conducting its analysis and rejecting the funding ban, the court found that "New Mexico's funding ban was part and parcel of a long history in which 'women's biology and ability to bear children have been used as a basis for discrimination against them,'"[2] and that the funding ban discriminated against women by treating them differently from men "with respect to medically necessary services."[3]

Other courts, however, have refused to find that their state ERAs encompass the right to publicly funded abortions. In a Texas case, for example, the state supreme court upheld the state's funding restriction on abortion. That court held that the decision to single out abortion for different treatment did not involve a distinction based on sex because it was "not so much direct at women as a class as it [was] abortion as a medical treatment," and there was no proof that the ban was based on an invidious discriminatory purpose. *Bell v. Low-Income Women of Texas*, 95 S.W.3d 253, 268 (Tex. 2002). Pennsylvania, using similar reasoning, also found that its ERAs does not require state funding of abortion. *Fischer v. Dep't of Pub. Welfare*, 502 A.2d 114 (1985).

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[1] *See* Wharton, *State Equal Rights Amendments Revisited*, *supra* note 1, at fns. 217, 218 (describing cases from Alaska, Arizona, California, Indiana, Massachusetts, Minnesota, New Jersey, and West Virginia).

[2] Linda J. Wharton, *State Equal Rights Amendments Revisited: Evaluating Their Effectiveness in Advancing Protection Against Sex Discrimination*, 36 Rutgers L.J. 1201, 1251 (2005) (quoting N.M. Right to Choose/NARAL v. Johnson, 975 P.2d 841, 854 (N.M. 1998)).

[3] Wharton, *State Equal Rights Amendments Revisited*, *supra* note 1, at 1252.

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BACKGROUND

Vermont (VT) is considering doing a state equal rights amendment (ERA). They have already passed one bill through the state senate and this year they are considering adding some abortion-specific language to the original language that was drafted. However, it is possible that those behind the change are not planning to add language that expressly mentions abortion.

The current language and one proposal for additional language are as follows:

[Current] *"Equal protection under the law shall not be denied or abridged because of race, sex, age, religion, creed, color, familial status, disability, sexual orientation, gender identity, or national origin."*

[Proposal] *"Sex" includes but is not limited to the capacity to become pregnant, pregnancy, and the prevention and termination of pregnancy."*

If abortion-specific language is left out of the ERA, we would like to argue that sex discrimination includes abortion/pregnancy.

QUESTION PRESENTED

Is there any precedent of VT state courts considering legislative history when construing the meaning of constitutional amendments/provisions? If so, what types of legislative history have been considered—debates, analysis by a legislative committee, etc.?

BRIEF ANSWER

The Vermont Supreme Court has used "historical analysis" to construe the meaning of constitutional text. But after reviewing around 20 Vermont cases, I did not see the Court specifically refer to typical sources of legislative history such as committee hearings or debates. Instead, in many cases the Court conducted a historical analysis on how the particular provision came into being. And the provision at issue was typically a constitutional provision, not an amendment.

Of note is the Court's frequent reference to how courts in other states have construed similar constitutional provisions. So, a sister-state court's broad interpretation of its ERA could be an additional source in support of a broader reading of the term "sex."

DISCUSSION

The Vermont Supreme Court is open to using "a number of different approaches in construing the Vermont Constitution," including, "historical analysis, examination of the text, constructions of identical or similar provisions in other state constitutions, and use of sociological materials." *State v. DeLaBruere*, 577 A.2d 254, 268 (1990). *But see Chittenden Town Sch. Dist. v. Dep't of Educ.*, 738 A.2d 539, 549 (1999) (limiting consideration of extrinsic aids to sister-state provisions with only "slightly variant phraseology" that can be easily reconciled).

The Court has repeatedly stated that the interpretation of a constitutional provision or amendment begins by first looking "to the plain meaning of the [constitutional] language in question." *See Turner v. Shumlin*, 163 A.3d 1173, 1183 (Vt. 2017) (quoting *State v. Madison*, 658 A.2d 536, 541–42 (Vt. 1995)); *see also Petition of Twenty-Four Vermont Utilities*, 618 A.2d 1295, 1308 (1992) (beginning first with the plain language of the constitutional text, then comparing how the Florida Supreme Court construed a similar provision, and then looking at other historical materials). In the Court's view, "[i]f the constitutional language, in and of itself, unambiguously furnishes answers to the questions for decision, it prevails over extraneous aids to interpretation. *Peck v. Douglas*, 530 A.2d 551, 554 (Vt. 1987) (citing *Hartness v. Black*, 114 A. 44, 47 (Vt. 1921)). Therefore, if the issue can be resolved from the plain meaning of the constitutional text, it is unlikely that the court will consider outside resources, including legislative history.

Moreover, the Court has expressly questioned whether legislative history or "intent" adds any value when interpreting constitutional language because of the "elaborate adoption procedures" involved in adopting constitutional amendments. *Peck*, 530 A.2d at 554. The Court notes that "the workings of constitutional commissions and subsequent submission of the proposals to the people of [the] state" considerably dissipate the value of legislative intent alone. *Id.*

On the other hand, the Court has suggested that it is sometimes appropriate to go beyond plain meaning. In *Turner v. Shumlin*, the Court stated that "applying the plain meaning of [an ancient] provision's language without considering its historical context" would give it pause. 163 A.3d at 1184. So, the Court comfortably refers to historical context to help determine the meaning of provisions written many years ago, i.e. the late 1700s. *See, e.g.*, *Chittenden Town*

Sch. Dist. v. Dep't of Educ., 738 A.2d 539, 552 (Vt. 1999) ("One of our most useful tools to determine the meaning of a constitutional provision is an understanding of its historical context, and we have often relied upon history to illuminate the meaning of our constitution."); *Daye v. State*, 769 A.2d 630, 638 (Vt. 2000) ("Plaintiffs are well served . . . in seeking guidance from the historical and ideological forces surrounding the framing of the constitutional provision at issue.").

To note, the Court does not expressly state that "legislative history" is a resource, but its use of "historical context" is very similar to exploring legislative intent. *See State v. Jewett*, 500 A.2d 233, 236 (Vt. 1985) (internal citations omitted) ("Historical argument may also touch upon the legislative history of a particular provision, or on the social and political setting in which it originated, or on the fate of the [provision] in subsequent constitutions."); *see also Daye*, 769 A.2d at 638 (quoting *Baker v. State*, 744 A.2d 864, 874 (Vt. 1999)) ("[T]he motivating ideal of the framers" must continually inform our analysis of contemporary issues.").

When construing more recent amendments, the Court has often found no basis for "straying from the plain meaning" of constitutional language. *Turner*, 163 A.3d at 1184 (finding that historical context was not an issue in construing a provision enacted 43 years prior). But it has left open the possibility of considering extrinsic sources, such as the "intent of the voters" and "an official voter's pamphlet that indicates the meaning of the language at issue," when an amendment contains a legal term of art that exceeds the "average voter's understanding" of the term. *See State v. Madison*, 658 A.2d 536, 542 (Vt. 1995) (discussing the legal term "*de novo*").

Construing constitutional language versus statutory language:

The approach to interpreting constitutional language and meaning is different from that used to interpret "ordinary statutes." *Peck v. Douglas*, 530 A.2d at 554. "[T]he purpose of any constitutional enactment is to delineate the framework of government, [and] the working details are frequently left . . . for legislative definition. Interpretation must, therefore, not be so narrow as to present an obstacle to that function." *Id.* Still, for constitutional language, canons of construction are used "more cautiously and sometimes differently . . . because a constitutional provision, unlike a statute, usually operates to limit or direct legislative action." *Id.* (citing *Dresden School District v. Norwich Town School District*, 203 A.2d 598, 600 (1964)). *Cf. Baker*

v. State, 744 A.2d 864, 868 (Vt. 1999) ("It is axiomatic that the principal objective of statutory construction is to discern the legislative intent.").

The first step for the Court when interpreting a statute is the same as interpreting a constitutional provision: examine the statute's language with the presumption that the "Legislature intended the plain, ordinary meaning of the statutory language." *Shires Hous., Inc. v. Brown*, 172 A.3d 1215, 1219 (Vt. 2017). If the language is clear on its face, the Court accepts its plain meaning. *Id.* "But where the language creates ambiguity or uncertainty, [the Court] resort[s] to statutory construction to ascertain the legislative intent." *Id.* At this point, the Court's approach differs because the Court openly embraces the use of legislative history, noting that "[l]egislative history, circumstances surrounding a statute's enactment, and evidence of the legislative policy at which the statute was aimed are indications of the Legislature's intent." *Id.*; *see also State v. Pellerin*, 996 A.2d 204, 209 n.3 (Vt. 2010) ("[P]olicy considerations are a helpful tool in discerning legislative intent.").

The Court utilizes various types of legislative history but remains cognizant of the quality of the evidence in proving legislative intent. *See In re Dep't of Bldgs. & Gen. Servs.*, 838 A.2d 78 (Vt. 2003). For example, in *In re Dep't of Bldgs. & Gen. Servs.*, the Court found "committee testimony and discussion much more weighty in determining legislative intent than the remarks of a witness at a committee hearing." *Id.* at 85 (internal quotations omitted). In addition, the Court considers committee statements that directly address the issue before the court, statements about an amendment's purpose, and statements made by the bill's sponsor to be persuasive. *Id.* *But see Madison*, 658 A.2d at 545 ("while statements in committee report concerning purpose of proposed law are used by courts in determining legislative history, courts are hesitant to resort to similar statements made by [individual] committee members or other persons at the committee's hearings.").

Interpreting "Sex"

In most of the cases where the Court interpreted a statute prohibiting discrimination on the basis of "sex," the alleged discrimination was unequal treatment of men and women. So, the Court was not tasked with deciding whether to read "sex" broadly. One case, however, did prompt the Court to consider whether "sex" discrimination included discrimination because of

pregnancy. *See Lavalley v. E.B. & A.C. Whiting Co.*, 692 A.2d 367 (Vt. 1997). The Court decided in the affirmative. Below are conclusions and quotations from the opinion.

> Discrimination because of pregnancy can constitute sex discrimination in violation of Fair Employment Practices Act (FEPA), 21 V.S.A. § 495(a)(1). *See Lavalley v. E.B. & A.C. Whiting Co.*, 692 A.2d 367, 369 (Vt. 1997).
>
> "We are more persuaded by the decisions of the courts of our sister states, which have overwhelmingly found in interpreting similar or identical statutes that pregnancy discrimination can be sex discrimination." *Lavalley*, 692 A.2d at 370.
>
> "We agree with the reasoning of the Massachusetts Supreme Judicial Court that "[p]regnancy is a condition unique to women, and the ability to become pregnant is a primary characteristic of the female sex. Thus any classification which relies on pregnancy as the determinative criterion is a distinction based on sex." *Lavalley*, 692 A.2d at 370 (citing *Massachusetts Elec. Co. v. Massachusetts Comm'n Against Discrimination*, 375 N.E.2d 1192, 1198 (Mass. 1978)).

The last quotation is likely the most helpful to our potential argument if "sex" is included in the ERA text but abortion-specific language is not. The Court's view of pregnancy aligns with the proposed language in the Background section (above).

36 Rutgers L.J. 1201

Rutgers Law Journal
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Articles
Linda J. Wharton [a1]

STATE EQUAL RIGHTS AMENDMENTS REVISITED: EVALUATING THEIR EFFECTIVENESS IN ADVANCING PROTECTION AGAINST SEX DISCRIMINATION

I. Introduction

Three decades have passed since fourteen states—inspired by the Federal Equal Rights Amendment ("ERA") campaign of the 1970s and early 1980s—added ERAs to their state constitutions. [1] In adding these provisions to their constitutions, these states joined three others that already had explicit protection from sex discrimination in their state constitutions. [2] The language of many of these amendments tracked that of the proposed Federal ERA, and their legislative histories indicate a specific desire to provide more comprehensive protection against sex discrimination than that available ***1202** under the existing Federal Constitution. [3] In recent years, additional states have added ERAs to their state constitutions, [4] and states continue to consider adding them. [5] Today, twenty-two states have some form of explicit protection against sex discrimination in their state constitutions. [6]

In the 1970s, when most of these state ERAs were adopted, it seemed possible that either through judicial interpretation of the Equal Protection Clause of the Fourteenth Amendment or ratification of the proposed Federal ERA, sex equality would receive rigorous protection under the Federal Constitution. To date, however, efforts to add an ERA to the Federal Constitution have not succeeded, although it continues to be reintroduced in Congress each session. [7] Moreover, the effectiveness of the Supreme Court's ***1203** application of the Equal Protection Clause to sex discrimination claims has been limited by various factors, including its reliance on a formal equality model of analysis that primarily protects against discrimination by governmental actors in instances where men and women are similarly situated. This analysis, embedded in constitutional doctrine by an emerging conservative majority, insulates from heightened scrutiny legislation that impacts women more heavily than men or regulates women in areas, such as reproduction, where men and women are biologically different or women are otherwise not similarly situated to men. In light of serious inadequacies in the protection offered by the Federal Constitution, state ERAs remain important legal tools for combating sex discrimination. Indeed, especially in this age of new judicial federalism, in which many state courts are interpreting state constitutions as independent, and often broader, sources of protection for individual liberties, state ERAs provide the potential for a more broadly-based framework of sex discrimination jurisprudence that goes well beyond the protection afforded under the Federal Constitution. Some recent legal scholarship on state ERAs, however, has expressed disappointment at their underutilization by litigators, [8] and the failure of state courts to interpret ERAs expansively in areas such as abortion and same-sex marriage. [9] One commentator, Paul Benjamin Linton, [10] has questioned the overall effectiveness of state ERAs, charging that state ERAs have been used to benefit men at the expense of women and that they have ultimately been ineffective "except as symbols" in advancing women's equality. [11]

***1204** This Article examines the extent to which state ERAs are, in fact, fulfilling their potential for enhancing protection against sex discrimination beyond the formal equality limits of Federal Equal Protection Clause analysis, finding, in direct contrast to Mr. Linton, that state ERAs have been an extremely important tool in advancing sex equality for women. While judicial interpretation has been uneven, in noteworthy instances state courts have interpreted these provisions in rich and expansive ways that extend the scope of protection for sex equality considerably beyond that afforded by the Equal Protection Clause.[12] Part II summarizes the status of the Supreme Court's interpretation of the Equal Protection Clause in sex discrimination cases, highlighting the limits of this analysis. Part III contrasts judicial interpretations of state ERAs with prevailing Equal Protection Clause jurisprudence, highlighting both selected state court decisions that have provided comprehensive protection against sex discrimination and others that have not. Part IV summarizes and responds to recent legal scholarship on state ERAs and identifies factors that have limited the scope of protection afforded by them, including the continuing tendency of some state court judges to rely on the Supreme Court's limited Federal Equal Protection Clause analysis in interpreting their state constitutions. Part V concludes with recommendations for surmounting the obstacles that have hindered their effectiveness, highlighting the role of lawyers, courts, policymakers and citizens in bringing to fruition the positive potential of these important state equality guarantees.

II. The Limits of Sex Equality Jurisprudence Under the Equal Protection Clause

Although the Supreme Court has been divided between a narrow and a much more progressive vision of the meaning of sex equality, in significant respects, the conservative majority of the Court has prevailed in limiting the scope of protection afforded against sex discrimination by the Equal Protection Clause of the Fourteenth Amendment. As a result, the Supreme Court's prevailing sex discrimination jurisprudence is highly selective, ***1205** identifying "as wrongful only some of the practices and understandings that maintain inequality in the social position of women and men, and obscur[ing]—or affirmatively vindicat[ing] many others."[13] The following factors have limited the scope of protection available under the Equal Protection Clause: (1) the requirement of state action; (2) the failure of the Supreme Court to subject claims of sex discrimination to the "strict scrutiny" standard of review applied to claims of race discrimination; (3) the Supreme Court's application of a formal equality model of analysis that further reduces the protection afforded claims of sex discrimination when men and women are deemed not similarly situated; and (4) the unwillingness of the Supreme Court, absent proof of intentional discrimination, to closely scrutinize facially neutral governmental regulations or policies that disparately impact women. These barriers to broad constitutional protection for sex equality, and the rationale underlying them, are discussed below.

A. State Action

The Equal Protection Clause of the Fourteenth Amendment provides that "[n]o State shall deny to any person within its jurisdiction the equal protection of the laws."[14] Based on its plain language; history;[15] and public policy rationales of federalism,[16] individual autonomy,[17] and separation of ***1206** powers;[18] the Supreme Court has interpreted the Fourteenth Amendment as a prohibition on discriminatory governmental action, not purely private discrimination by individuals, organizations, employers or businesses.[19] While the Court has defined the concept of state action to include nominally private parties engaged in public functions or closely connected with government,[20] in recent years, the conservative majority contracted the ***1207** definition of state action in certain cases.[21] Moreover, in a retreat from suggestions in earlier decisions,[22] a majority of the Court has recently insisted that the state action requirement extends beyond the self-enforcing provision of Section 1 of the Equal Protection Clause to legislation enacted by Congress pursuant to its Section 5 enforcement authority.[23] Accordingly, in United States v. Morrison, by a vote of five to four, the Court invalidated a provision of the Violence Against Women Act of 1994 ("VAWA")[24] enacted ***1208** by Congress

to remedy pervasive bias against victims of gender-motivated violence in the state justice systems by allowing them to bring a civil lawsuit to redress the civil rights deprivation. [25]

The requirement of state action, and the Supreme Court's narrow interpretation of it, obviously substantially limits the scope of protection afforded by the Federal Constitution against sex discrimination. [26] As several feminist scholars have noted, the state action requirement impacts women more harshly than men since

> [t]he major sites of women's oppression—including the nongovernmental workplace and the home—are located in the private sphere of civil society and therefore have historically not been considered appropriate subjects for protection under federal constitutional and civil rights law. Gender inequality arising from disparities in private power is invisible to a system designed to protect individuals from state interference. [27]

While numerous federal statutes fill the gap by extending protection against sex discrimination to actions by private entities, these statutes are targeted at sex discrimination in specific contexts and, of course, are subject to repeal ***1209** and amendment by Congress and narrow interpretation and enforcement by federal administrative agencies. [28] Moreover, as Morrison illustrates, through its federalism jurisprudence, the conservative majority of the Supreme Court has limited the power of Congress to pass laws protecting sex equality and other individual rights even in instances where an abysmal record of state failure in enforcing equality exists. [29]

***1210 B. Standard of Review**

Although it took many decades [30] and serious inadequacies still permeate its race discrimination jurisprudence, [31] the Supreme Court in recent years has ***1211** applied a rigorous standard of scrutiny in reviewing overt facial distinctions based on race under the Equal Protection Clause, requiring the government to justify such classifications by proving that they are necessary to advance a compelling governmental interest. [32] The Supreme Court has explained that this rigorous "strict scrutiny" standard of review is applied to "all racial classifications to 'smoke out illegitimate uses of race by assuring that [government] is pursuing a goal important enough to warrant use of a highly suspect tool.'" [33] In justifying strict scrutiny review, the Supreme Court has explained that, "'whenever the government treats any person unequally because of his or her race, that person has suffered an injury that falls squarely within the language and spirit of the Constitution's guarantee of equal protection.'" [34]

Despite the valiant efforts of feminist litigators to convince the Supreme Court to apply the strict scrutiny standard of review to sex-based discrimination, this argument never garnered more than four votes from the Supreme Court. [35] In 1976, in Craig v. Boren, [36] the Supreme Court stated that sex discrimination claims would be reviewed under a less rigorous standard, requiring proof that classifications based on sex "serve important governmental objectives," and those objectives must be substantially advanced by the use of the sex-based classification. [37] Under this "intermediate scrutiny" standard, the government need not, as in the case of race and other suspect classifications, demonstrate "compelling" objectives. Moreover, the availability of less discriminatory alternatives to the sex-based classification is not necessarily fatal to the government's case. [38] While some ***1212** commentators argue that the Court's 1996 opinion in United States v. Virginia [39] put more teeth into the intermediate standard of review, [40] recent precedent casts doubts on that conclusion and indicates that the Justices are sharply divided in their understanding and application of the intermediate standard. [41]

***1213** Lower courts, [42] commentators, [43] and even Supreme Court Justices, [44] have criticized the intermediate standard as vague, poorly defined and malleable, providing insufficient guidance in individual cases and giving broad discretion to individual judges in deciding the importance of a state interest and whether the classification is substantially related. Professor Deborah Brake, for example, has argued that "the history of intermediate scrutiny in the lower courts demonstrates widespread confusion and inconsistent results." [45] A recent quantitative analysis of equal protection decisions supports these criticisms, finding that, in contrast to the "relatively predictable outcomes" under the strict scrutiny and rational basis standards, ***1214** "when courts apply the intermediate standard, litigants alleging sex discrimination are nearly as likely to win as they are to lose." [46]

Although the Supreme Court has never clearly explained why it chose to apply a different standard to sex and race discrimination cases, [47] the limited scope of protection afforded against sex discrimination stems in part from the fact that the source of constitutional protection is the Fourteenth Amendment with its distinct history and purpose relating to race discrimination, as opposed to an Equal Rights Amendment or other constitutional provision with a history and purpose targeted specifically at sex discrimination. As Professor Reva Siegel explains:

> The intermediate standard of scrutiny expresses the intuition that sex discrimination is just like race discrimination—but, in the end, not exactly like race discrimination. Commentators commonly invoke several differences between sex and race discrimination to justify this difference in doctrinal standards. First, the framers of the Fourteenth Amendment were thinking about questions of race discrimination, not sex discrimination. Thus, it is appropriate for courts to apply a less rigorous standard of review to questions concerning equal citizenship for women; bluntly put, the nation never made a collective constitutional commitment to respect women as equals of men. Second the difference in standards reflects a pervasive ***1215** intuition that the problem of sex discrimination is not as grave, harmful, or significant in American history as the problem of race discrimination. The case law presents sex discrimination as a problem involving old-fashioned ways of thinking rather than a long trail of state-sponsored coercion. Third, underneath it all, there is a sense that sex discrimination is at root different from race discrimination. Sex distinctions are not always harmful (or based on animus) the way race distinctions are Note how, from this vantage point, the central constitutional question about sex discrimination is whether it is really like race discrimination. [48]

While powerful counter-arguments exist that support full constitutional protection for sex equality under the Equal Protection Clause, [49] explicit constitutional guarantees of sex equality—like those in the proposed Federal ERA and the guarantees expressed in many existing state ERAs—provide courts with direct authority, indeed a mandate, to treat sex-based discrimination as highly suspect. [50]

***1216** C. Formal Equality and Real Differences

The inadequacy of the federal constitutional protection afforded against sex discrimination is further exacerbated by the Supreme Court's reliance on a formal equality model of analysis. This analysis stems from the Supreme Court's insistence —applicable to all discrimination claims whether based on race, sex, or other classifications—that the Equal Protection Clause "is essentially a direction that all persons similarly situated should be treated alike." [51] Much as it does in the area of race discrimination, this formal equality model substantially limits the scope of protection afforded claims of sex discrimination. Only laws that discriminate against women in situations in which they are similarly situated to men trigger review under even the more modest "intermediate standard" of review. Thus, the Supreme Court has allowed

differences in treatment where they correspond to differences between men and women relating to biological or legal status, or other relevant differences. [52]

In Geduldig v. Aiello, for example, the Supreme Court held that the exclusion of pregnancy-related disabilities from a state disability insurance program does not violate the Equal Protection Clause. [53] The Court reasoned that the pregnancy exclusion was not discriminatory because, under the disability insurance program, "[t]here is no risk from which men are protected and women are not. Likewise, there is no risk from which women are protected and men are not." [54] Since "[n]ormal pregnancy is an objectively identifiable physical condition with unique characteristics . ***1217** lawmakers are constitutionally free to include or exclude pregnancy from the coverage of legislation such as this on any reasonable basis." [55] Legal commentators have widely criticized this decision and the Court's general insistence on formal equality as "injurious to women by ignoring important sex-based differences, or ultimately holding women to standards that have been established principally by men in a sexually unequal past." [56] Specifically, commentators have emphasized that by analyzing "pregnancy-based classifications as if pregnancy were merely a physical condition appearing in only one sex," [57] the Court ignored the long and troublesome history of women's disadvantageous treatment in the workplace and elsewhere precisely because of their reproductive capacity, thereby perpetuating the subordination of women. [58] Simply put, the Geduldig ***1218** analysis turns a blind eye to the reality that "the fundamental problem is [the] willingness to transmute woman's 'real' biological difference to woman's disadvantage." [59]

The formalistic reasoning of Geduldig has also been extended to uphold laws that make sex-based distinctions based on the capacity to become pregnant. For example, in Michael M. v. Superior Court, [60] the Court upheld a California statutory rape law that made only men criminally liable for sexual intercourse with females under eighteen. [61] The Court's plurality opinion by Justice Rehnquist reasoned that the statute was permissible because men and women were not similarly situated with respect to the State's asserted goal of preventing teenage pregnancy: [62]

> Only women may become pregnant, and they suffer disproportionately the profound physical, emotional, and psychological consequences of sexual activity. Because virtually all of the significant harmful and inescapable identifiable consequences of teenage pregnancy fall on the young female, a legislature acts well within its authority when it elects to punish only the participant who, by nature, suffers few of the consequences of his conduct. [63]

As in Geduldig, the Court's formalistic reasoning failed completely to recognize and distinguish between biological differences and "the social consequences of biology." [64] The failure to scrutinize carefully the gender distinctions at the heart of the case led the Court to "accept[] and reinforce[] ***1219** the sex-based stereotypes that men are naturally, biologically aggressive in relation to sex, while women are sexually passive, and that young women need the law's protection from their own weakness." [65]

The Court's refusal to closely scrutinize sex-based legislative classifications has also been extended to situations in which the perceived differences between men and women were created by law rather than biology. For example, in Rostker v. Goldberg, the Supreme Court upheld the exclusion of women from military draft registration because it found that men and women were not similarly situated with regard to the purpose of the draft. [66] Because the primary purpose of the draft is to call up troops for combat, and women were excluded from combat participation by law, men and women were not similarly situated with regard to the purpose of the draft. [67] Based on the different legal status of men and women, the Court deferred to the judgments of Congress, ignoring completely the sex stereotypes about the roles and capabilities of women and men underlying both the combat exclusion and the all-male draft. [68] The Court's reliance on

the legally created combat exclusion as the basis for the dissimilarity is troubling. As Professor Ann Freedman has noted, "If legislatures can create 'real' sex differences at will by passing sex-based laws, the [E]qual [P]rotection [C]lause can easily be circumvented." [69] Moreover, the Rostker ***1220** decision, fails utterly to examine the serious gender equality implications of the all-male draft:

> On the surface, [Rostker] appears to favor women—allowing them to volunteer for the military or not as they so choose, while subjecting men to involuntary registration This facile conclusion vanishes when one asks why males are subjected to this burden. The answer that our government gives the recalcitrant young man is: "It is your duty as a United States citizen." The message to young women is: "Your citizenship duty is optional, while your brother's is mandatory." [70]

In its subsequent decisions in Mississippi University for Women v. Hogan [71] and United States v. Virginia, [72] the Supreme Court indicated that the real differences doctrine does not extend to normative generalizations about the sexes. In United States v. Virginia, for example, Justice Ginsburg emphasized that in seeking to justify sex-based classifications, government "must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females." [73] Moreover, "generalizations about 'the way women are,' estimates of what is appropriate for most women, no longer justify denying opportunity to women whose talent and capacity place them outside the average description." [74]

However, the Supreme Court continued the formalistic reasoning of the Geduldig/Rostker line of cases in Nguyen v. INS, [75] a case decided in 2001, in which it upheld a federal immigration law that explicitly distinguished between parents based on sex, making it significantly easier for an out-of-wedlock child born overseas to a United States citizen to claim citizenship through a citizen-mother than a citizen-father. [76] The Court identified two ***1221** important governmental objectives served by the statute. [77] First, the sex-based classification served the government's interest in ensuring "that a biological parent-child relationship exists." [78] The Court reasoned that "[f]athers and mothers are not similarly situated with regard to the proof of biological parenthood." [79] Whereas paternity is uncertain, "[i]n the case of the mother, the relation is verifiable from the birth itself." [80] While recognizing that sex-neutral alternatives existed to accomplish the same ends—such as requiring both parents to prove biological parenthood—the Court concluded that the Constitution did not require their use since "the use of gender specific terms takes into account a biological difference between the parents." [81] Second, the sex-based distinction furthered the government's interest in ensuring the opportunity to develop a truly meaningful connection between the child and the citizen parent and, in turn, the United States. [82] In the case of a citizen-mother, the Court reasoned that this opportunity "inheres in the very event of birth." [83] In contrast, "it is not always certain that a father will know that a child was conceived, nor is it always clear that even the mother will be sure of the father's identify." [84] These factors create what the Court called an "undeniable difference in the circumstances of the parents." [85]

In a sharp dissent, Justice O'Connor accused the majority of watering down the intermediate scrutiny standard by "hypothesiz[ing] about the interests served by the statute," "fail[ing] adequately to inquire about the actual purposes" of the statute, and "casually dismiss[ing] the relevance of available sex-neutral alternatives." [86] She also charged that the law was based "not in biological differences but instead in a stereotype—i.e., 'the ***1222** generalization that mothers are significantly more likely than fathers to develop caring relationships with children.'" [87] Finally, Justice O'Connor correctly noted that in analyzing the law's sex-based classification from the limited and formalistic perspective of biological difference, the Court ignored both the long history of gender biases in laws governing the transmission of

citizenship [88] and the detrimental impact of a scheme that burdens women with the responsibility for unwed children and frees males to ignore parental responsibilities:

> Section 1409(a)(4) is paradigmatic of a historic regime that left women with responsibility, and freed men from responsibility, for nonmarital children Unlike § 1409(a)(4), our States' child custody and support laws no longer assume that mothers alone are "bound" to serve as "natural guardians" of nonmarital children. The majority, however, rather than confronting the stereotypical notion that mothers must care for these children and fathers may ignore them, quietly condones the "very stereotype the law condemns." [89]

***1223** As in past cases, in Nguyen, the Court confuses biology with social patterns and sex-based stereotypes, and ultimately accepts and reinforces the stereotype of motherhood as "unshakable responsibility" and fatherhood as "opportunity." [90]

D. Sex-Neutral Rules that Disparately Impact Women or Men

Finally, as in the case of race-neutral classifications, the Court's formal equality analysis has also resulted in its refusal to closely scrutinize sex-neutral classifications that are administered in a discriminatory manner or disproportionately impact women or men. Here, again, the reasoning is formalistic: because men and women are similarly situated with respect to rules that treat them equally on their face, the formal mandate of the equal protection clause is satisfied in the absence of direct proof that intentional sex discrimination has occurred. The Court's decision in Personnel Administrator of Massachusetts v. Feeney, [91] exemplifies this analysis. In Feeney, the Court rejected a challenge to a Massachusetts policy granting lifetime preference to veterans for state civil service positions. [92] Although the policy was neutral on its face, because over ninety-eight percent of veterans in Massachusetts were male, "the preference operate[d] overwhelmingly to the advantage of males." [93] Relying on its earlier ***1224** reasoning in racial discrimination cases under the Equal Protection Clause, [94] the Court employed a two-fold inquiry:

> The first question is whether the statutory classification is indeed neutral in the sense that it is not gender-based. If the classification itself, covert or overt, is not based upon gender, the second question is whether the adverse effect reflects invidious gender-based discrimination. In this second inquiry, impact provides an "important starting point," but purposeful discrimination is "the condition that offends the Constitution." [95]

Moreover, the Court narrowly defined the requisite discriminatory purpose, requiring proof that the government desired to discriminate, not merely that it took action with knowledge that it would have discriminatory consequences. [96] Despite the overwhelming disproportionate negative impact on women seeking civil service jobs, the Massachusetts veterans' preference policy met the requirements of the Equal Protection Clause because there ***1225** was no proof that the State's desire in adopting the law was to disadvantage women. [97]

The Court's refusal to closely scrutinize legal rules for discriminatory impact absent proof of discriminatory purpose poses formidable challenges to litigants. Especially now that legislators and other policymakers have adapted to the Court's modern equal protection jurisprudence, [98] discriminatory motives are rarely expressed and benign purposes can easily be articulated for most laws. [99] Moreover, over time the predominant forms of sexism, much like racism, have evolved from overt expressions of discrimination to more subtle forms. [100] Indeed, "many of the forms of state action

that are most detrimental to women involve laws and policies that are embedded in sexist stereotypes, but expressed in gender neutral language." [101] The impact of the Feeney decision is thus increasingly problematic, insulating most forms of facially neutral governmental action from review. [102] As Professor Reva Siegel has documented, the Court's reasoning in this area has, for example, eviscerated the effectiveness of the Equal Protection Clause in protecting against discriminatory marital status doctrines (now ***1226** expressed in gender-neutral terms), including lenient spousal assault and rape policies:

> [W]hen women challenged policies that provided victims of domestic violence less protection than victims of other violent crimes, they had great difficulty proving that the policies discriminated on the basis of sex—despite the fact that it is women who are overwhelmingly the targets of assaults between intimates. Federal courts have repeatedly ruled that facially neutral spousal assault policies do not trigger heightened review under the Equal Protection Clause. Judicial interpretation of the Equal Protection Clause thus has played virtually no role in the campaign to reform the law of rape, to abolish the marital rape exemption, and to alter domestic violence policies, which for the most part has been conducted in legislatures, administrative agencies, and on the streets. [103]

Many scholars have been highly critical of the purpose requirement. Professor Laurence Tribe argues that it is squarely at odds with the goal of the Equal Protection Clause: "The goal is not to stamp out impure thoughts, but to guarantee a full measure of human dignity for all [M]inorities can also be injured when the government is 'only' indifferent to their suffering or 'merely' blind to how prior official discrimination contributed to it and how current official acts will perpetuate it." [104] Scholars have also articulated various alternatives to the Court's narrow purpose requirement, including a standard that would operate much like the disparate effects test used under Title VI and Title VII requiring courts to closely scrutinize the impact of governmental practices that fall disproportionately on one gender. [105] ***1227** In sum, these decisions illustrate the multiple barriers to broad constitutional protection for sex equality under prevailing Equal Protection Clause jurisprudence. The next section compares the approach of selected state court decisions in applying and interpreting state ERAs to claims of sex discrimination.

III. An Overview of State Court Interpretations of State ERAs

Although judicial interpretation of state ERAs has been uneven, in considering claims of sex discrimination, state court judges have interpreted their own constitutions in rich and expansive ways that extend the scope of protection against sex inequality considerably beyond that afforded by the Equal Protection Clause. Indeed, in each of the four areas discussed above, the specific limits of equal protection analysis have been surmounted in some state court opinions. [106] In other instances, however, state court judges limited the scope of protection afforded under state ERAs.

A. State ERAs and the Requirement of State Action

As discussed supra Part II, the state action requirement of the Fourteenth Amendment derives from its text and history as well as concerns of federalism, separation of powers and protection of individual autonomy. In ***1228** contrast, state ERAs have their own unique language and legislative history with regard to state action. Moreover, the federalism concerns that serve as a primary justification for the state action requirement and lead to the Equal Protection Clause's "underenforcement," [107] plainly do not apply to state constitutions. [108] Separation of powers [109] and individual autonomy [110] concerns ***1229** may also be less salient in the state context. Accordingly, as Professor Jennifer Friesen has emphasized, "the question [of whether a state equality guarantee extends to private actors] cannot be fruitfully resolved by imitating [F]ederal [F]ourteenth [A]mendment state action doctrine." [111] Rather, subject to the limits posed by the

Federal Constitution, [112] the question must be approached separately by reference to the text, history and public policies underlying individual state ERAs.

The language of individual state ERAs varies considerably with regard to whether their reach is limited to state action. Montana's ERA expressly extends to private actors. [113] Rhode Island's extends to "persons doing business with the state." [114] The Louisiana Constitution contains separate ***1230** prohibitions on sex discrimination that apply to both governmental actors [115] and all actors operating public accommodations. [116] On the other hand, five states—Virginia, [117] Colorado, [118] Illinois, [119] Hawaii, [120] and New Hampshire, [121] — expressly limit the scope of their ERAs to governmental actors. The remaining fourteen state ERAs contain more open-textured language, which could be interpreted as extending to private actors. Of these states, six state ERAs— Maryland, [122] Pennsylvania, [123] Massachusetts, [124] Washington, [125] Texas [126] and New Mexico [127] —expressly forbid the denial of equality of rights "under the law." [128] Others contain broader language prohibiting the deprivation of undefined "political or civil rights" based on ***1231** sex, [129] or otherwise broadly proscribing sex-based discrimination without specifically referring to governmental involvement. [130] The broad language of these open-textured provisions differs markedly from the language of the Fourteenth Amendment and more readily supports extension to private actors. [131]

Judicial interpretation of the language of state ERAs falls into two categories of cases: (1) those considering whether the state ERA directly applies to private actors; and (2) those considering whether the values of state ERAs may be enforced against private actors via existing common law causes of action. In both categories of cases, some state courts have extended the scope of their ERAs beyond the limits of the federal state action requirement.

1. Direct Extension of ERAs to Private Actors

Pennsylvania courts have considered whether its ERA extends directly to private or nominally private actors on several occasions and expansively interpreted the scope of the Pennsylvania ERA on each occasion. In Hartford Accident & Indemnity Co. v. Insurance Commissioner of the Commonwealth, the Pennsylvania Supreme Court rejected the attempt of a private insurance company to rely on a requirement of state action. [132] The case involved a complaint by a male that the Insurance Commissioner had violated the state ERA by approving gender-based rates. In explicitly rejecting the Company's ***1232** attempt to "employ the state action concept of our federal system" in the context of a state ERA challenge, the court reasoned:

> The "state action" test is applied by the courts in determining whether, in a given case, a state's involvement in private activity is sufficient to justify the application of a federal constitutional prohibition of state action to that conduct. The rationale underlying the "state action" doctrine is irrelevant to the interpretation of the scope of the Pennsylvania Equal Rights Amendment, a state constitutional amendment adopted by the Commonwealth as part of its own organic law. The language of that enactment, not a test used to measure the extent of federal constitutional protections, is controlling. [133]

The court then turned to a close examination of the language of Pennsylvania's ERA and focusing on the words "under the law," [134] concluded that the amendment "circumscribes the conduct of state and local government entities and officials of all levels in their formulation, interpretation and enforcement of statutes, regulations, ordinances and other legislation as well as decisional law." [135] The court reasoned that the decision of the Pennsylvania Insurance Commissioner, a public official, was both an act "under the law" and constituted "the law." [136]

Following Hartford, the Pennsylvania Superior Court in Welsch v. Aetna Insurance Co. extended its rationale to a sex discrimination claim brought by males directly against their private automobile insurance companies. [137] The plaintiffs claimed that any requirement of state action was met because "they were compelled to obtain insurance coverage in accordance with the laws of the Commonwealth of Pennsylvania." [138] In response, the Pennsylvania court again carefully distinguished between the requirements of state action under the Federal Equal Protection Clause and those applicable under the Pennsylvania ERA, finding that although the plaintiffs' claims did not meet ***1233** the federal state action requirement, [139] the requirements of the ERA were met. [140]

These Pennsylvania state court decisions "suggest that Pennsylvania ERA protections against gender discrimination are greater than those protections typically provided in federal cases requiring state action." [141] Significantly, at least two recent federal district court opinions have interpreted these state court decisions as extending the reach of Pennsylvania's ERA to purely private actors. For example, in Imboden v. Chowns Communications, [142] a federal district court, relying on Welsch, refused to dismiss a sex discrimination claim against a private employer, holding that the argument that Pennsylvania's ERA did not extend to private actors was without merit. [143]

The court has also relied on the unique language and history of its constitutional guarantee of sex equality [144] to expand its application beyond federal standards. In Peper v. Princeton University Board of Trustees, [145] the ***1234** court, while rejecting claims under Title VII and a state anti-discrimination statute, [146] permitted a female plaintiff to state a claim of sex discrimination under the New Jersey Constitution against Princeton University, a private entity. [147] While not explicitly discussing the state action issue, the court reasoned that if the plaintiff was correct in her allegation that she was not promoted because she was a woman, then she was denied the same rights to acquire property as guaranteed to males under New Jersey's constitutional guarantee that "all persons" have a right to acquire property. [148] The court supported its holding by noting that in 1947, when the language of the New Jersey Constitution was expressly extended to include both sexes, "women were granted rights of employment and property protection equal to those enjoyed by men." [149] The court further found that it "has the power to enforce rights recognized by the New Jersey Constitution, even in the absence of implementing legislation." [150]

Peper, Hartford and the other Pennsylvania cases illustrate the potential for using state ERAs to expand protection against sex discrimination in the employment and insurance discrimination areas. In contrast, other state courts considering direct constitutional claims against private actors have specifically declined to extend their ERAs to private actors. [151] In Texas, for example, two appellate courts refused to apply the protections of the Texas ***1235** ERA to private, nonprofit corporations operating junior football leagues in Texas. [152] Both cases involved girls who challenged their exclusion from participating in junior football. [153] The plaintiffs argued that any requirement of governmental involvement under the Texas ERA was met because the cases involved teams that practiced and played their games on public school grounds [154] or in publicly-owned parks. [155] While the courts indicated that state action would extend to private conduct affirmatively "encouraged by, enabled by, or closely interrelated in function with state action," the facts of these cases did not meet this level of state involvement. [156]

The reasoning of these Texas courts has been sharply criticized by Justice William Wayne Kilgarlin, a former justice of the Texas Supreme Court. [157] Justice Kilgarlin focuses on the unexamined willingness of these state courts to defer to federal state action doctrine despite the inapplicability of the purposes of that doctrine in the state constitutional law context and without close analysis of the unique language and history of the Texas ERA. [158] With regard to the language of the Texas ERA, [159] Justice Kilgarlin notes that, while including the phrase "under the law," unlike the

Federal ERA and other state ERAs enacted at the same time, the Texas provision ***1236** does not expressly limit its reach to governmental actors. [160] Moreover, an assumption that the Texas Legislature intended to require governmental action is inconsistent with both the structure of the Texas Constitution [161] and the legislative history of its ERA, which indicated a legislative intent to extend its reach to private discrimination. [162] In deferring to federal precedent "without any apparent hesitation," and ignoring the text and legislative intent underlying the drafting and passage of the Texas ERA, Justice Kilgarlin concludes that these courts denied the Texas ERA of its independent meaning. [163]

Similarly, in United States Jaycees v. Richardet, the Alaska Supreme Court refused to extend the protections of Alaska's ERA to a plaintiff who challenged the Jaycees' exclusion of females from its membership. [164] Summarily rejecting the plaintiff's reliance on the language of the Alaska ERA, which by its plain terms appeared to extend beyond governmental conduct, [165] the court held that state action was a necessary predicate to an ERA claim because "the American constitutional theory is that constitutions are a restraining force against the abuse of governmental power." [166] The court then went onto apply federal state action principles and precedent, ***1237** concluding that neither the Jaycees' use of governmental facilities for free or at reduced rates nor government aid to several Jaycee programs met the state action requirement. [167] In stark contrast to the Pennsylvania Supreme Court's reasoning in Hartford, the Alaska Supreme Court in Richardet did not closely examine the language and legislative history of the Alaska provision, nor did it consider whether the rationale underlying federal action doctrine was applicable in the state context.

2. ERAs as Sources of Public Policy

An alternative approach to the direct extension of state ERAs to private actors is one in which courts essentially transport the equality values reflected in state ERAs into common law causes of action, thereby effectively enforcing these provisions against private actors without the need to discuss state action. This "private sector constitutional tort" approach has been used successfully in cases involving claims of sex discrimination in employment. [168] In Rojo v. Kliger, the California Supreme Court held that the female plaintiffs could bring a claim for wrongful discharge in violation of public policy against a private employer where they were continually subjected to sexual harassment in the workplace and their refusal to tolerate the harassment resulted in their discharge from employment. [169] In defining the public policy of California, the court imported the values reflected in California's constitutional prohibition against sex discrimination in employment and expressly rejected the defendant's attempt to invoke the requirement of state action as a defense:

> [W]hether article I, section 8 [of the California Constitution] applies exclusively to state action is largely irrelevant; the provision unquestionably reflects a fundamental public policy against discrimination in employment—public or private—on account of sex. Regardless of the precise scope of its application, article I, section 8 is declaratory of this state's fundamental public policy against sex discrimination, including sexual harassment No extensive discussion is needed to establish the fundamental public ***1238** interest in a workplace free from the pernicious influence of sexism. So long as it exists, we are all demeaned. [170]

In Badih v. Myers, [171] a California state appellate court extended the reasoning of Rojo to allow a claim for pregnancy discrimination against a private employer even though that employer was exempted from the coverage of California's employment discrimination statute because it employed fewer than five individuals. [172] The court reasoned that discrimination based on pregnancy contravened the strong public policy against sex discrimination in employment stated explicitly in California's constitutional equality guarantee. [173] Opinions in other states have likewise looked to the clear public policy expressed in state ERAs as justification for allowing wrongful discharge claims against private employers in sex discrimination cases, [174] or interpreting statutes liberally with an eye to realizing the sex equality ideals embodied in

state ERAs. [175] ***1239** The possibility of imposing constitutional sex equality guarantees on private actors reflected in this innovative line of cases holds great potential for expanding the reach and impact of state ERAs. This approach holds certain practical advantages over proceeding under anti-discrimination statutes, which might require administrative exhaustion or provide defendants with specific statutory defenses. Moreover, as Professor Friesen notes, this approach is more likely to develop positively in the future than efforts to directly extend constitutional provisions to private actors for a variety of reasons:

> First, advocates who urge [this approach] are asking courts to act consistently with tradition. Second, judges are often required to consider public interest and public policy, and may feel more comfortable doing justice on a case by case basis than by making broad declarations about the nature of the state's bill of rights. Third, this approach neutralizes the policy concerns about separation of powers and diminution of legislative power Fourth, seeking a resolution of a dispute by resort to non-constitutional grounds is consistent with normal principles of judicial economy and restraint. [176]

B. The Standard of Review Under State ERAs

Much like the state action determination, the question of what standard of review is applicable to claims under state ERAs is not controlled by federal precedent, which, as discussed supra Part II, is tied to the unique history of the Fourteenth Amendment and the Supreme Court's apparent reluctance to overstep "the bounds between constitutional interpretation and ***1240** constitutional amendment." [177] The majority of courts interpreting state ERAs have recognized this point and approached the question of standard of review by examining the legislative history and purpose of their individual provisions. Based on this analysis, most state courts have interpreted their state ERAs as requiring higher justification for gender-based classifications than the intermediate standard of review used by the Supreme Court in interpreting the Equal Protection Clause. Accordingly, a critical difference between state ERA jurisprudence and federal precedent is the higher standard of review applied to claims of sex discrimination. [178]

Most state courts apply a "strict scrutiny" standard of review, requiring proof that sex-based classifications are narrowly tailored to serve a compelling governmental interest and specifically rejecting such classifications if gender-neutral alternatives are available. [179] A handful of ***1241** other courts have announced an even more stringent "near absolutist" standard, condemning the vast majority of sex-based classifications except where physical differences dictate a different result. [180] In justifying these rigorous standards of review, many of these courts looked to the unique text and legislative history of their state ERAs and found that the very reason for adding these provisions to the Constitution was a specific legislative intent to provide more protection than that afforded under the Federal Constitution or previously afforded under their own state constitution. In Darrin v. Gould, for example, the Washington Supreme Court looked to the text, timing and purpose of that state's adoption of its ERA in 1972 and concluded that an absolute prohibition on sex discrimination was appropriate. [181] The court rejected both the standard applied under the Federal Equal Protection Clause and the strict scrutiny standard that had already been applied by Washington courts prior to the adoption of its ERA:

> Presumably the people in adopting [the ERA] intended to do more than repeat what was already contained in the otherwise governing constitutional ***1242** provisions, federal and state Any other view would mean the people intended to accomplish no change in the existing law Had such a limited purpose been intended, there would have been no necessity to resort to the broad, sweeping, mandatory language of the Equal Rights Amendment. [182]

Similarly, in People v. Ellis, the Illinois Supreme Court reasoned that, at minimum, the strict scrutiny standard of review was appropriate given the language and legislative history of the Illinois ERA:

> In contrast to the Federal Constitution, which, thus far, does not contain the Equal Rights Amendment, the [c]onstitution of 1970 contains [the state ERA] and in view of its explicit language, and the debates, we find inescapable the conclusion that it was intended to supplement and expand the guaranties of the equal protection provision of the Bill of Rights. [183]

In contrast, a minority of states assess the validity of sex-based classifications under their equality guarantees using a standard of review that is much like the federal intermediate standard of review. [184] Courts in two of ***1243** these states —Virginia [185] and Utah [186] —have done so based on a conclusion that their state equality guarantees are specifically coextensive with the standard applied under the Federal Equal Protection Clause, although with little analysis of the specific text and history of their provisions. [187]

Courts in Rhode Island and Florida have also adopted an intermediate standard of review, doing so, however, after specific examination of the legislative history of their provisions. In Kleczek v. Rhode Island Interscholastic Little League, Inc., the Rhode Island Supreme Court examined the distinct legislative history of Rhode Island's sex equality guarantee, which was added to its constitution in 1986 as part of a revision that also added protection against discrimination based on race and disability, and concluded that it was not a "true ERA" but rather "an adoption of an equal protection and nondiscrimination clause that contains protections similar to the equal protection guarantees contained in the Fourteenth Amendment." [188] The court noted that: (1) minutes of the constitutional convention established that the intent of the delegates was to add a general equal protection clause that would "catch [the Constitution] up" with prior ***1244** court rulings that had been applying federal equal protection standards [189] and thereby "fill a void that had existed in [Rhode Island's] Constitution"; (2) legislative committees at the time had considered and tabled all resolutions relating to an ERA "because of problems with language and interpretation"; and (3) in contrast to other states where adoption of ERAs occurred "only after full debate and with notice to all by calling the resolution what it was, an Equal Rights Amendment," the Rhode Island delegates knew that they were not acting on a true ERA. [190] On this basis, the court concluded that review of sex discrimination claims under the intermediate standard of review was appropriate, reversing the trial court's use of a strict scrutiny standard to invalidate a rule that prohibited boys from participating in girls' field hockey. [191]

Although the Florida Supreme Court has not considered the standard of review under Florida's ERA, which was adopted in 1998, two lower state courts have rejected the strict scrutiny standard of review. In Frandsen v. County of Brevard, a Florida appellate court looked to both the plain language and legislative history of revisions made to ***1245** article I, section 2 of the Florida Constitution in 1998. [192] The 1998 revisions added protection against discrimination based on both sex and national origin, but did so in two different sentences: "All natural persons, female and male alike, are equal before the law and have inalienable rights No person shall be deprived of any right because of race, religion, national origin, or physical disability. [193] The court also reviewed the commentary of the Constitution Revision Commission and found that an "initial proposal 'would have added 'sex' to the list of protected classes [along with race, religion, national origin and physical disability],' but some members objected that such an amendment could lead Florida courts to conclude that it required same-sex marriages ." [194] To address these concerns, the Florida Legislature removed "sex" from the list of classes protected in the final sentence of article I and, instead, extended protection against sex-based discrimination via the "female and male alike" language. [195] The Constitution Revision Commission's report explained their intention for this change as follows:

> The intent of [this proposal], as adopted, was to affirm explicitly that all natural persons, female and male alike, are equal before the law. The proposal as adopted is not intended, and should not be construed, to confer any right to same-sex marriages in this state. Many in the body were concerned that the proposal as it was originally proposed would have opened the door to same-sex marriage in Florida. That was not an acceptable result to many members of the Commission. Consequently, the purpose in amending the original proposal and adopting it in its amended form was to assure that the proposal would not be deemed in any way to countenance same sex marriages. [196]

The Commission report also specifically stated that the addition of "national origin" to the listing of protected classes "will require strict scrutiny of classifications based upon the place of a person's birth, ancestry or ***1246** ethnicity." [197] The Frandsen court concluded that "based on this different treatment of 'sex,' on the one hand, and 'national origin' and 'physical disability,' on the other, it must be concluded that classifications based on sex are not subject to strict scrutiny ." [198] The court then applied the intermediate standard of review to uphold the sex-based classification before it. [199] In 2004, a second Florida appellate court, relying entirely on Frandsen, rejected the strict scrutiny standard with no independent analysis. [200]

While the standard of review adopted by the Rhode Island Supreme Court in Kleczek is at least grounded in some relevant legislative history, the reasoning of the Florida courts is not. The legislative history of the Florida provision does indicate a clear legislative intent not to extend protection to same-sex marriage. However, the Frandsen court's conclusion that the Florida delegates intended a wholesale rejection of strict scrutiny in other fact settings involving sex discrimination is at odds with the apparent original and overarching legislative desire to expand Florida's protection against sex discrimination beyond that contained in existing interpretations of state and federal law. [201] Since existing Florida case law already applied the intermediate scrutiny standard, [202] the Frandsen court's interpretation means that it essentially added nothing to the governing constitutional standards for sex discrimination in Florida. This conclusion is contradicted by the analysis of at least one early legal commentary on the 1998 revisions, which concludes, based on a detailed analysis of the legislative record and documents distributed to guide the public in their understanding of the revisions, that "both the Commissioners and the voters were aware of the ***1247** ERA's intent to provide greater rights to women and of the probability that the strict scrutiny standard would apply to gender classifications." [203] The author notes, for example, that unlike the Rhode Island record examined in Kleczek, the Florida record indicates that those involved in its amendment proceedings viewed the 1998 revision as an ERA, specifically referring to it as an "equal rights proposal." [204] A more careful, detailed analysis of the legislative record in Florida by the courts thus may have warranted a different result.

C. Formal Equality and Real Differences

Although some state court decisions have followed the path of the Supreme Court in applying a formal equality approach to protection under their state ERAs, in noteworthy instances, others have moved beyond formalistic reasoning and employed a substantive equality model that closely scrutinizes all sex-based classifications, including those relating to biological differences, to assess their discriminatory nature and impact. Decisions relating to reproductive autonomy and the rights of unwed parents illustrate this expansive approach. [205]

***1248** 1. Reproductive Autonomy: Pregnancy and Abortion

State ERAs have been successfully used in a variety of factual contexts to challenge laws and policies that discriminated against women on the basis of pregnancy. In Colorado Civil Rights Commission v. Travelers Insurance Co., the Colorado Supreme Court held that excluding the costs of normal pregnancy care from an otherwise comprehensive insurance coverage constitutes sex discrimination in violation of the Colorado ERA.[206] The court began its analysis by specifically rejecting the United States Supreme Court's analysis in Geduldig v. Aiello[207] and General Electric Co. v. Gilbert,[208] emphasizing that, after Colorado's adoption of an ERA in 1972, "[r]eliance on the Gilbert rationale is particularly inappropriate in light of the fact that Colorado constitutional provisions provide additional prohibitions against sex discrimination not present in the United States Constitution."[209] In contrast to the United States Supreme Court's conclusion in Geduldig and General Electric that men and women are not similarly situated with respect to pregnancy, the Colorado Supreme Court reasoned that:

> [B]ecause pregnancy is a condition unique to women, an employer offers fewer benefits to female employees on the basis of sex when it fails to provide them insurance coverage for pregnancy while providing male employees comprehensive coverage for all conditions, including those unique to men. This disparity in the provision of comprehensive insurance benefits as a part of employment compensation constitutes discriminatory conduct on the basis of sex, and is essentially no different in effect than if the employer had provided female employees a lower wage on the basis of sex.[210]

***1249** State ERAs have also provided protection against pregnancy-based discrimination where an employer reassigned a pregnant worker to lesser duties[211] or discharged her because of pregnancy.[212]

The guarantee of equality at the heart of state ERAs is also clearly implicated by laws that single out abortion services for prohibition or restriction:

> Because only women obtain abortions, the direct impact of abortion restrictions falls on a class composed only of women, while men are able to protect their health and exercise their pro-creative choices free of governmental interference. Restrictive legislation coerces only women to continue their pregnancies to term. Only women bear the harmful consequences of dangerous, illegal abortions, where the state has made safe, legal abortions unavailable. By restricting a woman's right to choose abortion, the state conscripts women's bodies into its service, forcing women to continue their pregnancies and involuntarily bear children.[213]

Most state ERA challenges in this context have focused on state laws restricting public funding for abortion.[214] Challenges under the Federal Constitution to restrictions on public funding for abortion have uniformly failed, and the Supreme Court has explicitly permitted states to discriminate ***1250** between childbirth and abortion in their allocation of funds.[215] In contrast, challenges under state ERAs[216] or other state constitutional guarantees[217] have successfully invalidated restrictions on public funding for abortion in ***1251** many states.[218] State ERA challenges have been successful where state courts have been willing to abandon the formal equality analysis of federal precedent and extend greater protection for abortion rights under state equality provisions. The 1998 decision of the New Mexico Supreme Court in New Mexico Right to Choose/NARAL v. Johnson best illustrates this independent approach.[219] In holding that New Mexico's restrictions on state Medicaid funding for medically necessary abortions[220] violated the state ERA, the court reasoned that distinctions based on pregnancy, although a physical characteristic unique to women, must be subject to close scrutiny.[221] The court flatly rejected the reasoning of the United States Supreme Court in Geduldig, emphasizing that it "would be error to conclude that men and women are not similarly situated with respect to a classification simply because the classifying trait is a physical characteristic unique to one sex."[222] Instead, the court reasoned that New Mexico's ERA demanded that it look "beyond the classification to the purpose of the law"[223] and to

whether the law operates to the disadvantage of women. The court emphasized that "'[t]he question at hand is whether the government has the power to turn the capacity [to bear children], limited as it is to one gender, into a source of social disadvantage.'" [224] In this regard, the court noted that New Mexico's funding ban was part and parcel of a long history in which "'women's biology and ability to bear children have been used as a basis for discrimination against them.'" [225] The court also noted that the record in the trial court established "profound [potential] health consequences" of ***1252** pregnancy. [226] Finally, the court found that the New Mexico law discriminated against women by singling them out for distinctly different treatment than men with respect to medically necessary medical services:

> [T]here is no comparable restriction on medically necessary services relating to physical characteristics or conditions that are unique to men. Indeed, we can find no provision that disfavors any comparable, medically necessary procedure unique to the male anatomy
>
> Thus, [the regulation] undoubtedly singles out for less favorable treatment a gender-linked condition that is unique to women. [227]

Applying what it described as "searching judicial scrutiny," the court found that the State had produced no compelling justification for its discriminatory treatment of pregnant women seeking abortion. [228]

The New Mexico Right to Choose decision is noteworthy for its thorough and careful analysis of whether divergence from federal precedent was appropriate in light of "distinct characteristics" of New Mexico law. The New Mexico Supreme Court examined both the text of the New Mexico ERA and its history and meaning in the context of protection from sex discrimination under New Mexico law from territorial times to present. [229] With respect to the New Mexico ERA, the court noted that it was passed in 1973 "by an overwhelming margin" and represented a culmination of a series of state constitutional amendments "that reflect an evolving concept of gender equality." [230] Based on the distinctive text and legislative history of the New Mexico ERA, the court found that the ERA was added to New Mexico's constitution with the specific intention of providing broader protection against sex discrimination than that afforded under the Federal Constitution. [231] Thus, the court concluded that "the federal equal protection analysis [was] inapposite with respect to [the] claim of gender ***1253** discrimination" before it. [232] Having put federal precedent aside, the court went on to undertake an analysis that scrutinized the New Mexico funding cut-off from a substantive equality perspective that focused on the multiple ways in which the cut-off contributed to women's subordination. [233]

In contrast to the New Mexico Supreme Court, other courts have explicitly declined to find protection for abortion funding under their state ERAs. [234] In Bell v. Low-Income Women of Texas, for example, the Texas Supreme Court held that the Texas Medical Assistance Program's restrictions on abortion funding for indigent women did not violate the Texas ERA. [235] Unlike the New Mexico Supreme Court, the Texas Supreme Court refused to find that the State's decision to single abortion out for different treatment involved a sex-based classification:

> [I]t is true that the funding restrictions only affect women, but that is because only women can become pregnant. If the State were to deny funding of all medically-necessary pregnancy-related services, the classification might be comparable to [an] overt gender-based classification The classification here is not

> so much directed at women as a class as it is abortion as a medical treatment, which, because it involves potential life, has no parallel treatment method. [236]

Having concluded that no discriminatory facial classification was involved by relying upon the United States Supreme Court's decisions in Feeney and other cases, the Texas Supreme Court required proof that the funding restriction was based on an invidious discriminatory purpose. [237] Finding that the plaintiffs had failed to demonstrate a purpose to discriminate because of sex, the court refused to apply heightened scrutiny and reviewed the Texas law only to determine whether it was rationally related to a legitimate government purpose. [238] In addition to its outcome, the Bell opinion also differs from the New Mexico Right to Choose opinion in its reliance on ***1254** federal precedent. While noting that the Texas ERA was "'designed expressly to provide protection which supplements the federal guarantees of equal treatment'" and insisting that federal precedent was therefore not controlling, the Texas Supreme Court went on to rely heavily—indeed almost exclusively—on it. [239]

2. Unwed Parents

State ERAs have also frequently been used to mount successful challenges to a variety of state laws that make sex-based distinctions regarding the rights and responsibilities of unwed parents and their children. In Guard v. Jackson, the Washington Supreme Court relied on the state ERA to invalidate a statute that required the father, but not the mother, of an illegitimate child to have regularly contributed to the support of a minor child in order to recover for the child's wrongful death. [240] The court began by noting that the United States Supreme Court's reasoning in Parham v. Hughes, [241] upholding a similar statute, "provides no guidance to this court's consideration under the ERA." [242] Instead, the court reviewed the statute under the rigorous standard of review adopted in Darrin v. Gould, [243] which allows sex-based classifications only where actual differences justify it. The court concluded that, given the statute's purpose of allowing compensation "for the loss of love and companionship of a child," no actual differences justified barring a father from recovering damages, because "the capacity to suffer loss when a child dies is not unique to mothers." [244]

Similarly, in Estate of Hicks, the Illinois Supreme Court relied on the Illinois ERA to strike down a provision allowing only mothers to inherit from illegitimate children who die intestate. [245] The court rejected the State's argument that the sex-based distinction was legitimately based on biological differences between mothers and fathers and applied the strict scrutiny ***1255** standard of review to assess the statute. [246] The court reasoned that distinguishing between mothers and fathers was not necessary to achieve the State's goal of giving effect to the presumed intentions of a deceased child. [247] Instead, the court found that the statute was based on overbroad and impermissible generalizations about parental roles and behavior:

> [The statute] is based upon the presumption that a particular parent will be involved or uninvolved in his illegitimate child's life simply because that parent happens to be a man or a woman. Not all mothers assume sole responsibility for their illegitimate offspring, and not all fathers abandon such offspring. In fact, by employing a gender-based classification, [the statute] may actually thwart the legislature's desire to effectuate an illegitimate child's presumed intent [The statute] allows a mother who abandons her illegitimate child at birth to inherit from that child, while denying surviving fathers the opportunity to inherit even where there is conclusive evidence that they were objects of their child's affection. [248]

In In re McLean, the Texas Supreme Court relied on the Texas ERA to strike down a statute that required a father, but not a mother, to prove it was in the best interest of a child born out of wedlock that he be recognized as a parent. [249] The court began its opinion by emphasizing that the adoption of the Texas ERA required it to review the case on independent state constitutional grounds:

> We decline to give the Texas Equal Rights Amendment an interpretation identical to that given state and federal due process and equal protection guarantees. Both the United States Constitution and the Texas Constitution had due process and equal protection guarantees before the Texas Equal Rights Amendment was adopted in 1972. If the due process and equal protection provisions and the Equal Rights Amendment are given identical ***1256** interpretation, then the 1972 amendment, adopted by a four to one margin by Texas voters, was an exercise in futility. [250]

Applying a standard of strict scrutiny to assess the validity of the statute, the court found that while the state had a significant interest in protecting the welfare of a child born to a mother not married to the child's father, that interest could be served without discriminating on the basis of sex: "A father who steps forward, willing and able to shoulder the responsibilities of raising a child should not be required to meet a higher burden of proof solely because he is male." [251]

These cases are noteworthy because, in squarely rejecting harmful stereotypes and assumptions about the roles and responsibilities of parents, they reject the unreflective biological determinism reflected in Supreme Court decisions such as Parham and Nguyen.

D. Disparate Impact

Although there are relatively few reported decisions involving disparate impact claims, some courts have also been willing to extend the protection of state ERAs to facially neutral laws or policies that disproportionately impact men or women. [252] The Pennsylvania Supreme Court's 1975 decision in DiFlorido v. DiFlorido [253] is one early example of an expansive interpretation of a state ERA to reach a classification that was neutral on its face but disproportionately disadvantaged women. The court first invalidated a Pennsylvania common law rule that made household goods acquired during a marriage presumptively the property of the husband. [254] Next, the court went on to find invalid the trial court's alternative sex-neutral presumption that the actual purchaser of marital property is the owner. [255] In rejecting the notion that ownership should be based solely on proof of financial contribution, the ***1257** court reasoned that this "would necessitate an itemized accounting whenever a dispute over household goods arose and would fail to acknowledge the equally important and often substantial non-monetary contributions made by either spouse." [256] Noting that the ERA demanded that the law not impose "different benefits or different burdens" on members of either sex, the court held that household goods acquired during the marriage must be presumed to be held jointly by the couple unless specific proof was presented to overcome that presumption. [257]

More recently, in Kemether v. Pennsylvania Interscholastic Athletic Ass'n, Inc., a federal district court, relying on precedent from Pennsylvania's state courts, sustained a favorable jury verdict based on a disparate impact claim under Pennsylvania's ERA. [258] The case involved a claim by a female basketball referee that the Pennsylvania Interscholastic Athletic Association ("PIAA") discriminated against her on the basis of sex by refusing to assign her to officiate at boys' interscholastic basketball games during regular season play. [259] The plaintiff also alleged that the PIAA limited eligibility to officiate at boys' post-season playoff games to officials who officiated at ten regular season varsity boys' games. [260] The plaintiff argued that because of the ten-game rule and the inability of women to obtain assignments to

regular season boys' games, female officials were effectively precluded from officiating at boys' postseason games. [261] The court expressly rejected the defendant's claim that Pennsylvania's ERA did not extend to PIAA's facially neutral policy regarding post-season games: "[W]hile a practice may purport to treat men and women equally, if it has the effect of perpetuating discriminatory practices, thus placing an unfair burden on women, it may violate the ERA." [262] The court also rejected the defendant's claim that plaintiff had failed to provide evidence of disproportionate effect, noting both that "the record [was] replete with evidence to the contrary," and that "[i]t was known to PIAA that, because of the ten-game rule and the inability of women to obtain assignments to regular season boys' games, female officials were only ever eligible to officiate girls' playoff games." [263] ***1258** Importantly, in these cases, neither court imposed a requirement—like that applicable under Personnel Administrator of Massachusetts v. Feeney [264] and other Federal Equal Protection Clause precedent—that the plaintiffs demonstrate discriminatory purpose. Under Feeney, these plaintiffs could not have prevailed absent proof that the defendants desired to discriminate; proof that they took action with knowledge of the consequences, accepted by the court in Kemether, would not have been sufficient. [265] In these and other cases, [266] claims under state ERAs have enjoyed expanded protection against sex discrimination beyond the constraints of federal precedent.

In contrast, the Texas Supreme Court's opinion in Bell v. Low-Income Women of Texas, [267] represents a far more restrictive interpretation and application of a state ERA in the context of a claim viewed by the court as facially neutral. Repeatedly citing Feeney and other federal precedent, the Texas Supreme Court held that Texas's restriction on Medicaid funding for medically necessary abortions was facially neutral and therefore not subject to close scrutiny absent proof that Texas lawmakers acted with an explicit "purpose to discriminate because of sex":

> ***1259** "Whatever one thinks of abortion, it cannot be denied that there are common and respectable reasons for opposing it, other than hatred of, or condescension toward women as a class." The biological truism that abortions can only be performed on women does not necessarily mean that governmental action restricting abortion funding discriminates on the basis of gender [T]hat might be true if the State refused to fund medically necessary pregnancy-related services. But, other than abortion, the [Texas law] does fund all medically necessary pregnancy-related care. [268]

Finding no proof of such invidious intent, the court evaluated the Texas law under the highly deferential rational basis standard of review, readily concluding that it rationally furthered the state's legitimate purposes of providing funding where federal reimbursement was available and "encouraging childbirth and protecting potential life." [269] In contrast, the strict scrutiny standard employed by the New Mexico Supreme Court in New Mexico Right to Choose/NARAL v. Johnson would have required the State to provide compelling justification for its funding restriction and to demonstrate why that goal could not be achieved via less discriminatory means. [270] Numerous courts applying this standard have invalidated discriminatory funding bans, finding no compelling justification for denying medically necessary health care to poor women who need abortions. [271]

E. Sexual Orientation and Formal Equality

Finally, state court opinions demonstrate that state ERAs may provide protection from discrimination based on sexual orientation that goes well beyond that available under the Federal Constitution. The United States Supreme Court's own decision-making in this area has been sparse. In 1996, ***1260** the Supreme Court in Romer v. Evans held that a Colorado constitutional amendment prohibiting all legislative, administrative or judicial actions designed to protect gays and lesbians violated the Equal Protection Clause. [272] The Court held that the Colorado provision could not survive

minimum rationality scrutiny.[273] In 2003, in Lawrence v. Texas,[274] the Court used rationality review to strike down a law banning same-sex sodomy under the Due Process Clause,[275] expressly declining to rest its reasoning on the Equal Protection Clause.[276] The Supreme Court has never expressly decided whether sexual orientation is a suspect or quasi-suspect classification warranting application of heightened scrutiny.[277] Nor has the Supreme Court considered whether discrimination against gays and lesbians is a form of sex-based discrimination, warranting heightened scrutiny under Craig v. Boren.[278]

The sex discrimination argument has frequently been made in state constitutional law challenges to laws restricting marriage to opposite-sex ***1261** couples. Although state ERAs have not provided the legal basis for recent victories in Vermont[279] and Massachusetts,[280] in the Hawaii Supreme Court's landmark 1993 ruling in Baehr v. Lewin, the court relied on the Hawaii ERA in holding that its prohibition on same-sex marriage established a sex-based classification that could only pass muster if the state could satisfy the strict scrutiny standard.[281] The Baehr court employed a straightforward formal equality analysis to reach this result reasoning essentially that because Hawaii's law allowed men to marry women, but prevented women from marrying women, it denied women (and vice versa men) the ability to do something that men could do and therefore constrained women's (and men's) choice of marital partners because of sex.[282] The court supported its reasoning by analogizing to the Supreme Court's 1967 holding in Loving v. Virginia[283] that the Equal Protection Clause forbids the criminalization of marriage between persons of different races.[284] On remand, a trial court invalidated the statute after finding that the state had not proven that the marriage statute was supported by a compelling governmental interest.[285] The court's ruling, however, never went into effect because Hawaii voters amended the Hawaii Constitution to allow the state legislature "the power to ***1262** reserve marriage to opposite-sex couples."[286] No subsequent final appellate decisions have adopted the Baehr court's sex discrimination rationale. However, concurring opinions of supreme court justices in Massachusetts[287] and Vermont[288] and trial court opinions in Maryland,[289] Alaska[290] and Oregon[291] accepted the argument in same-sex marriage challenges, and a few opinions have done so in other contexts.[292] ***1263** Other state courts have squarely rejected the sex discrimination argument in a variety of cases.[293] In direct contrast to Baehr, several state courts have used a formal equality analysis to reason that prohibitions on same-sex marriage do not involve impermissible sex-based classifications because: (1) they apply equally to men and women in the sense that both men and women are precluded from marrying same-sex partners;[294] (2) they are not motivated by purposeful sex-based discrimination;[295] and (3) they are based upon "the unique physical characteristics" of the sexes.[296] These courts explicitly rejected Baehr's analogy to Loving. In the 1974 decision in Singer v. Hara, for example, the Washington Court of Appeals dismissed Loving as inapposite, reasoning that gender, unlike race, is an essential element of marriage: "[M]arriage [by definition], as a legal relationship, may exist only between one man and one woman."[297] More recently, in Baker v. Vermont, ***1264** the Vermont Supreme Court also rejected the analogy to Loving as "misplaced."[298] The Baker court emphasized that the United States Supreme Court was able to look beyond the facial neutrality of the miscegenation ban in Loving because it found that "its real purpose was to maintain the pernicious doctrine of white supremacy."[299] Relying on the Feeney discriminatory purpose standard, the court reasoned that, in contrast, on the record before it, there was insufficient evidence "to demonstrate that the authors of marriage laws excluded same-sex couples because of incorrect and discriminatory assumptions about gender roles."[300]

Given the limits of formal equality analysis reflected in the reasoning of Singer, Baker and other cases rejecting the sex discrimination argument, some legal scholars have suggested that those advancing this argument must go beyond the mechanical analysis of Baehr to a more substantive equality analysis that recognizes the ways in which discrimination against gays and lesbians perpetuates sex stereotypes, subordinates women and enforces heterosexual norms.[301] These

arguments have been well developed by legal scholars. Professor Andrew Koppelman, for example, has compellingly articulated the argument that, just as miscegenation laws enforce a code of white supremacist preservation of a "superior" race, laws that discriminate against gays and lesbians reinforce both gender stereotypes about proper male and female behavior and the hierarchy of males over females:

> Much of the connection between sexism and [homophobia] lies in social meanings that are accessible to everyone. It should be clear from ordinary experience that the stigmatization of the homosexual has something to do with the homosexual's supposed deviance from traditional sex roles. . . .
>
> Most Americans learn no later than high school that of the nastier sanction that one will suffer if one deviates from the behavior traditionally deemed appropriate for one's sex is the imputation of homosexuality. . . .
>
> ***1265** This common sense meaning shares certain implicit, rather ugly assumption with the misceganation taboo. Both assume the heirarchical signaficance of sexual intercourse and the polluted status of the penetrated person. The central outrage of male sodomy is that a man is reduced to the status of a woman, which is understood to be degrading. Just as miscegenation was threatening because it called into question the distinctive and superior status of being white, homosexuality is threatening because it calls into question the distinctive and superior status of being male. . . . Lesbianism, on the other hand, is a form of insubordination: it denies that female sexuality exists, or should exist, only for the sake of male gratification. [302]

Professor Sylvia Law has also cogently demonstrated that negative attitudes towards homosexuality preserve "traditional concepts of masculinity and femininity, and those traditional concepts in turn sustain particular political, market and family structures" [303] :

> Sexism and heterosexism are tightly linked. Lesbians and gay men pose a formidable threat to the classic gender script. They deny the inevitability of heterosexuality. They do not fit. Such persons, particularly if they are comfortable with their sexuality and reasonably content and successful in their work and family life, invite heterosexual people to explore whether their own sexual orientation is innate, "freely chosen," or simply the socially comfortable course of least resistance.
>
> . . . .
>
> At its core, secular opposition to homosexual expression and feminism rests on a defense of traditional ideas of family stability. Gay people and feminists violate conservative ideology of family in many ways. Most obviously, gay people engage in non-marital sex involving no immediate potential for procreation. More importantly, when homosexual people build ***1266** relationships of caring and commitment, they deny the traditional belief and prescription that stable relationships require the hierarchy and reciprocity of male/female polarity. In homosexual relationships authority cannot be premised on the traditional criteria of gender. [304]

Although the anti-subordination arguments of Professors Koppelman, Law and other scholars [305] have for the most part not been adopted in judicial opinions, the seeds of these more nuanced arguments are reflected in at least two recent concurring opinions in state constitutional law challenges to discrimination against gays and lesbians. In her concurring and dissenting opinion in Baker v. Vermont, Justice Johnson argued that Vermont's exclusion of same-sex couples from the benefits and protections of marriage should be subject to heightened scrutiny as a "suspect" or quasi-suspect classification based on sex. [306] Significantly, Justice Johnson viewed Vermont's opposite-sex marriage limitation as "a vestige of the sex-role stereotyping" that historically has pervaded marriage laws. [307] She specifically cited the long history of subordination of women within marriage via laws that enforced economic dependency and treated married women as legal incompetents. [308]

More recently, in a concurring opinion in Snetsinger v. Montana University System, Justice Nelson argued that the Montana University System's exclusion of health benefits to partners of gay and lesbian employees constituted a sex-based classification in violation of the Montana ERA. [309] Citing Professor Koppelman, Justice Nelson emphasized that the purpose and effect of the challenged restriction was essentially to force individuals into traditional gender roles:

> [T]he entire focus of laws directed at gays and lesbians is sex. Majoritarian morality and prevailing political ideology are offended by the fact that ***1267** people of the same sex have sexual relations with each other. This offense translates into laws and policies that explicitly or implicitly demonize homosexuals and make them a disfavored class. [310]

Baehr and other decisions demonstrate that state ERAs may support successful legal challenges to laws and policies that discriminate against gays and lesbians. Although some legal scholars, including those sympathetic to lesbian and gay rights, have disagreed with the use of the sex discrimination argument and advised that it "should be used with caution," [311] others have compellingly demonstrated the advantages of the argument and championed its use as one additional "arrow in the quiver" [312] in ongoing efforts to challenge discrimination against gays and lesbians. Professor Koppelman, for example, emphasizes that the sex discrimination argument has important analytic and moral strengths that support its use, along with other arguments, by gay and lesbian rights advocates. [313] Although the ***1268** argument has met with considerable judicial resistance, [314] as reflected in the recent concurring opinions in Baker and Snetsinger, highlighting the dynamic of gender oppression and heterosexism that underlie laws that restrict gays and lesbians may strengthen the claim and enhance its probability of success.

IV. Evaluating State ERAs

Although state ERAs were the subject of considerable scholarly interest from the mid-1970s through the mid-1990s, [315] relatively little legal scholarship has focused on them in the past decade. The scant scholarship of the past decade has focused primarily on the experience of ERAs in specific states [316] and the application of ERAs in specific areas. [317] While nearly all of ***1269** these recent articles have concluded that state ERAs have advanced protection against sex-based discrimination, [318] some commentators have expressed disappointment at the underutilization of ERAs by litigators [319] and the failure of state courts to interpret ERAs in such a way as to advance sex ***1270** equality jurisprudence in specific areas. [320] One commentator, Paul Benjamin Linton, has questioned their overall usefulness charging that state ERAs have benefited male litigants more often than female litigants and function essentially as mere symbols of equality. [321] Relatively little of this recent scholarship has addressed the specific reasons for either the substantive shortcomings of

ERAs or their underutilization by litigators.[322] Yet, identifying and addressing these underlying issues is essential if state ERAs are to achieve their full potential in the future. This section addresses these issues, identifying obstacles that have hindered the effectiveness of state ERAs and responding to some of the recent commentary on them.

A. The Continuing Problem of Unexamined Reliance on Federal Precedent

The decisions highlighted in Part III illustrate that in many important respects state ERAs provide more comprehensive protection against gender discrimination than that afforded under the Federal Equal Protection Clause. Some state courts have extended the scope of their ERAs beyond the limits of federal state-action constraints, reaching private actors and persons loosely affiliated with the state.[323] The majority of state courts have applied the rigorous strict scrutiny or an even stricter standard to review claims under their state ERAs[324]—a standard unavailable at the federal level. Moreover, in important and meaningful ways, some state courts have reached beyond the constraints of formal equality to a far more substantive analysis that evaluates sex-based classifications in the context of a long history in which biological differences between the sexes have been used to discriminate and ***1271** with a focus on the negative impact of sex-based classifications on both men and women. This substantive equality analysis has resulted in decisions at the state level that: provide constitutional protection against pregnancy-based discrimination;[325] prohibit the denial of medically necessary health care to poor women;[326] reject rules that are based on harmful sex-based stereotypes about parental roles;[327] and closely scrutinize a variety of classifications that have a disparate impact on the basis of sex.[328]

The emergence during the early 1970s of the "new judicial federalism,"[329] in which state court judges have increasingly relied on their state constitutions to expand individual rights and liberties, has supported this development of state ERAs as independent, broad-based sources of protection.[330] Yet, as decisions highlighted in Part III illustrate, an obstacle in the path of enhancing the scope of their protection is the continuing tendency of some state courts to conform their interpretations of these provisions to conventional Federal Equal Protection Clause analysis. This tendency—flagged over two decades ago by Professor Robert Williams and other constitutional law scholars[331] as a potential obstacle to the effectiveness of ***1272** state ERAs—is illustrated by state action decisions such as the Alaska Supreme Court's in United States Jaycees v. Richardet,[332] in which the court imported the federal state action requirement without independent analysis and without considering closely the text of Alaska's ERA or whether the policy concerns underlying that requirement apply in the state constitutional context. Likewise, the Texas Supreme Court's decision in Bell v. Low-Income Women of Texas[333] placed heavy, unexamined reliance on the formal equality analysis of the United States Supreme Court in determining both what constitutes a sex-based classification and how to assess classifications that disparately impact women. Preoccupied with federal precedent, the Texas Supreme Court did not undertake a truly independent analysis in which it examined the Texas funding restriction in light of the meaning and purpose of the Texas ERA.

State constitutional law scholars have frequently criticized this tendency of state courts reflexively to rely on federal precedent in interpreting their own constitutions.[334] State constitutions are not a mere reflection of the Federal Constitution, but rather differ in their text and history and serve as independent sources of state law. Institutional concerns, such as federalism, that underlie federal decisions may be inapplicable to state courts.[335] Moreover, "institutional environments and histories vary dramatically from state to state" and may require[336] state judges to employ different strategies ***1273** in enforcing constitutional norms. Therefore, as Justice Hans Linde of Oregon emphasizes, "the right question [in interpreting these independent state charters] is not whether a state's guarantee is the same as or broader than its federal counterpart as interpreted by the Supreme Court. The right question is what the state's guarantee means and how it applies to the case at hand."[337] Although Supreme Court decisions are a "valuable

source of guidance, state courts are responsible for construing state law, and need not justify their decisions by reference to any federal benchmark." [338]

These observations are especially apt in the context of state court interpretation of state ERAs. The language and legislative history of these provisions differs markedly from that of the Federal Equal Protection Clause. Indeed, as many state courts have recognized, [339] most of these provisions were added to state constitutions to overcome the very limits posed by the historical and doctrinal underpinnings of the Equal Protection Clause. In this sense, many are mandates for a high level of constitutional protection against sex discrimination. As Professor Robert Williams wrote over two decades ago, "Adoption of these provisions through popular referenda reflects an important social and political movement in our society [S]tate ERAs seem to direct, rather than just record, social change." [340] Their presence in state constitutions "is unmistakable evidence of societal action, of the choice whether to enact an idea into law. To bury such choices under a theory of noninterpretive adjudication deprives political action of its constitutional significance." [341]

***1274** Independent interpretation of state ERAs, however, does not necessarily mean that state courts will in every instance extend protection beyond that provided under the Federal Equal Protection Clause. [342] Rather, it means that state judges must employ a careful process, which includes a close and independent review of the text of the provision, its history, its doctrinal and political underpinnings, past judicial interpretations, its "place in the state's overall constitutional design," [343] its relation to earlier state constitutional provisions, [344] and provisions in other state constitutions. [345] Decisions such as the New Mexico Supreme Court's in New Mexico Right to Choose, [346] the Washington Supreme Court's in Darrin v. Gould [347] and the Colorado Supreme Court's in Colorado Civil Rights Comm'n v. Travelers Insurance Co. [348] reflect this kind of careful, independent analysis. Importantly, in considering text and history of state ERAs, these decisions do not reflect narrow literalism or rigid originalism, [349] but rather reflect a genuine ***1275** commitment to independent analysis that remains faithful to the equality values underlying these provisions. [350]

B. Underutilization by Litigators

Commentators have correctly noted that realization of the full potential of state ERAs has been hampered by the fact that they have not been frequently used by litigators. [351] Moreover, the use of state ERAs appears to be diminishing. For example, Judge Phyllis Beck, an expert on the Pennsylvania ERA, points out that "since 1994, Pennsylvania courts have published less than one case per year discussing the state ERA." [352] This phenomenon may, in part, be attributable to the fact that during the past thirty years numerous statutes and regulations targeted at sex discrimination have created alternative avenues for relief in some specific contexts. [353] In addition, as already noted, over time the predominant forms of sexism have evolved from overt expressions of sex discrimination to more subtle forms, which are more difficult to challenge given the potential lack of receptivity of courts to disparate impact claims. [354]

***1276** While these factors provide a partial explanation for the under use of state ERAs, they do not fully explain the phenomenon. As the cases discussed in Part III illustrate, there continues to be a strong need for the protection of ERAs in many areas. Moreover, the problem of underutilization of state ERAs is not a new one. [355] Nor is it limited to state ERAs. [356] Although, as cases challenging bans on same-sex marriage and prohibitions on Medicaid funding for abortion illustrate, resort to state constitutional law guarantees has increased in recent years, the problem of over-reliance on the Federal Constitution in framing individual rights claims has dogged the field of state constitutional law. [357]

State constitutional law scholars have offered several explanations for the underutilization of state constitutional law claims. First, while the receptivity of law schools to training in state constitutional law is steadily improving, legal education and legal resources have tended to focus on federal constitutional law and therefore lawyers are less comfortable and knowledgeable in the state constitutional law arena. [358] As Professor Friesen has pointed out, "[a]n advocate wishing to know how Pennsylvania and other ***1277** northeastern states have treated the issue of abortion funding under their bill of rights would get no help from the leading national treatise, despite its promising title, American Constitutional Law." [359] Educated in federal law, legal advocates may be less likely to bring claims under state constitutional law and, when they do, "will inevitably be tempted to use federal law as a reference point for the construction of state remedies for constitutional rights." [360]

Second, obstacles to adequate remedies in state judicial systems may discourage claims under state constitutions. Many states still do not allow private actions for damages for violations of state constitutional rights, although there is a growing trend towards recognizing such actions. [361] As a result, state ERAs have primarily been used to obtain injunctive relief, rather than as a grounds for recovering damages. In addition, in contrast to claims brought under federal law, [362] the prospects of obtaining court awarded attorneys' fees in cases brought solely on the basis of claims under state constitutional law are dim. Most states do not have statutes that permit state courts to award attorneys' fees to a party prevailing on a claim under state constitutional law. [363] In the absence of such statutes, attorneys' fees are not available for plaintiffs proceeding solely on state constitutional law grounds unless the state court can be convinced to award fees based on its equitable powers. [364]

***1278** The experience of the plaintiffs in New Mexico Right to Choose/NARAL v. Johnson [365] illustrates the difficulty of convincing a court to award fees in the absence of a statute. Following their groundbreaking victory in obtaining abortion funding for poor women under New Mexico's ERA, the plaintiffs were denied attorneys' fees by the New Mexico Supreme Court. [366] The court joined the majority of states in refusing to adopt a "private attorney general" exception that would allow fees in the absence of a statute when litigation protects important societal interests. [367] Ironically, as one commentator has noted, while the New Mexico Supreme Court expanded the availability of judicially enforceable rights under its state constitution in its abortion funding ruling and other cases, "it fail[ed] to facilitate and encourage the bringing of such cases" by exercising its equitable power to award fees in cases that succeed in vindicating important constitutional rights. [368] Unless plaintiffs seeking protections from sex discrimination can bear their own legal costs or obtain pro bono legal services, the unavailability of attorneys' fees may be a strong disincentive to proceeding in state court under a state ERA claim and may partially contribute to their underutilization in the courts. [369]

***1279 C. The Role of External Factors in Judicial Decision-Making**

A variety of external factors also influence outcomes under state ERAs. As in the case of other constitutional guarantees and legal rules, courts interpret ERAs in the context of political factors, majoritarian cultural norms and individual ideologies that may influence outcomes. Indeed, as noted above, a recent quantitative study of state ERAs showed that factors such as the particular facts of the case, the proportion of women on the bench, the political ideology of individual judges, and the sex of the litigant influence the outcome in claims under state ERAs. [370] These external factors may be especially relevant when ERAs are used to challenge more controversial governmental policies such as restrictions on abortion and same-sex marriage. [371] Thus, the mere presence on the books of an ERA does not automatically guarantee an outcome in litigation that advances sex equality. Nonetheless, as many of the decisions discussed in Part III reflect and the quantitative assessment documents, [372] though these external political factors are undoubtedly relevant and influential, the presence of a state ERA often makes a significant difference in increasing the likelihood of judicial

interpretations that advance sex equality principles. Moreover, as discussed below, the impact of state ERAs on executive and legislative decision-making, as well as their cultural and symbolic value, is extremely important.

***1280 D. Extending Protection to Both Males and Females**

Finally, several commentators have noted that male plaintiffs have frequently been the beneficiaries of protection against sex discrimination in state ERA challenges.[373] Paul Benjamin Linton is alone among these commentators in suggesting in two frequently-cited articles that the application of state ERAs to protect men somehow diminishes their value, renders them harmful to women and ultimately ineffective "except as symbols."[374] Pointing out that courts have invalidated statutes and rules that "traditionally favored women over men," such as the tender years presumption in custody cases, Mr. Linton concludes that "the ultimate irony in the adoption of the equal rights provision is that women have given up 'privileges' they have always enjoyed for 'rights' that were never in jeopardy."[375]

Mr. Linton's conclusions are misplaced. First, the mere fact that males are the immediate beneficiaries of court outcomes in some cases[376] does not ***1281** mean that the principles established in those cases do not also inure to the ultimate benefit of women and society at large. In many instances, rules that appear to benefit women "promote attitudes and expectations about women, including their dependency or status as victims, that disadvantage them across a wide spectrum of social contexts."[377] State ERA decisions invalidating rules that disadvantaged the fathers of illegitimate children in the context of wrongful death actions and inheritance rights, discussed in Part III,[378] illustrate this principle. The sex-based classifications invalidated in those cases, like those upheld in Nguyen, all serve to perpetuate and reinforce stereotypes about the role and responsibilities of mothers and fathers that are ultimately harmful to both men and women and their children:

> In taking responsibility for children women act as independent moral agents. When the Supreme Court assumes that "biology" dictates that women care for infants, it is impossible to attach moral value to the woman's actions or to acknowledge the human and social worth of the nurturing that women do. When the [Supreme] Court allows sex-based classifications to be justified by the presumption that fathers are unidentified, absent, and irresponsible, it is ***1282** more likely that these generalizations will continue to be true. Assertions that it is "virtually inevitable" that the mother will care for the child, assumptions of "unshakeable responsibility" and the "undeniable social reality that the mother is always the custodian of the child," are no different from the "old notion" that motherhood is "the noble and benign" mission of women. The assumption reinforces stereotypes and degrades women.[379]

Similarly, Mr. Linton's conclusion that state ERA decisions invalidating the tender years presumption in child custody cases[380] harm women is simplistic. As numerous feminist legal scholars have pointed out, while "[t]he maternal preference made it easier for women to leave marriages without losing custody and affirmed their centrality in childrearing," it also "encouraged the maintenance of traditional dichotomous gender roles in marriage, confining women to domesticity and stigmatizing those who did not conform."[381] Moreover, "because the maternal preference was based on ideologies about women's proper role, a judge had wide discretion to penalize a mother who had deviated from traditional homemaker norms ."[382] The "privilege" of the tender years presumption thus came with powerful negative ramifications for women, which Mr. Linton's analysis completely ignores. Sex-neutral custody standards that are applied in a non-biased fashion and that seek to undermine, not perpetuate, traditional gender roles are ultimately far more beneficial to women, men and society at large.[383]

***1283** Second, Mr. Linton's assessment of the value of state ERAs is utterly devoid of context. By failing to evaluate state ERAs in the broader context of their effectiveness at advancing sex equality jurisprudence beyond the constraints of federal equal protection analysis, his analysis ignores the myriad ways, detailed in this Article, in which courts have advanced legal protection for women beyond that available under federal law by employing substantive equality analyses that focus on the harmful effects of sex-based classifications. Cases extending protection to women discriminated against on the basis of pregnancy and reproductive capacity, for example, are hardly "symbolic" advancements in the law. Moreover, Mr. Linton's evaluation of the impact of state ERAs also ignores entirely the tremendous statutory reform and executive action that came about as a result of the passage of state ERAs. In Pennsylvania, for example, upon ratification of the ERA in 1971, the Governor immediately appointed a commission on the status of women to review Pennsylvania law for sex bias, which led to the passage in 1978 of a package of nineteen statutes implementing the mandate of its ERA and ultimately to the repeal or revision of over 140 discriminatory laws. [384] At ***1284** the executive level, the Pennsylvania Attorney General issued a flurry of opinions on a wide range of topics, including the right of women to use their birth names, the elimination of minimum height requirements for state troopers, and prohibitions on gender discrimination in insurance. [385] In addition, state agencies and departments, such as the Pennsylvania Department of Education and the Department of Insurance, issued regulations prohibiting discrimination in specific areas. [386] This reform, like so much of the case law described in this Article, inured to the direct benefit of women.

Finally, while totally ignoring the real practical impact and value of state ERAs, Mr. Linton also mistakenly trivializes their symbolic value. The choice of the citizens of individual states to add explicit protection against sex discrimination to their constitution affirms fundamental principles of human dignity, equality and liberty at the core of American democracy. This unequivocal commitment to gender equality has powerful implications beyond the outcomes in individual cases. The law operates "as a system of cultural and symbolic meanings" and the very presence of legal norms affects us—"through communication of symbols—by providing threats, promises, models, persuasion, legitimacy [and] stigma." [387] State ERAs make crystal clear that the principle of sex equality is so important that it is "deemed worthy of constitutional magnitude." [388] As Justice Ginsburg emphasized nearly thirty years ago in the context of the Federal ERA, they serve "as a forthright statement of our moral and legal commitment to a system in which neither sons nor daughters are pigeonholed because of sex." [389] Moreover, this textual clarification is vitally important:

> Text matters in our tradition because it is the site of understandings and practices that authorize, encourage, and empower ordinary citizens to make claims about the Constitution's meaning.
> ***1285** In our constitutional culture, elected officials and ordinary citizens understand themselves as authorized to make claims about the Constitution's meaning and regularly act on this understanding in a wide variety of social settings and through an array of practices, only some of which are formally identified in the text of the Constitution itself. [390]

Although not fully quantifiable, the Pennsylvania experience demonstrates that the very presence of an ERA will have a ripple effect through states, sensitizing both elected officials and citizens and mobilizing action to effectuate the values enshrined in its constitutional commitment to sex equality. Moreover, even where courts fail to interpret ERAs fully and effectively, litigation under state ERAs may have the effect of raising public consciousness about sex discrimination and mobilizing individuals to work for needed reform. [391] The cultural and symbolic meanings of state ERAs are thus profoundly important.

V. Recommendations and Conclusion

While judicial interpretation of state ERAs has been inconsistent, state court decisions of the past three decades powerfully demonstrate that they provide the potential for a more broad-based framework of sex discrimination jurisprudence that goes well beyond the protection afforded under the Federal Constitution. Especially at a time when

the United States Supreme Court is likely to become increasingly conservative as President Bush adds replacements to the Court, state ERAs are extremely important sources of protection against sex-based discrimination. Meaningful implementation of any law, however, is not guaranteed by its mere passage. Judges, lawyers and others play a critical role in shaping constitutional meaning and enhancing the effectiveness of constitutional guarantees. If the positive potential of state ERAs is to be fully realized, lawyers, courts, legislative policymakers and citizens themselves must participate in the hard work of giving them vitality and potency. As Professor Robert Williams has noted, as the New Judicial Federalism has matured to its "third stage," ***1286** considerable challenges and difficult work confront those involved in this "evolving phenomenon." [392]

Lawyers must make claims under state ERAs and must do so in terms independent of federal analysis. As courts and constitutional law scholars have emphasized, in briefing and analyzing state constitutional law claims, lawyers must break the habit of arguing state constitutional claims in the defensive language of federal jargon and instead must base arguments on the specific text, history and meaning of state provisions. [393] For example, in its famous opinion in State v. Jewett, [394] the Vermont Supreme Court admonished:

> One longs to hear once again of legal concepts, their meaning and their origin. All too often legal argument consists of a litany of federal buzz words memorized like baseball cards. As Justice Linde has noted: "People do not claim rights against self-incrimination, they 'take the fifth' and expect 'Miranda warnings.' All claims of unequal treatment are phrased as denials of equal protection of the laws. [395]

As Professor Friesen has counseled, "One way to break the state tie is to imagine a world in which there is no federal law." [396] In the case of state ERAs, for example, this would entail breaking free of the constraints of Feeney in arguing disparate impact claims, avoiding the automatic assumption that federal state action principles apply, and, most importantly, proceeding from the premise that sex equality jurisprudence rests on a model of substantive rather than formal equality. These arguments may be supported by the innovative work in recent years of commentators who have urged the use of state ERAs in areas such as reproductive autonomy, [397] ***1287** public benefits, [398] pay equity, [399] juvenile justice [400] and other cutting-edge issues of sex discrimination, including challenges to single-sex schools. [401]

Lawyers and litigants cannot act alone. Legislators and other public policy makers must support and facilitate the use of state equality provisions by enacting statutes that permit direct suits for damages for violations of state constitutional rights and, equally importantly, provide prevailing parties with attorneys' fees. Moreover, as the cases discussed in this Article demonstrate, the language and legislative history of these provisions matter. The option of amending constitutional guarantees is readily available much more at the state level than the federal level. Some existing state ERAs may benefit from amendments that strengthen and clarify their meaning. [402] States that are currently considering the addition of ERAs to their constitutions must write them in language that expresses the mandate of sex equality broadly and clearly; legislative intent regarding state action, standard of review and scope of coverage must also be clearly stated.

Citizens, in turn, can play a vital role by mobilizing to support legislative reform, insisting on gender and racial diversity in their state judiciaries and electing judges who will interpret state ERAs fully and effectively. Scholars can also support the enhanced use of state ERAs by additional scholarship that demonstrates their usefulness in advancing sex equality in specific contexts and fully exposes the weaknesses of existing federal equal protection analysis.

Finally, state court judges play a critical role in ensuring the vitality and integrity of state ERAs. In interpreting and applying them, state judges must include a close and independent review of the text of the provision, its history, its doctrinal and political underpinnings, relevant precedent and its relation to earlier state constitutional provisions. Through this kind of ***1288** careful, contextualized analysis, reflected in decisions such as the New Mexico Supreme

Court's in New Mexico Right to Choose and others discussed in this Article, state court judges honor the distinctiveness of their state constitutions and respect the political action that led to passage of these amendments.

Appendix

Alaska:

"No person is to be denied the enjoyment of any civil or political right because of race, color, creed, sex or national origin. The legislature shall implement this section."
ALASKA CONST. art. I, § 3 (1972).
California:

> "A person may not be disqualified from entering or pursuing a business, profession, vocation, or employment because of sex, race, creed, color, or national or ethnic origin."

CAL. CONST. art. I, § 8 (1879).

> "The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting."

CAL. CONST. art. I, § 31(a) (1996).
Colorado:

> "Equality of rights under the law shall not be denied or abridged by the state of Colorado or any of its political subdivisions on account of sex."

COLO. CONST. art. II, § 29 (1973).
Connecticut:

> "No person shall be denied the equal protection of the law nor be subjected to segregation or discrimination in the exercise or enjoyment of his or her civil or political rights because of religion, race, color, ancestry, national origin or sex."

CONN. CONST. art. I, § 20 (1974).
***1289** Florida:

> "All natural persons, female and male alike, are equal before the law and have inalienable rights, among which are the right to enjoy and defend life and liberty, to pursue happiness, to be rewarded for industry, and to acquire, possess and protect property; except that the ownership, inheritance, disposition and possession of real property by aliens ineligible for citizenship may be regulated or prohibited by law. No person shall be deprived of any right because of race, religion, national origin, or physical disability."

FLA. CONST. art. I, § 2 (1998).
Hawaii:

> "Equality of rights under the law shall not be denied or abridged by the State on account of sex. The legislature shall have the power to enforce, by appropriate legislation, the provisions of this section."

HAW. CONST. art. I, § 3 (1972).

"No person shall be deprived of life, liberty or property without due process of law, nor be denied the equal protection of the laws, nor be denied the enjoyment of the person's civil rights or be discriminated against in the exercise thereof because of race, religion, sex or ancestry." HAW. CONST. art. I, § 5 (1978).

> "There shall be no discrimination in public education institutions because of race, religion, sex or ancestry ."

HAW. CONST. art. X, § 1 (1978).
Illinois:

> "The equal protection of the laws shall not be denied or abridged on account of sex by the State or its units of local government and school districts."

ILL. CONST. art. I, § 18 (1971).
Iowa:

> "All men and women are, by nature, free and equal, and have certain inalienable rights—among which are those of enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining safety and happiness."

IOWA CONST. art. I, § 1 (1998).
***1290** Louisiana:

> "No person shall be denied the equal protection of the laws. No law shall discriminate against a person because of race or religious ideas, beliefs, or affiliations. No law shall arbitrarily, capriciously, or unreasonably discriminate against a person because of birth, age, sex, culture, physical condition, or political ideas or affiliations. Slavery and involuntary servitude are prohibited, except in the latter case as punishment for crime."

LA. CONST. art. I, § 3 (1974).

> "In access to public areas, accommodations, and facilities, every person shall be free from discrimination based on race, religion, or national ancestry and from arbitrary, capricious, or unreasonable discrimination based on age, sex, or physical condition."

LA. CONST. art. I, § 12 (1974).
Maryland:

> "Equality of rights under the law shall not be abridged or denied because of sex."

MD. CONST. DECL. OF RTS. art. 46.
Massachusetts:

> "All people are born free and equal and have certain natural, essential and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing and protecting property; in fine, that of seeking and obtaining their safety and happiness. Equality under the law shall not be denied or abridged because of sex, race, color, creed or national origin."

MASS. CONST. pt. 1, art. I (1976).
Montana:

> "The dignity of the human being is inviolable. No person shall be denied the equal protection of the laws. Neither the state nor any person, firm, corporation, or institution shall discriminate against any person in

> the exercise of his civil or political rights on account of race, color, sex, culture, social origin or condition, or political or religious ideas."

MONT. CONST. art. 2, § 4 (1972).

> "No person shall be refused admission to any public educational institution on account of sex, race, creed, religion, political beliefs, or national origin."

MONT. CONST. art. 10, § 7 (1889 (ratified); 1978 (amended)).

***1291** New Hampshire:

> "All men have certain natural, essential, and inherent rights—among which are, the enjoying and defending life and liberty; acquiring, possessing, and protecting, property; and, in a word, of seeking and obtaining happiness. Equality of rights under the law shall not be denied or abridged by this state on account of race, creed, color, sex or national origin."

N.H. CONST. pt 1, art. 2 (1974).

New Jersey:

> "All persons are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness."

N.J. CONST. art. I, para. 1 (1947).

> "Wherever in this Constitution the term 'person,' 'persons,' 'people' or any personal pronoun is used, the same shall be taken to include both sexes."

N.J. CONST. art. X, para. 4 (1947).

New Mexico:

> "No person shall be deprived of life, liberty or property without due process of law; nor shall any person be denied equal protection of the laws. Equality of rights under law shall not be denied on account of the sex of any person. The effective date of this amendment shall be July 1, 1973."

N.M. CONST. art. 2, § 18 (1973).

Pennsylvania:

> "Equality of rights under the law shall not be denied or abridged in the Commonwealth of Pennsylvania because of the sex of the individual."

PA. CONST. art. 1, § 28 (1971).

Rhode Island:

> "All free governments are instituted for the protection, safety, and happiness of the people. All laws, therefore, should be made for the good of the whole; and the burdens of the state ought to be fairly distributed among its citizens. No person shall be deprived of life, liberty or property without due process of law, nor shall any person be denied equal protection of the laws. No otherwise qualified person shall, solely by reason of race, gender or handicap be subject to discrimination by the state, its agents or any person or entity ***1292** doing business with the state. Nothing in this section shall be construed to grant or secure any right relating to abortion or the funding thereof."

R.I. CONST. art. I, § 2 (1986).

Texas:

> "Equality under the law shall not be denied or abridged because of sex, race, color, creed, or national origin. This amendment is self-operative."

TEX. CONST. art. I, § 3a (1972).
Utah:

> "The rights of citizens of the State of Utah to vote and hold office shall not be denied or abridged on account of sex. Both male and female citizens of this State shall enjoy equality, all civil, political and religious rights and privileges."

UTAH CONST. art. IV, § 1 (1896).
Virginia:

> "The right to be free from any governmental discrimination upon the basis of religious conviction, race, color, sex, or national origin shall not be abridged, except that the mere separation of the sexes shall not be considered discrimination."

VA. CONST. art. I, § 11 (1971).
Washington:

> "Equality of rights and responsibility under the law shall not be denied or abridged on account of sex."

WASH. CONST. art. XXXI, § 1 (1972).
Wyoming:

> "In their inherent right to life, liberty and the pursuit of happiness, all members of the human race are equal."

WYO. CONST. art. I, § 2 (1890).

> "Since equality in the enjoyment of natural and civil rights is only made sure through political equality, the laws of this state affecting the political rights and privileges of its citizens shall be without distinction of race, color, sex, or any circumstance or condition whatsoever other than individual incompetency, or unworthiness duly ascertained by a court of competent jurisdiction."

WYO. CONST. art. I, § 3 (1890).

> ***1293** "The rights of citizens of the State of Wyoming to vote and hold office shall not be denied or abridged on account of sex. Both male and female citizens of this state shall equal enjoy all civil, political and religious rights and privileges."

WYO. CONST. art. VI, § 1 (1890).

"In none of the public schools so established and maintained shall distinction or discrimination be made on account of sex, race or color."
WYO. CONST. art. VII, § 10 (1890).

Footnotes

a1 Associate Professor of Political Science, Richard Stockton College of New Jersey; Lecturer-in-Law, University of Pennsylvania School of Law (1996-2002); J.D. Rutgers University School of Law-Camden (1981). Many of the ideas in this Article grew out of my past work as the Managing Attorney of the Women's Law Project in Philadelphia, Pennsylvania, where I served as lead counsel or co-counsel in litigation challenging sex discrimination under both the Federal Constitution and Pennsylvania's Equal Rights Amendment. This litigation included several cases in the area of reproductive rights, including Planned Parenthood v. Casey, 505 U.S. 833 (1992). I am deeply grateful for the excellent feedback on drafts of this Article that I received from Pamela Elam, Ann Freedman, Susan Frietsche, Seth Kreimer, Molly Murphy MacGregor and Robert F. Williams. Many thanks also to Debra Franzese for her excellent research assistance and to both my colleagues at Richard Stockton College and my family for their encouragement and support.

1 ALASKA CONST. art I, § 3; COLO. CONST. art. II, § 29; CONN. CONST. art. I, § 20; HAW. CONST. art. I, § 21; ILL. CONST. art. I, § 18; MD. CONST. art. I, § 3; MASS. CONST. pt. I, art. 1; MONT. CONST. art. II, § 4; N.H. CONST. pt. I, art. 2; N.M. CONST. art. II, § 1; PA. CONST. art. I, § 28 ; TEX. CONST. art. I, § 3a; VA. CONST. art. I, § 11; WASH. CONST. art. XXXI, § 1. For the full text and date of adoption of each state ERA, see infra Appendix.

2 Two states—Wyoming and Utah—added sex equality guarantees to their constitutions at the same time that they extended the right of suffrage to women in the late nineteenth century. UTAH CONST., art. IV, § 1; WYO. CONST. art. I, § 2. California added a provision to its constitution that expressly prohibited sex discrimination in employment in 1879. CAL. CONST. art. I, § 8. Some states also explicitly provide protection against sex discrimination in public education in their constitutions. CAL. CONST. art. I, § 31(a); HAW. CONST. art. X, § 1; WYO. CONST. art. VII, §10; MONT. CONST. art. 10 § 7.

3 BARBARA A. BROWN, ANN E. FREEDMAN, HARRIET N. KATZ & ALICE M. PRICE, WOMEN's RIGHTS AND THE LAW: THE IMPACT OF THE ERA ON STATE LAWS 19 (Hazel Greenberg ed., 1977); G. ALAN TARR, UNDERSTANDING STATE CONSTITUTIONS 47 (1998).

4 FLA. CONST. art. I, § 1; IOWA CONST. art. I, § 1.

5 Concurrent resolutions of the Senate and the Assembly of New York to amend New York's constitution to explicitly protect against sex discrimination have been introduced in New York. See S. 1864, 2005-2006 Leg., Reg. Sess. (N.Y. 2005); A. 3465, 2005-2006 Leg., Reg. Sess. (N.Y. 2005). These resolutions would add the word "sex" to the proscribed classifications listed in New York's equal protection clause. See N.Y. CONST. art. I, § 11.

6 In addition to the state constitutions cited in footnotes 1, 2 and 4, the Rhode Island and Louisiana Constitutions, like California's, contain protections against sex discrimination that are explicitly limited in scope. See LA. CONST. art. I, § 3 (forbidding sex-based discrimination when it is arbitrary and unreasonable). The Rhode Island Constitution prohibits sex discrimination, but specifically states that it "shall [not] be construed to grant or secure any right relating to abortion or the funding thereof." R.I. CONST. art. I, § 2. In addition, although not commonly listed as one of the state constitutions that has adopted an ERA, the New Jersey Constitution guarantees natural and inalienable rights to all "persons" and defines "person" as meaning both sexes. N.J. CONST. art. I, para. 1 & art. X, para. 4. Although the New Jersey provision does not contain the word "equal," the New Jersey Supreme Court has interpreted it as a prohibition on sex discrimination. See generally Karen J. Kruger, The New Jersey ERA: The Key to Successful Sex Discrimination Litigation, 17 RUTGERS L.J. 253 (1986); Robert F. Williams, The New Jersey Equal Rights Amendment: A Documentary Sourcebook, 16 RUTGERS WOMEN's RTS. L. REP. 69 (1994).

7 Congress passed the Federal ERA on March 22, 1972. The proposed amendment read: "Equality of rights under the law shall not be denied or abridged by the United States or by any state on account of sex." H.R.J. Res. 208, 92d Cong. (1972). The ERA failed by three states to gain the approval of three-fourths (38) of the states by the extended congressional deadline of June 30, 1982. Efforts to add the ERA to the Constitution have been reinvigorated in recent years by the work of legal scholars who have suggested that ratification of the Twenty-seventh Amendment in 1992, more than 200 years after it was originally proposed, may allow ratification of the ERA if three more states approve it. See Allison Held et al., The Equal Rights Amendment: Why the ERA Remains Legally Viable and Properly Before the States, 3 WM. & MARY J. WOMEN & L. 113, 114 (1997). On March 16, 2005, the ERA was reintroduced into Congress. See S.J. Res. 7, 109th Cong. (2005); H.J. Res. 37, 109th Cong. (2005) (proposing a full reintroduction of the ERA). Another resolution, H. Res. 155, 109th Cong. (2005), would verify ratification when three additional state legislatures have passed appropriate legislation.

8 See infra note 319 and accompanying text.

9 See infra note 320 and accompanying text.

10 Mr. Linton, former General Counsel for Americans United for Life, is the author of three articles on state ERAs. See Paul Benjamin Linton, Same-Sex "Marriage" Under State Equal Rights Amendments, 46 ST. LOUIS U. L.J. 909 (2002); Paul Benjamin Linton, State Equal Rights Amendments: Making a Difference or Making a Statement?, 70 TEMP. L. REV. 907 (1997) [hereinafter Linton, Making a Difference?]; Paul Benjamin Linton & Ryan S. Joslin, The Illinois Equal Rights Provision at Twenty-Five: Has It Made a Difference?, 21 S. ILL. U. L.J. 275 (1997).

11 See, e.g., Linton, Making a Difference?, supra note 10, at 940-41; see also infra note 374 and accompanying text.

12 This Article focuses exclusively on state constitutional provisions that expressly guarantee protection against sex discrimination. Although not the focus of this Article, courts have interpreted various other provisions in state constitutions as providing protection against gender-based discrimination. These provisions include general equal protection guarantees, prohibitions on unequal privileges and immunities, and due process and privacy guarantees.

13 Reva B. Siegel, She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family, 115 HARV. L. REV. 947, 949 (2002) [hereinafter Siegel, She the People].

14 U.S. CONST. amend. XIV, § 1.

15 See Erwin Chemerinsky, Rethinking State Action, 80 NW. U. L. REV. 503, 511-16 (1985) [hereinafter Chemerinsky, Rethinking] (explaining that historically the state action requirement made sense because when the Constitution was written it was thought that the common law protected individuals from private infringement of their rights and that therefore the protections of the Constitution need not extend to action by private actors).

16 See, e.g., United States v. Morrison, 529 U.S. 598, 619 n.8 (2000) ("[T]he principle that 'the Constitution created a Federal Government of limited powers,' while preserving a generalized police power to the States is deeply ingrained in our constitutional history."); Lugar v. Edmundson Oil Co., 457 U.S. 922, 936-37 (1982) ("A major consequence [of the state action requirement] is to require courts to respect the limits of their own power as directed against state governments."); see also ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 488, 491-92 (2d ed. 2002) [hereinafter CHEMERINSKY, CONSTITUTIONAL LAW] (asserting that a primary public policy justification for the requirement of state action is that it "enhances federalism by preserving a zone of state sovereignty"); Kathleen M. Sullivan, Constitutionalizing Women's Equality, 90 CAL. L. REV. 735, 755 (2002) (" [T]he state action requirement for federal constitutional claims preserves a default of decentralized government. It is principally the states with their plenary powers, not the federal government with its narrower delegated powers, that perform the task of regulating private life.").

17 See, e.g., Lugar, 457 U.S. at 936; see also Kevin Cole, Federal and State "State Action," The Undercritical Embrace of a Hypercriticized Doctrine, 24 GA. L. REV. 327, 346-47 (1990) ("[T]he federal state-action doctrine preserved individual autonomy by preventing courts from precluding private actors from discriminating in their private lives."); Sullivan, supra note 16, at 755 ("Constitutional immunity for a private sphere fosters normative pluralism; not all associations need to conform to the constitutional norms imposed on government. This view holds that while citizens enjoy robust rights against the state, intimate or expressive groups ought not to be conceived as miniature governments, microcosms of the democratic policy in which members are conceived as rightholders vis-à-vis their groups.").

18 See Cole, supra note 17, at 347 ("In some areas, Congress may regulate private activities when the courts may not Thus, because state action doctrine precludes courts from invoking the Constitution to regulate private conduct that Congress can regulate, the doctrine fosters separation of powers— reserving to the legislative branch the power to regulate private activity.").

19 See, e.g., Shelley v. Kraemer, 334 U.S. 1, 13 (1948) ("Since the decision of the Court in the Civil Rights Cases, the principle has become firmly embedded in our constitutional law that the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. That Amendment erects no shield against merely private conduct.") (citation omitted); Civil Rights Cases, 109 U.S. 3, 11 (1883) (the "Fourteenth Amendment is prohibitory upon the States Individual invasion of rights is not the subject-matter of the amendment.").

20 The Supreme Court has recognized: (1) private conduct must meet the requirements of the Constitution "if it involves a task that has been traditionally, exclusively done by the government"; and (2) the Constitution applies where the government affirmatively "authorized, encouraged, or facilitated the unconstitutional conduct." CHEMERINSKY, CONSTITUTIONAL LAW, supra note 16, at 495-96. The Supreme Court's state action jurisprudence has been widely criticized by commentators for a variety of reasons, including its failure to guide concrete cases in a meaningful, coherent fashion; an alternative analysis frequently proposed by scholars is "a balancing test that allows courts to weigh the promotion of racial equality against the intrusion on the privacy interest in preserving a sphere of unregulated action." Mark Tushnet, Shelley v. Kraemer and Theories of Equality, 33 N.Y.L. SCH. L. REV. 383, 389-91 (1988). See generally Paul Brest, State Action and Liberal Theory: A Casenote on Flagg Brothers v. Brooks, 130 U. PA. L. REV. 1296 (1982); Chermerinsky, Rethinking, supra note 15.

21 While the Court expansively defined state action to encompass private race discrimination and other conduct by private actors in decisions from the early 1940s through the 1960s, see Burton v. Wilmington Parking Auth., 365 U.S. 715, 717 (1961); Smith v. Allwright, 321 U.S. 649, 657-58 (1944), some decisions from the Burger and Rehnquist Courts have more narrowly construed the state action requirement. See, e.g., Am. Mfrs. Mut. Ins. Co. v. Sullivan, 526 U.S. 40, 50 (1999); Nat'l Collegiate Athletic Ass'n v. Tarkanian, 488 U.S. 179, 192 (1988); Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 156-57 (1978); Jackson v. Metro. Edison Co., 419 U.S. 345, 350-51 (1974); Moose Lodge v. Irvis, 407 U.S. 163, 172-73 (1972); see also DeShaney v. Winnebago County Dep't of Soc. Servs. 489 U.S. 189, 195 (1989) (finding that the Due Process Clause does not "requir[e] the State to protect the life, liberty, and property of its citizens against invasion by private actors"). See generally CHEMERINSKY, CONSTITUTIONAL LAW, supra note 16, at 496, 517 (noting that the Burger and Rehnquist Courts have "applied a much narrower definition of state action"). Other opinions, however, indicate signs of a more expansive view of state action. See,

e.g., Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 531 U.S. 288, 291 (2001) (finding private entity regulating high school athletics was a state actor based on government's "entwinement" with its activities); Edmonson v. Leesville Concrete Co., 500 U.S. 614, 621-26 (1991) (finding state action when private parties exercise peremptory challenges in a civil case in a racially discriminatory manner).

22 See United States v. Guest, 383 U.S. 745, 782 (1966) (Brennan, J., concurring in part and dissenting in part) ("A majority of the members of the Court expresses the view today that [Section] 5 empowers Congress to enact laws punishing all conspiracies to interfere with the exercise of the Fourteenth Amendment rights, whether or not state officers acting under color of state law are implicated in the conspiracy."); id. at 761 (Clark, J., concurring) ("[T]here now can be no doubt that the specific langue of [Section] 5 empowers the Congress to enact laws punishing all conspiracies— with or without state action—that interfere with Fourteenth Amendment rights.").

23 See Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 368 (2001) ("Just as [Section] 1 of the Fourteenth Amendment applies only to actions committed 'under color of state law,' Congress's [Section] 5 authority is appropriately exercised only in response to state transgressions."); United States v. Morrison, 529 U.S. 598, 599 (2000) (" [T]he Fourteenth Amendment places limitations on the manner in which Congress may attack discriminatory conduct. Foremost among them is the principle that the Amendment prohibits only state action, not private conduct.").

24 Pub. L. No. 103-322, § 40,302, 108 Stat. 1902 (1994) (codified at 42 U.S.C. § 13,981), invalidated by United States v. Morrison, 529 U.S. 598 (2000). In enacting the civil rights provision of VAWA, Congress explicitly found that "existing bias and discrimination in the criminal justice system often deprives victims of crimes of violence motivated by gender of equal protection of the laws" and that therefore "a [f]ederal civil rights action is necessary to guarantee equal protection of the laws." H.R. Conf. Rep. No. 103-711, at 385 (1994), reprinted in 1994 U.S.C.C.A.N. 1839, 1853.

25 The Court held that neither the Commerce Clause nor Section 5 of the Fourteenth Amendment authorized Congress to enact the civil rights provision of VAWA. Morrison, 529 U.S. at 619, 627. The Court reasoned that the provision was an invalid exercise of Congress's power under Section 5 because it authorized suits against private actors, id. at 620-25, and because it was not "congruent and proportional" to the harm it sought to remedy, id. at 625-27. For an excellent critique of Morrison, see Sally F. Goldfarb, The Supreme Court, the Violence Against Women Act, and the Use and Abuse of Federalism, 71 FORDHAM L. REV. 57, 109-45 (2002).

26 For a detailed discussion of the arguments for and against a federal constitutional sex equality provision that extends to private actors, see Sullivan, supra note 16, at 754-59.

27 Sally F. Goldfarb, Violence Against Women and the Persistence of Privacy, 61 OHIO ST. L.J. 1, 38 (2000) (footnote omitted); see also Tracy E. Higgins, Democracy and Feminism, 110 HARV. L. REV. 1657, 1673-74 (1997). The narrow scope of protection afforded by the Federal Constitution to victims of domestic violence is also illustrated by the Supreme Court's recent decision in Town of Castle Rock v. Gonzales, in which the Court held that an individual has no enforceable property interest for due process purposes in police enforcement of a restraining order. 125 S. Ct. 2796, 2810 (2005).

28 See, e.g., Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-88 (2000) (prohibiting sex discrimination in educational programs or activities receiving federal funding); Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (2000) (prohibiting, inter alia, discrimination based on sex by certain public and private employers); Equal Pay Act of 1963, 29 U.S.C. § 206 (2000) (requiring "equal pay for equal work" in employment). For a detailed discussion of the ways in which Title IX protects students from sex discrimination more comprehensively than the Federal Constitution, see David S. Cohen, Title IX: Beyond Equal Protection, 28 HARV. J.L. & GENDER 217 (2005). Federal antidiscrimination laws, however, are far from comprehensive. See Deborah L. Brake, Sex as a Suspect Class: An Argument for Applying Strict Scrutiny to Gender Discrimination, 6 SETON HALL CONST. L.J. 953, 964-65 (1996) (noting, for example, that while protection against discrimination based on race, national origin, and disability extends to all federally funded programs, federal law prohibits sex discrimination in federally-funded education programs only).

29 See generally Morrison, 529 U.S. 598; JOHN T. NOONAN, JR., NARROWING THE NATION's POWER: THE SUPREME COURT SIDES WITH THE STATES (2002) (discussing various Supreme Court decisions in which the Court has restricted the powers of Congress and expanded the concept of state sovereign immunity). For specific examples of federal statutes invalidated, in whole or in part, by the Rehnquist Court on federalism grounds, see Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356 (2001); Kimel v. Fla. Bd. of Regents, 528 U.S. 62 (2000); Alden v. Maine, 527 U.S. 706 (1999); Coll. Sav.

Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666 (1999); City of Boerne v. Flores, 521 U.S. 507 (1997); and Seminole Tribe of Fla. v. Florida, 517 U.S. 44 (1996). But see, for example, Tennessee v. Lane, 124 S. Ct. 1978 (2004), which held that Congress had power under Section 5 of the Fourteenth Amendment to authorize lawsuits against states under Title II of the Americans with Disabilities Act of 1990 to force them to provide access for the disabled to courthouses; and Nevada Dep't of Human Resources v. Hibbs, 538 U.S. 721, 728-40 (2003), which held that passage of Family and Medical Leave Act of 1993 was a valid exercise of Congress's power under Section 5 of the Fourteenth Amendment.

30 Following the adoption of the Equal Protection Clause, the Supreme Court explicitly sanctioned race segregation as constitutionally permissible. See Plessy v. Ferguson, 163 U.S. 537, 550-52 (1896), overruled by Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954). Fifty-eight years passed before the Supreme Court invalidated segregation in public schools in Brown v. Board of Education, 347 U.S. 483, 495 (1954). It was not until 1967 that the Supreme Court finally invalidated antimiscegenation statutes as violative of the Equal Protection Clause. See Loving v. Virginia, 388 U.S. 1, 2 (1967); see also Reva Siegel, Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action, 49 STAN. L. REV. 1111, 1112 (1997) [hereinafter Siegel, Why Equal Protection No Longer Protects] ("Only after the Court's decision in Loving could it be confidently asserted that the Court had adopted a categorical presumption against race-based regulation.").

31 Although the Equal Protection Clause now provides protection against explicitly race-based forms of state action, the Supreme Court's application of the Equal Protection Clause to reach other forms of race discrimination has been highly limited, thereby immunizing much race discrimination from review. For example, in the area of school desegregation, the Court's "distinction between de jure and de facto discrimination insulates certain forms of school segregation from judicial remedy because they cannot be traced to forbidden governmental classifications on the basis of race." Jack M. Balkin, Plessy, Brown, and Grutter: A Play in Three Acts, 26 CARDOZO L. REV. 1689, 1715 (2005). In addition, the Supreme Court has repeatedly held that government policies that have a disparate impact on both minorities and women are constitutional so long as they are not enacted for discriminatory purposes. See discussion infra Part II.D. Moreover, over the years, the Supreme Court has closely scrutinized and invalidated affirmative action policies that increase the institutional representation of minorities. See Cheryl I. Harris, Equal Treatment and Reproduction of Inequality, 69 FORDHAM L. REV. 1753, 1766 (2001) ("The Supreme Court's insistence on the extension of strict scrutiny to all uses of race, even when deployed to remediate long-standing patterns of racial inequality, represents the repackaging of the formalist precepts about race implicit in the reasoning and holding of the Court's majority in Plessy."); see, e.g., Gratz v. Bollinger, 539 U.S 244, 270, 275-76 (2003) (applying strict scrutiny and invalidating University of Michigan's affirmative action policy); Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 229-30, 238-40 (1995) (remanding after concluding strict scrutiny should be applied in reviewing a federal affirmative action program); Richmond v. J.A. Croson Co., 488 U.S. 469, 493-94, 510-11 (1989) (applying strict scrutiny, and invalidating municipal affirmative action program). But see Grutter v. Bollinger, 539 U.S. 306, 326, 334-44 (2003), reh'g denied, 539 U.S. 982 (2003) (applying strict scrutiny, and upholding University of Michigan Law School's affirmative action policy). See generally Siegel, She the People, supra note 13, at 956-57 (arguing that the Supreme Court's narrow conceptualization of race discrimination ignores the reality that "race inequality in this country was sustained by a complex network of institutions, practices, stories, and reasons that involved both more and less than group-based classifications").

32 See, e.g., Johnson v. California, 125 S. Ct. 1141, 1146-48 (2005) (finding that strict scrutiny applies to state policy of segregating prisoners by race as they enter new correctional facilities).

33 Id. at 1146 (quoting Croson, 488 U.S. at 493) (alteration in original).

34 Grutter, 539 U.S. at 327 (quoting Adarand, 515 U.S. at 229-30).

35 The Court came closest to adopting the strict scrutiny standard in 1973, but fell one vote shy. See Frontiero v. Richardson, 411 U.S. 677, 678, 690-91 (1973) (plurality opinion) (invalidating a rule giving benefits to all spouses of men, but only to economically dependent spouses of women in the Air Force). Four Justices voted for invalidating the provision under the strict scrutiny standard. Id. at 688. Four others voted for invalidating it under the rational basis standard. Id. at 691 (Stewart, J., concurring); id. at 691-92 (Powell, J., concurring). Justice Rehnquist voted to uphold the statute under the rational basis standard. Id. at 691 (Rehnquist, J. dissenting).

36 429 U.S. 190 (1976).

37 Id. at 197.

38 Most recently, for example, in Nguyen v. INS, the Supreme Court conceded that Congress could have achieved its goals in a sex-neutral fashion but nonetheless upheld a sex-based classification in a federal immigration law. 533 U.S. 53, 63-64 (2001); see also id. at 81 (O'Connor, J., dissenting) (criticizing the majority for "dismiss[ing] the availability of available sex-neutral alternatives as irrelevant"). For additional discussion of Nguyen, see infra notes 75-90 and accompanying text.

39 518 U.S. 515 (1996).

40 In United States v. Virginia, the Court expressly adhered to the intermediate standard. Id. at 532 n.6 ("The Court has thus far reserved the most stringent judicial scrutiny for classifications based on race or national origin ."). However, in an opinion by Justice Ginsburg, the Court emphasized that for sex-based classifications to pass muster under the intermediate standard, the state must demonstrate an "exceedingly persuasive" justification, and "[t]he justification must be genuine, not hypothesized or invented post hoc in response to litigation It must not rely on overbroad generalizations about the different talents, capacities or preferences of males and females." Id. at 532. Some commentators have argued that Justice Ginsburg's opinion brought the standard closer to strict scrutiny. See, e.g., Jason M. Skaggs, Justifying Gender-Based Affirmative Action Under United States v. Virginia's "Exceedingly Persuasive Justification" Standard, 86 CAL. L. REV. 1169, 1182 (1998) (arguing that United States v. Virginia represents "a doctrinal progression towards a higher level of scrutiny"); Cass R. Sunstein, Foreword: Leaving Things Undecided, 110 HARV. L. REV. 4, 75 (1996) (arguing that "the Court did not merely restate the intermediate scrutiny standard but pressed it closer to strict scrutiny"). Some courts have expressly rejected this suggestion. See, e.g., Eng'g Contractors Ass'n of S. Fla., Inc. v. Metro. Dade County, 122 F.3d 895, 908 (11th Cir. 1997) (rejecting argument that United States v. Virginia changed the level of scrutiny applied to sex-based classifications, and holding that "[u]nless and until the Supreme Court tells us otherwise, intermediate scrutiny remains the applicable constitutional standard in gender discrimination cases, and a gender preference may be upheld so long as it is substantially related to an important governmental objective"); Cohen v. Brown Univ., 101 F.3d 155, 183 n.22 (1st Cir. 1996) ("We point out that Virginia adds nothing to the analysis of equal protection challenges of gender-based classifications that has not been part of that analysis since 1979 ."). But see Montgomery v. Carr, 101 F.3d 1117, 1123 (6th Cir. 1996) (citing Virginia, 518 U.S. at 531) (noting that Virginia "appear[ed] to create a new standard of review for gender-based classifications, requiring an 'exceedingly persuasive justification' on the part of a governmental actor"); Nabozny v. Podlesny, 92 F.3d 446, 456 n.6 (7th Cir. 1996) (noting in dicta that Virginia's "exceedingly persuasive justification standard" differed from traditional intermediate scrutiny formulation).

41 See Nguyen v. INS, 533 U.S. 53 (2001). Indeed, the Court's opinion in Nguyen appears to undermine the analysis of United States v. Virginia. See Nguyen, 533 U.S. at 74 (O'Connor, J. dissenting) ("While the Court invokes heightened scrutiny, the manner in which it explains and applies this standard is a stranger to our precedents."). For additional discussion of Nguyen, see infra notes 75-90 and accompanying text.

42 E.g., Associated Gen. Contractors of Cal., Inc. v. City and County of San Francisco, 813 F.2d 922, 939 (9th Cir. 1987) ("The mid-level review that the Court has applied to [sex-based] classifications provides 'relatively little guidance in individual cases.'" (quoting Note, A Madisonian Interpretation of the Equal Protection Doctrine, 91 YALE L.J. 1403, 1412 (1982))); Contractors Ass'n of E. Pa., Inc. v. City of Phila., 735 F. Supp. 1274, 1303 (E.D. Pa. 1990) (noting that the various standards of review under the Equal Protection Clause "are at times both difficult to distinguish and to apply," leading courts "to make defined formulas fit ill-defined circumstances, possibly leading to result oriented decision-making"), aff'd in part and rev'd in part, 6 F.3d 990 (3d Cir. 1993).

43 E.g., Brake, supra note 28, at 958 (noting that "[l]ower courts have often complained that the intermediate scrutiny standard provides insufficient guidance and leaves broad discretion with individual judges"); Norman T. Deutsch, Nguyen v. INS and the Application of Intermediate Scrutiny to Gender Classifications: Theory, Practice, and Reality, 30 PEPP. L. REV. 185, 187 (2002) (arguing that "intermediate scrutiny is a 'made up' rule that has little effect on the outcome of the decisions"); Joan A. Lukey & Jeffrey A. Smagula, Do We Still Need a Federal Equal Rights Amendment?, 44 B.B.J. 10, 26 (Feb. 2000) ("'[I]ntermediate scrutiny' constituted a malleable, rather indeterminate standard of review, providing little or no guidance for lower courts—or even for future Supreme Court cases.").

44 For example, in his confirmation hearing for the Supreme Court, Justice Souter stated that "[the intermediate test] is not good, sound protection. It is too loose." Skaggs, supra note 40, at 1190 (quoting Ruth Marcus & Michael Isikoff, Souter Declines Comment on Abortion, WASH. POST, Sept. 14, 1990, at A1, A16); see also Craig v. Boren, 429 U.S. 190, 221 (1976)

(Rehnquist, J., dissenting) (criticizing intermediate standard for containing phrases "so diaphanous and elastic as to invite subjective judicial preferences or prejudices relating to particular types of legislation, masquerading as judgments").

45 Brake, supra note 28, at 958, 960-61 (citing cases in which lower courts have applied intermediate scrutiny to reach opposite results regarding: the constitutionality of statutes punishing only male rapists who attack females; the constitutionality of criminal statutes distinguishing between male and female perpetrators who commit the same crime; and the constitutionality of criminal statutes imposing different penalties on men and women for nonsupport of spouses and children).

46 Lee Epstein, Andrew D. Martin, Lisa Baldez & Tasina Nitzchke Nihiser, Constitutional Sex Discrimination, 1 TENN. J.L. & POL'Y 11, 67 (2004). The authors examined both state court decisions and the decisions of the United States Supreme Court and concluded that their "results underscore the importance of elevating the standard used to adjudicate sex discrimination claims." Id. at 20. The authors found, for example, that when state courts apply the intermediate standard, "the probability that a litigant alleging discrimination will prevail is 47% This is in contrast to the relatively predictable outcomes generated by rational basis (under which a litigant faces only 20% likelihood of winning) and strict scrutiny (with a 73% probability of success)." Id. at 49. The authors also emphasized the impact of the ideology of the judges on outcomes under the intermediate standard: "the more left-of-center ('liberal') the court, the more likely it was to apply intermediate scrutiny in a way favorable to the party alleging discrimination." Id.

47 In his concurring opinion in Frontiero v. Richardson, Justice Powell expressly declined to characterize sex as a suspect classification explaining that this conclusion with its "far-reaching implications" was "unnecessary" given that the sex-based classification could not survive minimal rationale basis review. 411 U.S. 677, 691-92 (1973) (Powell, J., concurring). Justice Powell also emphasized that, given the pendency of the Equal Rights Amendment, "reaching out to pre-empt by judicial action a major political decision which is currently in process of resolution does not reflect appropriate respect for duly prescribed legislative processes." Id. at 692.

48 Siegel, She the People, supra note 13, at 954-56 (emphasis added) (footnotes omitted). In many respects, the intermediate scrutiny standard represents a political compromise within the Court that creates a loophole for approving different treatment of the sexes in areas viewed by some members of the Court as justifying different treatment. See Sullivan, supra note 16, at 742-47 ("Race and sex discrimination are imperfectly analogous. When faced with such analogical crises, the Supreme Court often splits the difference by striking down some but not all types of challenged law.").

49 In Frontiero v. Richardson, Justices Brennan, Marshall, Douglas and White reasoned that sex-based classifications should be subjected to strict scrutiny because: (1) there is long history of sex discrimination against women; (2) sex, like race and national origin, is an immutable characteristic determined solely by birth and bearing "no relation to ability to perform or contribute to society"; (3) sex is a highly visible characteristic that causes women to continue to face pervasive discrimination; and (4) women tend to be underrepresented in the political process. 411 U.S. at 686-87. The Court also observed that Congress, through statutes addressing sex discrimination, had recognized "that classifications based upon sex are inherently invidious," and that "this conclusion of a coequal branch of Government is not without significance to the question presently under consideration." Id. at 687-88.

50 See, e.g., Ruth Bader Ginsburg, Let's Have E.R.A. as a Signal, 63 A.B.A. J. 70, 73 (1977) ("The adoption of the equal rights amendment would relieve the Court's uneasiness in the gray zone between interpretation and amendment of the Constitution."); Ruth Bader Ginsburg, Sex Equality and the Constitution: The State of the Art, 14 WOMEN's RTS. L. REP. 361, 366 (1992) ("Ratification of the Equal Rights Amendment would give the Supreme Court a clear signal—a more secure handle for its rulings than the [F]ifth and [F]ourteenth [A]mendments."); LAWRENCE TRIBE, AMERICAN CONSTITUTIONAL LAW, 1585-86 (2d ed. 1988) [hereinafter TRIBE, AMERICAN CONSTITUTIONAL LAW] ("The Supreme Court's failure to articulate clearer and more sensitive principles in the area of gender discrimination may be explained in part by the Court's reluctance to overstep what it conceives to be the bounds between constitutional interpretation and constitutional amendment [An ERA] would add to our fundamental law a principle under which the judiciary would be encouraged to develop a more coherent pattern of gender-discrimination doctrines."). See generally Barbara A. Brown, Thomas I. Emerson, Gail Falk, & Ann E. Freedman, The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women, 80 YALE L.J. 871 (1971) (providing comprehensive examination and analysis of the meaning, impact and need for the Equal Rights Amendment).

51 City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 439 (1985).

52 In these instances, the Supreme Court has been highly deferential to the judgment of the governmental actor (usually the state legislature), requiring only a minimal connection between the sex-based classification and the state's asserted objective. See, e.g., Michael M. v. Superior Court, 450 U.S. 464, 468-69 (1981).

53 417 U.S. 484, 497 (1974).

54 Id. at 496-97.

55 Id. at 496 n.20. The analysis of Geduldig was extended to cases under Title VII of the Civil Rights Act, 42 U.S.C. § 2000e-2(a)(1) (2000). See Gen. Elec. Corp. v. Gilbert, 429 U.S. 125, 145-46 (1976) (holding that the failure to cover pregnancy-related disabilities under a disability benefit plan does not violate Title VII). Congress subsequently enacted the Pregnancy Discrimination Act of 1978 ("PDA"), amending Title VII to include pregnancy classifications within the definition of sex discrimination under Title VII. Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076 (codified at 42 U.S.C. § 2000e(k) (2000)). While the passage of the PDA ameliorates the practical impact of Geduldig in the employment context, its rationale continues to be applicable in challenges to pregnancy discrimination under the Equal Protection Clause and certain federal statutes. In Bray v. Alexandria Women's Health Clinic, the Court explicitly relied on Geduldig's reasoning in holding that the practice of denying women access to medical services by blockading abortion facilities did not constitute the "class-based, invidiously discriminatory animus" necessary to prove a violation of the civil rights statute, 42 U.S.C. § 1985(3). Bray, 506 U.S. 263, 271 (1993) (noting the continued vitality of Geduldig). The Court, in an opinion by Justice Scalia, held that a cause of action was available under § 1985(3) only if private conspirators had discriminated against women as a class. Id. at 270. Justice Scalia reasoned that because discrimination on the basis of pregnancy was not discrimination against women "by reason of their sex," but rather an attempt to save fetal life, there was no cause of action under § 1985(3). Id.

56 KATHLEEN M. SULLIVAN & GERALD GUNTHER, CONSTITUTIONAL LAW 803 (15th ed. 2004). See generally Ann E. Freedman, Sex Equality, Sex Differences and the Supreme Court, 92 YALE L.J. 913 (1983); Sylvia A. Law, Rethinking Sex and the Constitution, 132 U. PA. L. REV. 955 (1984).

57 David H. Gans, Stereotyping and Difference: Planned Parenthood v. Casey and the Future of Sex Discrimination Law, 104 YALE L.J. 1875, 1883 (1995).

58 Id. ("[T]he Court stripped the ability to become pregnant of any social meaning, ignoring the ways in which the legal treatment of pregnancy defines the appropriate roles of women and, consequently, dictates women's place in society."); see also Deborah A. Ellis, Protection for Pregnant Persons: Women's Equality and Reproductive Freedom, 6 SETON HALL CONST. L.J. 967, 972 (1996) ("[T]he right to control one's reproductive life can be seen as the sina qua non of personhood, the precursor to the exercise of all other rights. And because only women can become pregnant, women's equality is violated when reproductive freedom is denied.").

59 TRIBE, AMERICAN CONSTITUTIONAL LAW, supra note 50, at 1584.

60 450 U.S. 464 (1981).

61 Id. at 467.

62 As Professor Ann Freedman has pointed out, the State's asserted goal was dubious:
A much more plausible explanation for the [S]tate's choice to penalize only males for sexual intercourse involving teenage girls was the assumption that when such conduct occurs, males are the aggressors and females are their victims. This explanation of the statute is supported not only by historical evidence about the origins of the law in the nineteenth century but also by contemporary evidence about the kinds of situations in which the law is enforced.
Freedman, supra note 56, at 932-33 (footnotes omitted).

63 Michael M., 450 U.S. at 471, 473.

64 Law, Rethinking Sex, supra note 56, at 1001.

65 Id. at 1000.

66 453 U.S. 57, 67 (1981).

67 Id.

68 Id.

69 Freedman, supra note 56, at 939. In Parham v. Hughes, the Supreme Court also relied on a legislatively-created difference to justify a second sex-based statute. 441 U.S. 347, 351 (1979). The Supreme Court upheld a Georgia law denying a father (but not the mother) the right to sue for the wrongful death of his nonmarital child because he had not formally legitimated the child pursuant to another Georgia law that gave only fathers this power. Id. at 355-56. The Court reasoned that mothers and fathers of illegitimate children were not similarly situated because under Georgia law only a father "can by voluntary unilateral action make an illegitimate child legitimate." Id. In dissent, Justice White pointed out,
Only fathers may resort to the legitimization process cannot dissolve the sex discrimination in requiring them to. Under the plurality's bootstrap rationale, a state could require that women, but not men, pass a course in order to receive a taxi license, simply by limiting admission to the course to women.
Id. at 361-62 (White, J., dissenting) (footnote omitted); see also Lehr v. Robertson, 463 U.S. 248, 267-68 (1983) (upholding state law allowing a child to be adopted without notice to the father where the father had not lived with the mother and the child or had not registered intent to claim paternity).

70 Arnold H. Loewy, Returned to the Pedestal—The Supreme Court and Gender Classification Cases: 1980 Term, 60 N.C. L. REV. 87, 95 (1981).

71 458 U.S. 718 (1982).

72 518 U.S. 515 (1996).

73 Id. at 533.

74 Id. at 550.

75 533 U.S. 53 (2001); see also Miller v. Albright, 523 U.S. 420, 440 (1998) (asserting that "strong governmental interests justify the additional requirement imposed on children of citizen fathers" under a federal immigration law, 8 U.S.C. § 1409, although a majority of the Court did not resolve the issue on the merits).

76 Under the statute, 8 U.S.C. § 1409 (2000), which governs the citizenship of out-of-wedlock children born outside of the United States to only one U.S. citizen, an unwed citizen mother automatically conveys citizenship to her foreign-born child so long as she meets certain minimal residency requirements. Id. § 1409(c). In contrast, an unwed American father must: (1) prove the existence of a "blood relationship" by "clear and convincing evidence"; (2) provide a written statement that he will provide financial support while the child is a minor; and (3) before the child's eighteenth birthday, formally recognize paternity via legal legitimation, a declaration of paternity under oath, or a court order of paternity. Id. § 1409(a).

77 Nguyen, 533 U.S. at 62-64.

78 Id. at 62.

79 Id. at 63.

80 Id. at 62.

81 Id. at 64.

82 Id. at 64-65.

83 Id. at 65.

84 Id.

85 Id. at 68.

86 Id. at 78-79 (O'Connor, J., dissenting).

87 Id. at 88-89 (quoting Miller v. Albright, 523 U.S. 420, 482-83 (1998) (Breyer, J., dissenting)). As Justice O'Connor pointed out, the facts of the Nguyen case reveal the inaccuracy of the stereotype asserted by the majority as biological fact. Id. The petitioner, Tuan Anh Nguyen, was born in Saigon in 1969. Id. at 57 (majority opinion). After the relationship between his American father and Vietnamese mother ended, Nguyen lived with the family of his father's new Vietnamese partner. Id. At the age of six, he came to the United States and was raised by his father. Id.

88 See Manisha Lalwani, The "Intelligent Wickedness" of U.S. Immigration Law Conferring Citizenship to Children Born Abroad and Out-of-Wedlock: A Feminist Perspective, 47 VILL. L. REV. 707, 739-40 (2002) (tracing origins of § 1409(a) to common law doctrine of coverture, which regarded out-of-wedlock children as the sole responsibility of unwed mothers, while marital children were the property of fathers); Kristin Collins, Note, When Fathers' Rights Are Mothers' Duties: The Failure of Equal Protection in Miller v. Albright, 109 YALE L.J. 1669, 1680 (2000) (same).

89 533 U.S. at 92 (O'Connor, J., dissenting) (citation omitted). As one commentator has emphasized, the law seriously impacts children born abroad and out-of-wedlock by allowing fathers to opt out of their financial responsibilities: "[I]f a citizen father actively chooses not to fulfill the requirements for conferring citizenship on his foreign-born out-of-wedlock child, the child is precluded from utilizing domestic child support laws. Consequently, section 1409(a)(4) perpetuates the gender schema of sexual irresponsibility for men." Lalwani, supra note 88, at 740-41. The impact on foreign-born, out-of-wedlock children of American servicemen is severe. See, e.g., Joseph M. Ahern, Comment, Out of Sight, Out of Mind: United States Immigration Law and Policy as Applied to Filipino-Amerasians, 1 PAC. RIM. L. & POL'Y J. 105, 112 (1992) (noting that only fifteen percent of Filipino-Ameriasian children have acquired U.S. citizenship through their unwed citizen fathers), quoted in Lalwani, supra note 88, at 741 n.202.

90 See Law, Rethinking Sex, supra note 56, at 996-97 ("When the Court allows sex-based classifications to be justified by the presumption that fathers are unidentified, absent, and irresponsible, it is more likely that these generalizations will continue to be true. Assertions that it is 'virtually inevitable' that the mother will care for the child, assumptions of her 'unshakable responsibility' are no different from the 'old notion' that motherhood is 'the noble and benign mission' of women. The assumption reinforces stereotypes and degrades women."); see also Lalwani, supra note 88, at 739-40 (arguing that the statute upheld in Nguyen "maintains the gender schemas of unwed women as sexually responsible and unwed men as sexually irresponsible" by automatically conveying citizenship to the foreign-born out-of-wedlock children of American mothers, but requiring American fathers to take affirmative steps to convey citizenship and thereby allowing them to "skirt their financial responsibility for supporting their children").

91 442 U.S. 256 (1979).

92 Id. at 280-81.

93 Id. at 259.

94 In Washington v. Davis, which involved an employment exam that excluded four times as many African-Americans as whites, the Court held that race discrimination challenges to facially neutral governmental action require proof of discriminatory purpose to trigger strict scrutiny review under the Equal Protection Clause. 426 U.S. 229, 239 (1976); see also McClesky v. Kemp, 481 U.S. 279, 298 (1987) ("For this claim to prevail, McClesky would have to prove that the Georgia Legislature enacted or maintained the death penalty statute because of an anticipated racially discriminatory effect."); Mobile v. Bolden, 446 U.S. 55, 66 (1980) ("[O]nly if there is purposeful discrimination can there be a violation of the Equal Protection Clause of the Fourteenth Amendment."); Village of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 265-66 (1977) ("When there is proof that a discriminatory purpose has been a motivating factor in the decision judicial deference is no longer justified."). In contrast, as noted supra, if governments implement race-conscious affirmative action policies to increase minority representation in institutions, their actions are subject to strict scrutiny. See supra note 31 and accompanying text. But see United States v. Virginia, 518 U.S. 513, 533-34 (1996) (distinguishing sex-based classifications that are designed to compensate for women's economic and social disadvantage, which are permissible, from those that disadvantage women based on impermissible sex-based stereotypes, which are impermissible). State court decisions considering state ERA-based challenges to affirmative action policies are briefly discussed infra at note 377.

95 Feeney, 442 U.S. at 274 (emphasis added) (citations omitted).

96 Id. at 279 ("'Discriminatory purpose,' however, implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." (emphasis added) (citations omitted)).

97 In Feeney and other cases, the Court reasoned that the requirement of discriminatory purpose was justified by its commitment to deferring to the policy-making function of the coordinate branches. See, e.g., McKlesky, 481 U.S. at 319 ("McClesky's arguments are best presented to the legislative bodies. It is not the responsibility—or indeed even the right—of this Court to determine the appropriate punishment for particular crimes."); Feeney, 442 U.S. at 272 ("The calculus of effects, the manner in which a particular law reverberates in society is a legislative and not a judicial responsibility.").

98 See Siegel, Why Equal Protection No Longer Protects, supra note 30, at 1135-36 (commenting that the Court's modern equal protection opinions and its doctrines of heightened scrutiny "have created incentives for legislators to explain their policy choices in terms that cannot be so impugned").

99 CHEMERINSKY, CONSTITUTIONAL LAW, supra note 16, at 685 (citing Daniel R. Ortiz, The Myth of Intent in Equal Protection, 41 STAN. L. REV. 1105 (1989)).

100 See Siegel, Why Equal Protection No Longer Protects, supra note 30, at 1136-37 (citing sociological and psychological studies of racial bias, which demonstrate that, although racial bias is prevalent among white Americans, they are strongly inhibited in expressing it, and their racism is often unconscious).

101 Sylvia A. Law & Ann E. Freedman, Thomas I. Emerson: A Pioneer for Women's Equality, 38 CASE W. RES. L. REV. 539, 552 (1988).

102 See Siegel, Why Equal Protection No Longer Protects, supra note 30, at 1136 (citing 1991 study hypothesizing that the discriminatory purpose standard discourages plaintiffs from bringing intent-based claims, and citing statistics that, "on average, just one or two intent claims are filed per federal district per year"); see also Cohen, supra note 28, at 260-71 (comparing the Federal Constitution's formal equality guarantees to Title IX's broader protection against sex discrimination in federally-funded education programs and activities).

103 Siegel, She the People, supra note 13, at 1026-27 & n.255 (citing Shipp v. McMahon, 234 F.3d 907, 914-15 (5th Cir. 2000); Soto v. Flores, 103 F.3d 1056, 1066 (1st Cir. 1997); Navarro v. Block, 72 F.3d 712, 716-17 (9th Cir. 1995); Hynson v. City of Chester, Legal Dep't, 864 F.2d 1026, 1031 (3d Cir. 1988)); see also Town of Castle Rock v. Gonzales, 125 S. Ct. 2796 (2005) (holding that a victim of domestic violence has no enforceable property interest for due process purposes in police enforcement of a restraining order).

104 TRIBE, AMERICAN CONSTITUTIONAL LAW, supra note 50, at 1516-19.

105 See, e.g., Paul Brest, Palmer v. Thompson: An Approach to the Problem of Unconstitutional Legislative Motivation, 1971 SUP. CT. REV. 95, 130-31 (proposing that disparate impact based on race should trigger strict scrutiny); Siegel, Why Equal Protection No Longer Protects, supra note 30, at 1144-45 (suggesting that, once disparate impact is demonstrated, the government must justify its policy via proof that it lacked feasible, less discriminatory means for achieving its objectives); see also TRIBE, AMERICAN CONSTITUTIONAL LAW, supra note 50, at 1520 (proposing antisubjugation principle in which heightened scrutiny "would be reserved for those government acts that, given their history, context, source, and effect, seem most likely not only to perpetuate subordination but also to reflect a tradition of hostility toward an historically subjugated group, or a pattern of blindness or indifference to the interests of that group"); R.A. Lenhart, Understanding the Mark: Race, Stigma, and Equality in Context, 79 N.Y.U. L. REV. 803, 887-90 (2004) (proposing four-part test to determine whether racially disparate impact imposes a risk of stigmatic harm); Michael J. Perry, The Disproportionate Impact Theory of Racial Discrimination, 125 U. PA. L. REV. 540, 563-80 (1977) (proposing that disparate impact based on race should trigger sliding scale scrutiny). But see Charles F. Abernathy, Legal Realism and the Failure of the "Effects" Test for Discrimination, 94 GEO. L.J. (forthcoming 2006) (finding that lower court judges—across the political spectrum—disfavored effects test as a useful tool, and proposing political solution in form of "adoption of targeted civil rights statutes" as alternative).

106 This section highlights examples of selected opinions in which courts have either expanded their sex equality jurisprudence, interpreted it as consistent with federal precedent, or otherwise limited its scope. It does not represent a complete catalogue of all judicial decisions construing state ERAs. For a more thorough review of state ERA opinions and their outcomes, see

JENNIFER FRIESEN, STATE CONSTITUTIONAL LAW: LITIGATING INDIVIDUAL RIGHTS, CLAIMS AND DEFENSES § 3-1 to -5 (3d ed. 2000).

107 See Lawrence Gene Sager, Fair Measure: The Legal Status of Underenforced Constitutional Norms, 91 HARV. L. REV. 1212, 1218-20 (1978) (arguing that state court adherence to federal judicial constructs is especially inappropriate where institutional concerns such as federalism and judicial competence prevent federal courts from fully enforcing federal constitutional norms).

108 See, e.g., Judith Avner, Some Observations on State Equal Rights Amendments, 3 YALE L. & POL'Y REV. 144, 150 (1984) (arguing that the state action requirement is less necessary at state level because "[t]he narrow construction of the state action requirement by federal courts is intended to protect states' traditional jurisdiction over private actions"); Beth Gammie, State ERAs: Problems and Possibilities, 1989 U. ILL. L. REV. 1123, 1149 (arguing that the federalism concerns underlying federal state action requirement are inapplicable to state ERAs because "[w]hen the citizens and legislature of a state enact an ERA, choosing to prohibit sex discrimination within their state, there is absolutely no invasion of states' rights by the federal government").

109 Professor Kevin Cole argues that separation of powers concerns are "less compelling" in the state context because "state courts resolve private disputes in a nonconstitutional mode more frequently than federal courts do," and therefore "neither institutional competence nor institutional specialization provides persuasive justification for a state state-action doctrine that preserves separation of powers by relegating private disputes to legislatures." Cole, supra note 17, at 379-80. Professor Friesen argues that separation of powers concerns may be "overstated" given the fact that state legislatures have the ability to pass statutes that "limit and structure remedies for any newly declared rights ." FRIESEN, supra note 106, § 9-2(c)(3), at 9-15. Moreover, she notes that if fundamental constitutional interests "are thought to need protection against private invasion, it is appropriate to entrust them to the courts and to inhibit democratic diminution of such rights." Id. § 9-2(c)(3), at 9-16. Other commentators have argued that separation of powers concerns are less relevant at the state level because, in some states, judges are elected and therefore are accountable in the political process. See, e.g., William Wayne Kilgarlin & Banks Tarver, The Equal Rights Amendment: Governmental Action and Individual Liberty, 68 TEX. L. REV. 1545, 1565 (1990) (arguing that in Texas "the separation-of-powers concerns are not nearly as compelling on a state level, because state court judges are politically accountable for their actions in developing civil rights policy: Texas state court judges are elected and their decisions are more readily subject to political modification by the legislature"); David M. Skover, The Washington Constitutional "State Action" Doctrine: A Fundamental Right to State Action, 8 U. PUGET SOUND L. REV. 221, 257-59 (1985) (same with regard to the Washington State Constitution).

110 See generally FRIESEN, supra note 106, § 9-2(c)(2), at 9-14 to -15 (arguing that frequent references in state charters to "inalienable" rights refer to inherent rights that were intended to be protected from both governmental and private interference); Cole, supra note 17, at 369-70 (arguing that, in the state constitutional context, "a state action doctrine fosters individual autonomy in none of the ways that the goal is arguably served on the federal level" because, unlike federal courts, "state courts have primary responsibility for developing a general common law" and therefore "remain obligated to explore the merits of competing private claims, and the outcome of that analysis is not preordained by any state action analysis"; thus, "the broad common-law powers of state courts prevent a state state-action doctrine from achieving the policies of notice-giving or merit-shielding).

111 FRIESEN, supra note 106, § 9-2(a), at 9-6. See generally Cole, supra note 17, at 396 (criticizing "underinformed embrace" by state courts of federal state action doctrine in state constitutional law context).

112 Although states have broad power to prohibit sex discrimination by private actors, they are, of course, subject to the "independent federal constitutional constraints such as the freedom of private expressive association." Sullivan, supra note 16, at 756 (noting that under current Supreme Court interpretation "the Boy Scouts or a hypothetical 'Male Supremacist Society' might be free to exclude women despite a state law forbidding sex discrimination in public accommodations, but the Rotary Club, or the Jaycees would not"). Compare Boy Scouts of Am. v. Dale, 530 U.S. 640 (2000) (holding that the Boy Scouts' First Amendment expressive associational rights were violated by application of a state public accommodations law prohibiting them from revoking membership of gay scout leader), with Bd. of Dirs. of Rotary Int'l v. Rotary Club, 481 U.S. 537 (1987) (rejecting a First Amendment freedom of association claim challenging law forbidding all-male clubs), and Roberts v. U.S. Jaycees, 468 U.S. 609 (1984) (rejecting First Amendment freedom of association claim challenging a law forbidding all-male organizations).

113 MONT. CONST. art. II, § 4 ("Neither the state nor any person, firm, corporation, or institution shall discriminate against any person in the exercise of his civil or political rights on account of sex .").

114 R.I. CONST. art. I, § 2 (prohibiting discrimination based on gender "by the state, its agents or any person or entity doing business with the state").

115 LA. CONST. art. I, § 3 (providing that "[n]o law shall discriminate against a person because of sex").

116 LA. CONST. art. I, § 12 (providing that "[i]n access to public areas, accommodations, and facilities, every person shall be free from arbitrary, capricious, or unreasonable discrimination based on age, sex, or physical condition"). In Albright v. Southern Trace Country Club of Shreveport, Inc., the Louisiana Supreme Court interpreted this provision for the first time and held that it prohibited a country club, deemed a "public facility," from denying female members access to a dining area for men only. 879 So. 2d 121, 138 (2004).

117 VA. CONST. art. I, § 11 (prohibiting "governmental discrimination" on the basis of sex).

118 COLO. CONST. art. II, § 29 (prohibiting denial of "[e]quality of rights under the law by the state of Colorado or any of its political subdivisions").

119 ILL. CONST. art. I, § 18 (prohibiting denial of equal protection of the law on account of sex "by the State or its units of local government and school districts").

120 HAW. CONST. art. I, § 3 (prohibiting denial of "[e]quality of rights under the law by the State on account of sex").

121 N.H. CONST. pt. I, art. 2 (prohibiting denial of "[e]quality of rights under the law by this [S]tate on account of sex").

122 MD. CONST. art. XLVI.

123 PA. CONST. art. I, § 28.

124 MASS. CONST. pt. I, art. 1.

125 WA. CONST. art. XXXI, § 1.

126 TEX. CONST. art. I, § 3a.

127 N.M. CONST. art II, § 1.

128 The language of these six ERAs, like those of Colorado, New Hampshire and Hawaii, is modeled on the Federal ERA. See supra note 7. However, these six state constitutions, while referring to "equality under the law," do not contain any explicit reference to deprivation "by the State." For additional discussion of the language of the Texas ERA, see infra note 160 and accompanying text.

129 See ALASKA CONST. art. I, § 3 (prohibiting the denial of "any civil or political right" because of sex); CONN. CONST. art. I, § 20 (prohibiting the denial of the "equal protection of the law" and discrimination in the exercise of "civil or political rights" because of sex); UTAH CONST. art. IV, § 1 (providing that males and females "shall enjoy equally all civil, political and religious rights and privileges"); WYO. CONST. art. VI, § 1 (providing both male and female citizens "shall enjoy equally all civil, political and religious rights and privileges").

130 See CAL. CONST. art. I, § 8 (prohibiting disqualification "from entering or pursuing a business, profession, vocation, or employment because of sex"); FLA. CONST. art. I, § 2 (providing that "[a]ll natural persons, female and male alike, are equal before the law" and have certain "inalienable rights"); IOWA CONST. art. I, § 1 (providing "[a]ll men and women are, by nature, free and equal" and have certain "inalienable rights"); N.J. CONST. art. I, para. 1 & art. X, para. 4 (providing that "[a]ll persons are by nature free and independent, and have certain natural and unalienable rights" and defining "all persons" as including both sexes).

131 See, e.g., Bruce Altschuler, State ERAs and Employment Discrimination, 65 TEMP. L. REV. 1267, 1270 (1992). See generally FRIESEN, supra note 106, § 9-2(b)(1), at 9-7 to -10.

132 482 A.2d 542, 549 (Pa. 1984).

133 Id.

134 Pennsylvania's ERA provides: "Equality of rights under the law shall not be denied or abridged in the Commonwealth of Pennsylvania because of the sex of the individual." PA. CONST. art. I, § 28.

135 Hartford, 482 A.2d at 549.

136 Id.

137 Welsch, 494 A.2d 409, 412 (Pa. Super. Ct. 1985).

138 Id. at 411.

139 Id. The court reasoned that "'the challenged acts were carried out by the private party on its own initiative under the provisions of the Rate Regulatory Act which permits the fixing of rates based upon measured risk of loss, but were not required by the Commonwealth,'" and thus did not satisfy the federal state action requirement. Id. (quoting Murphy v. Harleysville Mut. Ins. Co., 422 A.2d 1097, 1102 (Pa. Super. Ct. 1980)). In Murphy, the Pennsylvania Superior Court relied on the United States Supreme Court's decision in Jackson v. Metropolitan Edison Co., in which the Supreme Court rejected the claim that state regulation converted the action of a private utility company into that of the State for purposes of the Fourteenth Amendment. Murphy, 422 A.2d at 1100-01 (citing Jackson, 419 U.S. 345, 350 (1974)).

140 Welsch, 494 A.2d at 412.

141 Phyllis W. Beck & Patricia A. Daly, Prohibition Against Denial or Abridgment of Equality of Rights Because of Sex, in THE PENNSYLVANIA CONSTITUTION: A TREATISE ON RIGHTS AND LIBERTIES 715 (Ken Gormley et al. eds., 2004).

142 182 F. Supp. 2d 453 (E.D. Pa. 2002).

143 Id. at 458 (citing Welsch, 494 A.2d at 412); see also Barrett v. Greater Hatboro Chamber of Commerce, Inc., No. 02-CV-4421, 2003 WL 22232869, at *4 (E.D. Pa. Aug. 19, 2003) ("[T]here is a purely private right of action under the PERA absent any type of state action ."). But see Mulligan v. Abington Mem'l Hosp., Inc., No. 03-6510, 2004 WL 1047796, at *2 (E.D. Pa. May 4, 2004) (refusing to extend Pennsylvania ERA to purely private actor).

144 See N.J. CONST. art. I, para. 1 & art. X, para. 4. For a discussion of the unique language of New Jersey's ERA, see supra note 6 and infra note 344.

145 389 A.2d 465 (N.J. 1978). Peper has been the subject of considerable interest among scholarly commentators. See, e.g., John Devlin, Constructing an Alternative to "State Action" as a Limit on State Constitutional Rights Guarantees: A Survey, Critique and Proposal, 21 RUTGERS L.J. 819, 847, 888 (1989); Kruger, supra note 6, at 260; Elizabeth A. Sherwin, Sex Discrimination and State Constitutions: State Pathways Through Federal Roadblocks, 13 N.Y.U. REV. L. & SOC. CHANGE 115, 124-26 (1984-1985); Robert F. Williams, Equality Guarantees in State Constitutions, 63 TEX. L. REV. 1195, 1220 n.166 (1985) [hereinafter Williams, Equality Guarantees]. However, in New Jersey, Peper has "only rarely been cited by the New Jersey courts." Williams, supra note 6, at 125. For a discussion of the infrequent use of state equality guarantees, see discussion infra Part IV.B.

146 389 A.2d at 471-76. The court rejected the state statutory claim because, at the time of the alleged violation, the statute exempted private universities. Id. at 474. The court rejected the Title VII claim because the plaintiff had purposefully failed to exhaust her administrative remedies. Id. at 475.

147 Id. at 478.

148 Id. at 477.

149 Id.

150 Id. at 476; see also Rojo v. Kliger, 801 P.2d 373, 388 (Cal. 1990) (noting, without deciding, that previous cases had assumed that California's ERA "covers private as well as state action").

151 See FRIESEN, supra note 106, § 9-7, at 9-33 (noting that "[m]ost cases in the equality area have required allegations of government involvement to activate the state constitution"). See generally Altschuler, supra note 131, at 1269-73 (discussing court decisions and attorneys general opinions holding that state ERAs limited to governmental action).

152 See Lincoln v. Mid-Cities Pee Wee Football Ass'n, 576 S.W.2d 922, 926 (Tex. App. 1979); Junior Football Ass'n v. Gaudet, 546 S.W.2d 70, 71 (Tex. App. 1976). For a thorough discussion and critical analysis of these cases, see Kilgarlin & Tarver, supra note 109, at 1557-64.

153 Lincoln, 576 S.W.2d at 923; Gaudet, 546 S.W.2d at 70.

154 Lincoln, 576 S.W.2d at 924 (noting that plaintiff alleged that the teams practiced and played games on fields constructed and maintained by the league on public school grounds); Gaudet, 546 S.W.2d at 71 (noting that plaintiff alleged that players usually practiced on school grounds).

155 Gaudet, 546 S.W.2d at 71 (noting that plaintiff alleged that games were played in a park owned by the City).

156 Lincoln, 576 S.W.2d at 924 (affirming the trial court's refusal to enter a temporary injunction against the league on ground that there was no abuse of discretion, but noting that the record in the case was still developing); Gaudet, 546 S.W.2d at 71 (reversing trial court's order granting a temporary injunction against the league).

157 See Kilgarlin & Tarver, supra note 109, at 1557-64.

158 Justice Kilgarlin and his co-author, Banks Tarver, also argue that application of the federal state-action doctrine to review Texas ERA cases is unjustified because the federalism and separation of powers purposes underlying the federal requirement "are not at all pertinent to state constitutional discourse." Id. at 1559; see supra notes 107-09 and accompanying text.

159 TEX. CONST. art I, § 3a ("Equality under the law shall not be denied or abridged because of sex, race, color, creed, or national origin.").

160 Kilgarlin & Tarver, supra note 109, at 1560; see supra note 128 and accompanying text. Compare HAW. CONST. art. I, § 3 (prohibiting denial of "equality of rights under the law by the State on account of sex"), with TEX. CONST. art. I, § 3a (prohibiting denial of "equality of rights under the law" with no limiting reference to discrimination by the State).

161 Kilgarlin & Tarver, supra note 109, at 1561. Justice Kilgarlin emphasizes that, unlike other state constitutions and the Federal Constitution, "[t]he Texas Constitution does not speak solely in terms of proscriptions on governmental authority; instead, it affirmatively recognizes the inalienable or natural rights of its citizenry." Id.

162 Id. at 1562-63. According to Justice Kilgarlin, the Texas Legislative Council's 1971 report on the proposed ERA and statements by the ERA's primary drafter and its primary sponsor in the Texas Senate, all indicate a clear legislative intent to extend its reach to private discrimination. Id.

163 Id. at 1559.

164 666 P.2d 1008, 1010 (Alaska 1983).

165 Id. at 1011. The court rejected the plaintiff's argument that the plain language of the Alaska ERA permitted extension to private actors. Id. Article I, section 1 of the Alaska Constitution provides that "all persons are equal and entitled to equal rights, opportunities, and protection under the law; and that all persons have corresponding obligations to the people and to the State." ALASKA CONST. art. I, § 1. Article I, section 3 provides: "No person is to be denied the enjoyment of any civil or political right because of race, color, creed, sex or national origin." Id. § 3.

166 Richardet, 666 P.2d at 1013.

167 Id. (citing Jackson v. Metro. Edison Co., 419 U.S. 345 (1974)).

168 See generally FRIESEN, supra note 106, § 9-1(c), at 9-5; id. § 9-7(a), at 9-33 to -35.

169 801 P.2d 373, 375 (Cal. 1990).

170 Id. at 389 (citations omitted). The California Supreme Court also rejected the defendant's defenses of statutory preemption and failure to exhaust administrative remedies, holding that the state anti-discrimination statute did not supplant the plaintiffs' common law claims, and administrative exhaustion under that statute was not required before asserting nonstatutory causes of action. Id. at 383, 387.

171 43 Cal. Rptr. 2d 229, 231 (Ct. App. 1995).

172 Id. at 233. But see Thibodeau v. Design Group One Assocs., LLC, 802 A.2d 731, 744-45 (Conn. 2002) (declining to allow pregnancy discrimination claim against a small employer on public policy grounds under the Connecticut ERA and Connecticut statutory law).

173 Badih, 43 Cal. Rptr. 2d at 233; accord Merrell v. All Seasons Resorts, Inc., 720 F. Supp. 815, 821-22 (C.D. Cal. 1989).

174 See, e.g., Watson v. Peoples Sec. Life Ins. Co., 588 A.2d 760, 771-72 (Md. 1991) (Eldridge, J., concurring) (asserting that, although Maryland's ERA may not directly apply to private employers, the ERA nonetheless established a public policy in Maryland that an individual should not be subjected to sex discrimination); Drinkwater v. Shipton Supply Co., 732 P.2d 1335, 1339 (Mont. 1987) (recognizing a tort action for wrongful discharge based on the policy against sex discrimination reflected in Montana ERA, but subsequently superceded by the Montana Legislature's amendment of anti-discrimination statute to make that statute the exclusive remedy for discrimination claims against private employers), superceded by statute, MONT. CODE ANN. § 49-2-509(7); Clay v. Advanced Computer Applications, Inc., 559 A.2d 917, 924 (Pa. 1989) (Zappala, J., concurring) (suggesting that tort of wrongful discharge might expand to encompass sex discrimination based on clear "public policy favoring the equal treatment of employees without regard to sex" expressed in the Pennsylvania ERA); Roberts v. Dudley, 993 P.2d 901, 911-12 (Wash. 2000) (Alexander, J., concurring) (asserting that, though the majority relied on a statute to discern a public policy to allow employees to state a common law cause of action for wrongful discharge against small private employer, the Washington ERA was "another and more powerful source of public policy"); cf. Hennessey v. Coastal Eagle Point Oil Co., 609 A.2d 11, 16 (N.J. 1992) (finding that the New Jersey Constitution is the source of public policy in determining whether the firing of a "firing of at-will" employee for failing random urine test constitutes wrongful discharge).

175 See, e.g., Hartford Accident & Indem. Co. v. Ins. Comm'r of the Commonwealth, 482 A.2d 542, 549 (Pa. 1984) (reading insurance statute "as excluding sex discrimination [that] would contradict the plain mandate of the Equal Rights Amendment to our Pennsylvania Constitution"); cf. Stephen Gardbaum, The "Horizontal Effect" of Constitutional Rights, 102 MICH. L. REV. 387, 458 (2003) (arguing that "although private actors are not bound by individual constitutional rights in the United States, they are indirectly subject to (and may be adversely affected by) them because such rights govern the laws that private actors invoke and rely on against each other").

176 FRIESEN, supra note 106, § 9-7, at 9-33.

177 TRIBE, AMERICAN CONSTITUTIONAL LAW, supra note 50, at 1585.

178 While this Article represents a qualitative analysis of the impact of state ERAs, a recent quantitative analysis of state ERAs by Professors Lee Epstein, Lisa Baldez and Andrew Martin concludes that "the presence of an ERA significantly increases the likelihood of a court applying a higher standard of law, which, in turn, significantly increases the likelihood of a decision favoring the equality claim." Lisa Baldez et al., Does the U.S. Constitution Need an Equal Rights Amendment?, 35 J. LEGAL STUD. 243, 246 (2006); see also Craig F. Emmert & Carol Ann Traut, State Supreme Courts, State Constitutions, and Judicial Policymaking, 16 JUST. SYS. J. 37, 43-45, 47 (1992) (finding both that legal challenges based on state equality provisions have a good likelihood of success when state courts based their decisions solely on state constitutional grounds, and stating "the rate of invalidation is over twice as high as for challenges based on federal or a combination of state and federal grounds"). Importantly, the research of Professors Epstein, Baldez and Martin demonstrates that outcomes in claims under state equality guarantees are also influenced by factors unrelated to judges' selection of legal standards, including the number of women on the bench and the political ideology of judges hearing the cases. Lisa Baldez et al., supra, at 268-71. Thus, they conclude that "formal constitutional provisions [i.e. the addition of an ERA to the Federal Constitution] probably will alter the way courts adjudicate claims of sex discrimination [although] other factors—from the fraction of women composing the court

to the position taken by the government over the suit's resolution to the facts it entails—likely will impact the efficacy (or lack thereof) of an ERA." Id. at 272. For additional discussion of the role of external factors, see infra notes 370-72 and accompanying text.

179 FRIESEN, supra note 106, § 3-2(e)(1), at 3-21; see, e.g., Sail'er Inn, Inc. v. Kirby, 485 P.2d 529, 541 (Cal. 1971) ("[S]exual classifications are properly treated as suspect ."); Doe v. Maher, 515 A.2d 134, 161 (Conn. Super. Ct. 1986) ("At the very least, the standard for judicial review of sex classifications under our ERA is strict scrutiny."); Baehr v. Lewin, 852 P.2d 44, 67 (Haw. 1993) (finding sex to be a "suspect category" subject to strict scrutiny); People v. Ellis, 311 N.E.2d 98, 101 (Ill. 1974) (holding that the Illinois ERA "requires us to hold that a classification based on sex is a 'suspect classification,' which to be held valid, must withstand 'strict judicial scrutiny"'); Attorney Gen. v. Mass. Interscholastic Athletic Ass'n, 393 N.E.2d 284, 291 (Mass. 1979) (holding that classification on the basis of sex is subject to constitutional scrutiny demands "'at least as strict as the scrutiny required by the Fourteenth Amendment for racial classifications"'); LeClair v. LeClair, 624 A.2d 1350, 1355 (N.H. 1993) (holding that strict scrutiny is applicable to claims based on gender and other suspect classes under New Hampshire equality guarantee); In re McLean, 725 S.W.2d 696, 698 (Tex. 1987) (holding that the Texas ERA "elevates sex to a suspect classification" and "does not yield except to compelling state interests").

180 FRIESEN, supra note 106, § 3-2(e)(1), at 3-19 to -20 (listing Pennsylvania, Colorado, Washington, Maryland and New Mexico as "absolutist" states); see, e.g., N.M. Right to Choose/NARAL v. Johnson, 975 P.2d 841, 853 (N.M. 1998) (holding that classifications based on sex are "presumptively unconstitutional" and will be subject to "searching judicial inquiry"); Henderson v. Henderson, 327 A.2d 60, 62 (Pa. 1974) ("The sex of citizens of this Commonwealth is no longer a permissible factor in the determination of their legal rights and legal responsibilities."); Sw. Wash. Chapter, Nat'l Elec. Contractors Ass'n v. Pierce County, 667 P.2d 1092, 1102 (Wash. 1983) ("The ERA absolutely prohibits discrimination on the basis of sex and is not subject to even the narrow exceptions permitted under traditional 'strict scrutiny.' The ERA mandates equality in the strongest terms and absolutely prohibits the sacrifice of equality for any state interest, no matter how compelling ."). Despite its stringent standard of review, the Washington Supreme Court has allowed sex-based affirmative action policies "intended solely to ameliorate the effects of past discrimination." Sw. Wash. Chapter, 667 P.2d at 1102; cf. infra note 377 and accompanying text.

181 540 P.2d 882, 889 (Wash. 1975) (en banc).

182 Id.

183 311 N.E.2d 98, 101 (Ill. 1974); see also Maher, 515 A.2d at 160-61 ("To equate our ERA with the [E]qual [P]rotection [C]lause of the [F]ederal [C]onstitution would negate its meaning given that our state adopted an ERA while the federal government failed to do so. Such a construction is not reasonable."); Rand v. Rand, 374 A.2d 900, 905 (Md. 1977) ("[T]he 'broad, sweeping mandatory language' of the [state ERA] is cogent evidence that the people of Maryland are fully committed to equal rights for men and women."); New Mexico Right to Choose, 975 P.2d at 851 ("We construe the intent of [the ERA] as providing something beyond that already afforded by the general language of the Equal Protection Clause.").

184 See, e.g., Pace v. State ex rel. La. State Employee Ret. Sys., 648 So. 2d 1302, 1305 (La. 1995) ("When a statute classifies persons on the basis of birth, age, sex, culture, physical condition, or political ideas or affiliations, it is presumed to deny the equal protection of the laws and to be unconstitutional unless the state or other advocate of the classification shows that the classification substantially furthers an important governmental objective."); see also Plas v. State, 598 P.2d 966, 968 (Alaska 1979) (noting that sex discrimination claims under the Alaska Constitution should be assessed "by considering the purpose of the statute, the legitimacy of that purpose, the means used to accomplish the legislative objective, and 'then determin[ing] whether the means chosen substantially further the goals of the enactment"' (citation omitted)); B.C. v. Bd. of Educ. Cumberland Reg'l Sch. Dist., 531 A.2d 1059, 1064 (N.J. Super. App. Div. 1987) (noting that under the state constitution it is necessary "to balance [the plaintiff's] right not to be discriminated against on the basis of sex with the public need to promote equalization of athletic opportunities and to rectify past discrimination against women in athletics").

185 Wilkins v. West, 571 S.E.2d 100, 111 (Va. 2002) (adhering to an earlier decision in Archer v. Mayes, 194 S.E.2d 707 (Va. 1973), and noting that "we will continue to apply standards and nomenclature developed under the Equal Protection Clause of the U.S. Constitution"); Schilling v. Bedford City Mem'l Hosp. Inc., 303 S.E.2d 905, 907-08 (Va. 1983) (applying intermediate standard of review to sex-based classification based on federal precedent); Archer, 194 S.E.2d at 711 (holding that state equal rights provision will be given "no broader" interpretation than the Federal Equal Protection Clause).

The authors of an early review of state ERAs concluded that this interpretation of Virginia's ERA is inconsistent with legislative intent: "The drafters of the equal rights clause, and the Virginia General Assembly in adopting it, expected that a strict standard of review would be applied by the courts." Lujuana Wolfe Treadwell & Nancy Wallace Page, Equal Rights Provisions: The Experience Under State Constitutions, 65 CAL. L. REV. 1086, 1094-95 (1977) (citing JOINT PRIVILEGES & ELECTIONS COMM. OF THE COMMONWEALTH OF THE GEN. ASSEMBLY, COMMONWEALTH OF VIRGINIA, RATIFICATION OF THE EQUAL RIGHTS AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES OF AMERICA 19 (1974)).

186 Estate of Scheller v. Pessetto, 783 P.2d 70, 76-77 (Utah Ct. App. 1989) (applying intermediate standard of review drawn from federal precedent).

187 For a detailed critical analysis of this "prospective lockstepping" approach in which a state court borrows a federal standard and announces that it will apply it in future cases, see generally Robert F. Williams, State Courts Adopting Federal Constitutional Doctrine: Case-by-Case Adoptionism or Prospective Lockstepping, 46 WM. & MARY L. REV. 1499 (2005).

188 612 A.2d 734, 739 (R.I. 1992).

189 Prior to the adoption of article I, section II in 1986, the Rhode Island Supreme Court adopted the intermediate standard of review in analyzing classifications based on sex. See, e.g., Waldeck v. Piner, 488 A.2d 1218, 1220 (R.I. 1985); State v. Ware, 418 A.2d 1, 3 (R.I. 1980) (citing Craig v. Boren, 429 U.S. 190, 197-98 (1975)).

190 Kleczek, 612 A.2d at 739-40.

191 Id. at 741. The Rhode Island Superior Court, relying on the Massachusetts Supreme Court's decision in Attorney General v. Massachusetts Scholastic Athletic Ass'n, 393 N.E.2d 284, 289, 294 (Mass. 1979) (involving identical facts), held that an absolute prohibition of all boys from the sport of field hockey rested on "archaic and overbroad generalizations and assumptions" and that an absolute ban "was totally out of proportion to any danger of girls being displaced from athletics." Kleczek v. R.I. Interscholastic League, Inc., No. PC 91-5475, 1991 WL 789881, at *6 (R.I. Super. Ct. Sept. 27, 1991) (citing Mass. Scholastic Athletic Ass'n, 393 N.E.2d at 294), vacated by 612 A.2d 734 (R.I. 1992).
In Massachusetts Scholastic Athletic Ass'n, the Massachusetts Supreme Court emphasized that under the strict scrutiny standard sex-based classifications were impermissible given the availability of gender-neutral alternatives. 393 N.E. 2d at 294 (noting that absolute ban "represents a sweeping use of a disfavored classification when less offensive and better calculated alternatives appear to exist," and noting alternative of gender-neutral height, weight, skill standards and option of creating separate boys' field hockey team if large number of boys become interested). In contrast, the Rhode Island Supreme Court, though sending the case back to the trial court for its assessment, intimated its belief that the exclusion of boys satisfied the intermediate standard of review. Kleczek, 612 A.2d at 739. The case thus illustrates how the application of different standards of review may be a determinative factor in the ultimate outcome of the case.

192 800 So. 2d 757, 759-60 (Fla. Dist. Ct. App. 2001).

193 FLA. CONST. art. I, § 2 (revisions emphasized). The term "physical handicap" was changed to "physical disability." Id.

194 Frandsen, 800 So. 2d at 759.

195 Id. at 758.

196 Id. at 759 n.4 (first and second alterations in original) (quoting Florida Constitution Revision Commission, Statement of Intent, JOURNAL OF THE FLORIDA CONSTITUTION REVISION COMMISSION (1977-1978)).

197 Id. (quoting Florida Constitution Revision Commission, supra note 196).

198 Id. at 759-60.

199 Id.

200 Choice for Women, Inc. v. Fla. Agency for Health Care Admin., 872 So. 2d 970 (Fla. Dist. Ct. App. 2004), review denied, 885 So. 2d 386 (Fla. 2004).

201 This conclusion is directly supported by the fact that the original draft revisions placed "sex" in the list of proscribed classes subject to strict scrutiny review along with race, religion, national origin and physical disability. Changes to this proposed wording were made only to ensure that same-sex marriage did not receive protection. In this regard, the drafters were especially concerned with the Hawaii Supreme Court's interpretation of its state ERA as providing protection against bans on same-sex marriage. See Baehr v. Lewin, 852 P.2d 44, 63-67 (Haw. 1993). Drafting the 1998 revision so that it contained language distinctly different from Hawaii's was apparently in the mind of the drafters. For a discussion of Baehr and the application of state ERAs in same-sex marriage challenges, see infra Part III.E.

202 See, e.g., Kendrick v. Everheart, 390 So. 2d 53, 56 (Fla. 1980); Brown v. Dykes, 601 So. 2d 568, 569 (Fla. Dist. Ct. App. 1992).

203 Andrea J. Faraone, The Florida Equal Rights Amendment: Raising the Standard Applied to Gender Under the Equal Protection Clause of the Florida Constitution, 1 FLA. COASTAL L.J. 421, 441 (2000).

204 Id. at 444.

205 Formal equality principles have also been rejected in some state ERA challenges involving other issues, including segregation in athletics. See, e.g., Attorney General v. Mass. Interscholastic Athletic Ass'n, 393 N.E.2d 284, 293 (Mass. 1979) (invalidating association rule barring boys from playing on girls' teams, and stating that "classifications on strict grounds of sex, without reference to actual skill differentials would merely echo 'archaic and overbroad generalizations'" (citation omitted)); Commonwealth v. Pa. Interscholastic Athletic Ass'n, 334 A.2d 839, 842 (Pa. 1975) (striking down a rule excluding girls from practice or competition with boys in intramural sports, and noting "even where separate teams are offered for boys and girls in the same sport, the most talented girls may still be denied the right to play at that level of competition which their ability might otherwise permit them"); see also Newberg v. Bd. of Pub. Educ., 26 Pa. D. & C.3d 682, 709 (1983) (invalidating single-sex admission policy of public high school, and noting that "under Pennsylvania's ERA, the separate-but-equal concept under the [E]qual [P]rotection [C]lause of the Fourteenth Amendment does not have currency"), appeal quashed by 478 A.2d 1352 (Pa. Super. Ct. 1984).

206 759 P.2d 1358, 1359 (Colo. 1988) (en banc). The group insurance policy limited coverage to costs relating to the complications of pregnancy, but excluded expenses incurred during a normal pregnancy. Id. at 1359 n.2.

207 417 U.S. 484 (1974); see supra notes 53-59 and accompanying text.

208 429 U.S. 125 (1976); see supra note 55 and accompanying text.

209 Colo. Civil Rights Comm'n, 759 P.2d at 1363.

210 Id. (citations omitted).

211 E.g., Allison-LeBlanc v. Dep't of Pub. Safety, 671 So. 2d 448, 452-53 (La. Ct. App. 1995) (holding that automatic reassignment of pregnant police officer to administrative duty or leave violates Louisiana ERA).

212 E.g., Merrell v. All Seasons Resorts, Inc. 720 F. Supp. 815, 823 (C.D. Cal. 1989) (rejecting Geduldig, 417 U.S. 484, and concluding "pregnancy-discrimination is a form of sex discrimination under article I, section 8 of the California Constitution"); Badih v. Myers, 43 Cal. Rptr. 2d 229, 233 (Ct. App. 1995) (same).

213 Kathryn Kolbert & David H. Gans, Responding to Planned Parenthood v. Casey: Establishing Neutrality Principles in State Constitutional Law, 66 TEMP. L. REV. 1151, 1167-68 (1993).

214 Under the Federal Constitution, the main source of protection from laws restricting abortion is the Due Process Clause of the Fourteenth Amendment. In Roe v. Wade, the Supreme Court held that the right to choose abortion is a fundamental right, protected by the strict scrutiny standard of review. 410 U.S. 113, 154 (1973). Nineteen years later, in Planned Parenthood v. Casey, the Supreme Court cut back on constitutional protection for abortion, adopting a new, more permissive "undue burden" standard to judge the constitutionality of restrictions on abortion. 505 U.S. 833, 837 (1992). See generally Kolbert & Gans, supra note 213, at 1151-56.

215 See, e.g., Harris v. McRae, 448 U.S. 297, 326 (1980) (holding that a state participating in Medicaid program is not required by the United States Constitution to fund medically necessary abortions even where it funds childbirth); Maher v. Roe, 432

U.S. 464, 474 (1977) (holding that a state participating in Medicaid program is not required by the United States Constitution to pay for non-therapeutic abortions even where it pays for childbirth); see also Webster v. Reprod. Health Servs., 492 U.S. 490, 509 (1989) (upholding bans on performance of abortions in public hospitals).

216 Two courts have relied on state ERAs in striking down restrictions on public funding for abortion. See Doe v. Maher, 515 A.2d 134, 162 (Conn. Super. Ct. 1986) (invalidating Connecticut's restrictions on funding medically necessary abortion services based on Connecticut's ERA and its due process guarantee); N.M. Right to Choose/NARAL v. Johnson, 975 P.2d 841, 859 (N.M. 1998) (invalidating New Mexico's restrictions on funding medically necessary abortion services based on New Mexico's ERA); cf. Right to Choose v. Byrne, 450 A.2d 925, 934 (N.J. 1982) (finding that a New Jersey funding restriction constitutes denial of equal protection by discriminating between Medicaid-eligible pregnant women "for whom medical care is necessary for childbirth and those for whom an abortion is medically necessary" and thereby "impinges upon the fundamental right of a woman to control her body").

217 See, e.g., State v. Planned Parenthood of Alaska, 28 P.3d 904, 908 (Alaska 2001) (invalidating Alaska's restriction on public funding of abortion based on state constitutional guarantee of "equal rights, opportunities and protection under the law"); Simat Corp. v. Ariz. Health Care Cost Containment Sys., 56 P.3d 28, 32, 37 (Ariz. 2002) (invalidating Arizona's restrictions on public funding of medically necessary abortion services based on the equal privileges and immunities clause of the Arizona Constitution); Comm. to Defend Reprod. Rights v. Myers, 625 P.2d 779, 798-99 (Cal. 1981) (invalidating California's restrictions on public funding medically necessary abortion services based on constitutional guarantee of privacy); Humphreys v. Clinic for Women, 796 N.E.2d 247, 259-60 (Ind. 2003) (requiring limited additional public funding of certain medically necessary abortions based on state constitution's privileges and immunities clause); Moe v. Sec'y of Admin., 417 N.E.2d 387, 390 n.4, 397 (Mass. 1981) (invalidating a state ban on public funding of medically necessary abortion services based on declaration of rights clause guaranteeing due process of law); Women of Minn. v. Gomez, 542 N.W.2d 17, 31-32 (Minn. 1995) (invalidating Minnesota's restrictions on public funding of medically necessary abortion services based on constitutional guarantee of privacy); Right to Choose v. Byrne, 450 A.2d 925, 941 (N.J. 1982) (invalidating New Jersey's restrictions on public funding of medically necessary abortion services based on constitutional guarantee of equal protection); Women's Health Ctr. v. Panepinto, 446 S.E.2d 658, 665-67 (W. Va. 1993) (invalidating West Virginia's restrictions on public funding of medically necessary abortion services based on express constitutional right to safety and due process of law).

218 As recently noted by the Arizona Supreme Court:
The majority of states that have examined [restrictions on Medicaid funding for abortion] have determined that their state statutes or constitutions offer broader protection of individual rights than does the United States Constitution and have found that medically necessary abortions should be funded if the state also funds medically necessary expenses related to childbirth. Simat Corp., 56 P.3d at 35.

219 975 P.2d at 859.

220 New Mexico's rule prohibited state funding of medically necessary abortions for Medicaid-eligible women except when necessary to save the life of the pregnant woman, when necessary to end an ectopic pregnancy or when the pregnancy was the result of rape or incest. Id. at 844.

221 Id. at 853-55.

222 Id. at 854.

223 Id.

224 Id. (quoting Cass R. Sunstein, Neutrality in Constitutional Law (with Special Reference to Pornography, Abortion, and Surrogacy), 92 COLUM. L. REV. 1, 33 (1992)).

225 Id. (quoting Doe v. Maher, 515 A.2d 134, 159 (Conn. Sup. Ct. 1986)).

226 Id.

227 Id. at 856.

228 Id. The court began with the premise that sex-based classifications are "presumptively unconstitutional," and required the State to provide a compelling justification for using one. Id. at 853. The court found that State's asserted interest in reducing the cost of medical assistance was insufficient justification given that the costs of carrying a pregnancy to term (funded under the state Medicaid program) are typically much greater than the expense of providing an abortion. Id. at 856.

229 Id. at 852-53.

230 Id. at 851-52.

231 Id. at 851-54.

232 Id. at 851.

233 Id. at 857-58.

234 See, e.g., Choice for Women, Inc. v. Fla. Agency for Health Care Admin., 872 So. 2d 970, 973 (Fla. Dist. Ct. App. 2004), review denied, 885 So. 2d 386 (Fla. 2004); Fischer v. Dep't of Pub. Welfare, 502 A.2d 114, 126 (Pa. 1985).

235 95 S.W.3d 253, 266 (Tex. 2002).

236 Id. at 258.

237 Id. at 258-60 (citing Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256 (1979)).

238 Id. at 264.

239 Id. at 257 (quoting TEXAS LEGISLATIVE COUNCIL, 14 PROPOSED CONSTITUTIONAL AMENDMENTS ANALYZED FOR ELECTION 24 (1972)). The Texas Supreme Court relied heavily on Bray v. Alexandria Women's Health Clinic, 506 U.S. 263 (1993), Harris v. McRae, 448 U.S. 297 (1980), and Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256 (1979).

240 940 P.2d 642, 645 (Wash. 1997).

241 441 U.S. 347 (1979); see supra note 69 and accompanying text.

242 Guard, 940 P.2d at 643.

243 540 P.2d 882 (Wash. 1975) (en banc); see supra note 181 and accompanying text.

244 Guard, 940 P.2d at 645.

245 675 N.E.2d 89, 99 (Ill. 1996).

246 Id. at 93.

247 Id. at 94. The court found that the State's goal could be achieved in a gender-neutral manner by allowing intestate succession by any parent who has acknowledged and supported his child. Id.

248 Id.

249 725 S.W.2d 696, 698-99 (Tex. 1987); see also R. McG. & C.W. v. J.W. & W.W., 615 P.2d 666, 672 (Colo. 1980) (asserting that Federal Equal Protection Clause and state ERA required that natural fathers be given the same period of years as mothers to assert their paternity).

250 In re McLean, 725 S.W.2d at 697 (citation omitted).

251 Id. at 698.

252 It is important to note, however, that, in addition to judicial decisions, state ERAs have inspired legislative and executive action prohibiting sex-neutral rules that disparately impact women. See infra notes 384-85 and accompanying text. Professor

Abernathy's recent findings regarding the reluctance of federal judges to apply disparate impact standards highlight the importance of these political solutions for sex-neutral rules that disproportionately impact women. See Abernathy, supra note 105.

253 331 A.2d 174 (Pa. 1975).

254 Id. at 179.

255 Id.

256 Id.

257 Id. at 179-80.

258 No. Civ. A. 96-6986, 1999 WL 1012957, at *20 (E.D. Pa. Nov. 8, 1999).

259 Id. at *1.

260 Id. at *2.

261 Id.

262 Id. at *20.

263 Id. at *19.

264 442 U.S 256 (1979); see supra notes 91-97 and accompanying text.

265 See supra note 96 and accompanying text.

266 See, e.g., Hardy v. Stumpf, 112 Cal. Rptr. 739 (Ct. App. 1974) (asserting that a challenge to height and weight requirements in employment under constitutional equality provision need not demonstrate discriminatory intent, and holding that if requirements pose discriminatory impact, such requirements are invalid unless "demonstrably related to job performance"); Burning Tree Club, Inc. v. Bainum, 501 A.2d 817, 826 (Md. App. Ct. 1985) (recognizing that "statute may be couched in gender neutral terms and still have an unconstitutional discriminatory purpose and effect," but finding no state action sufficient to trigger protection of Maryland ERA); Buchanan v. Dir. of Div. of Employment Sec., 471 N.E.2d 345, 348 (Mass. 1984) (recognizing availability of claim of disparate impact under Massachusetts ERA, although plaintiffs did not make out requisite proof of disparity); Snider v. Thornburgh, 436 A.2d 593, 601 (Pa. 1981) (noting that "'facially neutral policies which have the practical effect of perpetuating discriminatory practices"' may violate the ERA, but finding no state action (quoting Gen. Elec. Corp. v. Human Relations Comm'n, 365 A.2d 649, 658 (Pa. 1976))); Pa. Nat'l Org. for Women v. Commonwealth Ins. Dep't, 551 A.2d 1162, 1167 (Pa. Commw. Ct. 1988) (noting in challenge to insurance commissioner's approval of equal automobile insurance rates for men and women that the plaintiff could not "prove 'de facto' discrimination by insisting without some support that the insurers' rate-making practices have a discriminatory effect"); State v. Brayman, 751 P.2d 294, 305 (Wash. 1988) (recognizing merits of a disparate impact theory of sex discrimination).

267 95 S.W.3d 253 (Tex. 2002); see discussion supra notes 235-39 and accompanying text.

268 Id. at 263-64 (quoting Bray v. Alexandria Women's Health Clinic, 506 U.S. 263, 270 (1993)).

269 Id. at 264.

270 975 P.2d 841, 855 (N.M. 1998).

271 See, e.g., State v. Planned Parenthood of Alaska, 28 P.2d 904, 915 (Alaska 2001) ("The State, having undertaken to provide health care for poor Alaskans, must adhere to neutral criteria in distributing that care. It may not deny medically necessary services to eligible individuals based on criteria unrelated to the purposes of the public health care program."); Simat Corp. v. Ariz. Health Care Cost Containment Sys., 56 P.3d 28, 33 (Ariz. 2002) ("Promoting childbirth is a legitimate state interest,

but it seems almost inarguable that promoting and actually saving the health and perhaps eventually the life of a mother is at least as compelling a state interest.").

272 517 U.S. 620, 632 (1996).

273 Id.

274 539 U.S. 558 (2003). In Lawrence, the Supreme Court overruled its prior decision in Bowers v. Hardwick, 478 U.S. 186, 196 (1986), in which it had upheld Georgia's criminal ban on sodomy. Lawrence, 539 U.S. at 578; cf. Boy Scouts of Am. v. Dale, 530 U.S. 640, 653 (2000) (holding that the Boy Scouts' First Amendment expressive associational rights were violated by application of New Jersey's public accommodations law to prohibit them from revoking membership of gay scout leader).

275 Lawrence, 539 U.S. at 578. The Court never reached the question whether to apply heightened scrutiny, finding that "[t]he Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual." Id.

276 Id. at 574. Justice O'Connor concurred solely on equal protection grounds, but carefully distinguished the marriage question. See id. at 585 (O'Connor, J., concurring). Professor Pamela Karlan has suggested that the majority avoided the Equal Protection Clause because of its
fear[] that if it struck down Texas's statute on the ground that it violated the Equal Protection Clause to treat gay people differently from straight people, this would require it to invalidate all laws that treat gay and straight couples differently, the most obvious of which are laws restricting the right to marry.
Pamela S. Karlan, Foreword: Loving Lawrence, 102 MICH. L. REV. 1447, 1460 (2004).

277 The majority of lower court rulings have rejected the argument that sexual orientation deserves heightened scrutiny. See generally Edward Stein, Evaluating the Sex Discrimination Argument for Lesbian and Gay Rights, 49 UCLA L. REV. 471, 482 & n.50 (2001) (collecting cases). Federal courts use the rational review standard to scrutinize claims of discrimination based on sexual orientation, sometimes invalidating the challenged governmental action, and sometimes upholding it. Id. at 484-85 nn.68-69 (collecting cases).

278 429 U.S. 190 (1976).

279 Baker v. State, 744 A.2d 864 (Vt. 1999). The Vermont Supreme Court held that Vermont's exclusion of same-sex couples from the benefits and protections of marriage violated the common benefits clause of the Vermont Constitution. Id. at 886. The court expressly rejected the argument that restricting marriage to opposite-sex couples established a sex-based classification. Id. at 880 n.13. For additional discussion of the majority opinion in Baker, see infra notes 295-300 and accompanying text.

280 Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941 (Mass. 2003). The Massachusetts Supreme Court held that limiting marriage to opposite-sex couples violated the individual liberty and equality guarantees of the Massachusetts Constitution. Id. at 969. While noting that the Massachusetts Constitution specifically forbids sex-based discrimination, the majority declined to decide whether sexual orientation is a suspect classification. Id. at 961 n.21.

281 852 P.2d 44, 67 (Haw. 1993), superseded by constitutional amendment as stated in Baehr v. Miike, No. 20371, 1999 Haw. LEXIS 391, at *1 (Haw. Dec. 9, 1999) (holding that the amendment to article I, section 23 of the Hawaii Constitution rendered the challenge moot).

282 See id. at 60, 67-68.

283 388 U.S. 1 (1967).

284 Baehr, 852 P.2d at 68 ("Substitution of 'sex' for 'race' and article I, section 5 [of Hawaii's Constitution] for the [F]ourteenth [A]mendment yields the precise case before us together with the conclusion that we have reached.").

285 Baehr v. Miike, No. Civ. 91-1394, 1996 WL 694235, at *22 (Haw. Cir. Ct. Dec. 3, 1996).

286 HAW. CONST. art. I, § 23; see Baehr v. Miike, No. 20371, 1999 Haw. LEXIS 391, at *1 (Haw. Dec. 9, 1999) (holding that the amendment to the state constitution rendered the challenge moot).

287 Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 971 (Mass. 2003) (Greaney, J., concurring) (relying on the Massachusetts ERA).

288 Baker v. State, 744 A.2d 864, 904-12 (Vt. 1999) (Johnson, J., concurring in part and dissenting in part) (relying on Vermont's common benefits clause). For additional discussion of this opinion, see infra notes 306-08 and accompanying text.

289 Deane v. Conaway, No. 24-C-04-005390, 2006 WL 148145, at *3-7 (Md. Cir. Ct. Jan. 20, 2006) (holding that Maryland's same-sex marriage prohibition constitutes discrimination based on sex in violation of Maryland's ERA).

290 Brause v. Bureau of Vital Statistics, No. 3AN-95-6562 CI, 1998 WL 88743, at *5-6 (Alaska Super. Ct. Feb. 27, 1998) (finding a fundamental right to choose a "life partner" under the Alaska Constitution, and noting, in dicta, that the restriction of marriage to opposite-sex couples also "implicate [s] the Constitution's prohibition of classifications based on sex or gender" in violation of the Alaska ERA). The case was subsequently dismissed after the Alaska Constitution was amended to define marriage as a union between a man and a woman. ALASKA CONST. art I, § 25; see Brause v. State 21 P.3d 357, 358 (Alaska 2001).

291 Li v. State, No. 0403-03057, 2004 WL 1258167, at *6 (Or. Cir. Ct. Apr. 20, 2004) (holding that the effect of Oregon's denial of marriage to same-sex couples "is to impermissibly classify on the basis of gender," as well as sexual orientation, in violation of the privileges or immunities clause of the Oregon Constitution). The ruling was subsequently reversed after the Oregon Constitution was amended, effective December 2, 2004, to define marriage as a union between a man and a woman. See Li v. State, 110 P.3d 91, 102 (Or. 2005).

292 Snetsinger v. Mont. Univ. Sys., 325 Mont. 148, 173 (2005) (Nelson, J., concurring) (asserting that denial of health benefits to same-sex partners of employees by state university is sex-based discrimination in violation of Montana ERA). For additional discussion of this opinion, see infra note 309-10 and accompanying text.
In other cases, lower court opinions accepted the sex discrimination argument, but the decisions were subsequently overruled or affirmed on other grounds by higher courts. See., e.g., Picado v. Jegley, No. CV-99-7048 (Ark Cir. Ct. Mar. 23, 2001) (accepting sex discrimination argument as basis for invalidating Arkansas sodomy ban), available at http//: www.lambdalegal.org/sections/library/decisions/picadodecision.pdf, aff'd on other grounds, 80 S.W.3d 332, 334 (Ark. 2002) (striking Arkansas sodomy ban on privacy and equal protection grounds and, finding that Arkansas statute impermissibly discriminates on the basis of sexual orientation and fails rationality review); Lawrence v. State, Nos. 14-99-00109-CR & 14-99-00111-CR, 2000 WL 729417 (Tex. Ct. App. June 8, 2000) (accepting sex discrimination argument applied to Texas sodomy ban), withdrawn and overruled, 41 S.W.2d 349 (Tex. Ct. App. 2001) (en banc), rev'd by Lawrence v. Texas, 539 U.S. 558 (2003).

293 See Andrew Koppelman, Defending the Sex Discrimination Argument for Lesbian and Gay Rights: A Reply to Edward Stein, 49 UCLA L. REV. 519, 534 & n.84 (2001) (noting that "[t]he sex discrimination argument has usually been rejected by the courts," and citing federal and state cases).

294 See Baker v. State, 744 A.2d 864, 880 n.13 (Vt. 1999); Singer v. Hara, 522 P.2d 1187, 1191 (Wash. Ct. App. 1974).

295 See Baker, 744 A.2d at 880 n.13.

296 Singer, 522 P.2d at 1195. The court reasoned that "marriage exists as a protected legal institution primarily because of societal values associated with the propagation of the human race," and that "it is apparent that no same-sex couple offers the possibility of the birth of children by their union." Id. Accordingly, Washington's denial of same-sex marriage fell within the "unique physical characteristics" exception to that state's ERA. Id.; see also Baker v. Nelson, 191 N.W.2d 185, 186 (Minn. 1971) (upholding Minnesota's prohibition on same-sex marriage because "[t]he institution of marriage as a union of man and woman, uniquely involve[s] the procreation and rearing of children within a family" (citation omitted)), appeal dismissed, 409 U.S. 810, 810 (1972).

297 Singer, 522 P.2d at 1191. In 2004, two lower courts ruled that Washington's prohibition on same-sex marriage violated its state constitution. See Castle v. State, No. 04-2-00614-4, 2004 WL 1985215, at *16 (Wash. Super. Ct. Sept. 7, 2004) (prohibiting same-sex couples from marrying violates the privileges and immunities clause of the Washington Constitution); Anderson v. King County, No. 04-2-04964-4, 2004 WL 1738447, at *7 (Wash. Super. Ct. Aug. 04, 2004) (prohibiting same-sex couples from marrying violates the privileges and immunities and due process clauses of the Washington Constitution). Appeals in these

cases are pending before the Washington Supreme Court. In Anderson, the court noted that "[t]he Equal Rights Amendment argument presented by plaintiffs is an intriguing one," but noted that it was bound by the Washington Court of Appeals's rejection of the argument in Singer. Anderson, 2004 WL 1738447, at *11. In Castle, the court likewise noted that it was bound by the Singer decision, but referred to it as a "weak reed" and emphasized that it "cries out for reexamination by a higher court." 2004 WL 1985215, at *2-3.

298 See Baker, 744 A.2d at 880 n.13.

299 Id.

300 Id. (emphasis added).

301 See, e.g., Nan D. Hunter, The Sex Discrimination Argument in Gay Rights Cases, 9 J.L. & POL'Y 397, 406-12 (2001); Cass R. Sunstein, Homosexuality and the Constitution, 70 IND. L.J. 1, 18-23 (1994).

302 Andrew Koppelman, Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination, 69 N.Y.U. L. REV. 197, 234-36 (1994) (first emphasis added) (citations omitted); see also ANDREW KOPPELMAN, THE GAY RIGHTS QUESTION IN CONTEMPORARY AMERICAN LAW 53 (2002); Andrew Koppelman, The Miscegenation Analogy: Sodomy Laws as Sex Discrimination, 98 YALE L.J. 145, 158-60 (1988).

303 Sylvia A. Law, Homosexuality and the Social Meaning of Gender, 1988 WIS. L. REV. 187, 187.

304 Id. at 210, 218.

305 See, e.g., WILLIAM N. ESKRIDGE, JR., THE CASE FOR SAME-SEX MARRIAGE 153-72 (1996) [hereinafter ESKRIDGE, THE CASE FOR SAME-SEX MARRIAGE]; WILLIAM N. ESKRIDGE, JR., GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET 218-28 (1999) [hereinafter ESKRIDGE, GAYLAW]; Sunstein, supra note 301, at 17-23.

306 744 A.2d 864, 904-12 (Vt. 1999) (Johnson, J., concurring in part and dissenting in part).

307 Id. at 906.

308 Id. at 908-09.

309 325 Mont. 148, 173-74 (2005) (Nelson, J., concurring).

310 Id. at 173 (citing KOPPELMAN, supra note 302, at 53-54).

311 E.g., Stein, supra note 277, at 515. Professor Stein argues that the sex discrimination argument is sociologically and theoretically flawed because "there are actual and significant differences between sexism and homophobia in contemporary America" in that homophobia, unlike sexism, "remains entrenched in our society." Id. at 499. He further reasons that the sex discrimination argument is morally flawed because it "mischaracterizes the core wrong" of laws that restrict the rights of gays and lesbians by failing to recognize that they "violate principles of equality primarily because [they] discriminate on the basis of sexual orientation, not because they discriminate based on sex." Id. at 503. While conceding that the sex discrimination argument has certain practical advantages, he reasons that it is unlikely to persuade judges and could lead to backlash that would weaken protections against sex discrimination. Id. at 507-14. For a detailed response to Professor Stein, see KOPPELMAN, THE GAY RIGHTS QUESTION, supra note 302, at 534-38.
For other criticisms of the sex discrimination argument, see, for example, J.M. Balkin, The Constitution of Status, 106 YALE L.J. 2313, 2362 (1997); Craig M. Bradley, The Right Not to Endorse Gay Rights: A Reply to Sunstein, 70 IND. L.J. 29, 31-38 (1994); David Orgon Coolidge, Playing the Loving Card: Same-Sex Marriage and the Politics of Analogy, 12 BYU J. PUB. L. 201, 217-20 (1998); Richard F. Duncan, From Loving to Romer: Homosexual Marriage and Moral Discernment, 12 BYU J. PUB. L. 239, 240-45 (1998); and Lynn Wardle, A Critical Analysis of Constitutional Claims for Same-Sex Marriage, 1996 BYU L. REV. 1, 62-94.

312 KOPPELMAN, THE GAY RIGHTS QUESTION, supra note 302, at 538; see also ESKRIDGE, GAYLAW, supra note 305, at 218-28; ESKRIDGE, THE CASE FOR SAME-SEX MARRIAGE, supra note 305, at 153-72.

313 KOPPELMAN, THE GAY RIGHTS QUESTION, supra note 302, at 534-38.

314 Professor Koppelman suggests that the argument has frequently been rejected by judges for three reasons: (1) it is "simply not understood"; (2) it strikes observers as a "mere trick"; and (3) its potential impact is too broad for judges to accept. Id. at 536.

315 See generally Altschuler, supra note 131; Avner, supra note 108; Phyllis W. Beck, Equal Rights Amendment: The Pennsylvania Experience, 81 DICK. L. REV. 395 (1977); Phyllis W. Beck & Joanne Alfano Baker, An Analysis of the Impact of the Pennsylvania Equal Rights Amendment, 3 WIDENER J. PUB. LAW 743 (1993); Susan Crump, An Overview of Equal Rights Amendments in Texas, 11 HOUS. L. REV. 136 (1973); Dawn-Marie Driscoll & Barbara J. Rouse, Through a Glass Darkly: A Look at State ERAs, 12 SUFFOLK U. L. REV. 1282 (1977); Gammie, supra note 108; Leo Kanowitz, The New Mexico Equal Rights Amendment, 3 N.M. L. REV. 1 (1973); Kilgarlin & Tarver, supra note 109; Kolbert & Gans, supra note 213; Kruger, supra note 6; Awilda Marquez, Comparable Worth and the Maryland ERA, 47 MD. L. REV. 1129 (1988); Mary McCausland, Washington's Equal Rights Amendment and Law Against Discrimination, 58 WASH. L. REV. 465 (1983); Dawn Nunziato, Gender Equality: States as Laboratories, 80 VA L. REV. 945 (1994); Kevin Francis O'Neill, The Road Not Yet Taken: State Constitutions as an Alternative Source of Protection for Reproductive Rights, 11 N.Y.L. SCH. J. HUM. RTS. 5 (1993); Peter Saucier, The Maryland Equal Rights Amendment: Eight Years of Application, 9 U. BALT. L. REV. 342 (1980); Rodic Schoen, The Texas Equal Rights Amendment After the First Decade: Judicial Developments, 1978-1982, 20 HOUS. L. REV. 1321 (1983); Sherwin, supra note 145; G. Alan Tarr & Mary Cornelia Porter, Gender Equality and Judicial Federalism, 9 HASTINGS CONST. L.Q. 919 (1982); Treadwell & Page, supra note 185; Williams, Equality Guarantees, supra note 145; Williams, supra note 6.

316 See, e.g., Phyllis W. Beck & Patricia A. Daly, Pennsylvania's Equal Rights Amendment Law: What Does It Portend for the Future?, 74 TEMP. L. REV. 579, 582-89 (2001) (surveying recent cases decided under Pennsylvania ERA); Faraone, supra note 203, at 432-42 (analyzing legislative history of 1998 Florida ERA, and concluding that strict scrutiny standard of review is applicable); Wolfgang P. Hirczy de Mino, Does an Equal Rights Amendment Make a Difference?, 60 ALB. L. REV. 1581, 1588-93 (1997) (surveying cases decided under Texas ERA); see also Beck & Daly, supra note 141, at 707 (providing comprehensive survey and analysis of history and impact of the Pennsylvania ERA).

317 See, e.g., Risa E. Kaufman, State ERAs in the New Era: Securing Poor Women's Equality by Eliminating Reproductive-Based Discrimination, 24 HARV. WOMEN's L.J. 191, 209 (2001) (proposing the use of state ERAs in challenging welfare provisions that deny incremental benefits to children born into families receiving welfare benefits); Marsha L. Levick & Francine T. Sherman, When Individual Differences Demand Equal Treatment: An Equal Rights Approach to the Special Needs of Girls in the Juvenile Justice System, 18 WIS. WOMEN's L.J. 9, 35 (2003) (arguing that state ERAs "present a potentially powerful tool" for challenging disparities female offenders face in the juvenile justice system); Linton, Same-Sex Marriage Under State Equal Rights Amendments, supra note 10, at 961-62 (reviewing potential application of state ERAs to prohibitions on same-sex marriage, and concluding "[n]othing in the text, history or interpretation of state equal rights provisions even remotely suggests that those provisions should invalidate [them] [S]uch laws are gender neutral and do not have a discriminatory impact on either men or women."); Rachel Weissmann, What "Choice" Do They Have?: Protecting Pregnant Minors' Reproductive Rights Using State Constitutions, 1999 ANN. SURV. AM. L. 129, 166 (arguing that state ERAs and other state constitutional provisions "provide a unique legal landscape that is well worth cultivating" in crafting challenges to restrictions on minors' access to abortion).

318 See, e.g., Beck & Daly, supra note 316, at 594 (concluding that the Pennsylvania ERA provides both genders with important tangible and intangible benefits, including rigorous scrutiny of sex-based classifications and formal recognition in the Commonwealth that "women and men are equal partners who share both the benefits and burdens of society," but noting that "the state ERA has not markedly changed the social fabric of the Commonwealth"); Hirczy de Mino, supra note 316, at 1607-09 (evaluating judicial interpretation of the Texas ERA in variety of contexts, and concluding that the Texas ERA has been an effective tool in challenging sex discrimination); Kaufman, supra note 317, at 193 ("[S]tate ERAs can be effective in eradicating the sex discrimination that will survive scrutiny under the Federal Constitution."). For a comprehensive quantitative study of state ERAs, see Lisa Baldez et al., supra note 178.

319 See, e.g., Beck & Daly, supra note 316, at 583 (noting diminishing use of ERA in Pennsylvania); Hirczy de Mino, supra note 316, at 1588 (citing twenty-seven cases decided over two decades, and noting that "the volume of significant precedent setting litigation engendered by adoption of the ERA in Texas is rather moderate"); Kaufman, supra note 317, at 193 ("[State ERAs]

offer a fruitful, yet underutilized, foundation for enforcing women's rights where federal protections fail."); Levick & Sherman, supra note 317, at 35 (noting state ERAs are "not used frequently").

320 See, e.g., Beck & Daly, supra note 316, at 594 (noting that Pennsylvania has not issued "bold rulings" in area of abortion rights or same-sex marriage).

321 Linton, Making a Difference?, supra note 10, at 940-41 (describing outcomes in litigation under state ERAs throughout the country, and concluding that ERAs have been "[ineffective] except as a symbol" because "women have brought relatively few cases," and most cases have involved discrimination against men (citation omitted)); Linton & Joslin, supra note 10, at 284 (concluding that the Illinois ERA has mainly been used to challenge "statutes, ordinances or common law doctrines that discriminated against men in favor of women").

322 For a comprehensive survey and analysis of state ERAs, including recent decisions, see FRIESEN, supra note 106, § 3-2; see also Jeffrey Shaman, The Evolution of Equality in State Constitutional Law, 34 RUTGERS L.J. 1013, 1063-70 (2003) (reviewing decisions under state ERAs).

323 See supra notes 132-50, 170-75 and accompanying text.

324 See supra notes 179-83 and accompanying text.

325 See supra notes 206-12 and accompanying text.

326 See supra notes 216-33 and accompanying text.

327 See supra notes 240-48 and accompanying text.

328 See supra notes 252-66 and accompanying text.

329 See generally Randall T. Shepard, The Maturing Nature of State Constitution Jurisprudence, 30 VAL. U. L. REV. 421 (1996); TARR, supra note 3; G. Alan Tarr, The New Judicial Federalism in Perspective, 72 NOTRE DAME L. REV. 1097 (1997); Robert F. Williams, Foreword: Looking Back at the New Judicial Federalism's First Generation, 30 VAL. U. L. REV., at xiii (1996).

330 The new judicial federalism emerged during the early 1970s and was encouraged by U.S. Supreme Court Justice William Brennan. See Tarr, New Judicial Federalism, supra note 329, at 1097. In a frequently cited article in the Harvard Law Review, Justice Brennan admonished: "[S]tate courts cannot rest when they have afforded their citizens the full protections of the [F]ederal Constitution. State constitutions, too, are a font of individual liberties, their protections often extending beyond those required by the Supreme Court's interpretation ." William J. Brennan, Jr., State Constitutions and the Protection of Individual Rights, 90 HARV. L. REV. 489, 491 (1977). Justice Brennan subsequently called the new judicial federalism "[t]he most important development in constitutional jurisprudence of our times." William J. Brennan, Jr., Special Supplement, State Constitutional Law, Nat'l L.J., Sept. 29, 1986, at S1.

331 See, e.g., Williams, Equality Guarantees, supra note 145, at 1213 (noting that despite the powerful mandate of state ERAs "most jurisprudence under these new provisions is dominated by federal equal protection analysis"); see also Tarr & Porter, supra note 315, at 950 ("Even when litigants have raised claims in state courts, those courts tend to rely on federal law either explicitly, by basing decisions on relevant federal statutes or cases, or indirectly, by using the Supreme Court's equal protection methodology when interpreting the state constitution[s].").

332 See supra notes 164-67 and accompanying text.

333 See supra notes 235-39 and accompanying text.

334 See, e.g., FRIESEN, supra note 106, § 3-1(c), at 3-8 ("The federal method of equal protection analysis has greatly influenced state judges applying various state equality guarantees, even when state texts have a radically different text and history than the [F]ourteenth [A]mendment's clause."); TARR, supra note 3, at 208 ("[T]oo many states continue to rely automatically on federal law when confronted with rights issues. Even when they interpret state guarantees, too many frame their analysis in federal doctrinal categories, making state constitutional law merely a poor relation, stuck with ill-fitting hand-me-downs."). Scholars have been especially critical of the "unreflective adoptionism" or "kneejerk lockstepping" approach in which state

courts apply "federal analysis to a state clause without acknowledging the possibility of a different outcome, or considering arguments in favor of such a different, or more protective, outcome." Williams, Case-by-Case Adoptionism or Prospective Lockstepping?, supra note 187, at 1505.

335 See supra notes 107-08 and accompanying text.

336 Lawrence Gene Sager, Foreword: State Courts and the Strategic Space Between the Norms and Rules of Constitutional Law, 63 TEX. L. REV. 959, 975-76 (1985) ("State judges confront institutional environments and histories that vary dramatically from state to state, and that differ, in any one state, from the homogenized, abstracted, national vision from which the Supreme Court is forced to operate. It is natural and appropriate that in fashioning constitutional rules the state judges' instrumental impulses and judgments differ.").

337 Hans S. Linde, E Pluribus—Constitutional Theory and State Courts, 18 GA. L. REV. 165, 179 (1984).

338 FRIESEN, supra note 106, § 1-6, at 1-40. See generally Robert F. Williams, In the Glare of the Supreme Court: Continuing Methodology and Legitimacy Problems in Independent State Constitutional Rights Adjudication, 72 NOTRE DAME L. REV. 1015, 1063-64 (1997) ("State constitutional provisions need not, and should not, be reduced to a 'row of shadows' through too much reliance on federal precedent. Swinging the pendulum in the other direction, however, where too little reliance on federal precedent will 'render State practice incoherent,' is also unnecessary.").

339 See supra notes 181-83 and accompanying text.

340 Williams, Equality Guarantees, supra note 145, at 1213.

341 Linde, supra note 337, at 195; see also Hans S. Linde, Judges, Critics, and the Realist Tradition, 82 YALE L.J. 227, 253 (1972) (" [C]onstitution [is] directly obligatory on government, with judicial review as a consequence rather than as a source of obligation."); Hans S. Linde, Without "Due Process": Unconstitutional Law in Oregon, 49 OR. L. REV. 125, 131 (1970) ("[W]hat the judicial decision [making] applies was first a political decision that others deemed worthy of constitutional magnitude.").

342 Given the text and distinct history of many state ERAs, this will likely be the outcome in the vast majority of cases. However, the language of state ERAs vary and the legislative history is not the same in every state.

343 TARR, supra note 3, at 209.

344 Dr. G. Alan Tarr has pointed out, for example, that if New Jersey's equality guarantee were viewed in the abstract, without reference to its preceding constitutional provision, one would not understand its language or significance: "Whereas the 1844 version acknowledged that 'men' possessed various natural rights, the 1947 version recognized that the rights pertain to all 'persons.' By substituting the gender-neutral 'persons' for the gendered 'men,' the constitution emphasized that women enjoyed the same rights as men." Tarr, supra note 3, at 202.

345 Id. at 189-209.

346 See supra notes 218-34 and accompanying text.

347 See supra note 243 and accompanying text.

348 See supra notes 206-10 and accompanying text.

349 Analysis of, and reliance on, the text and history of state constitutions "has been an integral part of the New Judicial Federalism." Robert F. Williams, Old Constitutions and New Issues: National Lessons from Vermont's State Constitutional Case on Marriage of Same-Sex Couples, 43 B.C. L. REV. 73, 86 (2001) [hereinafter Williams, Old Constitutions]; see also Stephen E. Gottlieb, Foreword: Symposium on State Constitutional History: In Search of a Usable Past, 53 ALB. L. REV. 255, 258 (1989) (noting analysis of state constitutional history "is valuable whether or not one subscribes to a jurisprudence of original intent"). Dr. G. Alan Tarr has pointed out that, in contrast to federal constitutional history, "given the frequency of amendment and revision," many state constitutional provisions are "relatively recent"; the greater availability of their documentary record facilitates the discovery of the drafters' intentions. TARR, supra note 3, at 196. Moreover, examination of the history and text of state constitutions is often used "to justify an interpretation of the state constitution that was more

protective, or recognized greater rights, than those available at the federal level." Williams, Old Constitutions, supra, at 86. For example, Professor Williams points out that in the majority opinion in Baker v. State, 744 A.2d 864 (Vt. 1999) (holding Vermont's constitution entitled same-sex couples to the same benefits and protections as opposite-sex couples), Chief Justice Amestoy used state constitutional history not "as an attempt to discover original intent in its strict sense [but] rather; as a wide-ranging survey of the egalitarian impulses of the Revolution." Williams, Old Constitutions, supra, at 79-80.

350 See Baker, 744 A.2d at 874 ("Out of the shifting and complicated kaleidoscope of events, social forces, and ideas that culminated in the Vermont Constitution of 1777, our task is to distill the essence, the motivating ideal of the framers. The challenge is to remain faithful to that historical ideal, while addressing contemporary issues that the framers undoubtedly could never have imagined.").

351 See supra note 319 and accompanying text.

352 See, e.g., Beck & Daly, supra note 316, at 579.

353 See FRIESEN, supra note 106, § 3-2(a), at 3-12 to -13. Professor Friesen also points out that "because issues of legal equality for women have gained a meaningful amount of political attention in recent times, outmoded, discriminatory statutes and regulations have often been repealed or modified without the need for a court challenge." Id. (footnotes omitted). As discussed infra, much of this reform of statutes and administrative regulations came about as the result of the passage of state ERAs. See infra notes 384-86 and accompanying text.

354 The number of sex discrimination cases brought under the Equal Protection Clause has likewise diminished over time. See MARY BECKER, CYNTHIA GRANT BOWMAN & MORRISON TORREY, FEMINIST JURISPRUDENCE: TAKING WOMEN SERIOUSLY, CASES AND MATERIALS 83 (2d ed. 2001) ("[T]he number of cases brought under the formal equality standard applicable in sex cases—which thus far recognized sex discrimination only when overt—has declined over time.").

355 Tarr & Porter, supra note 315, at 950 (noting "paucity" of sex discrimination claims brought under state ERAs in 1970s as compared to cases brought under the United States Constitution, and finding that "litigant preference for federal law and forums has led to federal dominance in the field of gender discrimination").

356 Robert F. Williams, The Third Stage of the New Judicial Federalism, 59 ANN. SURV. AM. L. 211, 220 (2003) (noting that "[d]espite the development of the New Judicial Federalism nearly two generations ago, lawyers still fail to properly argue the state constitutional grounds where available" and that, as a result, many state courts fail to reach the state constitutional argument).

357 TARR, supra note 3, at 167 (citing Craig F. Emmert & Carol Ann Traut, State Supreme Courts, State Constitutions, and Judicial Policymaking, 16 JUST. SYS. J. 37, 44 (1992)). This study showed that "[i]n over half the courts' civil liberties cases, litigants continued to challenge state laws exclusively on the basis of the [F]ederal Constitution, and in only 17 percent of those cases did they challenge state laws exclusively on state constitutional grounds." Id.

358 Jennifer Friesen, Adventures in Federalism: Some Observations on the Overlapping Spheres of State and Federal Constitutional Law, 3 WIDENER J. PUB. L. 25, 31-34 (1993) (citing relatively small percentage of law professors who teach a course in state constitutional law and small number of legal texts and other state constitutional law resources, but noting trend of increasing awareness of the importance of state constitutions in law schools and greater availability of textbooks and law journal resources).

359 Id. at 31.

360 See Jennifer Friesen, Recovering Damages for State Bills of Rights Claims, 63 TEX. L. REV. 1269, 1272 (1985).

361 See FRIESEN, supra note 106, §§ 7-1 to 7-7-7(b)(22); Friesen, supra note 360, at 1269-70; see also Dorwart v. Caraway, 58 P.3d 128, 133 (Mont. 2002) (noting that by 1998, twenty-nine states either by statute or implied judicial cause of action had recognized causes of action for violation of state constitutional rights; seven states have specifically rejected such causes of action).

362 At the federal level, fee-shifting is permitted for prevailing parties under numerous statutes. The primary federal fee-shifting statute is the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C § 1988 (2004), which permits the award of attorneys' fees to a party, other than the United States, who prevails under certain federal statutes, including § 1983, which allows civil rights suits against the state or a person acting under the authority of state laws.

363 See generally FRIESEN, supra note 106, §§ 10-1 to -6; Friesen, supra note 360.

364 See FRIESEN, supra note 106, § 10-3, at 10-5 to -7. In addition, plaintiffs who bring claims under both state constitutional law and federal law may be able to obtain fees under the Civil Rights Attorney's Fee Awards Act, 42 U.S.C. § 1988. FRIESEN, supra note 106, § 10-1, at 10-2. Where suits combine claims under § 1983 and state constitutional law, the prevailing practice in the federal courts is to award fees pursuant to § 1988 as long as plaintiff's claims under § 1983 were "substantial" enough to confer subject matter jurisdiction on the federal court. Id. State courts vary in whether they adhere to this practice. Id. §§ 10-3, 10-6. Some state courts follow the "relatively generous" federal practice. Id. § 10-1, at 10-3. Other state courts "may either reach out to decide and reject the federal claim, thus erasing the presumed justification for section 1988 fees, or they may treat an unadjudicated federal claim as superfluous ., thus finding no justification for an award of federally based attorneys fees." Id.

365 See supra notes 219-33 and accompanying text.

366 N.M. Right to Choose/NARAL v. Johnson, 986 P.2d 450, 451 (N.M. 1999).

367 Id. at 452-53; see Allison Crist, No Private Attorney General Exception to the American Rule in New Mexico: New Mexico Right to Choose/NARAL v. Johnson, 31 N.M. L. REV. 585, 593 (2001).

368 Crist, supra note 367, at 599.

369 Of course, in some cases, state ERA claims may be successfully brought in federal court as supplemental claims allowing fees under federal law. This is not an option, however, in cases in which past United States Supreme Court precedent has rendered a claim under the Federal Constitution insubstantial, such as New Mexico Right to Choose/NARAL v. Johnson. Thus, in the very cases in which relief under a state ERA is most needed, fees are likely not available.

370 See Lisa Baldez et al., supra note 178, at 268-71.

371 In Pennsylvania, for example, where the state ERA has otherwise been extremely effective in advancing sex equality in many areas, a challenge brought in the mid-1980s to the cut-off of public funding for abortion was unsuccessful. See Fischer v. Dep't of Pub. Welfare, 502 A.2d 114 (Pa. 1985).
As popular support for abortion rights and gay marriage increases, courts are more likely to issue favorable opinions. Indeed, in the area of abortion funding, the number of favorable state court decisions has increased significantly since the 1980s. See supra notes 216-17 and accompanying text.

372 See Lisa Baldez et al., supra note 178 ("[W]hile ERAs do not have a direct effect on judicial decisions, they do, even after controlling for other relevant factors, increase the probability of a court applying a higher standard of law to adjudicate claims of sex discrimination. And the application of a higher standard of law, even after controlling for other relevant factors, increases the probability of a court reaching a disposition favorable to litigants alleging a violation of their rights.").

373 Beck & Daly, supra note 316, at 594 (noting that "[t]he judicial decisions under the [Pennsylvania] ERA continue, at least in part, to have the pragmatic effect of improving the condition of men more than women," but concluding that "[t]he ERA provides both genders with tangible and intangible benefits"); Hirczy de Mino, supra note 316, at 1608-09 (noting that Texas ERA has protected men against sex discrimination sometimes "at the expense of women," but concluding that "[r]ecognizing men's parental rights claims to be on par with those of women is entirely consistent with the idea of jettisoning the separate sphere doctrine and ceasing to define women in terms of their reproductive function").

374 Linton, Making A Difference?, supra note 10, at 941 ("The ultimate irony of the adoption of equal rights amendments is that in many respects women have given up 'privileges' they always enjoyed in exchange for 'rights' that never were in jeopardy. Whether the symbolism of having enshrined a statement of equal rights under law in the constitutions of eighteen states was worth this price is a question women who live in those states must answer for themselves."); Linton & Joslin, supra note 10, at 284 (noting that courts have invalidated a range of statutes and common law rules that traditionally favored women over men).

375 Linton & Joslin, supra note 10, at 284.

376 Mr. Linton does not provide comprehensive quantitative data to support his conclusion that "most of the litigation brought under state equal rights provisions to date has involved statutes [or] ordinances that discriminated against men in favor of women." Linton, supra note 10, at 940. Assuming that this assertion is correct, the litigation track record of claims by men under the Federal Equal Protection Clause is similar. The majority of the sex discrimination cases heard by the Supreme Court under the Equal Protection Clause have been brought by men. See BECKER ET AL., supra note 354, at 81 (noting that from 1971 through the end of 2000, of the twenty-nine constitutional sex discrimination cases that the Supreme Court decided, men brought eighteen, and women brought eleven). The predominance of male litigants thus reflects not an inherent defect in ERAs, but rather, more likely, the practical reality that men have greater economic resources than women to bear the costs of litigation. The unavailability of attorneys' fee awards under most state ERAs may exacerbate the imbalance between male and female litigants. See supra notes 362-69 and accompanying text (discussing court-awarded attorneys' fees). Moreover, a recent quantitative analysis of state ERA decisions found that when women do bring claims, they are more likely to prevail in state ERA claims than men. See Lisa Baldez et al., supra note 178, at 268 ("[T]he probability of the court finding discrimination is nearly .50 when a woman brings the suit; it dips to about a third for all other litigants.").

377 KATHARINE T. BARTLETT, ANGELA P. HARRIS & DEBORAH L. RHODE, GENDER AND THE LAW: THEORY, DOCTRINE, COMMENTARY 118 (3d ed. 2002). In contrast, some policies, such as affirmative action policies in the employment context, explicitly advantage women solely to ameliorate the effects of past discrimination and increase female representation in institutions. Although few cases have considered the validity of sex-based affirmative action policies under state ERAs, the Washington Supreme Court has refused to invalidate these policies under its state ERA. See Sw. Wash. Chapter, Nat'l Elec. Contractors Ass'n v. Pierce County, 667 P.2d 1092, 1103 (Wash. 1983) (finding that a county affirmative action plan that gave preferences to businesses owned by minorities and women does not violate the Washington ERA); Marchioro v. Chaney, 582 P.2d 487, 492-93 (Wash. 1978) (finding that statutes mandating that both men and women hold responsible positions in state political parties do not violate the Washington ERA).

378 See supra notes 240-51 and accompanying text.

379 Law, supra note 56, at 996 (footnote omitted).

380 While some state ERAs provided a legal basis for invalidating the tender years presumption in some states, see, e.g., Commonwealth ex rel. Spriggs v. Carson, 368 A.2d 635, 639-40 (Pa. 1977), the complex social and political changes of the 1960s and beyond made abandonment of the maternal preference inevitable. Today, the vast majority of explicit sex-based custody preferences have been eliminated from the law via legislative action or judicial decision-making. BARTLETT ET AL., supra note 377, at 487.

381 BARBARA A. BABCOCK, ANN E. FREEDMAN, SUSAN DELLER ROSS, WENDY WEBSTER WILLIAMS, RHONDA COPELON, DEBORAH L. RHODE & NADINE TAUB, SEX DISCRIMINATION AND THE LAW: HISTORY, PRACTICE AND THEORY 1223-24 (2d ed. 1996) (citing DEBORAH L. RHODE, JUSTICE AND GENDER 155 (1989)).

382 Id. at 1224.

383 There is considerable thoughtful debate among legal scholars, including feminist scholars, about what standard should be applied in determining child custody. Many scholars have criticized the best-interests of the child standard. See, e.g., Mary Ann Glendon, Fixed Rules and Discretion in Contemporary Family Law and Succession Law, 60 TUL. L. REV. 1165, 1181-82 (1986); Robert H. Mnookin, Child-Custody Adjudication: Judicial Functions in the Face of Indeterminancy, 39 LAW & CONTEMP. PROBS. 226, 229-30 (Summer 1975). Most feminist scholars support sex-neutral alternatives, including, for example, a primary caretaker presumption, see, e.g., Martha Albert Fineman, Dominant Discourse, Professional Language, and Legal Change in Child Custody Decisionmaking, 101 HARV. L. REV. 727, 770-74 (1988), or a standard that allocates custodial responsibility in proportion to the share of responsibilities each parent assumed before the divorce, see, e.g., Katharine T. Bartlett, Child Custody in the 21st Century: How the American Law Institute Proposes to Achieve Predictability and Still Protect the Individual Child's Best Interests, 35 WILLIAMETTE L. REV. 467, 478-82 (1999); Elizabeth S. Scott, Pluralism, Parental Preferences, and Child Custody, 80 CAL. L. REV. 615, 639-41 (1992). Professor Mary Becker has argued for a maternal deference standard, not based on the original justification that women's caretaker role is biologically

determined, but because such a standard recognizes women's greater emotional commitment to children and better protects women's economic interests. See Mary Becker, Maternal Feelings: Myth, Taboo, and Child Custody, 1 S. CAL. REV. L. & WOMEN'S STUD. 133, 142-58 (1992).

384 PENNSYLVANIA COMMISSION FOR WOMEN, IMPACT OF THE PENNSYLVANIA STATE EQUAL RIGHTS AMENDMENT: A REPORT ON THE IMPACT OF THE STATE EQUAL RIGHTS AMENDMENT IN PENNSYLVANIA SINCE 1971, at 11-16 (1980). The nineteen new laws mandated that all existing Pennsylvania statutes should be interpreted as "sex-neutral"; amended the Pennsylvania Human Relations Act by adding the word "sex" to those classes protected in public accommodations; and corrected inequities in various areas, including divorce, criminal law, treatment of rape victims, the military code, probate and estates, and tax assistance and rebates. Id. For a detailed history of Pennsylvania's Equal Rights Amendment, see SUSAN RUBINOW GORSKY, MARCH TO EQUALITY: WOMEN IN PENNSYLVANIA's 300 YEAR HISTORY 16-36 (1982). Moreover, the Pennsylvania Supreme Court has held that ambiguities in all statutes must be read in light of the public policy against sex discrimination expressed in Pennsylvania's ERA. See Hartford Accident & Indem. Co. v. Ins. Comm'r of the Commonwealth, 482 A.2d 542, 549 (Pa. 1984).

385 PENNSYLVANIA COMMISSION FOR WOMEN, supra note 384, at 4-7.

386 Id. at 7-8.

387 MICHAEL W. MCCANN, RIGHTS AT WORK: PAY EQUITY REFORM AND THE POLITICS OF LEGAL MOBILIZATION 6 (1994).

388 Hans S. Linde, Without "Due Process": Unconstitutional Law in Oregon, 49 OR. L. REV. 125, 131 (1970).

389 Ginsburg, supra note 50, at 73.

390 Reva B. Siegel, Text in Contest: Gender and the Constitution from a Social Movement Perspective, 150 U. PA. L. REV. 297, 345 (2001).

391 In the area of pay equity, for example, Professor McCann has argued that "legal norms significantly shaped the terrain of the struggle over wage equity; and, concurrently, that litigation and other legal tactics provided movement activists an important resource for advancing their cause." McCann, supra note 387, at 4.

392 For a thoughtful reflection on the issues and challenges currently arising in the "third stage" of the New Judicial Federalism, see Williams, supra note 356, at 219-23.

393 FRIESEN, supra note 106, § 1-8(c), at 1-60 to -61; see also Friesen, supra note 358, at 28 ("Even when state constitutional claims are briefed, they are often wrapped in the recycled language of balancing 'tests' or other federally inspired formulas for judicial review .").

394 500 A.2d 233 (Vt. 1985).

395 Id. at 235; see also Commonwealth v. Edmunds, 586 A.2d 887, 894-95 (Pa. 1991) (urging counsel to engage in a detailed and specific independent analysis of the Pennsylvania Constitution).

396 FRIESEN, supra note 106, § 1-(c), at 1-61.

397 See, e.g., Kolbert & Gans, supra note 213; O'Neill, supra note 315; Weissman, supra note 317.

398 See, e.g., Kaufman, supra note 317.

399 See, e.g., Altschuler, supra note 131; Marquez, supra note 315.

400 See, e.g., Levick & Sherman, supra note 317.

401 See, e.g., Newberg v. Bd. of Pub. Educ., 26 Pa. D. & C.3d 682, 707-11 (1983), appeal quashed by 478 A.2d 1352 (Pa. Super. Ct. 1984) (finding that denying girls admission to a public high school in Philadelphia violated both the Federal Equal Protection Clause and the state ERA, and explicitly rejecting "the separate-but-equal concept" as violative of the state ERA). See

generally Nancy Levit, Separating Equals: The Educational Research and the Long-Term Consequences of Sex Segregation, 67 GEO. WASH. L. REV. 451 (1999) (arguing against single-sex schooling); Valorie K. Vojdik, Girls' Schools After VMI: Do They Make the Grade?, 4 DUKE J. GENDER L. & POL'Y 69 (1997) (same).

402 For a discussion of the choices "a hypothetical set of feminist drafters face if they were to constitutionalize women's equality," see Sullivan, supra note 16, at 747-62.

36 RULJ 1201

End of Document

Spottswood, Eleanor

From: Spottswood, Eleanor
Sent: Tuesday, October 23, 2018 11:02 AM
To: 'Leriche, Lucy Rose'
Subject: Accepted: Abortion Rights Meeting

From:	Leriche, Lucy Rose
To:	Diamond, Joshua; Spottswood, Eleanor; jlyall@acluvt.org; cwhite@acluvt.org; Jill Krowinski; Jill Krowinski; Becca Balint; Levasseur, Katherine
Subject:	Intern
Date:	Tuesday, October 23, 2018 10:55:23 AM

Hi all,

I will be working with a legislative intern this session, and I would like to bring her along to the meeting on the 31st, unless any of you have objections. Please let me know. Thanks!

Lucy
Lucy Leriche(she/her/hers)
Vice President of Public Policy Vermont
Planned Parenthood Northern New England
784 Hercules Drive suite 110
Colchester, Vermont 05446
Cell: 802 598-4182
www.ppnne.org<http://www.ppnne.org/>
Lucy.Leriche@ppnne.org

From:	Becca Balint
To:	Levasseur, Katherine
Cc:	Leriche, Lucy Rose; Diamond, Joshua; Spottswood, Eleanor; cwhite@acluvt.org; jlyall@acluvt.org; Jill Krowinski; jill.krowinski@gmail.com
Subject:	Re: Abortion Rights Meeting
Date:	Tuesday, October 23, 2018 10:53:18 AM

I'll be there by phone...

Sent from my iPad

On Oct 23, 2018, at 10:51 AM, Katherine Levasseur <KLevasseur@leg.state.vt.us> wrote:

> Hi Lucy,
>
> I have this in my notes for 10/31 at 11am, is that correct?
>
> Thank you,
>
> Katherine
>
> **Katherine Levasseur**
>
> Chief of Staff, Office of the Speaker
> 115 State St., Montpelier, VT 05633
>
> KLevasseur@leg.state.vt.us
> (w) 802.828.2245
> (c) 802.735.3799
>
> ---
>
> **From:** Leriche, Lucy Rose <Lucy.Leriche@ppnne.org>
> **Sent:** Tuesday, October 23, 2018 10:49:19 AM
> **To:** Diamond, Joshua; Spottswood, Eleanor; cwhite@acluvt.org; jlyall@acluvt.org; Jill Krowinski; jill.krowinski@gmail.com; Katherine Levasseur; Becca Balint
> **Subject:** Abortion Rights Meeting
> **When:** Tuesday, October 23, 2018 11:00 AM-11:30 AM.
> **Where:** ACLU offices Montpelier
> As a reminder, this is the meeting where we are going to try to hash out some language options/decisions to help inform our poll design. If you can circulate any language options you are working on before the meeting that would be helpful. Thanks and see you all soon1
> Lucy

From:	Katherine Levasseur
To:	Leriche, Lucy Rose; Diamond, Joshua; Spottswood, Eleanor; cwhite@acluvt.org; jlyall@acluvt.org; Jill Krowinski; jill.krowinski@gmail.com; Becca Balint
Subject:	Re: Abortion Rights Meeting
Date:	Tuesday, October 23, 2018 10:51:33 AM

Hi Lucy,

I have this in my notes for 10/31 at 11am, is that correct?

Thank you,

Katherine

Katherine Levasseur
Chief of Staff, Office of the Speaker
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KLevasseur@leg.state.vt.us
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Lucy

From: Leriche, Lucy Rose
To: Spottswood, Eleanor
Subject: 3:15 today?
Date: Thursday, October 18, 2018 2:02:20 PM

Perhaps you and I can talk at around 3:15 today? Meagan is in meetings all day.
Lucy

Sent from my iPhone

From:	Spottswood, Eleanor
To:	Spottswood, Eleanor
Subject:	FW: VT ERA and FOCA
Date:	Wednesday, October 17, 2018 8:59:16 PM
Attachments:	DRAFT MODEL FOCA 10-12-18.docx FOCA Findings 10.15.18 FINAL.docx

---

From: Leriche, Lucy Rose <Lucy.Leriche@ppnne.org>
Sent: Monday, October 15, 2018 2:59 PM
To: Jill Krowinski <JKrowinski@leg.state.vt.us>; Diamond, Joshua <Joshua.Diamond@vermont.gov>; cwhite@acluvt.org; Spottswood, Eleanor <Eleanor.Spottswood@vermont.gov>; jlyall@acluvt.org
Subject: FW: VT ERA and FOCA
For our meeting on Friday. Jill please share with Katherine Lavassar. I can't seem to find her email address. Thanks!
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Lucy Leriche(she/her/hers)
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784 Hercules Drive suite 110
Colchester, Vermont 05446
Cell: 802 598-4182
www.ppnne.org<http://www.ppnne.org/>
Lucy.Leriche@ppnne.org
From: Sousa, Bethany <bethany.sousa@ppfa.org>
Sent: Monday, October 15, 2018 9:34 AM
To: Leriche, Lucy Rose <Lucy.Leriche@ppnne.org>
Cc: Keauna Gregory <keauna.gregory@ppfa.org>
Subject: VT ERA and FOCA
Hi Lucy,
I am attaching a revised FOCA model and some findings that might be helpful either as findings for your bill or as talking points. I know you said you weren't including the right to parent and I am not sure how broad you decided to go on other issues, but I thought you would like to see the latest draft anyway.
I also heard from Keauna that the leg counsel is now drafting some ERA language on abortion. I would love to see what they come up with when you get it back. We did do some research on legislative history for constitutional amendments in VT but it wasn't that helpful. I will send you what we have with an explanation in a separate email. I do think that if you can't get the abortion language into the ERA, you should as least try to create legislative history that makes it clear that "sex" includes abortion/repro health care. I understand that you do have legislators who are supportive of including the language but one thing to consider might be whether it could get included in the initial draft but then taken out down the line. If that were to happen, it could actually create negative legislative history around the inclusion of repro health in the original language (ie - the fact that it was inserted and then removed demonstrates that it was not thought to be included in the original language).
Best,

Beth

--

Bethany Sousa
Senior Policy Counsel
Public Policy, Litigation and Law
Planned Parenthood Federation of America
123 William St., NYNY 10038
212-261-4572

From:	Spottswood, Eleanor
To:	Spottswood, Eleanor
Subject:	FW: VT ERA and FOCA
Date:	Wednesday, October 17, 2018 8:59:00 PM
Attachments:	DRAFT MODEL FOCA 10-12-18.docx FOCA Findings 10.15.18 FINAL.docx

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Planned Parenthood Federation of America
123 William St., NYNY 10038
212-261-4572

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To:	Jill Krowinski; Diamond, Joshua; cwhite@acluvt.org; Spottswood, Eleanor; jlyall@acluvt.org
Subject:	FW: VT ERA and FOCA
Date:	Monday, October 15, 2018 2:59:57 PM
Attachments:	DRAFT MODEL FOCA 10-12-18.docx FOCA Findings 10.15.18 FINAL.docx

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Lucy

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Vice President of Public Policy Vermont
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Lucy.Leriche@ppnne.org

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To: Leriche, Lucy Rose <Lucy.Leriche@ppnne.org>
Cc: Keauna Gregory <keauna.gregory@ppfa.org>
Subject: VT ERA and FOCA

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Senior Policy Counsel
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Planned Parenthood Federation of America

123 William St., NYNY 10038
212-261-4572

DRAFT FOCA TEXT

(a) Every individual has the fundamental right to choose or refuse contraception or sterilization, and to parent their child.

(b Every individual who becomes pregnant has the fundamental right to choose to carry a pregnancy to term, give birth to a child, or to have an abortion.

(c) The state shall not, in the regulation or provision of benefits, facilities, services, or information, deny or interfere with an individual's fundamental rights:

(i) to choose or refuse contraception or sterilization, or to parent their child, except for [STATE child abuse/neglect state statutes] to the extent that such statutes do not discriminate on the basis of sex, gender identity, sexual orientation disability, race, ethnicity, age, national origin, immigration status, or religion;

(ii) to choose to carry a pregnancy to term, to give birth to a child, or to obtain an abortion, including individuals under state control or supervision.

(d) A fertilized egg, embryo, or fetus does not have independent rights under the laws of this state.

(e) Neither the state nor any subdivision or agency, nor any municipality nor any subdivision or agency thereof shall prosecute any individual for inducing, performing, or attempting to induce or perform, their own abortion.

(f) Neither the state nor any subdivision or agency, nor any municipality nor any subdivision or agency thereof, shall prosecute any individual for any act or failure to act during their own pregnancy based on the potential or actual impact on their maternal health or the pregnancy.

(g) The state shall not discriminate in the protection or enforcement of these fundamental rights on the basis of sex, disability, race, ethnicity, gender identity, age, national origin, immigration status, religion, or sexual orientation.

MODEL FOCA FINDINGS:

Given historic and continued attacks on abortion access at the federal level and in many states, it is critical that [STATE] ensures that its residents [and those who come here] maintain the fundamental rights to choose to use or refuse contraception or sterilization, carry a pregnancy, give birth to a child, or have an abortion, regardless of where they live.

[STATE] believes the legislature and state government have a critical role in supporting the provision of comprehensive reproductive healthcare, including the full range of evidence-based information and counseling and quality healthcare services.

Women's ability to access contraception, as well as safe and legal abortion, allows women to participate fully in society and many of the gains women have made in obtaining education, pursuing careers, and moving closer to pay equity, and in having greater determination over the timing and spacing of their children—are the direct result of increased access to birth control.

A woman's ability to access safe and legal abortion when she needs it is a critical component of her health and dignity, as well as independence, freedom, and equality.

Women and families in [STATE] have come to rely on the right to abortion recognized over 45 years ago in *Roe v. Wade*.

Abortion is one of the safest medical procedures in the United States.

Experts at the National Academies of Science, Engineering, and Medicine recently published a study confirming that scientific evidence consistently indicates that legal abortions in the U.S., including those performed in the second-trimester, are extremely safe.[1]

Access to the full range of reproductive health care should be free from discrimination and unnecessary barriers, including for women who are under state control or supervision, such as those who are incarcerated or living in state-funded institutions.

Transgender men and gender non-conforming people may also become pregnant and need access to comprehensive reproductive healthcare, including contraception, abortion, prenatal care, and care during and after giving birth.

Abortion must be not just legal but accessible; studies show that rapidly declining access to abortion can cause women to turn to self-induction.[2]

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[1] NAT'L ACADEMIES OF SCI., ENGINEERING, AND MED. ("NAT'L ACADEMIES"), THE SAFETY & QUALITY OF ABORTION CARE IN THE U.S. (March 2018).

[2] *See* D. GROSSMAN, ET AL., TEXAS EVALUATION PROJECT, KNOWLEDGE, OPINION, AND EXPERIENCE RELATED TO ABORTION SELF-INDUCTION IN TEXAS (2015), *available at* https://liberalarts.utexas.edu/txpep/_files/pdf/TxPEP-Research-Brief-KnowledgeOpinionExperience.pdf

Throughout her pregnancy, women must be able to make their own health care decisions with the advice of health care professionals they trust and without government interference or fear of prosecution.

The National Academies of Science, Engineering, and Medicine study concluded that abortion is safe and effective, but that medically unnecessary regulations of abortion can diminish the quality of abortion care by contributing to a declining number of facilities that provide abortion, needlessly delaying abortion, and making it unnecessarily difficult to access.[3]

The impact of abortion restrictions is predominantly felt by those who already experience barriers to health care, including young women, women of color and those with disabilities, women with low incomes, and women who live in rural areas or are undocumented.

Women of color experience disparities across a range of reproductive health outcomes, including infant and maternal mortality, unintended pregnancies, and preventive care.[4]

The state recognizes this country's long history of discrimination and forced sterilization against women of color and women with disabilities, and finds it imperative to ensure true reproductive choice and access.

Proactively safeguarding the right to contraception and abortion in [STATE] will protect and show respect for women's health and safety, as well as the wellbeing of all people in [STATE].

ADDITIONAL FINDINGS:

Abortion Safety

Abortion is one of the safest medical procedures performed in the United States, and data, including from the CDC, show that abortion has over a 99 percent safety record.

(finding that between 100,000 and 240,000 women of reproductive age in Texas have attempted to self-induce abortion in their lifetime and linking an increase in self-induced abortion attempts to the closure of abortion clinics); Teddy Wilson, *Advocates: Texas Law Brought Surge in Self-Induced Abortions*, REWIRE, (Jan. 20, 2016, 12:20 PM), https://rewire.news/article/2016/01/20/advocates-texas-law-brought-surge-self-induced-abortions/.

[3] NAT'L ACADEMIES, *supra* note 1 at 32, 76-80.

[4] Ngozi Anachebe & Madeline Sutton, *Racial Disparities in Reproductive Health Outcomes*, 188 AM. J. OBSTETRICS GYNECOLOGY S37 (2003).

Legal abortion is among the safest outpatient procedures performed in the United States, and is significantly safer than carrying a pregnancy to term: the risk of maternal mortality associated with pregnancy is 14 times higher than with that of abortion.[5]

The National Academies of Science, Engineering, and Medicine study also concluded that abortion can be performed safely by a physician assistant, certified nurse-midwife, nurse practitioner or physician, and that medication abortion can be provided safely through telemedicine.[6]

Abortion can be safely provided in doctor's offices and outpatient health centers, and carries similar risks as other gynecological procedures that take place in doctors' offices every day.[7]

In order for individuals to be able to exercise their right to decide to have an abortion, health care professionals must be trained and available to provide abortions without fear of government interference.

The Need to Prevent Restrictions on Abortion

Every individual has a fundamental right to make personal reproductive health decisions free from coercion, discrimination, and stigma.

Politicians have passed more than 400 abortion restrictions since 2011.[8]

The National Academies of Science, Engineering, and Medicine study concluded that abortion is safe and effective, but that medically unnecessary regulations of abortion can diminish the quality of abortion care by contributing to the decline of facilities that provide abortion, needlessly delaying abortion, and making it unnecessarily difficult to access.[9]

A woman's health needs should not be dictated by ideology or politicians.

The Importance of Abortion to Women's Equality

Access to abortion is a core component to women's social and economic equality.

Access to abortion is crucial for individual liberty, dignity, equality, and privacy.

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[5] E.G. Raymond & D.A. Grimes, *The Comparative Safety of Legal Induced Abortion and Childbirth in the United States*, 119 OBSTETRICS & GYNECOLOGY 215 (2012).
[6] NAT'L ACADEMIES, *supra* note 1 at57–58.
[7] Bonnie Scott Jones & Tracy Weitz, *Legal Barriers to Second-Trimester Abortion Provision and Public Health Consequences*, 99 AM. J. PUB. HEALTH 623, 627 (2009), *available at* https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2661467/.
[8] Elizabeth Nash, et al., *Policy Trends in the States, 2017*, GUTTMACHER INST. (Jan. 2018), https://www.guttmacher.org/article/2018/01/policy-trends-states-2017.
[9] NAT'L ACADEMIES, *supra* note 1 at 32, 76-80.

The legalization of abortion, in Justice Ruth Bader Ginsburg's words, made it possible for a woman to take "autonomous charge of her full life's course,"[10] by giving her the option to enter the workforce, gain financial independence, and plan her family.

Individuals are more likely to stay in abusive relationships when they are unable to access abortion.[11]

Being forced to carry a pregnancy to term has long-term economic consequences for women and their families.

Women who are denied an abortion are more likely than those who receive an abortion to be living in poverty and lacking full-time employment six months after the denial.[12]

Abortion as a Public Health Issue

Keeping abortion safe and legal drastically reduces the odds of medical risk or death for women in this state.

Before *Roe v. Wade*, illegal abortions were estimated to range from 200,000 to 1.2 million per year, and constituted at least 17 percent of all deaths attributed to pregnancy and childbirth in 1965 alone.[13]

The legalization of abortion in the U.S. led to safer practices and drastically reduced the incidence of maternal deaths and hospitalizations related to abortion.[14]

Abortion must be not just legal but accessible; studies show that rapidly declining access to abortion can cause women to turn to self-induction.[15]

According to the American College of Obstetricians and Gynecologists, the American Medical Association, American Academy of Family Physicians, and the American

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[10] Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to* Roe v. Wade, 63 N.C. L. REV. 375, 383 (1985).
[11] Sarah C.M. Roberts et al., *Risk of Violence from the Man Involved in Pregnancy After Receiving or Being Denied an Abortion*, 12 BMC MED. 1 (2014), *available at* https://bmcmedicine.biomedcentral.com/track/pdf/10.1186/s12916-014-0144-z.
[12] Diane Greene Foster, et al., *Socioeconomic Outcomes of Women Who Receive and Women Who are Denied Wanted Abortions in the United States*, 108 AM. J. PUB. HEALTH 407 (2018).
[13] Rachel Benson Gold, *Lessons from Before* Roe*: Will Past Be Prologue?*, GUTTMACHER INST. (March 2003), https://www.guttmacher.org/gpr/2003/03/lessons-roe-will-past-be-prologue.
[14] Susan A. Cohen, *Facts and Consequences: Legality, Incidence and Safety of Abortion Worldwide*, 12 GUTTMACHER POLICY REVIEW 2 (2009), *available at* https://www.guttmacher.org/sites/default/files/article_files/gpr120402.pdf.
[15] *See* D. GROSSMAN, *supra* note 2 (finding that between 100,000 and 240,000 women of reproductive age in Texas have attempted to self-induce abortion in their lifetime and linking an increase in self-induced abortion attempts to the closure of abortion clinics); Teddy Wilson, *supra* note 2.

Osteopathic Association, leading public health organizations, blocking women's access to legal abortion "jeopardize[s] women's health."[16]

Each year about five million women worldwide are hospitalized for complications arising from unsafe, illegal abortions.[17]

Internationally, abortion-related deaths occur more frequently in countries that restrict abortion, and the 82 countries with the most restrictive abortion laws also have the highest incidence of unsafe abortions.[18]

The Importance of Reproductive Choices and Access to Healthcare

Whether a woman is choosing parenting, abortion, sterilization, or is attempting to get pregnant through assisted reproductive technologies, her choice should be free from governmental interference, discrimination, and unnecessary barriers.

Women living in states with policies that support women's access to health care have higher earnings and are more integrated into the workforce than women in other states.[19]

Access to reproductive health care has been linked to reduced unemployment gaps between jobs.[20]

[STATE] finds it unacceptable that about one-half of all counties in the United States do not have an OB-GYN,[21] and believes that an individual's ability to access quality health care should not depend on her zip code.

Findings on Importance of Contraception

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[16] Brief for American College of Obstetricians and Gynecologists et al. as Amici Curiae Supporting Appellant at 5, *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016) 2016 WL 74948.
[17] Susan A. Cohen, *Facts and Consequences: Legality, Incidence and Safety of Abortion Worldwide*, 12 GUTTMACHER POLICY REVIEW 2 4 (2009), *available at* https://www.guttmacher.org/sites/default/files/article_files/gpr120402.pdf.
[18] Lisa Haddad & Nawal Naur, *Unsafe Abortion: Unnecessary Maternal Mortality*, 2 REVIEWS IN OBSTETRICS & GYNECOLOGY 122, 124 (2009), *available at* https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2709326/pdf/RIOG002002_0122.pdf.
[19] Kate Bahn et al. , *Linking Reproductive Health Care Access to Labor Market Opportunities for Women*, CTR. FOR AM. PROGRESS (2017), *available at* https://www.americanprogress.org/issues/women/reports/2017/11/21/442653/linking-reproductive-health-care-access-labor-market-opportunities-women/ (finding that "women living in states with a better reproductive health care climate—including insurance coverage of contraceptive drugs and services; expanded Medicaid eligibility for family-planning services; insurance coverage of infertility treatments; and the availability of state-supported public funding for medically necessary abortions—have higher earnings and face less occupational segregation compared with women living in states that have more limited reproductive health care access").
[20] Kate Bahn et al., supra note 19.
[21] Kate Bahn et al., supra note 19.

One-third of the wage gains women have made since the 1960s are the result of access to oral contraceptives.[22]

Studies have found that access to birth control by age 21 is the most influential factor in enabling women to stay in college.[23]

The Centers for Disease Control and Prevention named family planning, including access to modern contraception, one of the ten great public health achievements of the 20th century.[24]

More than 99 percent of women between the ages of 15–44 who have ever had sexual intercourse have used at least one contraception method.[25]

Contraception is commonly used across all demographics and religious denominations by individuals who are sexually active and do not want to become pregnant.[26]

Importance of Access to Reproductive Healthcare for Women of Color

The ability to access safe and legal abortion has been a critical component of women's ability to gain independence and participate fully in society.

Accessing safe and legal abortion is not only critical to women's health and independence, but also to their dignity, freedom, and empowerment.

The rate of maternal mortality for Black women is four times higher than for white women.[27]

Racial and ethnic disparities in health care exist in every state and are exacerbated by policies that make access to the full range of reproductive health services challenging.[28]

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[22] Martha J. Bailey, et al., *The Opt-In Revolution? Contraception and the Gender Gap in Wages*, 4 AM. ECON. J. APPLIED ECON. 225 (2012), *available at* https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3684076/.

[23] Heinrich Hock, *The Pill and the College Attainment of American Women and Men*, Working Paper, Washington, DC: Mathematica Policy Research, 2008; *see also*, ADAM SONFIELD ET AL., GUTTMACHER INST., THE SOCIAL AND ECONOMIC BENEFITS OF WOMEN'S ABILITY TO DETERMINE WHETHER AND WHEN TO HAVE CHILDREN 7 (2013), *available at* https://www.guttmacher.org/sites/default/files/report_pdf/social-economic-benefits.pdf.

[24] Ctr. for Disease Control, Achievements in Public Health, 1900–1999: Family Planning, MORBIDITY AND MORTALITY WEEKLY REPORT, 48(47), 1073-1080 (1999), https://www.cdc.gov/mmwr/preview/mmwrhtml/mm4847a1.htm.

[25] *Insurance Coverage of Contraception*, GUTTMACHER INST. (Dec. 2016), https://www.guttmacher.org/evidence-you-can-use/insurance-coverage-contraception.

[26] *Contraceptive Use in the United States*, Fact Sheet, GUTTMACHER INST. (July 2018), https://www.guttmacher.org/fact-sheet/contraceptive-use-united-states.

[27] Linda Villarosa, *Why America's Black Mothers and Babies are I a Life-or-Death Crisis*, N.Y. TIMES,April 11, 2018, https://www.nytimes.com/2018/04/11/magazine/black-mothers-babies-death-maternal-mortality.html.

Women of color face significant barriers to accessing prenatal care, and consequently the percentage of Black and Latina women with delayed or no prenatal care continues to be about two times that of white women.[29]

Women of color are more likely to be denied coverage for abortion, even when they have health insurance.[30]

Coerced Sterilization for Women of Color and Women with Disabilities

There is a long history of forced sterilization of women of color and people with mental and physical disabilities.[31]

More than half of the states had some type of eugenics law impacting women of color and women with disabilities, some of which lasted through the 1970s.[32]

Even today, women with disabilities continue to face coercive tactics designed to encourage sterilization or abortion, and rates of female sterilization are higher among women with cognitive disabilities than among those with non-cognitive disabilities or no disability.[33]

Women with disabilities are still less likely to receive information about contraception and STI screening than the general population.[34]

Every woman should be able to exercise her reproductive choices free from coercion or discrimination.

Importance of Giving Birth Free from State Interference

---

[28] KAISER FAMILY FOUNDATION, PUTTING WOMEN'S HEALTH CARE DISPARITIES ON THE MAP 99–101 (2009), *available at* https://kaiserfamilyfoundation.files.wordpress.com/2013/01/7886.pdf.
[29] Ngozi Anachebe & Madeline Sutton, *Racial Disparities in Reproductive Health Outcomes*, 188 AM. J. OBSTETRICS GYNECOLOGY S37, S38 (2003).
[30] Megan K. Donovan, *In Real Life: Federal Restrictions on Abortion Coverage and the Women They Impact*, 20 GUTTMACHER POLICY REVIEW 1 (2017), *available at* https://www.guttmacher.org/sites/default/files/article_files/gpr2000116.pdf.
[31] *See* Roberta Cepko, *Involuntary Sterilization of Mentally Disabled Women*, 8 BERKLEY J. OF GENDER, LAW & JUSTICE 122 (1993); Rachel Benson Gold, *Guarding Against Coercion While Ensuring Access: A Delicate Balance*, 17 GUTTMACHER POLICY REV. 8, 9-10 (2014), *available at* https://www.guttmacher.org/sites/default/files/article_files/gpr170308.pdf.
[32] OPEN SOC'Y FOUND., AGAINST HER WILL: FORCED AND COERCED STERILIZATION OF WOMEN WORLDWIDE 3 (2011), https://www.opensocietyfoundations.org/sites/default/files/against-her-will-20111003.pdf.
[33] Henan Li, et al., *Female Sterilization and Cognitive Disability in the United States, 2011–2015*, 132 OBSTETRICS & GYNECOLOGY 559 (2018).
[34] *See* CAROLYN FROHMADER & STEPHANIE ORTOLEVA, INT'L CONFERENCE ON HUMAN RIGHTS, THE SEXUAL AND REPRODUCTIVE RIGHTS OF WOMEN AND GIRLS WITH DISABILITIES 6–7 (July 1, 2013), http://www.womenenabled.org/pdfs/issues_paper_srr_women_and_girls_with_disabilities_final.pdf.

The practice of shackling pregnant incarcerated women during labor, childbirth, or recovery, which includes placing handcuffs or shackles around a woman's wrists, ankles, or even stomach, continues in some places despite efforts to prohibit the practice and requires further legislative action.[35]

Shackling pregnant women deprives women of their liberty and freedom to move around during labor.

The practice of shackling disproportionately affects women of color, who are overrepresented in U.S. prisons and are eight times more likely to be incarcerated than white women.[36]

Shackling incarcerated women not only increases the risks associated with pregnancy, labor, and delivery, but is rarely necessary and demeans women's basic dignity.[37]

Major national medical associations and even correctional associations oppose shackling.[38]

Independent Rights for Embryos or Fetuses

If a fertilized egg, embryo, or fetus, is granted rights, it could result in the criminalization and prosecution of pregnant women not just for abortion, but for anything that goes wrong during pregnancy, putting women's health and lives at risk.

It is critical that [X STATE] ensure that women cannot be criminalized for a miscarriage or for their actions during pregnancy.

Granting legal rights to a fertilized egg, embryo, or fetus could create a chilling effect on health care professionals who provide any type of health care to pregnant women and who treat women for miscarriages.

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[35] INT'L HUMAN RIGHTS CLINIC, UNIV. OF CHICAGO, THE SHACKLING OF INCARCERATED PREGNANT WOMEN: A HUMAN RIGHTS VIOLATION COMMITTED REGULARLY IN THE UNITED STATES 3 (2013), *available at* https://ihrclinic.uchicago.edu/sites/ihrclinic.uchicago.edu/files/uploads/Report%20-%20Shackling%20of%20Pregnant%20Prisoners%20in%20the%20US.pdf. *See also* Priscilla A. Ocen, *Punishing Pregnancy: Race, Incarceration, and the Shackling of Pregnant Prisoners*, 100 CAL. L. REV. 1239, 1247-48 (2012), *available at* https://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=4181&context=californialawreview (describing how shackling has continued in some places despite efforts to prohibit the practice).

[36] Priscilla A. Ocen, *supra* note 35 at 1250–51.

[37] Women's Health Care Physician: Committee on Health Care for Underserved Women, *Health Care for Pregnant and Postpartum Incarcerated Women and Adolescent Females* 2–3 (Am. Coll. of Obstetricians & Gynecologists, Comm. Op. No. 511, Nov. 2011), *available at* http://www.acog.org/~/media/Committee%20Opinions/Committee%20on%20Health%20Care%20for%20Underserved%20Women/co511.pdf?dmc=1&ts=20130725T1738421657.

[38] *See* Int'l Human Rights Clinic, *supra* note 35 at 4 n.20.

Women experiencing health crises during pregnancy should have greater access to the health care system, and should not be criminalized or fear prosecution for accessing needed health care.

It is important that the state safeguard a woman's right to be free from prosecution for actions during pregnancy or miscarriage if in the future, federal constitutional law no longer offers that protection.

Coercion to Continue a Pregnancy or Obtain an Abortion

A pregnant woman's choice to either have an abortion or keep a pregnancy should be entirely her own and free from coercion by any individual, including state inference in the doctor-patient relationship.

One study found that women with unintended pregnancies are four times more likely to experience intimate partner violence than women with intended pregnancies,[39] and reproductive coercion—a partner's attempt to control a woman's reproductive choices—may largely be to blame for the higher level of unplanned pregnancies for women in abusive relationships.[40]

The state shall ensure that all women, including those with disabilities, are protected from coercion to become pregnant, carry a pregnancy to term, or have an abortion.

Women need access to qualified and unbiased advice from health care professionals they trust, not state interference with their personal, medical decisions.

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[39] *Reproductive and Sexual Coercion* (Am. Coll. of Obstetricians & Gynecologists, Comm. Op. No. 554, Feb. 2013) at 2, *available at* https://www.acog.org/-/media/Committee-Opinions/Committee-on-Health-Care-for-Underserved-Women/co554.pdf?dmc=1&ts= 20180830T1925162724

[40] *See* Elizabeth Miller, et al., *Pregnancy Coercion, Intimate Partner Violence, and Unintended Pregnancy*, 81 CONTRACEPTION 316 (2010), *available at* https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2896047/ ("Women's lack of control over her reproductive health is increasingly recognized as a critical mechanism underlying abused women's elevated risk for unintended pregnancy.").

From:	jlyall@acluvt.org
To:	Leriche, Lucy Rose; Diamond, Joshua; Spottswood, Eleanor; cwhite@acluvt.org; Jill Krowinski; jill.krowinski@gmail.com; Becca Balint
Subject:	RE: Meeting Invite Sent
Date:	Tuesday, October 9, 2018 10:04:28 AM
Attachments:	image001.png image002.png image003.png

Thanks Lucy – it's 90 Main St, Suite 200 (above TD Bank). See you all then.

James Duff Lyall
Executive Director
American Civil Liberties Union of Vermont
PO Box 277, Montpelier, VT 05601
802.223.6304 x115 | jlyall@acluvt.org

acluvt.org
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ACLU Vermont

From: Leriche, Lucy Rose <Lucy.Leriche@ppnne.org>
Sent: Tuesday, October 09, 2018 9:43 AM
To: Diamond, Joshua <Joshua.Diamond@vermont.gov>; Spottswood, Eleanor <Eleanor.Spottswood@vermont.gov>; cwhite@acluvt.org; jlyall@acluvt.org; Jill Krowinski <JKrowinski@leg.state.vt.us>; jill.krowinski@gmail.com; Becca Balint <beccabalint@gmail.com>
Subject: Meeting Invite Sent
Hi All!
Our meeting will be on Friday 10/19 at 9:00am at the ACLU Offices in Montpelier. See you then!
Lucy

Lucy Leriche(she/her/hers)
Vice President of Public Policy Vermont
Planned Parenthood Northern New England
784 Hercules Drive suite 110
Colchester, Vermont 05446
Cell: 802 598-4182
www.ppnne.org<http://www.ppnne.org/>
Lucy.Leriche@ppnne.org

Spottswood, Eleanor

From: Spottswood, Eleanor
Sent: Tuesday, October 9, 2018 9:45 AM
To: 'Leriche, Lucy Rose'
Subject: Accepted: Repro Rights

From:	Leriche, Lucy Rose
To:	Diamond, Joshua; Spottswood, Eleanor; cwhite@acluvt.org; jlyall@acluvt.org; Jill Krowinski; jill.krowinski@gmail.com; Becca Balint
Subject:	Meeting Invite Sent
Date:	Tuesday, October 9, 2018 9:42:53 AM

Hi All!

Our meeting will be on Friday 10/19 at 9:00am at the ACLU Offices in Montpelier. See you then!

Lucy

Lucy Leriche(she/her/hers)
Vice President of Public Policy Vermont
Planned Parenthood Northern New England
784 Hercules Drive suite 110
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www.ppnne.org<http://www.ppnne.org/>
Lucy.Leriche@ppnne.org

From: Leriche, Lucy Rose
To: Diamond, Joshua; Spottswood, Eleanor; cwhite@acluvt.org; jlyall@acluvt.org; Jill Krowinski; Becca Balint
Subject: Next abortion Rights meeting
Date: Friday, October 5, 2018 11:40:01 AM

Please fill out the following doodle so we can get our next meeting on the books!
https://doodle.com/poll/34ixxbv3kand3g6u
Lucy

Lucy Leriche(she/her/hers)
Vice President of Public Policy Vermont
Planned Parenthood Northern New England
784 Hercules Drive suite 110
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From: Jill Krowinski
To: Diamond, Joshua; Spottswood, Eleanor; cwhite@acluvt.org; jlyall@acluvt.org; Lucy Leriche
Cc: Levasseur, Katherine
Subject: Following Up
Date: Tuesday, September 25, 2018 2:22:04 PM

Hello,

It was good to see all of you last week. I spoke with Sen. Balint, she is supportive and wants to be part of the group discussion. Lucy, can you please include her in the next round of group emails? Thank you!

I spoke with Brynn in legislative council and put in a drafting request on the short term game plan bill and am meeting with Sen. Lyons on Thursday.

Thanks,
Jill

Representative Jill Krowinski
(she/her/hers)
House Majority Leader
Chittenden 6-3
Cell 802-363-3907

From:	Spottswood, Eleanor
To:	Matthews, Deborah
Subject:	FW: state ERA
Date:	Friday, September 21, 2018 8:04:00 AM

See below.

From: Jill Krowinski <JKrowinski@leg.state.vt.us>
Sent: Thursday, September 20, 2018 10:41 PM
To: Leriche, Lucy Rose <Lucy.Leriche@ppnne.org>
Cc: Diamond, Joshua <Joshua.Diamond@vermont.gov>; Spottswood, Eleanor <Eleanor.Spottswood@vermont.gov>; cwhite@acluvt.org; jlyall@acluvt.org
Subject: Re: state ERA

Hi all,

Thanks for this info, Lucy.

Just a heads up I'm going to bring a Katherine Levasseur from the Speaker's office with me tomorrow.

See you soon,

Jill

Sent from my iPhone

On Sep 19, 2018, at 11:04 AM, Leriche, Lucy Rose <Lucy.Leriche@ppnne.org> wrote:

> Hello everyone,
>
> I am looking forward to connecting with you all on Friday morning at 9am at the AG's office in Montpelier. Please see the message below from an attorney at PPFA. Some good information for us as we continue our discussion about abortion access in Vermont.
>
> Best,
>
> Lucy
>
> Lucy Leriche(she/her/hers)
> Vice President of Public Policy Vermont
> Planned Parenthood Northern New England
> 784 Hercules Drive suite 110
> Colchester, Vermont 05446
> Cell: 802 598-4182
> www.ppnne.org<http://www.ppnne.org/>
> Lucy.Leriche@ppnne.org
>
> **From:** Sousa, Bethany <bethany.sousa@ppfa.org>
> **Sent:** Tuesday, September 18, 2018 4:54 PM
> **To:** Leriche, Lucy Rose <Lucy.Leriche@ppnne.org>
> **Subject:** state ERA
>
> Hi Lucy,
>
> I wanted to get back to you but also happy to discuss this over the phone. I don't know who was pushing/supporting these ERA efforts, how likely it is to pass, etc so we could discuss more on the phone if it's helpful.

I do think it is a tricky proposition to add reproductive rights to your state ERA for several reasons. One, if you add it to the language and then it fails, there is some risk that courts look back at the failure and interpret it to mean that abortion isn't protected in the constitution because you tried to add it and failed. I don't think this reason disqualifies the idea, but I do think you would have to be very conscious of what legislators and advocates are saying about the reason to add this in and make clear that that abortion is already protected and this would just be more explicit, put it in a different place, etc. This obviously works both ways b/c then some will ask why you really need to do it if it's already protected, etc. Second, there is no easy way to add it to this language without being explicit and without singling out sex discrimination from the other parts of the provision. You could add it into the text rather than defining it below (ie sex, which includes pregnancy, etc), but however you do it, it will certainly stand out. This isn't about putting a privacy protection into the constitution - this is about defining sex to make sure it includes abortion/repro rights. I think this makes it hard politically and I would assume you would get push back from other advocacy groups who are behind the ERA.

Here is one formulation (new text in red):

"Equal protection under the law shall not be denied or abridged because of race, sex, age, religion, creed, color, familial status, disability, sexual orientation, gender identity, or national origin."

"Sex" includes but is not limited to the capacity to become pregnant, pregnancy, and the prevention and termination of pregnancy.

I also think it's worth considering whether you can change it to "equal rights" rather than "equal protection." Although you have a common benefits clause rather than a state equal protection clause, the term "equal protection" references the federal constitutional provision and it may be better to have language that doesn't reference the federal constitution in that way and creates something new for the state. As you know, the federal constitution's abortion protections have been found within privacy and not equal protection, so referencing that body of law isn't necessarily helpful for abortion. Many other state ERAs use "equal rights" language, although I can't claim that all of those state ERAs that have used that language have been interpreted more broadly by state courts b/c that isn't the case. So not sure if you could get those pushing the amendment to change the language now, but I do think it would be worth considering if they are also willing to include your language/issue and define "sex" in some way.

I also think it's worth doing some research on how legislative history is treated in VT by the courts and whether it could be enough to argue that abortion in included in sex discrimination throughout the debates and passage of the ERA. This could be a fallback if it seems like you can't add something into the existing ERA language. We can do some research around constitutional amendments in VT

and what the leg history looks like and if it was used in any analysis by state courts.

Let me know if you want to discuss. There are other ways to try to define sex but they are all somewhat similar.

On another note, some national coalition partners have been working with us to draft a model FOCA and it will look somewhat different than what I sent you (although it's not finalized yet). I can send you a version when I have it. We also have a ton of findings and I can send you what we have right now or wait another week or two to see what additions we get from our partners. Let me know your timing. The findings can also be used as TPs.

Best,

Beth

--

Bethany Sousa
Senior Policy Counsel
Public Policy, Litigation and Law
Planned Parenthood Federation of America
123 William St., NYNY 10038
212-261-4572

From:	Jill Krowinski
To:	Leriche, Lucy Rose
Cc:	Diamond, Joshua; Spottswood, Eleanor; cwhite@acluvt.org; jlyall@acluvt.org
Subject:	Re: state ERA
Date:	Thursday, September 20, 2018 10:41:35 PM

Hi all,

Thanks for this info, Lucy.

Just a heads up I'm going to bring a Katherine Levasseur from the Speaker's office with me tomorrow.

See you soon,
Jill

Sent from my iPhone

On Sep 19, 2018, at 11:04 AM, Leriche, Lucy Rose <Lucy.Leriche@ppnne.org> wrote:

> Hello everyone,
> I am looking forward to connecting with you all on Friday morning at 9am at the AG's office in Montpelier. Please see the message below from an attorney at PPFA. Some good information for us as we continue our discussion about abortion access in Vermont.
> Best,
> Lucy
> Lucy Leriche(she/her/hers)
> Vice President of Public Policy Vermont
> Planned Parenthood Northern New England
> 784 Hercules Drive suite 110
> Colchester, Vermont 05446
> Cell: 802 598-4182
> www.ppnne.org<http://www.ppnne.org/>
> Lucy.Leriche@ppnne.org
> **From:** Sousa, Bethany <bethany.sousa@ppfa.org>
> **Sent:** Tuesday, September 18, 2018 4:54 PM
> **To:** Leriche, Lucy Rose <Lucy.Leriche@ppnne.org>
> **Subject:** state ERA
> Hi Lucy,
> I wanted to get back to you but also happy to discuss this over the phone. I don't know who was pushing/supporting these ERA efforts, how likely it is to pass, etc so we could discuss more on the phone if it's helpful.
> I do think it is a tricky proposition to add reproductive rights to your state ERA for several reasons. One, if you add it to the language and then it fails, there is some risk that courts look back at the failure and interpret it to mean that abortion isn't

protected in the constitution because you tried to add it and failed. I don't think this reason disqualifies the idea, but I do think you would have to be very conscious of what legislators and advocates are saying about the reason to add this in and make clear that that abortion is already protected and this would just be more explicit, put it in a different place, etc. This obviously works both ways b/c then some will ask why you really need to do it if it's already protected, etc. Second, there is no easy way to add it to this language without being explicit and without singling out sex discrimination from the other parts of the provision. You could add it into the text rather than defining it below (ie sex, which includes pregnancy, etc), but however you do it, it will certainly stand out. This isn't about putting a privacy protection into the constitution - this is about defining sex to make sure it includes abortion/repro rights. I think this makes it hard politically and I would assume you would get push back from other advocacy groups who are behind the ERA.

Here is one formulation (new text in red):

"Equal protection under the law shall not be denied or abridged because of race, sex, age, religion, creed, color, familial status, disability, sexual orientation, gender identity, or national origin."

"Sex" includes but is not limited to the capacity to become pregnant, pregnancy, and the prevention and termination of pregnancy.

I also think it's worth considering whether you can change it to "equal rights" rather than "equal protection." Although you have a common benefits clause rather than a state equal protection clause, the term "equal protection" references the federal constitutional provision and it may be better to have language that doesn't reference the federal constitution in that way and creates something new for the state. As you know, the federal constitution's abortion protections have been found within privacy and not equal protection, so referencing that body of law isn't necessarily helpful for abortion. Many other state ERAs use "equal rights" language, although I can't claim that all of those state ERAs that have used that language have been interpreted more broadly by state courts b/c that isn't the case. So not sure if you could get those pushing the amendment to change the language now, but I do think it would be worth considering if they are also willing to include your language/issue and define "sex" in some way.

I also think it's worth doing some research on how legislative history is treated in VT by the courts and whether it could be enough to argue that abortion in included in sex discrimination throughout the debates and passage of the ERA. This could be a fallback if it seems like you can't add something into the existing ERA language. We can do some research around constitutional amendments in VT and what the leg history looks like and if it was used in any analysis by state courts.

Let me know if you want to discuss. There are other ways to try to define sex but

they are all somewhat similar.
On another note, some national coalition partners have been working with us to draft a model FOCA and it will look somewhat different than what I sent you (although it's not finalized yet). I can send you a version when I have it. We also have a ton of findings and I can send you what we have right now or wait another week or two to see what additions we get from our partners. Let me know your timing. The findings can also be used as TPs.
Best,
Beth
--
Bethany Sousa
Senior Policy Counsel
Public Policy, Litigation and Law
Planned Parenthood Federation of America
123 William St., NYNY 10038
212-261-4572

From:	Wemple, Doug
To:	Diamond, Joshua
Cc:	Spottswood, Eleanor
Subject:	Title X Draft
Date:	Wednesday, September 19, 2018 2:27:20 PM

Dear Judi:

Our office received your correspondence with Governor Scott's office inquiring about Vermont and the recently proposed changes to Title X funding.

Attorney General Donovan and his office remain committed to standing up for Title X. Earlier this summer, the Office of the Vermont Attorney General spoke out to encourage Vermonters to speak out against these proposed changes. Title X works. This program was created to provide access to high-quality family planning and related preventative health care for low-income and underserved individuals. Any potential changes would be devastating, particularly to rural communities in Vermont. Title X clinics provide essential preventive health care services to millions nationwide, including STD testing, family planning, and cancer screenings.

The Vermont Department of Health is the sole grantee in the State of Title X funds, most of which are designated to Planned Parenthood of Northern New England. PPNNE provides services at ten locations in Vermont, serving rural populations.

On July 31st, Attorney General Donovan joined Attorney's General Ferguson (Washington), Healey (Massachusetts), and Rosenblum (Oregon) urging the U.S. Department of Health and Human Services to withdraw its proposed rule changes. I've attached a copy of this letter for your review. Thank you for speaking out in support of this important issue. Attorney General Donovan shares your concerns and will continue to speak out in support of Vermonters having access to these essential healthcare services. Please be in touch with any questions or further concerns.

Sincerely,

Doug Wemple

Doug Wemple
Executive Assistant
Office of the Vermont Attorney General
109 State Street - Montpelier, VT
Office: (802)828-5515

From: Leriche, Lucy Rose
To: Diamond, Joshua; Spottswood, Eleanor; cwhite@acluvt.org; Jill Krowinski; jlyall@acluvt.org
Subject: FW: state ERA
Date: Wednesday, September 19, 2018 11:04:12 AM

Hello everyone,
I am looking forward to connecting with you all on Friday morning at 9am at the AG's office in Montpelier. Please see the message below from an attorney at PPFA. Some good information for us as we continue our discussion about abortion access in Vermont.
Best,
Lucy
Lucy Leriche(she/her/hers)
Vice President of Public Policy Vermont
Planned Parenthood Northern New England
784 Hercules Drive suite 110
Colchester, Vermont 05446
Cell: 802 598-4182
www.ppnne.org<http://www.ppnne.org/>
Lucy.Leriche@ppnne.org
From: Sousa, Bethany <bethany.sousa@ppfa.org>
Sent: Tuesday, September 18, 2018 4:54 PM
To: Leriche, Lucy Rose <Lucy.Leriche@ppnne.org>
Subject: state ERA
Hi Lucy,
I wanted to get back to you but also happy to discuss this over the phone. I don't know who was pushing/supporting these ERA efforts, how likely it is to pass, etc so we could discuss more on the phone if it's helpful.
I do think it is a tricky proposition to add reproductive rights to your state ERA for several reasons. One, if you add it to the language and then it fails, there is some risk that courts look back at the failure and interpret it to mean that abortion isn't protected in the constitution because you tried to add it and failed. I don't think this reason disqualifies the idea, but I do think you would have to be very conscious of what legislators and advocates are saying about the reason to add this in and make clear that that abortion is already protected and this would just be more explicit, put it in a different place, etc. This obviously works both ways b/c then some will ask why you really need to do it if it's already protected, etc.
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sex, age, religion, creed, color, familial status, disability, sexual orientation, gender identity, or national origin."

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Best,

Beth

--

Bethany Sousa
Senior Policy Counsel
Public Policy, Litigation and Law
Planned Parenthood Federation of America
123 William St., NYNY 10038
212-261-4572

From:	Spottswood, Eleanor
To:	Diamond, Joshua; Wemple, Doug
Cc:	Clark, Charity
Subject:	RE: AG constituent inquiry
Date:	Tuesday, September 18, 2018 2:42:00 PM
Attachments:	Final_Title_X_Comment_Letter_7.31.18 WAMAORVT.PDF VDH -HHS-OS-2018-0008 Vermont Comments.pdf image002.png image003.png

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I attach the official Title X comments from TJ and the AGs of Washington, Massachusetts, and Oregon.
In case you'd like to include it, I also attach comments filed separately (against the proposed rules) from the Vermont Department of Health.
Ella

From: Diamond, Joshua
Sent: Tuesday, September 18, 2018 2:36 PM
To: Wemple, Doug <Doug.Wemple@partner.vermont.gov>
Cc: Clark, Charity <Charity.Clark@vermont.gov>; Spottswood, Eleanor <Eleanor.Spottswood@vermont.gov>
Subject: FW: AG constituent inquiry
Doug,
Please prepare a response that informs Ms. Daly that Vermont is opposing the proposed Title X rules and provide a copy of the public comments that we filed. Ella, could you provide a copy of the comments for Doug?
Thanks. Josh
Joshua R. Diamond, Deputy Attorney General
Vermont Attorney General's Office
109 State Street
Montpelier, Vermont 05609
802-828-3175
joshua.diamond@vermont.gov

From: Wemple, Doug
Sent: Tuesday, September 18, 2018 1:39 PM
To: Matthews, Deborah <Deborah.Matthews@vermont.gov>; Clark, Charity <Charity.Clark@vermont.gov>; Diamond, Joshua <Joshua.Diamond@vermont.gov>
Subject: RE: AG constituent inquiry
I can follow up and let Judi know about our office's work around Title X.
Doug Wemple

Executive Assistant
Office of the Vermont Attorney General
109 State Street - Montpelier, VT
Office: (802)828-5515

From: Matthews, Deborah
Sent: Tuesday, September 18, 2018 8:13 AM
To: Wemple, Doug <Doug.Wemple@partner.vermont.gov>; Clark, Charity <Charity.Clark@vermont.gov>; Diamond, Joshua <Joshua.Diamond@vermont.gov>
Subject: FW: AG constituent inquiry

Deb Matthews
Administrative Secretary
Office of the Attorney General | GCAL
109 State Street, 3rd Floor
Montpelier, VT 05609
Phone | 802-828-3689
E-Mail | deborah.matthews@vermont.gov

From: Rubinstein, David
Sent: Monday, September 17, 2018 5:13 PM
To: AGO - Info <AGO.Info@vermont.gov>
Subject: AG constituent inquiry

Good evening,

We recently received this email at the Governor's Office – I figured I'd pass it along since it appears to fall under the AG's purview. Let me know if you would like any more information.

Best,
David

Why is Vermont not part of the group of states (12 states and the District of Columbia) urging the HHS Secretary Alex Azar NOT to implement proposed Title X rules that will effectively gag providers from advising patients on all their reproductive health options? Vermont has long supported Planned Parenthood and women's rights to family planning. The proposed rules are a disaster. Please refer to the letter written by a group of other state's attorney generals.
https://oag.ca.gov/system/files/attachments/press-docs/final-title-xcomment-letter.pdf

Judi Daly
judicdaly@yahoo.com
1061 Cobb Hill Rd
Waterbury, Vermont 05676
8022445868 (H)

David Rubinstein
Executive Assistant
Office of Governor Phil Scott

State of Vermont
P. 802.828.6438
David.Rubinstein@vermont.gov | governor.vermont.gov

Bob Ferguson
ATTORNEY GENERAL OF WASHINGTON
Administration Division
PO Box 40100 ● Olympia, WA 98504-0100 ● (360) 753-6200

July 31, 2018

VIA FEDERAL eRULEMAKING PORTAL

Secretary Alex M. Azar II
Assistant Secretary ADM Brett P. Giroir, M.D.
Deputy Assistant Secretary Diane Foley, M.D., FAAP
Attention: Family Planning
U.S. Department of Health and Human Services
Hubert H. Humphrey Building, Room 716G
200 Independence Avenue SW
Washington, DC 20201

RE: HHS–OS–2018–0008, Comments on Proposed Rule: *Compliance With Statutory Program Integrity Requirements*, Docket No.: HHS-OS-2018-0008

Dear Secretary Azar, Assistant Secretary Giroir, and Deputy Assistant Secretary Foley:

The undersigned, Attorneys General for the States of Washington, Oregon, and Vermont and the Commonwealth of Massachusetts, respectfully urge the Department of Health and Human Services (the Department) to withdraw its Proposed Rule: *Compliance with Statutory Program Integrity Requirements*, 83 Fed. Reg. 25,502 (June 1, 2018). We have grave concerns with the legality of the proposed rule, and do not believe it would survive judicial review in its current form.

The Title X family planning program was created to provide access to high-quality family planning and related preventive health care for low-income and underserved individuals. The proposed rule has a host of legal flaws. In some states, if implemented, it will eliminate from the Title X program many Title X providers and leave thousands of residents without reasonable options for critical family planning services. In other states, it will frustrate the ability of providers to deliver high-quality and complete care to their patients and will undermine the efficacy of the network as a whole. The proposed rule thus frustrates rather than promotes the purposes of Title X. The proposed rule shifts the burden and costs to the states, including myriad reproductive health services related to unintended pregnancies, treatment of sexually transmitted infections (STIs), cervical and breast cancer screening and treatment, and other public health

services that the Title X program currently covers. The public health impact will fall the heaviest on our States' most vulnerable populations – including low-income and rural women and families, immigrants and people of color that the program is intended to help.

Further, the proposed rule requires directive counseling, which is in violation of a federal statute governing Title X.[1] It illegally injects the government into the Title X medical examination room, and it violates the constitutional rights of providers and patients under the First and Fifth Amendments. The proposed rule also violates the Department's current statutory interpretation of "acceptable and effective family planning methods and services" without mentioning the current interpretation or the evidence justifying it. Various parts of the rule are unsupported by any evidence and are thus arbitrary and capricious. Finally, the proposed rule violates Executive Orders 12866 and 13562.

A. Relevant Background of Title X to the Public Health Service Act, 42 U.S.C. §§ 300-300a-6

The Family Planning and Services Population Research Act of 1970, which added Title X to the Public Health Service Act, authorizes the Secretary of Health and Human Services:

> 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 . . . .

42 U.S.C. § 300(a).

Title X projects serve an estimated four million women annually.[2] In 2015, 64 percent of U.S. counties had at least one safety-net family planning center supported by Title X, and 90 percent of women in need of publicly funded family planning care lived in those counties.[3] Title X clients are among the nation's most vulnerable populations: two-thirds have incomes at or below the Federal Poverty Level (FPL)($20,090 for a family of three in 2015), nearly half are uninsured—even after implementation of the Affordable Care Act's (ACA) major insurance

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[1] Public Law No. 115-141, § 118, https://www.congress.gov/bill/115th-congress/house-bill/1625/text.

[2] Fowler CI et al., Family Planning Annual Report: 2015 National Summary, Research Triangle Park, NC: RTI International, 2016, http://www.hhs.gov/opa/sites/default/files/title-x-fpar-2015.pdf (last accessed 7/17/18).

[3] Frost JJ and Zolna MR, Response to inquiry concerning the availability of publicly funded contraceptive care to U.S. women, memo to U.S. Senator Patty Murray, Senate Health, Education, Labor and Pensions Committee, New York: Guttmacher Institute, May 3, 2017, https://www.guttmacher.org/article/2017/05/guttmacher-murray-memo-2017 (last accessed 7/17/18).

expansions—and another 35 percent have coverage through Medicaid and other public programs.[4]

In 2015, the contraceptive care delivered by Title X–funded providers helped women avoid 822,000 unintended pregnancies, which would have resulted in 387,000 unplanned births and 278,000 abortions.[5] Without the contraceptive care provided by these health centers, the U.S. rates of unintended pregnancy and abortion would have been 31 percent higher, and the teen unintended pregnancy rate would have been 44 percent higher.[6] Title X is a vital program, especially for low-income women and teens as:

> access to and consistent use of the most effective contraceptive methods are not enjoyed equally by all U.S. women. Disparities in contraceptive use are a major reason why half of U.S. pregnancies—3.2 million each year—are unplanned. . . . [U]nplanned and teen pregnancies occur disproportionately to poor women (those with incomes below the federal poverty level), whose unplanned pregnancy rate is five times that of higher income women.[7]

Concern for low-income women led President Nixon to push for national family planning assistance in the 1960s, stating that "unwanted or untimely childbearing is one of the several forces which are driving many families into poverty or keeping them in that condition."[8] That remains a driving concern today. Studies have shown that access to family planning assistance makes it more likely that a teen will graduate high school, that a woman will achieve her educational and career goals, and that a woman will earn more money (positively impacting not only her life, but the lives of her family).[9] Access to family planning also leads to healthier

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[4] Fowler CI et al., Family Planning Annual Report: 2015 National Summary, Research Triangle Park, NC: RTI International, 2016, http://www.hhs.gov/opa/sites/default/files/title-x-fpar-2015.pdf (last accessed 7/17/18).

[5] Frost JJ, et al., Publicly Funded Contraceptive Services at U.S. Clinics, 2015, New York: Guttmacher Institute, 2017, https://www.guttmacher.org/report/publicly-funded-contraceptive-services-us-clinics-2015 (last accessed 7/17/18).

[6] Hasstedt K, Why We Cannot Afford to Undercut the Title X National Family Planning Program, Guttmacher Institute, Jan. 30, 2017, https://www.guttmacher.org/gpr/2017/01/why-we-cannot-afford-undercut-title-x-national-family-planning-program (last accessed 7/17/18).

[7] Adam Sonfield, *What Women Already Know: Documenting the Social and Economic Benefits of Family Planning*, Guttmacher Institute (Mar. 2013), *available at* https://www.guttmacher.org/gpr/2013/03/what-women-already-know-documenting-social-and-economic-benefits-family-planning.

[8] Special Message to the Congress on Problems of Population Growth (Jul. 18, 1969), *available at* http://www.presidency.ucsb.edu/ws/?pid=2132.

[9] Adam Sonfield et al., *The Social and Economic Benefits of Women's Ability To Determine Whether and When to Have Children*, Guttmacher Institute, *available at* https://www.guttmacher.org/report/social-and-economic-benefits-womens-ability-determine-whether-and-when-have-children, and *Staff of J. Economic Comm., 114th Cong. The Economic Benefits of Access to Family Planning, available at*

relationships, better health outcomes, and better parenting.[10] Title X is critical in assuring that teens and low-income women can achieve these same positive outcomes.

For many women, a visit to a family planning provider is about far more than birth control. During a visit for contraceptive services at a Title X site, women commonly receive other preventive sexual and reproductive health services, including preconception health care and counseling, STI testing and treatment, human papillomavirus (HPV) vaccinations, cancer screening, Pap tests for early detection of cervical cancer, and referrals for mammograms. Title X providers also screen for a host of other potential health issues, such as high blood pressure, diabetes, and depression, connecting clients to further care when needed.[11] For four in 10 women who obtain their contraceptive care from a safety-net family planning center that focuses on reproductive health, that provider is their only source of care.

Title X improves the health of our States' residents beyond helping them plan for their pregnancies. In 2010, the services provided within the Title X network prevented 87,000 preterm or low-weight births, 63,000 STIs and 2,000 cases of cervical cancer.[12]

B. Title X Is a Critical Program That Provides High-Quality Care To Thousands of Residents of Washington, Massachusetts, Oregon, and Vermont Every Year.

1. *Washington*

The Washington State Department of Health (DOH) is the sole grantee of Title X funds in Washington State and runs the program. Washington's current grant project period is one year and six months and ends August 31, 2018.

Washington's Title X expenditure for 2017 was approximately $13 million. The state-funded amount was approximately $9 million, and the federally funded amount was approximately $4 million.

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https://www.jec.senate.gov/public/_cache/files/d0a67745-74ff-439c-a75a-aacc47e0abc1/jec-fact-sheet---economic-benefits-of-access-to-family-planning.pdf.

[10] *Id.*

[11] Frost JJ, Gold RB and Bucek A, Specialized family planning clinics in the United States: why women choose them and their role in meeting women's health care needs, Women's Health Issues, 2012, 22(6):e519–e525, http://www.whijournal.com/article/S1049-3867(12)00073-4/pdf (last accessed 7/17/18).

[12] Sonfield A, Beyond preventing unplanned pregnancy: the broader benefits of publicly funded family planning services, *Guttmacher Policy Review*, 2014, 17(4):2–6, http://www.guttmacher.org/gpr/2014/12/beyond-preventing-unplanned-pregnancy-broader-benefits-publicly-funded-family-planning (last accessed 7/17/18). 2010 is the most recent year for which these data are available.

Washington served 91,284 patients through Title X in 2017, with 128,296 patient visits. In 2017, 57 percent of Washington's Title X-funded patients were at or below the FPL, and 81 percent had incomes below 200 percent of the FPL. Sixteen percent of Title X clients were women of color. Nine percent of patients were under the age of 18. The DOH projects that Title X services prevented 16,233 unintended pregnancies in 2017; the resulting cost savings for Title X services (including STI, HIV, HPV, and Pap tests) was $113,434,910.

DOH distributes Washington's Title X funds by an approved allocation process. DOH broadly distributes information about an upcoming competition for Title X funds toward the end of the project period. It conducts a formal Request for Proposals process to select providers. After the due date for proposals is past, they are reviewed by objective reviewers and scored on criteria that includes choosing the entities that can best utilize the available funding to carry out Title X requirements.

In addition to Title X funds, Washington separately funds contracted Title X health care providers for Title X-allowable services. Further, some Medicaid providers in Washington offer Title X-allowable services but are not Title X projects. The funding from Title X and Medicaid is separate and distinct. However, if an entity receives Title X funding, all clients that have received services according to Title X guidelines are counted as Title X clients in the data system regardless of their funding source.

There are 12 Title X sub-grantee agencies with 70 clinic sites across Washington State. Five of the 12 agencies that receive Title X funds in Washington perform abortions outside of the Title X project. There are several counties in Washington that only have one Title X provider, including Clallam, Grays Harbor, Pacific, Kitsap, Wahkiakum, Lewis, Thurston, Mason, Jefferson, Whatcom, Skagit, Clark, Skamania, Kittitas, Chelan, Ferry, Pend Oreille, Whitman, and Walla Walla. All sites have physicians on staff as medical directors, but nurse practitioners primarily provide care to patients. All sites have nurse practitioners accessible during all business hours.

Washington subjects Title X providers to numerous contractual requirements. These include: (1) they must be non-profit agencies; (2) they must be able to meet reporting requirements (including the ability to extract data from their Electronic Medical Records system to report to the contracted data vendor); (3) they must follow all regulations; (4) they must be able to separate abortion activities from Title X funding; and (5) they must have qualified personnel and licensed providers.

2. *Massachusetts*

Approximately $6,155,000 in Title X funding flows into Massachusetts annually. These funds support, either directly or indirectly, 90 family planning providers. In 2016 alone, Title X

providers in Massachusetts served 66,072 people.[13] Data from fiscal year 2017 shows that 88 percent of all Title X visits were made by female patients, 50 percent of all patients were between 18 and 29 years old, and 88 percent of all patients were at or below 200 percent of the FPL.

Title X providers in Massachusetts offer a wide range of services and care, including pregnancy testing and options counseling; contraceptive services and supplies; pelvic exams; screenings for cervical and breast cancer; screenings for high blood pressure, anemia, and diabetes; screenings and treatment for STIs; infertility services; health education; and referrals for other health and social services. These services not only have a profound and positive impact on patients' lives, but also save Massachusetts and the federal government money. In fact, according to one estimate, Title X services save Massachusetts and the federal government approximately $140 million per year in Massachusetts alone.[14] Beyond the significant fiscal impact, the services provided have a real and profound impact on the lives of Massachusetts women and their families. In 2014, Title X-funded centers met 15 percent of all contraceptive needs in Massachusetts[15] and helped avert 13,600 unintended pregnancies.[16]

Title X funds are crucial and must be spent wisely. Programs that currently receive these funds do so in a culturally competent and welcoming manner. They offer an array of services. They understand the health needs of their patients. The proposed rule does not advance Title X's purpose and undermines the ability of its recipients to do the important work that they do every day on behalf of some of Massachusetts' most vulnerable patients.

3. *Oregon*

The state of Oregon has been the umbrella grantee for Title X services throughout Oregon since 1970. The Oregon Health Authority's Reproductive Health Program administers the state's Title X grant. In fiscal year 2018, Oregon's Title X award was $3,076,000. This funding provides direct support to a network of 35 agencies with 106 clinic sites and is comprised of local public

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[13] *Title X in Massachusetts: Improving Public Health and Saving Taxpayer Dollars*, National Family Planning & Reproductive Health Association, at 1 (Dec. 2017), available at https://www.nationalfamilyplanning.org/file/state-snapshots-2017/Massachusetts.pdf.

[14] *Contraception, Cost Savings at Title X-Funded Centers: From Contraceptive Services*, Guttmacher Institute Data Center, https://data.guttmacher.org/states/table?state=MA&dataset=data&topics=96 (last visited July 30, 2018).

[15] *Contraception, Title X-Funded Centers: Percentage of Need Met By Title X-Funded Centers*, Guttmacher Institute Data Center, https://data.guttmacher.org/states/table?state=MA&dataset=data&topics=257 (last visited July 30, 2018).

[16] *Contraception, Outcomes Averted By Title X-Funded Centers: From Contraceptive Services*, Guttmacher Institute Data Center, https://data.guttmacher.org/states/table?state=MA&topics=120&dataset=data (last visited July 30, 2018).

health authorities, federally qualified health centers (FQHCs), Planned Parenthood clinics, rural health centers, and other community health centers. Almost every county has at least one Title X Program provider, often with multiple clinic sites per provider.

A total of 37,012 unduplicated clients were served by Title X sub-recipient clinics in 2017. Of these clients, 15,225 (41 percent) were uninsured, meaning they have limited options for accessing affordable reproductive health services.

Oregon's Title X clinics provide essential, high-quality preventive reproductive health services to underserved individuals. Data from 2017 show that of the 37,012 clients served by Oregon's Title X clinics:

- 93 percent were female;
- 47 percent were females between the ages of 18 and 29;
- 95 percent were at or below 250 percent of the FPL and 66 percent were at or below 100 percent of the FPL; and
- 60,647 clinic visits were provided, including:
  - 6,511 cervical cancer screenings
  - 49,366 STI screenings
  - 12,649 annual/well-woman exams

Further evidence of the high quality of care in Oregon's Title X clinics comes from clients themselves. According to Oregon's 2015 Reproductive Health Client Satisfaction Survey, 99 percent of clients reported the following: that medical staff respected their values, they trust the medical staff to help them make decisions, and they would recommend the clinic to friends or family.

In addition to offering high quality care, Oregon's Title X program is also cost effective. In 2017, over 6,000 unintended pregnancies were averted through the provision of effective contraceptive methods and high-quality counseling services in Oregon's Title X clinics. Using a conservative estimate of $16,000 for an average delivery and the first year of infant health care under Oregon's Medicaid program, even if less than half of these 6,000 unintended pregnancies resulted in births, the savings to the state were in excess of $40 million in taxpayer funds in Oregon alone in 2017.

4. *Vermont*

The Vermont Department of Health, the sole grantee for Vermont, has relied on Title X grant funding for decades. The Vermont Department of Health receives about $775,000 annually from Title X, of which the majority is passed on directly to the sole sub-grantee, Planned Parenthood of Northern New England (PPNNE). With these funds, PPNNE provides reproductive health

services at 10 different clinics located throughout Vermont. These clinics serve a largely rural population—none are located in Chittenden County, the most populous county of Vermont.

Through these clinics, Title X provided family planning services to 9,808 Vermonters in 2016. Of these, 44 percent reported income of less than 100 percent of the FPL, and 76 percent had income less than 250 percent of the FPL. Vermont's Title X patients were 11 percent male, and 20 percent were under age 20. And 22 percent had no health insurance.[17]

Services provided by Title X funds in Vermont include "a broad range of family planning and related preventive health services for Vermont women, men, and their partners."[18] As required in 42 C.F.R. Part 59, all pregnancy counseling at Title X clinics in Vermont is nondirective.[19] In addition, Title X funds provided "patient education and counseling; breast and pelvic examinations; breast and cervical cancer screening according to nationally recognized standards of care; STI and Human Immunodeficiency Virus (HIV) prevention education, counseling, testing and referral; and pregnancy diagnosis and counseling."[20]

Title X funding has been an essential part of the success that Vermont has seen in reproductive health outcomes over time. For example, while the current Title X rules and program have been in place, the number of teen pregnancies in Vermont has steadily declined.[21] And, the number of teen abortions occurring in Vermont has steadily declined.[22] This is consistent with the overall drop in abortion rates in Vermont and nationwide.[23] Title X-specific analyses show that these trends over time are at least partly attributable to Title X funding. One estimate shows that approximately 1900 unintended pregnancies were averted by Title X-funded clinics in Vermont

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[17] Office of Population Affairs, Title X Family Planning Annual Report: Vermont (April 2017) (on file with Vermont Attorney General's Office).

[18] Office of Population Affairs, Program Review: Title X Family Planning Project: Vermont Department of Health, 1, 33 (May 2017) (on file with Vermont Attorney General's Office).

[19] *Id.* at 34-35.

[20] *Id.* at 1.

[21] Kathryn Kost et al., *Pregnancies, Births and Abortions Among Adolescents and Young Women in the United States, 2013: National and State Trends by Age, Race and Ethnicity*, 36 (Guttmacher Inst. Aug. 2017) (data going back to 1988), *available at* https://www.guttmacher.org/sites/default/files/report_pdf/us-adolescent-pregnancy-trends-2013.pdf

[22] *Id.* at 40.

[23] Vt. Dept. of Health, "Fig. 11: Vermont and U.S. Abortion Ratios 1980 – 2016," *2016 Vital Statistics: 132nd Report Relating to the Registry and Return of Births, Deaths, Marriages, Divorces, and Dissolutions*, 129 (Agency of Human Servs. 2016) (data going back to 1980), *available at* http://www.healthvermont.gov/sites/default/files/documents/pdf/Vital%20Statistics%20Bulletin%202016.pdf

in 2014.[24] Of those, 400 would have been teen pregnancies.[25] In addition, Title X's successes have not been limited to pregnancy outcomes. Although Title X is not the only public health program addressing these issues, cervical cancer rates[26] and new HIV/AIDS diagnoses[27] in Vermont have been generally declining as well. In 2016, Title X clinics screened 1,344 clients for cervical cancer and 2,834 clients for HIV.[28]

The successes of the Title X program translate from public health to the public fisc. By one estimate, Title X services in Vermont saved the state and federal governments $7,868,000 in 2010.[29] Of that money, the majority ($7,520,000) was saved in annual maternity and birth-related costs as a result of contraceptive services.[30] An additional $215,000 was saved in annual miscarriage and ectopic pregnancy costs.[31] Tens of thousands of dollars in public health costs were saved from STI and cancer screening at Title X clinics.[32]

C. The Fatal Deficiencies in the Proposed Rule

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[24] *Number of Unintended Pregnancies Averted by Title X-Funded Centers*, Data Ctr., Guttmacher Inst., https://data.guttmacher.org/states/table?state=VT&topics=114 (last visited July 30, 2018).

[25] *Number of Unintended Pregnancies Averted to Clients Aged <20 by Title X-Funded Centers*, Data Ctr., Guttmacher Inst., https://data.guttmacher.org/states/table?state=VT&topics=114 (last visited July 30, 2018).

[26] Vermont Cancer Registry, *HPV Associated Cancers—Data Brief*, 1 (Vt. Dept. of Health May 2018) (data going back to 1994), *available at* http://www.healthvermont.gov/sites/default/files/documents/pdf/stat_cancer_HPV_Assoc_Ca_Data_Brief.pdf.

[27] Decrease seen since the height of the epidemic, and the introduction of the first effective treatments, in the early 1990s. Vt. Dept. of Health, "History of the HIV/AIDS epidemic, Vermont residents at diagnoses 1984 – 2014," *Vermont HIV/AIDS Annual Report*, 2 (May 2015), *available at* http://www.healthvermont.gov/sites/default/files/documents/pdf/ID_HIV_surveillance_Vt%20HIV%20Annual%20Rep%202014.pdf; *see also* Vt. Dept. of Health, *2016 Vermont HIV Annual Report*, 2-3 (May 2018), *available at* http://www.healthvermont.gov/sites/default/files/documents/pdf/ID_HIV_VermontHIVAnnualReport2016.pdf.

[28] Office of Population Affairs, Title X Family Planning Annual Report: Vermont, 10, 13 (April 2017) (on file with Vermont Attorney General's Office).

[29] *Total Annual Gross Savings from Services Provided During Family Planning Visits at Title X-Funded Centers*, Guttmacher Institute Data Center, https://data.guttmacher.org/states/table?state=VT&topics=98 (last visited July 30, 2018).

[30] *Annual Maternity and Birth Related Costs (Through 60 Months) Saved from Contraceptive Services*, Guttmacher Institute Data Center, https://data.guttmacher.org/states/table?state=VT&topics=96 (last visited July 30, 2018).

[31] *Annual Miscarriage and Ectopic Pregnancy Costs Saved from Contraceptive Services*, Guttmacher Institute Data Center, https://data.guttmacher.org/states/table?state=VT&topics=96 (last visited July 30, 2018).

[32] *Annual Costs Saved From Chlamydia, Gonorrhea and HIV Testing at Title X-Funded Centers; Annual Costs Saved from Pap and HPV Testing at Title X-Funded Centers*, Guttmacher Institute Data Center, https://data.guttmacher.org/states/table?state=VT&topics=97 (last visited July 30, 2018).

1. *The proposed rule requires directive counseling in violation of the Consolidated Appropriations Act, 2018.*

In numerous ways, the proposed rule imposes unethical requirements to provide directive, mandatory patient counseling. This is contrary to the Consolidated Appropriations Act, 2018, which states that, with respect to the amounts appropriated "for carrying out the program under title X of the PHS Act to provide for voluntary family planning projects, . . . all pregnancy counseling shall be nondirective."[33] While Congress is free to "make a value judgment favoring childbirth over abortion,"[34] once Congress makes a policy choice executive agencies are not at liberty to ignore it. Here Congress has required that counseling of patients using Title X funds may not be slanted, and HHS may not direct Title X providers to disregard Congress's directive.

The proposed rule requires Title X funds be used for directive counseling in several ways. First, the rule prohibits Title X providers from referring a patient who discovers she is pregnant to abortion providers, except in the narrow circumstances where the patient "clearly states" that she has "already decided" she will have an abortion.[35] Of course, such a "clear decision" for someone who learned minutes earlier that she was pregnant would be unlikely, meaning the vast majority of patients will be referred away from abortion providers. Second, providers are prohibited from even "present[ing]" the option of abortion. Third, providers must refer patients for "appropriate prenatal and/or social services (such as prenatal care and delivery, infant care, foster care, or adoption)" whether or not the patient desires such referrals.[36] Fourth, providers are required to assist in setting up these referral appointments—unless the patient wants an abortion.[37] In short, if a pregnant patient says that she wants advice on birth or adoption options the provider is unencumbered, but if she wants to discuss the option of abortion, the provider may not assist her. Only if the patient states she wants an abortion may the provider offer her a list that includes abortion providers, but that list must obfuscate which clinics offer what she seeks and which do not.[38]

These provisions are intended to, and do, slant Title X counseling against termination and in favor of childbirth, in violation of Congress's directive otherwise. Indeed, the text of the proposed rule says nothing about nondirective counseling, instead eliminating the former

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[33] Pub. L. No. 115-141, div. H, tit. II, 132 Stat. 348, 716 (2018), https://www.congress.gov/bill/115th-congress/house-bill/1625/text.

[34] *Rust v. Sullivan*, 500 U.S. 173, 192 (1991) (quoting *Maher v. Roe*, 432 U.S. 464, 474 (1977)).

[35] 83 Fed. Reg. 25,531 (proposed § 59.14(a), (c)).

[36] 83 Fed. Reg. 25,531 (proposed § 59.14(b)).

[37] *Id*.

[38] 83 Fed. Reg. 25,531 (proposed § 59.14(c)).

requirement to provide "neutral, factual information and nondirective counseling . . . ." 42 C.F.R. 59.5(a)(5)(ii). Through the repeal of the nondirective counseling requirement and the addition of severe restrictions on referrals, the proposed rule seeks to replace what has been a patient-guided, provider-informed approach to care with a system that jeopardizes both providers' ethical obligations and patients' health.

2. *The proposed rule illegally injects the government into the provider-patient relationship.*

We are deeply troubled by the Department's proposed government interference in the relationship between a medical provider and a patient, and not only because it violates a federal law. The proposed rule purports to tell providers paid with Title X funds what they can and cannot say when a patient discovers she is pregnant. The government should have no role telling a health care provider what to say to a patient. Here, the proposed rule prohibits nurses and nurse practitioners, who see the majority of Title X patients, from mentioning abortion, and doctors may do so only in the very limited circumstances permitted in proposed section 59.14(c) and (d).[39] Under the proposed rule, Title X providers could not simply take off their "Title X hats" and offer the same nondirective advice that they currently offer because the rule would require Title X providers to comply with Title X requirements, whether or not Title X funds a particular patient's service.

As America's women's health providers have jointly stated in opposing the proposed rule, "[p]oliticians have no role in picking and choosing among qualified providers."[40] This government script for providers when addressing their Title X patients violates the American Medical Association's Code of Ethics, which states that "withholding information without the patients' knowledge or consent is ethically unacceptable."[41] Similarly, the Code of Ethics for Nursing requires nurses to give complete – not slanted – information to patients.[42]

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[39] 83 Fed. Reg. 25,531.

[40] "America's Women's Health Providers Oppose Efforts to Exclude Qualified Providers from Federally-Funded Programs," Join Statement of the American College of Obstetricians and Gynecologists, the American Academy of Pediatrics, the American College of Nurse-Midwives, the American College of Physicians, the Association for Physician Assistants in Obstetrics and Gynecology, the National Association of Nurse Practitioners in Women's Health, Nurses for Sexual and Reproductive Health, and the Society for Adolescent Health and Medicine (May 23, 2018), https://www.acog.org/About-ACOG/News-Room/Statements/2018/Health-Providers-Oppose-Efforts-to-Exclude-Qualified-Providers-from-Federally-Funded-Programs (last accessed on July 17, 2018).

[41] American Medical Association, Code of Medicaid Ethics Opinion 2.1.3, Withholding Information from Patients, available at https://www.ama-assn.org/delivering-care/withholding-information-patients (last accessed on July 17, 2018).

[42] Code of Ethics for Nursing, Provision 1.4, www.bc.edu/content/dam/files/schools/son/pdf2/ANA code of ethics.pdf (last accessed on July 17, 2018) (patients must be given "accurate, complete, and understandable information in a manner that facilitates an informed decision").

Further, the proposed rule is arbitrary and capricious because it only permits "a medical doctor" to provide the very limited referral for abortion the proposed rule allows.[43] In our States, this severely restricts the nondirective counseling Title X patients would receive. In Oregon, for example, over 93 percent of visits to Title X clinics in 2017 were conducted by non-physician caregivers such as nurse practitioners and physician assistants. The preamble to the proposed rule itself recognizes that only 22 percent of clinical service FTEs delivered to Title X patients were provided by medical doctors.[44] As a result, the proposed rule would prevent 78 percent of the medical professionals who see patients at Title X providers from providing even the limited and intentionally obfuscated abortion referral it claims to authorize. The Department does not explain why prohibiting such a large percentage of Title X caregivers from providing any kind of counseling on the legally available option of abortion comports with the statutory requirement that Title X funds be used only for nondirective counseling, and we request such an explanation.

The proposed rule's roadblocks for a patient seeking complete and accurate health information also are arbitrary and capricious. First, the patient must already know that she wants an abortion. This precludes the patient from engaging in an important conversation with her health care provider about the pros and cons of abortion. The Department fails to address the fact that many women do not ask directly about abortions immediately upon learning they are pregnant, and instead consider it as one of many medical options. We ask that the Department explain how its proposed restrictions can be reconciled with this experience of clinicians. Second, only a doctor can give the patient the referral list. This appears designed to undermine the provision of healthcare. Moreover, it is not clear what, if any, counseling a physician is entitled to provide to a woman who has decided to have an abortion given that the proposed rules prohibit providers from "promot[ing]" and "support[ing]" abortion as a method of family planning. Limiting the medical information that physicians can offer their patients unreasonably intrudes upon the physician-patient relationship and undermines ethical standards of care.

The preamble to the proposed rule relies on "Federal conscience statutes" to justify its diverging from the requirement in the Consolidated Appropriations Act that Title X-funded counseling must be nondirective.[45] This reliance is misplaced. The proposed rule does not merely create an exception to nondirective counseling for conscience objectors. Instead, it allows conscience objectors to dictate what all Title X providers may say. Purportedly to uphold conscience protections, the proposed rule prohibits nearly 80 percent of the medical professionals who treat patients at Title X clinics from saying anything about abortion, regardless of their religious or moral beliefs. Likewise, it severely restricts the information medical doctors can impart, again regardless of their religious or moral convictions. In doing so, it makes no accommodation for providers who have religious or moral convictions contrary to the proposed rule, for instance

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[43] 83 Fed. Reg. 25,531 (§ 59.14(a); *see also*, § 59.14(c)).

[44] 83 Fed. Reg. 25,523.

[45] 83 Fed. Reg. 25,506-507.

those whose convictions align more closely with professional ethics rules. These prohibitions go substantially further than necessary to vindicate a select number of providers' conscience objections, and we ask the Department to better explain its reasoning.

3. *The proposed rule is contrary to, and ignores, the Department's authoritative recommendations for evidence-based "family planning methods and services" without reason or explanation.*

A federal agency cannot simply ignore its prior statutory interpretations. This is especially true where, as here, the prior interpretation is based on factual findings or cited evidence, and the new interpretation fails to consider that evidence. "[T]he consistency of an agency's position is a factor in assessing the weight that position is due." *Good Samaritan Hospital v. Shalala*, 508 U.S. 402, 417 (1993). "To be sure, the requirement that an agency provide reasoned explanation for its action would ordinarily demand that it display awareness that it is changing position." *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).

In 2014, the Department's Centers for Disease Control and Prevention (CDC) issued a Recommendations and Report entitled "Providing Quality Family Planning Services: Recommendations of CDC and the U.S. Office of Population Affairs."[46] The report provided the agency's view on what are "acceptable and effective family planning methods and services."[47] The CDC stated:

> This report provides recommendations developed collaboratively by CDC and the Office of Population Affairs (OPA) of the U.S. Department of Health and Human Services (HHS). The recommendations outline how to provide quality family planning services, which include contraceptive services, pregnancy testing and counseling, helping clients achieve pregnancy, basic infertility services, preconception health services, and sexually transmitted disease services. The primary audience for this report is all current or potential providers of family planning services, including those working in service sites that are dedicated to family planning service delivery as well as private and public providers of more comprehensive primary care.[48]

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[46] Gavin, L, Moskosky, S, Carter, M, Curtis, K, Glass, E, Godfrey, E, Marcell, A, Mautone-Smith, N, Pazol, K, Zapata, L, "Providing Quality Family Planning Services: Recommendations of CDC and the U.S. Office of Population Affairs." Morbidity and Mortality Weekly Report, 63 Recommendations and Reports No. 4 (April 25, 2014), available at https://www.cdc.gov/mmwr/pdf/rr/rr6304.pdf (last accessed July 19, 2018) (hereinafter "CDC Report and Recommendations").

[47] 42 U.S.C. § 300(a).

[48] CDC Report and Recommendations at 1.

The report provided "recommendations for how to help prevent and achieve pregnancy, emphasize[d] offering a full range of contraceptive methods for persons seeking to prevent pregnancy, highlight[ed] the special needs of adolescent clients, and encourage[d] the use of the family planning visit to provide selected preventive health services for women, in accordance with the recommendations for women issued by the Institute of Medicine and adopted by HHS."[49] In other words, it was a careful, evidence-based description of the best practices for family planning in the United States.

Without explanation, the proposed rule contradicts this report in numerous ways, and it does so without mentioning the report. The CDC report's "recommendations support offering a full range of Food and Drug Administration (FDA)-approved contraceptive methods,"[50] while the proposed rule eliminates "medically approved" from the requirement that projects provide a broad range of family planning methods.[51] The CDC report advocates a "[c]lient-centered approach" where the patient is offered a "broad range of contraceptive methods so that clients can make a selection based on their individual needs and preferences,"[52] while the proposed rule offers Title X funds to a clinic that chooses to offer only a single method of family planning.[53] The CDC report states that a provider, after administering a pregnancy test, should present "options counseling" and "appropriate referrals,"[54] while the proposed rule mandates concealing the full range of options available to the patient, including abortion, and directs omitting abortion providers from referral lists.[55] These changes undermine long-held, evidence-based standards of care.

The Department fails to explain why it is rejecting its own recommendations expressly "based on scientific knowledge."[56] Indeed, it fails even to acknowledge the existence of those

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[49] *Id*.

[50] CDC Report and Recommendations at 2.

[51] 83 Fed. Reg. 25,530 (proposed § 59.5).

[52] CDC Report and Recommendations at 2.

[53] 83 Fed. Reg. 25,530 (proposed § 59.5). Without doubt, the proposed regulations' emphasis on fertility awareness-based methods of family planning over all other forms of contraception will result in increased numbers of unintended pregnancies, including teen pregnancies. Table 3-2, Contraceptive Technology, http://www.contraceptivetechnology.org/wp-content/uploads/2013/09/CTFailureTable.pdf (last visited July 30, 2018) (listing a 24% failure rate for typical use of fertility awareness-based methods, compared to a less than 10% failure rate for typical use of hormonal contraceptives and less than 1% failure rate for long-acting reversible contraceptives).

[54] CDC Report and Recommendations at 14.

[55] 83 Fed. Reg. 25,531 (proposed § 59.14).

[56] CDC Report and Recommendations at 4.

recommendations. The proposed rule lacks the "reasoned analysis" the Department concedes is required.[57]

4. *The financial separation requirement reverses a prior agency interpretation and is unsupported by any evidence.*

The proposed rule imposes a new requirement of physical separation between Title X projects and the abortion activities of the Title X grantee/sub-recipient.[58] This requirement reverses the Department's prior interpretation, is imposed without supporting evidence, and does not reflect agency consideration of substantial evidence contradicting the Department's conclusion.

The proposed rule reverses the Department's longstanding interpretation that, "[i]f a Title X grantee can demonstrate [separation] by its financial records, counseling and service protocols, administrative procedures, and other means. . . …, then it is hard to see what additional statutory protection is afforded by the imposition of a requirement for 'physical' separation."[59] The Department states that this reversal is necessary to avoid the risk of (i) intentional or unintentional use of Title X funds for impermissible purposes or the commingling of funds, and (ii) public confusion that Title X funds being used by a family planning organization may be supporting the program's abortion activities.[60]

Despite the need for *evidence* to justify an agency's reversal of course, the preamble to the proposed rule cites no evidence of commingled funds or public confusion. The preamble states that the Department's concerns are "acute" because, according to a Guttmacher Institute report, the percentage of "nonspecialized clinics" such as doctors' offices accounting for abortions performed in the United States inched up 6 percent from 2008 to 2014, which may increase the risk of confusion and misuse of Title X funds.[61] However, the Department has no evidence that any of these nonspecialized clinics receive Title X funds. The Guttmacher Institute itself noted that the data its report relied on included inaccuracies and out-of-date information.[62] This is the only evidence the Department cites of potential public confusion and commingling of funds, yet

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[57] 83 Fed. Reg. 25,505.

[58] 83 Fed. Reg. 25,532 (proposed § 59.15).

[59] Standards of Compliance for Abortion Related Services in Family Planning Services Projects, 65 Fed. Reg. 41,270, 41,276 (Jul. 3, 2000).

[60] 83 Fed. Reg. 25,507.

[61] *Id*.

[62] Jones, RK, Jerman, J, Abortion Incidence and Service Availability In the United States, 2014, Guttmacher Institute Perspectives on Sexual and Reproductive Health (March 2017) ("Limitations"), https://www.guttmacher.org/journals/psrh/2017/01/abortion-incidence-and-service-availability-united-states-2014 (last accessed July 18, 2018).

it evinces no actual *use* of Title X funds.[63] In fact, unlike the Title X regulations proposed in 1988—which relied in part on two reports, one from the Department's Office of Inspector General (OIG) and the other from The General Accounting Office—the Department currently points to no reports or relevant evidence as justification for the proposed rule.

The Department fails to cite its own safeguards it already has in place to ensure that Title X funds are kept separate from abortion-related services. "According to [the Office of Population Affairs], family planning projects that receive Title X funds are closely monitored to ensure that federal funds are used appropriately and that funds are not used for prohibited activities, such as abortion."[64] These "[s]afeguards to maintain this separation include (1) careful review of grant applications to ensure that the applicant understands the requirements and has the capacity to comply with all requirements; (2) independent financial audits to examine whether there is a system to account for program-funded activities and non-allowable program activities; (3) yearly comprehensive reviews of the grantees' financial status and budget report; and (4) periodic and comprehensive program reviews and site visits by OPA regional offices."[65] Despite this thorough monitoring, the Department fails to provide any evidence of actual threats to Title X funding and instead relies on reports from the 1980s, old Medicaid audits, and unsupported assertions.

The Department's monitoring has been thorough. For example, the 2017 OPA Program Review Report for the Vermont Department of Health found the following:

> Financial documentation at service sites demonstrates that Title X funds are not being used for abortion services and adequate separation exists between Title X and non-Title X activities. (42 C.F.R. § 59.5(a)(5))
>
> REVIEW OF EVIDENCE
> The grantee does not provide abortion services. However, the sub-recipient does provide these services. The sub-recipient has established policies, procedures, and practices to ensure the adequate separation of Title X activities from non-Title X activities. Staff separates their time, after the fact, into clearly defined cost centers in the TimeForce system. This is done each day, is checked by the site supervisor,

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[63] In a separate part of the preamble addressing the purported need for monitoring of the use of Title X funds, the Department cites a Washington Medicaid Fraud Control Unit investigation. 83 Fed. Reg. 25,509. The Medicaid Fraud Control Unit is part of the Washington Attorney General's Office. Our investigation found that the individuals reporting the alleged violations relied only a newsletter sent out by American Life League and had no additional information or any firsthand knowledge, the state Medicaid agency auditor did not see any indication of fraudulent billing, and there was no pattern of intentional billing misconduct.

[64] Angela Napili, Cong. Research Serv., R45181, *Family Planning Program Under Title X of the Public Health Service Act* 16 (2018), *available at* https://fas.org/sgp/crs/misc/R45181.pdf.

[65] *Id*.

> and is further checked through an analysis of the number and type of services provided each day in the clinic setting by administrative staff.
>
> The sub-recipient demonstrated that no abortion-related activities were provided as part of the Title X project. This included policies and procedures and the actual practices in the clinic setting, counseling and service protocols, intake and referral procedures, and fiscal and other administrative procedures.
>
> This requirement [compliance with Section 1008] was MET.[66]

No evidence indicates that the Vermont Department of Health has ever had any issues complying with Section 1008.

In addition, the Department does not address the steps states like ours take to ensure sub-recipients' separation of Title X funds from any abortion-related activities. In Washington, the State Department of Health Family Planning Program ensures the separation of Title X funds from abortion services through contract language, desk reviews, and on-site monitoring. The goal of monitoring is to document the extent of sub-recipient agencies' compliance with state and federal laws and regulations. Monitoring helps the Family Planning Program assist local agencies with compliance with Federal Title X and state rules related to funding. This ensures accountability.

The Washington Department of Health (DOH) does three types of monitoring: Administrative, Clinical, and Fiscal. As federal grant funds flow through the Family Planning Program to a sub-recipient, the Family Planning Program maintains primary responsibility for ensuring enforcement of federal and state requirements. Those requirements pertain to sub-recipients as they receive state and federal funds. When a sub-recipient signs the Family Planning Program contract with the DOH, they agree to enforce those same certifications, assurances, cost principles, and administrative rules. All of these requirements are incorporated in contract language. Title X sub-recipient contract standard clauses include that the Contractor does "not provide abortion as a method of family planning within the Title X Project. (42 CFR 59.5(5))," and "[t]he Title X Project must not include sterilizations, abortions, or any flat rated service (for instance some STD or HIV testing) or income/revenue generated from them."

Furthermore, the DOH Fiscal Monitoring and Review Guide and On-site Monitoring Tool is used by site consultants and agency fiscal experts to perform on-site reviews every three years or more often if needed. They monitor for documentation that:

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[66] Office of Population Affairs, Program Review: Title X Family Planning Project: Vermont Department of Health, 21 (May 2017) (on file with Vermont Attorney General's Office).

i. The financial system provides for financial separation of Title X family planning service dollars and abortion service dollars;
ii. Agency personnel must be informed that they could be prosecuted, under Federal law, if they coerce, or try to coerce, anyone to undergo abortion or a sterilization procedure, and the agency has a policy in place to this end;
iii. The agency has written policies that clearly state that no Title X funds will be used in programs where abortion is a method of family planning;
iv. The agency is in compliance with Title X, specifically calling out Section 1008; and
v. Staff members have been trained about separating Title X family planning services and abortion services.

The site consultant verifies this onsite through the sub-recipients' policies and procedures, personnel records, and a review of the accounting system.

In addition, the Washington State Family Planning Manual[67] advises about separating Title X services from abortion, including that Contractors must be in full compliance with Section 1008 prohibiting the use of Title X funds for abortion as a method of family planning.

Oregon's Reproductive Health Program maintains a robust process for monitoring compliance among its Title X agencies. Ongoing and routine compliance reviews ensure that Title X agencies adhere to administrative, clinical, and fiscal requirements. The monitoring process includes:

i. Annual recertification of agencies;
ii. Onsite compliance reviews of consent forms, policies, procedures and protocols; chart audits; onsite clinical observation; and onsite observation of patient and physical environment; and
iii. Regular billing, client enrollment, and quality assurance reviews.

Like Washington's DOH, Oregon's Reproductive Health Program uses a comprehensive Program Certification Verification Tool to monitor its Title X agencies. Specific policies relating to abortion, including the requirement that no federal funds are used for abortion services and that abortion is not provided as a birth control method, are reviewed and verified.

In Massachusetts, the Department of Public Health's robust oversight of sub-recipients providing abortion services ensures compliance with current Title X requirements. The Department of Public Health requires that these sub-recipients establish and follow written policies that clearly indicate that Title X funds will not be used for abortion services, clearly segregate Title X funds to prevent allocation of Title X funding to abortion services; maintain separate inventory for

[67] *Family Planning Manual*, Washington State Department of Health, September 2016, available at https://www.doh.wa.gov/portals/1/Documents/Pubs/930-122-FPRHManualComplete.pdf (last visited July 30, 2018)

abortion and non-abortion services; and implement fiscal review and oversight procedures to assure that no Title X funds are used for abortion services. The Massachusetts Department of Public Health also engages in regular monitoring, and requires all providers to inform them of any changes in their practice.

In Vermont, in addition to the safeguards noted above, PPNNE undergoes an annual financial audit, which specifically examines its Title X expenditures. PPNNE passes its audit every year, including its accounting of Title X funds.[68]

The Department has not explained why these thorough guidance, monitoring, and auditing steps taken by our state agencies and by the Department itself are insufficient to prevent commingling of funds, and we ask the Department to provide this explanation.

5. *The proposed rule would violate the constitutional rights of Title X providers and their patients.*

The proposed rule imposes government restrictions on speech and denies women freedom from government interference in their most intimate and personal decisions that courts will find fatal under the First and Fifth Amendments. It should be withdrawn for these reasons.

In *Rust v. Sullivan*, the Supreme Court recognized that "funding by the government, even when coupled with the freedom of the fund recipients to speak outside of the scope of the Government-funded project," is not "invariably sufficient to justify Government control over the content of expression." 500 U.S. at 199. In some areas, particularly rural areas, the proposed rule is likely to drive all Title X providers from the program, leaving patients without reasonable access to any Title X services. And for those Title X providers remaining in the program, the Department's restriction on speech will extend beyond the Title X program to every patient encounter by every Title X provider, whether or not Title X funds are used. As a consequence, the proposed rule will force all Title X grantees to give up neutral abortion-related speech, whether or not they are wearing a "Title X hat." These facts are different from those presented in *Rust v. Sullivan*, which makes that decision distinguishable.

The massive contraction of the Title X program that would occur under the proposed rule, and is shown herein as to our States, results in a violation of the unconstitutional conditions doctrine and the vagueness and overbreadth doctrines of the First Amendment. The proposed rule interferes with a doctor's ability to provide, and a woman's right to receive, information concerning abortion and abortion-related services, both within and outside of the Title X program. This violates women's Fifth Amendment rights to be free of government interference

[68] Financial audits for 2015 – 2017 may be downloaded at the Federal Audit Clearinghouse, https://harvester.census.gov/facdissem/Main.aspx. Financial audits for 2013 and 2014 on file with the Vermont Attorney General's Office. Financial audits older than five years were not readily available.

in their decisions whether to continue pregnancies to term. It is also contrary to the First Amendment, especially given the Supreme Court's recent recognition that "[a]s with other kinds of speech, regulating the content of professionals' speech 'pose[s] the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information.'" *National Institute of Family and Life Advocates v. Becerra*, 138 S. Ct. 2361, 2374 (2018) (quoting *Turner Broadcasting System v. FCC*, 512 U.S. 622, 641 (1994)). And it contravenes Supreme Court cases that reject "confin[ing] the attending physician in an undesired and uncomfortable straitjacket in the practice of his profession." *Planned Parenthood of Central Mo. v. Danforth*, 428 U.S. 52, 67 n.8 (1976). Finally, it interferes in the states' rights to design and implement health care programs in their states by causing the Title X regulations to be applicable outside the Title X program.

If the Department does not voluntarily withdraw the proposed rule, we ask it to explain, in light of these facts, how the proposed rule is consistent with the Constitution.

6. *The proposed rule includes many requirements that are unsupported by any evidence and, if not abandoned, will be found to be arbitrary and capricious.*

    a. *The primary care requirement is unsupported and arbitrary.*

The proposed rule requires that Title X providers "should offer either comprehensive primary health services onsite or have a robust referral linkage with primary health providers who are in close physical proximity to the Title X site."[69] This requirement is supposedly meant to "promote holistic health and provide seamless care."[70] This call for holistic and seamless care rings hollow considering that the Department is simultaneously proposing specific steps to limit the provision of complete health information and seamless care to patients through abortion counseling and referral restrictions. Instead, the primary care requirement appears intended to push out long-standing Title X providers who have specialized in family planning services and rural Title X providers who may not have "robust referral linkage[s] . . . in close physical proximity."[71]

This requirement alone could dramatically reduce the scope of the Title X program in our States depending upon how the Department defines "close physical proximity." This requirement is not stated in the statute. The Department must explain how it can be reconciled with the goals of the Title X program.

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[69] 83 Fed. Reg. 25,530.

[70] *Id.*

[71] *Id.*

b. *The provisions requiring reporting on minors are unsupported and irrational.*

Currently, Title X providers must attempt to encourage a minor to involve her or his family in the decision-making process when the minor seeks contraceptive services. Under the proposed rule, this "encouragement" would be replaced with undue pressure on both the provider and the minor. The proposed rule requires that a Title X provider document "in the minor's medical records the specific actions taken by the provider to encourage the minor to involve her/his family (including her/his parents or guardian) in her/his decision to seek family planning services."[72] The only exception to this requirement, which must be documented in the minor's medical record, is if the provider "suspects the minor to be the victim of child abuse or incest" and this has been reported in compliance with state or local law.

Today, if a minor explains to a Title X provider that she wishes not to involve her family, that wish is respected. Minors may choose not to involve their families in their health care decisions due to differences of religious belief, fear of violence, fear of abandonment, lack of a suitable adult to involve, or simply a desire for confidential care. By requiring that the providers' efforts to encourage family involvement be recorded in the medical record, the proposed rule could force providers to apply pressure on minor patients to involve their families even when doing so is not in the minor's best interests. The proposed rule could ultimately have a chilling effect on honest and open conversations between providers and minor patients. Further, the proposed rule imperils patient confidentiality to such a degree that minors could be discouraged from seeking care altogether.[73] This will serve neither the purposes of the Title X program nor patients.

c. *The other reporting requirements are unsupported, vague, and beyond the Department's legal authority.*

The proposed rule would bury Title X projects and sub-recipients in overly burdensome reporting requirements. For example, a Title X project would need to report for each sub-recipient and referral agency not only the exact services provided, but also a "[d]etailed description of the extent of the collaboration" even down to the individuals involved and inclusive of undefined "less formal partners within the community."[74]

Along with the inclusion of the "less formal partners," the proposed rule's definition of "referral agency" makes the reporting requirements overly broad. The proposed rule suggests that even if a referral agency does not receive Title X funds, it may still be "subject to the same reporting

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[72] *Id.*

[73] *See, e.g.*, *Planned Parenthood Fed'n of Am. v. Heckler*, 712 F.2d 650, 659-61 (D.C. Cir. 1983) (describing Congress's decision not to mandate family involvement in Title X care for minors).

[74] 83 Fed. Reg. 25,530.

requirements as a grantee or sub-recipient."[75] These requirements improperly overreach into relationships not otherwise governed by Title X regulations and burden projects, sub-recipients, and referral agencies. Rather than achieving the stated goal of creating a robust referral system, these requirements will cause projects and sub-recipients to limit their referral networks in order to control the amount of reporting.

These changes will have significant impacts. For example, the proposed regulations' applicability to "referral agencies"[76] of Title X clinics would impact a significant number of Vermont's health care providers. As a small and rural state, Vermont's pool of available health care referral partners is also small. PPNNE maintains a "comprehensive referral data base" of other local health care providers.[77] But the proposed regulations would be unnecessarily and prohibitively restrictive on those health care providers that do not receive Title X funds, interfering with those providers' and their patients' rights and their ability to provide ethical and professional care.

7. *The proposed rule does not comply with Executive Orders 12866 and 13562.*

Executive Orders 12866 and 13562 require agencies to "assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits." 83 Fed. Reg. 25521. Executive Order 12866 requires that a "significant regulatory action" comply with additional regulatory requirements. This proposed rule meets all the definitions of a "significant regulatory action" because it would (1) have an annual effect on the economy of $100 million or more and will "adversely and materially affect" the health sector of the economy, public health, and state and local governments; (2) create a serious inconsistency and interfere with an action taken or planned by another agency; (3) materially alter budgetary impacts of entitlement grants or the right and obligations of recipients thereof; and (4) raise novel legal or policy issues arising out of legal mandates.

The restrictive requirements of the proposed rule disqualify many current Title X grantees from the program across the country. Some Title X patients currently served by these providers will lose access altogether to family planning services, particularly among the uninsured and those residing in rural areas. In 2017, Title X services saved our four States alone many millions of dollars in costs for health care services. Extrapolating those cost savings across all states, the fiscal impact of the proposed rule on the economy will exceed $100 million and will adversely affect public health, the health care sector, and state treasuries. Additionally, the proposed rule materially changes the outflow of entitlement grants and the rights and obligations of grant

[75] 83 Fed. Reg. 25,514.

[76] 83 Fed. Reg. 25514.

[77] Office of Population Affairs, Program Review: Title X Family Planning Project: Vermont Department of Health, 11 (May 2017) (on file with Vermont Attorney General's Office).

applicants and recipients. It also raises novel legal and policy issues because of new restrictions on speech. The preamble wrongly concludes that the proposed rule is not economically significant and fails to address these considerations.

8. *The proposed rule is contrary to Congress's intent because it would exclude qualified and experienced Title X providers from the program and reduce access to essential preventive health services.*

The impact of the proposed rule is contrary to the Title X statute. The proposed rule appears to be designed to deny Title X funds to many of the current Title X providers in our States and nationwide, and it does not address the impact this rule will have on our States' residents and budgets. The proposed rule, if implemented, will leave many counties without a Title X provider. Because the proposed rule will undermine the quality of health care provided and impose burdensome and counterproductive separation and reporting requirements, many providers in our States will be unable or unwilling to comply. Further, the proposed rule falls particularly hard on uninsured patients and those in rural areas, who in some cases will have no other reasonable option for obtaining family planning services. As a result, thousands of people who rely on Title X providers for contraception and other family planning services will lose access to those services. The proposed rule thus frustrates, rather than promotes, the purpose of Title X.

It is no secret that the Department wants to expel Planned Parenthood from the network of Title X providers. As then-candidate Donald Trump stated, "We're not going to allow, and we're not going to fund, as long as you have the abortion going on at Planned Parenthood."[78] More recently, when introducing the proposed rule, President Trump stated: "For decades American taxpayers have been wrongfully forced to subsidize the abortion industry through Title X federal funding so today, we have kept another promise. My administration has proposed a new rule to prohibit Title X funding from going to any clinic that performs abortions."[79] The proposed rule would certainly achieve the President's goal, but as described herein, it would go much further than that.

For some Title X providers, creating a separate corporate entity with complete physical and financial separation will be prohibitively expensive. In Massachusetts, at least one Title X provider, if forced to create a separate corporate entity to continue providing abortion care, will have to stop participating in Title X at one of its locations, resulting in the loss of a geographically important Title X clinic. In Oregon, two major Title X agencies with 12 clinic sites would likely be unable to continue as Title X providers due to the onerous physical

[78] Danielle Paquette, "Donald Trump's Incredibly Bizarre Relationship with Planned Parenthood," *Washington Post* (Mar. 2, 2016), https://www.washingtonpost.com/news/wonk/wp/2016/03/02/donald-trumps-incredibly-bizarre-relationship-with-planned-parenthood/?utm_term=.db131f627e96 (last accessed 7/13/18).

[79] https://www.whitehouse.gov/briefings-statements/remarks-president-trump-susan-b-anthony-list-11th-annual-campaign-life-gala/ (last accessed 7/13/18).

separation requirements set forth in the rules. The same is true in Washington and Massachusetts. All of Vermont's Title X clinics would be ineligible to continue under the program. A wide range of Title X provider types will have no choice but to forgo Title X funds, thus reducing their capacity to provide much needed family planning services. For example, it is unclear whether a hospital that runs a Title X clinic (on or off site) that also provides abortion would be able to comply with the requirement to have "separate, accurate accounting records" or "separate personnel, electronic or paper-based health care records."[80] Would funds attributed to the clinic also be attributable to the hospital as a whole? In addition to the practical issues created by the proposed rule's separation requirement, it also creates serious risk to patient safety by requiring separate medical record systems and further stigmatizes legal medical procedures.

In 2017, in Washington, over 14,000 Title X-funded patients received their Title X services at Planned Parenthood or other clinics that provided abortions outside the Title X project. In fact, in 20 of Washington's 39 counties, the only Title X provider is one that performs abortions outside the Title X project.[81] If these Title X providers no longer could offer Title X-funded family planning services due to the separation and other requirements, these patients would need to either locate new Title X providers for their contraception and other family planning services, or forego the benefits of the Title X program. In all of eastern Washington, which is comprised of 20 counties, only four of those counties would have any Title X provider at all. In western Washington, the proposed rule would drive out the Title X providers in 10 additional counties. This includes six of the 10 most populous counties in Washington.

If the proposed regulations take effect, for the first time in the history of Title X, the Vermont Department of Health's Title X funding will be jeopardized. None of the current Title X clinics in Vermont will be eligible for Title X funds. Nor does Vermont have the health care infrastructure to make up for the anticipated loss in funding. Although Vermont has several FQHCs and rural health centers, they are not equipped to absorb all the family planning patients currently served by Title X clinics. Vermont FQHCs saw a total of 4,047 patients for contraceptive management in 2016.[82] By comparison, Vermont's Title X clinics served 9,808 family planning patients in 2016. The FQHCs would have to more than double their family planning patient services in rural areas to absorb the needs of all Title X patients. FQHCs in Vermont are not equipped to do this.

In the Department's zeal to punish providers that perform abortions *outside* of the Title X project, the Department is harming many recipients of Title X services in our States. The

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[80] 83 Fed. Reg. 25,519.

[81] *See* Attachment 1 (map of Washington counties without Title X services if organizations that also provide abortions are removed from Title X).

[82] 2016 Health Center Data: Vermont Data, Health Resources & Servs. Admin., https://bphc.hrsa.gov/uds/datacenter.aspx?q=tall&year=2016&state=VT (last visited July 30, 2018).

Department has not explained why issuing a rule to govern Title X that requires thousands of Title X-funded patients to search for a new Title X family planning provider—or go without one entirely—is consistent with Congress's intent in establishing the Title X program, and we ask the Department to provide this explanation.

The harmful consequences of the proposed rule uniquely impact rural and uninsured patients. In five Washington counties, for example, one quarter or more of Title X patients are uninsured, and the only Title X providers are ones that perform abortions outside the Title X project.[83] And in five other counties in rural Washington, Title X patients are served by small Title X clinics associated with providers that perform abortions outside the Title X project. These clinics are in Ellensburg (in Kittitas County), Walla Walla (in Walla Walla County), Wenatchee (in Chelan County), Pullman (in Whitman County), and Moses Lake (in Grant County). We are advised that, because they are so small and a significant amount of their work involves Title X-funded services, at least some of these clinics would not survive the loss of Title X funds. If these current Title X providers are driven from the Title X program, many of these patients will not be able to shift to another provider.[84] Even if some current Title X providers remain in the program, the distance these patients would have to travel to another Title X provider is impracticable. We ask that the Department explain how it reconciles the significant impact the proposed rule will have on rural and uninsured patients with the mission of the Title X program.

In Oregon, significant portions of the state, primarily the rural and frontier areas, are designated as Medically Underserved Areas because they have a shortage of primary health care providers and facilities coupled with high levels of need. The proposed rule will likely cause providers to decline Title X funds in order to maintain their quality of care, further straining access to reproductive health care for Oregonians in these areas. For the 40 percent of Oregon's Title X clients who are uninsured, this burden is heightened because the high quality of care at Title X clinics may not be available to them at other clinics. Title X clinics currently are required to provide the same high quality of care to all clients regardless of ability to pay, whereas other clinics may limit services for patients without coverage sources.

A remarkably broad coalition of Vermont health care providers has joined the nationwide medical community's condemnation of the proposed rule.[85] This Vermont coalition "strongly

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[83] These counties are Mason (24 percent of Title X patients were uninsured in 2017), San Juan (30 percent), Skagit (29 percent), Douglas (28 percent), and Whitman (27 percent). These counties do not have local health jurisdictions providing family planning services.

[84] In addition, under the proposed rule, eliminating Planned Parenthood and other abortion providers from Title X will cause the following colleges and universities in Washington to lose their Title X providers: Washington State University, Western Washington University, Central Washington University, Eastern Washington University, Big Bend Community College, Columbia Basin College, and Yakima Valley Community College.

[85] *Vermont Health Care Coalition Title X Statement*, Vt. Ass'n of Hosps. and Health Sys. (June 15, 2018), https://vahhs.org/title-x-statement.html (endorsing, among other things, a statement from the American Nurses Association stating, "The Code of Ethics for Nurses outlines that the nurse's primary commitment is to the patient,

opposes" the proposed regulations and warns that those regulations "will significantly restrict access to necessary care for both women and men particularly in rural, hard to serve areas of Vermont."[86] Vermont is a small state, and the Vermont coalition represents a significant majority of all health care providers in Vermont. It is therefore unlikely that the number of Vermont medical professionals who would consent to work in a clinic governed by the proposed regulations would be sufficient to replace the current robust number of Title X-funded providers statewide.

9. *The proposed rule would impose tens of millions of dollars of costs on the treasuries in Washington, Massachusetts, Oregon, and Vermont.*

The costs imposed on our States, along with all other states, by the proposed rule will be well over $100 million. Because the cost or burdens of compliance with the proposed rule will be prohibitively high for many providers, the network of Title X providers will shrink in our States and around the country. Further, some Title X patients will lose all access to family planning services as a result of the proposed rule. As mentioned, in Oregon 41 percent of Title X patients were uninsured in 2017, and in Washington there are counties where upwards of 30 percent of Title X patients are uninsured.

Yet the Department fails to analyze either the significant public health impact or the fiscal impact to states. The Department fails to grapple with the fact that, unless it is expecting the states to step in to plug the fiscal hole created by the loss of Title X funding, unplanned pregnancies and births will occur, cervical cancers will not be diagnosed in early stages, and complications will occur due to untreated STIs, among other things, all resulting in significant increased health care costs for states that Title X is meant to address.

The Department provides no analysis explaining why these impacts are consistent with the fundamental mission of the Title X program. In fact, they are not. Analyses show that significant cost savings are achieved by funding family planning services. Nationally, an estimated $7.09 is saved for every dollar spent.[87] In short, a significant portion of the cost savings created by

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whether an individual, family, group, community, or population. This proposed rule interferes with that relationship and violates the basic ethics of the profession."); *see also* Mike Faher, *Vermont health care coalition protests Title X change*, VTDigger.com (June 12, 2018), https://vtdigger.org/2018/06/12/vermont-health-care-coalition-protests-title-x-change/ (calling the Vermont Health Care Coalition opposing the proposed regulations "an unlikely group of allies in Vermont").

[86] *Vermont Health Care Coalition Title X Statement*, Vt. Ass'n of Hosps. and Health Sys. (June 15, 2018), https://vahhs.org/title-x-statement.html

[87] Jennifer J. Frost, *Return on Investment: A Fuller Assessment of the Benefits and Cost Savings of the US Publicly Funded Family Planning Program*, Milbank Quarterly, Vol. 92, No. 4, p. 668 (2014) (*available at* https://www.guttmacher.org/sites/default/files/pdfs/pubs/journals/MQ-Frost_1468-0009.12080.pdf).

funding family planning services is jeopardized by the proposed rule and would fall on our States, among others.

D. Conclusion

The proposed rule will drive many family planning providers from the Title X program. As a result, thousands of patients will lose reasonable access to family planning services and other critical reproductive health services. The Title X providers that remain will be prevented from delivering the high-quality and complete medical care that they have always provided. This frustrates rather than achieves the purposes of Title X, and the courts will strike down the proposed rule, if implemented, accordingly. The proposed rule would limit health care services to vulnerable populations that Congress intended to help. It also would shift the costs of reproductive health care, including services for unintended pregnancies, breast and cervical cancer diagnoses, spread of STIs, and other serious health conditions to our states. For these and the other reasons stated in our comments, we urge the Department to withdraw the proposed rule.

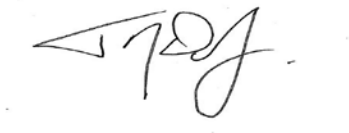
Thank you for considering our views.

Sincerely,

Bob Ferguson
Washington Attorney General

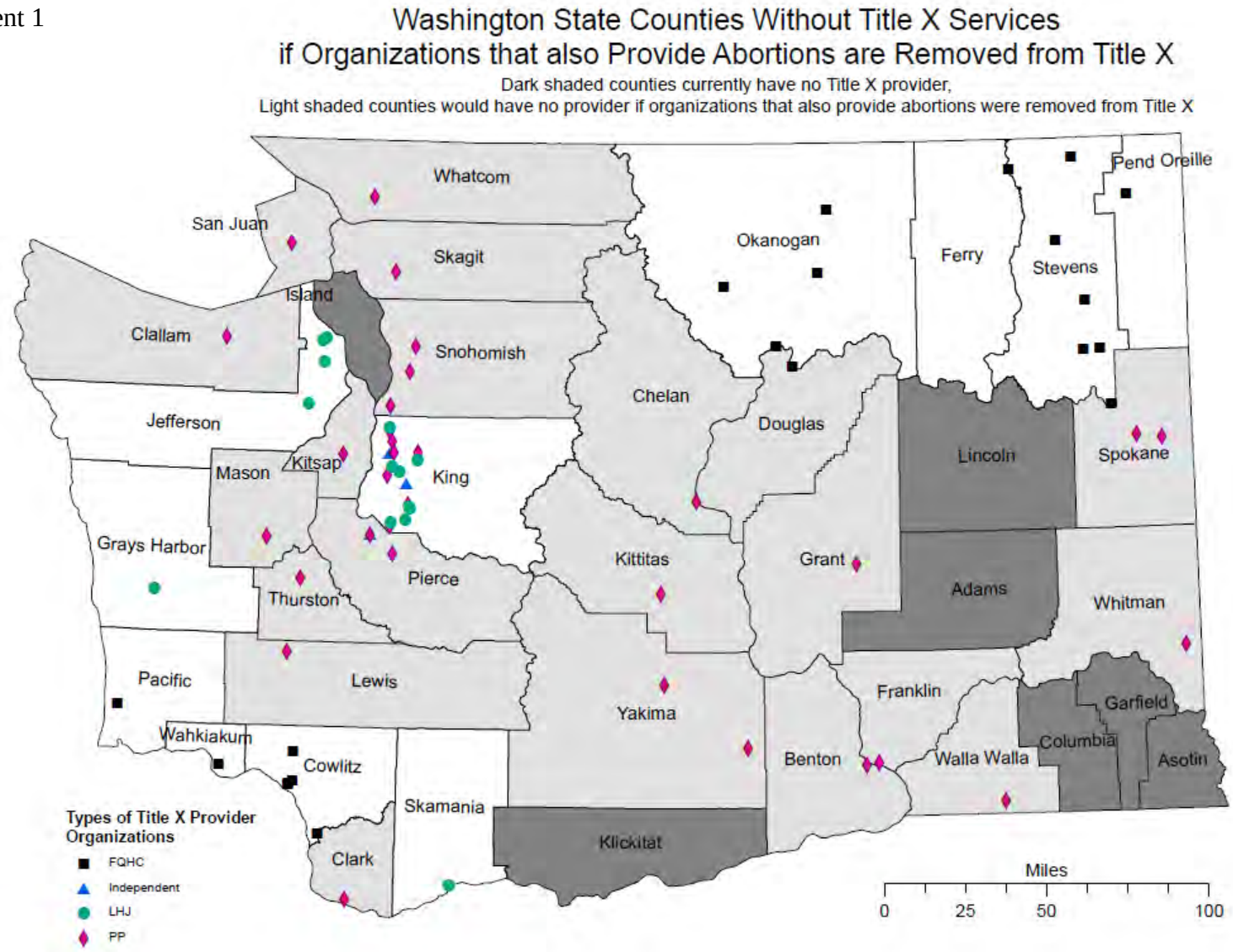
Maura Healey
Massachusetts Attorney General

Ellen Rosenblum
Oregon Attorney General



Thomas J. Donovan, Jr.
Vermont Attorney General

Attachment 1



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Agency of Human Services

July 31, 2018

Office of the Assistant Secretary for Health
Office of Population Affairs
Attention: Family Planning
U.S. Department of Health and Human Services
Hubert H. Humphrey Building, Room 716G
200 Independence Avenue SW
Washington, DC 20201

Re: **Docket Number HHS-OS-2018-0008: "Compliance with Statutory Program Integrity Requirements" for the Tile X Family Planning Program**

Assistant Secretary Giroir and Senior Policy Advisory Huber:

On behalf of the Vermont Department of Health, please accept the following comments regarding the Notice of Proposed Rulemaking published in the Federal Register on Jun 1 2018 **(Docket Number HHS-OS-2018-0008).** The proposed rule would reduce the funding going directly to evidence-based services and limit the number of vulnerable Vermont women able to access the care they need. As proposed, the rule would at a minimum jeopardize services, and potentially eliminate Title X access in whole areas of Vermont, leaving many patients without a source of reproductive health care. Title X projects deliver a host of critical services to Vermonters, including cancer screening and testing for sexually transmitted diseases. The reduction in services resulting from the proposed rule would not only mean higher health care costs resulting from lack of preventive care, but also an increase in unintended pregnancies and abortions.

The provisions of the proposed rule would undermine the high-quality standards of care in Title X and discourage and prevent highly qualified, trusted family planning providers in Vermont from participating in the Title X program. Title X services are currently offered across the state, serving largely rural and vulnerable populations. Approximately 10,000 Vermonters currently receive Title X services annually, twenty percent of whom are under the age of 20.

In Vermont, a diverse coalition of health care organizations, including all the major insurers, the hospital association and patient advocates have come out in strong opposition to the proposed rule. The Vermont Department of Health strongly opposes the proposed rule and recommends that the current regulatory framework be upheld. The following are specific comments on the proposal. The Vermont Department of Health is referred to as VT-DOH, and specific comments to which VT-DOH would like a comprehensive response are called out with the language "VT-DOH recommends".

Sincerely,

Mark A. Levine, MD
Commissioner
Vermont Department of Health

Comments

Section 59.1: To what programs do these regulations apply?

Health and Human Services (HHS) Title X relationship has been and is with the Title X grantee, in this case the VT-DOH, concerning the project it operates. Adding a relationship between HHS and the subgrantee is a duplication of effort, adding red tape, bureaucracy and cost that is unnecessary and redundant. This is contradictory to the requirement in Section 59.18 requiring that grantees "use the majority of grant fund to provide direct services to clients". VT-DOH recommends the new language adding subgrantees to this section be struck.

Section 59.2: Definitions.

The proposed new definition of family planning differs substantively from current precedent and would have harmful effects on the quality of services provided. The proposed changes elevate the focus of the program towards natural family planning and other fertility awareness-based methods regardless of clinical efficacy and patient desire. This is counter-productive and harmful to patients who need medically accurate and up-to-date information in order to make the decision that is best for them.

Changes to the definition of "family planning" confuses the terms "choices," "methods," and "services". The VT-DOH recommends this section be re-written to ensure that family planning is focused on medically accurate evidence-based **methods**.

The new requirement that minors may only be seen for medical advice or treatment if providers document specific actions taken to involve the minor's family in the medical record or document a report of child abuse or incest in the medical record fails to consider the clinician's judgment or privacy concerns inherent in written documentation of these sensitive issues. This stigmatizes young patients who may be sexually active and could prevent them from seeking care. VT-DOH recommends this be struck or amended to require it only for those patients who show signs of abuse.

The proposed rule expands the definition of "low-income family" so that any woman who has employer-sponsored health insurance coverage "which does not provide the contraceptive services sought by the woman because [the employer] has a sincerely held religious or moral objection to providing such coverage" "can be considered" to be low income. The VT-DOH supports increasing access to Title X services but would require additional funding to accommodate an expansion of eligible clients.

Section 59.5: What requirements must be met by a family planning project?

Vermont is committed to providing evidence-based care. As such, Paragraph (a)(1) must include the term "medically approved": "a broad range of acceptable and effective **medically approved** family planning methods." The VT-DOH recommends that this critical term be re-inserted into Paragraph (a)(1).

The removal of the current requirement that Title X providers offer non-directive and comprehensive counseling on all pregnancy options (parenting, adoption, or abortion) for pregnant patients (except for those options about which the patient states they do not

want to receive information) weakens the commitment to individualized patient care that is at the heart of the Title X program. Non-directive options counseling that includes all options is not only required according to existing Title X regulations but consistent with medical and ethical standards and many medical professional organizations.

Additionally, health equity is an important focus for Vermont. It is critical that all women, regardless of where they live, be able to decide between a broad range of evidence-based medically approved family planning methods. The proposed language, "projects are not required to provide every acceptable and effective family planning method or service" could seriously limit the options for women in a rural state should the project nearest them only provide one method. The VT-DOH recommends this language be struck.

VT-DOH recommends paragraph (5) be struck or clarified as stated above to ensure that there are no barriers for referral to abortion services or the provision of nondirective counseling.

Paragraph (12) requires that Title X providers offer comprehensive primary health services, services that are specifically prohibited with Title X funding. The paragraph states that if they do not provide these services they must refer a patient to such services in "close physical proximity". In a rural state this is untenable and also vague. The language should be struck to ensure equal access to Title X services, particularly in rural states.

Paragraph (14) requires every Title X project to "[e]ncourage family participation in the decision of minors to seek family planning services and ensure that the records maintained with respect to each minor document the specific actions taken to encourage such family participation (or the specific reason why such family participation was not encouraged)." This is not required by Vermont state law and is a state law issue. It does not belong in federal rule and undermines the confidentiality of patients and could deter adolescents and young adults from seeking services. In Vermont, 20% of Title X participants are under 20 years old.

Extending the type of reporting expected of Title X grantees to subrecipients and referral partners would create extraordinary burdens for all involved. This focuses staff time and energy on duplicative reporting efforts when in Vermont there is no evidence that this would increase compliance with Title X requirements, further depleting the amount of Title X funding available for services. It could also limit the number of partners willing to work with VT-DOH, and in a small state with limited medical resources access is a critical issue. VT-DOH recommends that Title X grantees remain the responsible reporting party.

Section 59.7: What criteria will the Department of Health and Human Services use to decide which family planning services projects to fund and win what amounts?

As a state where the Health Department is the singular grantee, it is unclear how the VT-DOH would know it had satisfied the new criteria set out by HHS. VT-DOH recommends this section be improved to specifically and clearly state the criteria with which HHS will review applicants before they reach the objective merits panel review.

Section 59.14: Prohibition on referral for abortion.

The VT-DOH is dedicated to providing evidence-based care. The new language in this section eliminates the long-standing requirement for nondirective options counseling and prohibits abortion referral but requires all pregnant people to be referred for prenatal care and/or social services, regardless of their wishes. This will serve to undermine the

extensive systems level work that has been accomplished in Vermont to ensure that patients have access to quality family planning services, which includes being able to access the full range of contraceptive methods through Title X. It could also impede all the work the VT-DOH has done with other state partners, such as the Blueprint Women's Health Initiative, to ensure providers are trained in best practice approaches to contraceptive counselling, which is grounded in medical accuracy and a comprehensive understanding of the full range of contraceptive methods.

Given the critical importance of evidence-based medicine, VT-DOH recommends this section be modified to require evidence-based counseling methods and remove any barriers to referring a patient for an abortion. There are two major problems with providing a patient seeking an abortion with a mixed list of providers who do and do not provide abortion:

1. Misdirecting patients, or not providing information on locations that provide safe, legal abortions could lead to patients seeking abortions from unsafe providers or through unsafe means.
2. Misdirecting patients will lead to unnecessary increased medical cost for patients who make appointments with providers who do not end up providing the services they are seeking.

Limiting referrals for abortion to only come from doctors is an example of a barrier and is in conflict with 42 CFR § 59.5(b)(6) which requires that projects "[p]rovide that family planning medical services will be performed under the direction of a physician with special training or experience in family planning" (emphasis added). This provision of the rule already allows for the existing practice in Vermont of other qualified medical providers (i.e. nurse practitioners and physicians assistants) to provide care within the scope of their practice under the direction of a physician.

In addition, language in paragraph (a) is confusing when it states that a medical doctor may "provide a list of licensed, qualified, comprehensive health service providers (some but not all, of which also provide abortion services…". It is critical for the patient-provider relationship that when a patient requests information, such as a referral for an abortion, that the provider be able to answer the question accurately and completely. As such, the VT-DOH recommends that Paragraph (a) and (c) be struck.

Paragraph (b) requires providers to refer for prenatal and social services even for those women who do not want those services. This again is not evidence-based medicine and undermines the provider-patient relationship. Additionally, should a woman be referred for prenatal services who is not seeking such services and it is a true referral, time and energy will be wasted by both the sending and receiving provider in discussing services for a patient who will not use them. The VT-DOH recommends that paragraph (b) be struck or be re-written to require providers to provide such referrals only when the patient requests them.

Paragraph (d) of this section is confusing as it is unclear what "promote abortion" means. Vermont recommends that this be clarified in the rule so that it is clear that nondirective family planning counseling is not "promotion" of abortion.

Paragraph (e)(4) states: "None of the entities on the list are providers that principally provide abortions." What does this mean? How will HHS define or determine "principally"?

VT-DOH recommends this entire section be struck. Providers should be required to use evidence-based counseling methods and be fully able to provide medically accurate and specific information to their patients in order to provide them with the best possible care.

Section 59.15: Maintenance of physical and financial separation.

VT-DOH has a demonstrated history of full compliance with the prohibition against using Title X funding for abortion and has a continued commitment to complying completely with the law. As such, part (a) of this section is acceptable.

Although Title X statute, regulation, and policy already prohibit abortion as a family planning method and do not allow Title X funding to be used for abortion services, the proposed rule requires additional physical separation of abortion services from Title X services. These additional requirements would mandate physical separation, separation of email addresses and websites, separate staff, separate health care/medical records, and separate signs and materials. These requirements are unnecessarily burdensome and do not add additional clarity or quality to the Title X program. As such, VT-DOH opposes requirements for organizational separation and separate names.

Paragraphs (b), (c) and (d) are not tenable in Vermont and VT-DOH recommends they be struck. The Title X provider network has spent the past several years improving and enhancing infrastructure and opening new facilities. These conditions would undermine, if not negate, the significant investments made to develop this robust system. Health care delivery is extremely costly, and the cost of care is often associated with the overhead investment in medical facilities. This requirement goes far beyond what is necessary to ensure that taxpayer dollars are not spent on abortion services, undermines access to critical family planning, and would continue to drive up the cost of medical care. It is common practice, for example, for multiple types of providers to share a waiting area, as waiting rooms do not need to be specific to a type of care. Additionally, mandating physical separation can also become a barrier to receiving care – creating a fragmented system that is confusing and difficult to access.

Section 59.16: Prohibition on activities that encourage, promote or advocate for abortion.

This section is unclear. As the Grantee, VT-DOH would be responsible for assisting subgrantees to comply with this regulation. Paragraph (a) of this section is very broad and is followed by a list that "includes" a number of slightly more specific items. However, given that this is not a complete list and that Paragraph (a) is broad and vague, VT-DOH would be unable to provide guidance to subgrantees. For example, in Paragraph (b) the first example provided (1) states: "Clients at a Title X project are given brochures advertising a clinic that provides abortions…" These seem to directly contradict the guidance in Section 59.14 in which "…a doctor may, if asked, provide a list of licensed, qualified, comprehensive health service providers (some of which also provide abortion, in addition to comprehensive prenatal care)."

This list of prohibited activities threatens to isolate family planning services outside of common women's health needs, limiting access and decreasing quality of care. VT-DOH recommends that health care providers be able to make their own decisions about the services they offer in addition to Title X services so long as they demonstrate financial separation.

Section 59.17: Compliance with Reporting Requirements.

Providers are already required to comply with State Laws. The addition of a compliance plan is an overreach and adds unnecessary costs and burden. This is contradictory to the

requirement in Section 59.18 requiring that grantees "use the majority of grant fund to provide direct services to clients" and VT-DOH recommends this requirement be struck.

Vermont's Title X projects demonstrate compliance with legislative mandates that require Title X service sites to encourage family participation in the decision of minors to seek family planning services and provide counseling to minors on how to resist attempts to coerce minors into engaging in sexual activities. All Title X providers must comply with State laws requiring notification or the reporting of child abuse, child molestation, sexual abuse, rape, or incest. The addition of a reporting and documentation requirement is added bureaucracy and does not improve patient safety and could compromise patient confidentiality.

The new language also threatens patient confidentiality, particularly for minors. These individuals could be deterred from seeking much needed services if they were under the impression they would be reported for doing so. The required documentation of reports in the medical record is not best practice and experts in the sexual assault and domestic violence fields recommend against it.

VT-DOH recommends that these new reporting and documentation requirements be struck.

From:	Diamond, Joshua
To:	Wemple, Doug
Cc:	Clark, Charity; Spottswood, Eleanor
Subject:	FW: AG constituent inquiry
Date:	Tuesday, September 18, 2018 2:36:23 PM
Attachments:	image002.png image003.png

Doug,

Please prepare a response that informs Ms. Daly that Vermont is opposing the proposed Title X rules and provide a copy of the public comments that we filed. Ella, could you provide a copy of the comments for Doug?

Thanks. Josh

Joshua R. Diamond, Deputy Attorney General
Vermont Attorney General's Office
109 State Street
Montpelier, Vermont 05609
802-828-3175
joshua.diamond@vermont.gov

From: Wemple, Doug
Sent: Tuesday, September 18, 2018 1:39 PM
To: Matthews, Deborah <Deborah.Matthews@vermont.gov>; Clark, Charity <Charity.Clark@vermont.gov>; Diamond, Joshua <Joshua.Diamond@vermont.gov>
Subject: RE: AG constituent inquiry

I can follow up and let Judi know about our office's work around Title X.

Doug Wemple
Executive Assistant
Office of the Vermont Attorney General
109 State Street - Montpelier, VT
Office: (802)828-5515

From: Matthews, Deborah
Sent: Tuesday, September 18, 2018 8:13 AM
To: Wemple, Doug <Doug.Wemple@partner.vermont.gov>; Clark, Charity <Charity.Clark@vermont.gov>; Diamond, Joshua <Joshua.Diamond@vermont.gov>
Subject: FW: AG constituent inquiry

Deb Matthews
Administrative Secretary

Office of the Attorney General | GCAL
109 State Street, 3rd Floor
Montpelier, VT 05609
Phone | 802-828-3689
E-Mail | deborah.matthews@vermont.gov

From: Rubinstein, David
Sent: Monday, September 17, 2018 5:13 PM
To: AGO - Info <AGO.Info@vermont.gov>
Subject: AG constituent inquiry

Good evening,

We recently received this email at the Governor's Office – I figured I'd pass it along since it appears to fall under the AG's purview. Let me know if you would like any more information.

Best,
David

Why is Vermont not part of the group of states (12 states and the District of Columbia) urging the HHS Secretary Alex Azar NOT to implement proposed Title X rules that will effectively gag providers from advising patients on all their reproductive health options? Vermont has long supported Planned Parenthood and women's rights to family planning. The proposed rules are a disaster. Please refer to the letter written by a group of other state's attorney generals.
https://oag.ca.gov/system/files/attachments/press-docs/final-title-xcomment-letter.pdf

Judi Daly
judicdaly@yahoo.com
1061 Cobb Hill Rd
Waterbury, Vermont 05676
8022445868 (H)

David Rubinstein
Executive Assistant
Office of Governor Phil Scott

State of Vermont
P. 802.828.6438
David.Rubinstein@vermont.gov | governor.vermont.gov

From: Leriche, Lucy Rose
To: Diamond, Joshua
Cc: cwhite@acluvt.org; Jill Krowinski; Spottswood, Eleanor
Subject: Re: Legislative Meeting
Date: Friday, September 14, 2018 4:17:21 PM

Let's go with 9am at the AG's offices in Montpelier on Friday the 21st then.
Lucy

Sent from my iPhone

On Sep 14, 2018, at 11:48 AM, Diamond, Joshua <Joshua.Diamond@vermont.gov> wrote:

> Yes, works for me.
> Josh
> Joshua R. Diamond, Deputy Attorney General
> Vermont Attorney General's Office
> 109 State Street
> Montpelier, Vermont 05609
> 802-828-3175
> joshua.diamond@vermont.gov
> PRIVILEGED & CONFIDENTIAL COMMUNICATION: This communication may contain information that is privileged, confidential, and exempt from disclosure under applicable law. DO NOT read, copy or disseminate this communication unless you are the intended addressee. If you are not the intended recipient (or have received this E-mail in error) please notify the sender immediately and destroy this E-mail. Vermont's lobbyist registration and disclosure law applies to certain communications with and activities directed at the Attorney General. Prior to any interactions with the Office of the Vermont Attorney General, you are advised to review Title 2, sections 261-268 of the Vermont Statutes Annotated, as well as the Vermont Secretary of State's most recent compliance guide available at https://www.sec.state.vt.us/elections/lobbying.aspx.
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> **From:** Leriche, Lucy Rose <Lucy.Leriche@ppnne.org>
> **Sent:** Friday, September 14, 2018 11:24 AM
> **To:** cwhite@acluvt.org; Diamond, Joshua <Joshua.Diamond@vermont.gov>; Jill Krowinski <JKrowinski@leg.state.vt.us>
> **Cc:** Spottswood, Eleanor <Eleanor.Spottswood@vermont.gov>
> **Subject:** RE: Legislative Meeting
> Would 9 work better for folks?
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> Lucy Leriche(she/her/hers)
> Vice President of Public Policy Vermont
> Planned Parenthood Northern New England
> 784 Hercules Drive suite 110
> Colchester, Vermont 05446
> Cell: 802 598-4182
> www.ppnne.org<http://www.ppnne.org/>

Lucy.Leriche@ppnne.org

From: cwhite@acluvt.org <cwhite@acluvt.org>
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Cc: Spottswood, Eleanor <Eleanor.Spottswood@vermont.gov>
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Yes, would you like us to host?

Josh

Joshua R. Diamond, Deputy Attorney General
Vermont Attorney General's Office
109 State Street
Montpelier, Vermont 05609
802-828-3175
joshua.diamond@vermont.gov

From: Leriche, Lucy Rose <Lucy.Leriche@ppnne.org>
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Cc: Diamond, Joshua <Joshua.Diamond@vermont.gov>; cwhite@acluvt.org; Spottswood, Eleanor <Eleanor.Spottswood@vermont.gov>
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Lucy

Lucy

Sent from my iPhone

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From: Spottswood, Eleanor
To: Diamond, Joshua; Leriche, Lucy Rose; cwhite@acluvt.org; Jill Krowinski
Subject: RE: Legislative Meeting
Date: Friday, September 14, 2018 1:07:00 PM

Fine with me.
Ella
Eleanor L.P. Spottswood
Assistant Attorney General
Vermont Attorney General's Office
109 State Street
Montpelier, Vermont 05609
802-828-3178
eleanor.spottswood@vermont.gov

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From: Leriche, Lucy Rose <Lucy.Leriche@ppnne.org>
Sent: Thursday, September 13, 2018 8:17 PM
To: Jill Krowinski <JKrowinski@leg.state.vt.us>
Cc: Diamond, Joshua <Joshua.Diamond@vermont.gov>; cwhite@acluvt.org; Spottswood, Eleanor <Eleanor.Spottswood@vermont.gov>
Subject: Re: Legislative Meeting

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To:	Leriche, Lucy Rose; cwhite@acluvt.org; Jill Krowinski
Cc:	Spottswood, Eleanor
Subject:	RE: Legislative Meeting
Date:	Friday, September 14, 2018 11:48:16 AM

Yes, works for me.

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From:	Leriche, Lucy Rose
To:	cwhite@acluvt.org; Diamond, Joshua; Jill Krowinski
Cc:	Spottswood, Eleanor
Subject:	RE: Legislative Meeting
Date:	Friday, September 14, 2018 11:23:44 AM

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Lucy Leriche(she/her/hers)
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Colchester, Vermont 05446
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Lucy.Leriche@ppnne.org

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From:	cwhite@acluvt.org
To:	Diamond, Joshua; Leriche, Lucy Rose; Jill Krowinski
Cc:	Spottswood, Eleanor
Subject:	RE: Legislative Meeting
Date:	Friday, September 14, 2018 10:03:19 AM

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From: Diamond, Joshua
To: Leriche, Lucy Rose; Jill Krowinski
Cc: cwhite@acluvt.org; Spottswood, Eleanor
Subject: RE: Legislative Meeting
Date: Friday, September 14, 2018 6:47:14 AM

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>
> On Sep 13, 2018, at 6:47 PM, Diamond, Joshua <Joshua.Diamond@vermont.gov> wrote:
>
> > Folks, do we have a time for the 21st?
> > My calendar is beginning to fill in.

Best, Josh
Joshua R. Diamond, Deputy Attorney General
Vermont Attorney General's Office
109 State Street
Montpelier, Vermont 05609
802-828-3175
joshua.diamond@vermont.gov

From: Leriche, Lucy Rose
To: Jill Krowinski
Cc: Diamond, Joshua; cwhite@acluvt.org; Spottswood, Eleanor
Subject: Re: Legislative Meeting
Date: Thursday, September 13, 2018 8:17:06 PM

Oh, sorry Jill! Early in the day ok with everyone? How about 9:30?
Lucy
Lucy

Sent from my iPhone

On Sep 13, 2018, at 8:08 PM, Jill Krowinski <JKrowinski@leg.state.vt.us> wrote:

> Hi all,
>
> The 21st works for me. The earlier in the day the better.
>
> Thanks,
> Jill
>
> Sent from my iPhone
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> >

From: Leriche, Lucy Rose
To: Diamond, Joshua
Cc: cwhite@acluvt.org; Jill Krowinski; Spottswood, Eleanor
Subject: Re: Legislative Meeting
Date: Thursday, September 13, 2018 8:16:07 PM

As soon as we hear back from Jill.
Lucy

Sent from my iPhone

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From: Jill Krowinski
To: Diamond, Joshua
Cc: cwhite@acluvt.org; Leriche, Lucy Rose; Spottswood, Eleanor
Subject: Re: Legislative Meeting
Date: Thursday, September 13, 2018 8:08:51 PM

Hi all,

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Thanks,
Jill

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From: Diamond, Joshua
To: cwhite@acluvt.org; Leriche, Lucy Rose; Jill Krowinski
Cc: Spottswood, Eleanor
Subject: Legislative Meeting
Date: Thursday, September 13, 2018 6:47:36 PM

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Vermont Attorney General's Office
109 State Street
Montpelier, Vermont 05609
802-828-3175
joshua.diamond@vermont.gov

From:	cwhite@acluvt.org
To:	Spottswood, Eleanor; Diamond, Joshua; jlyall@acluvt.org; Leriche, Lucy Rose; Jill Krowinski
Subject:	RE: Abortion Access
Date:	Wednesday, September 12, 2018 10:21:25 AM
Attachments:	image001.png image002.png image003.png

Hello all,

I'm free the 21st after 11ish and am free the 26th. I'm booked up the 25th.

Looking forward to speaking with you all on this important issue!

Chloé

From: Spottswood, Eleanor <Eleanor.Spottswood@vermont.gov>
Sent: Monday, September 10, 2018 7:28 PM
To: Diamond, Joshua <Joshua.Diamond@vermont.gov>; jlyall@acluvt.org; Leriche, Lucy Rose <Lucy.Leriche@ppnne.org>; Jill Krowinski <JKrowinski@leg.state.vt.us>; cwhite@acluvt.org
Subject: RE: Abortion Access

Hello all,

I am free on the 21st.

Ella

Eleanor L.P. Spottswood
Assistant Attorney General
Vermont Attorney General's Office
109 State Street
Montpelier, Vermont 05609
802-828-3178
eleanor.spottswood@vermont.gov

From: Diamond, Joshua
Sent: Monday, September 10, 2018 6:24 PM
To: jlyall@acluvt.org; Leriche, Lucy Rose <Lucy.Leriche@ppnne.org>; Jill Krowinski <JKrowinski@leg.state.vt.us>; Spottswood, Eleanor <Eleanor.Spottswood@vermont.gov>; cwhite@acluvt.org
Subject: RE: Abortion Access

Folks,

I'm free anytime on the 21st until 2:00. Unfortunately, I'm booked up on the 25th and 26th.

Best, Josh

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joshua.diamond@vermont.gov

certain communications with and activities directed at the Attorney General. Prior to any interactions with the Office of the Vermont Attorney General, you are advised to review Title 2, sections 261-268 of the Vermont Statutes Annotated, as well as the Vermont Secretary of State's most recent compliance guide available at https://www.sec.state.vt.us/elections/lobbying.aspx.

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Sent: Monday, September 10, 2018 3:21 PM
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Subject: RE: Abortion Access

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We're happy to host here if that's helpful.

Talk soon.

James Duff Lyall
Executive Director
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ACLU Vermont

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Subject: Abortion Access

Hello everyone,

It's time to get together and talk next steps and strategy. I am throwing out some dates for your consideration. I am thinking a Montpelier location probably works best for most.

So what about Friday the 21st anytime, or Tuesday the 25th anytime in the morning until 10, or anytime in the afternoon. I am also free on Wednesday the 25th from 11am-2pm. Hoping there might be an hour in there that will works for everyone?

Lucy

Lucy Leriche(she/her/hers)
Vice President of Public Policy Vermont
Planned Parenthood Northern New England
784 Hercules Drive suite 110
Colchester, Vermont 05446

Cell: 802 598-4182
www.ppnne.org<http://www.ppnne.org/>
Lucy.Leriche@ppnne.org

From: Wemple, Doug
To: AGO - Everybody
Subject: Summer Newsletter
Date: Tuesday, September 11, 2018 11:10:14 AM
Attachments: Summer Newsletter.pdf

All,

Attached, please find this Summer's newsletter. Enjoy!

Doug

Doug Wemple
Executive Assistant
Office of the Vermont Attorney General
109 State Street - Montpelier, VT
Office: (802)828-5515

VERMONT ATTORNEY GENERAL'S OFFICE SUMMER NEWSLETTER 2018

INSIDE THIS ISSUE:

- DIVISION UPDATES
- AGO IN THE COMMUNITY/ SNAPSHOTS

ANNOUNCEMENTS

NEW FACES IN THE AGO

In the past few months, we've added a lot of new faces to the AGO family. We are in the process of hiring people even as this newsletter is being written, so stay tuned for even more new folks in the next edition. Make sure to say hello to our new colleagues!

- **GCAL: *Brandy LaPrade*** joined us as a paralegal to support our newly created Hearings Unit.
- **AHS: *Tom Allingham*** joined the Family Services Legal Unit in the Rutland District Office. Tom joined our office after many years in private practice out of state and is happy to be settling into living full time in Vermont with his family (which includes two hamburger-loving donkeys). ***Jessica Hartleben*** joined the Family Services Legal Unit having previously represented children and parents in Bennington. Jessica has been assigned the Brattleboro District Office and will help provide some relief to the rising caseloads in the Southern part of the state.
- ***Lillian Colasurdo*** joined AHS in the Department of Health Legal Unit. Lilly was formerly at the VDH in a policy position, and we are happy to welcome her, and her love of chickens and Elvis, to the AHS legal team.
- **CRIMINAL: *John Waszack*** joined us in Spring of 2018.

DIVISION UPDATES

AHS

AHS has had a busy winter/spring. In addition to keeping up with consistently high caseloads and appeal numbers, AHS has had some significant changes and additions to the staff within the Division.

- **AAG Tom Allingham** joined the Family Services Legal Unit and has been assigned the Rutland District Office. Tom joined our office after many years in private practice out of state and is happy to be settling into living full time in Vermont with his family (which includes two hamburger-loving donkeys).
- **AAG Jessica Hartleben** also joined the Family Services Legal unit having previously represented children and parents in Bennington. Jessica has been assigned the Brattleboro District Office and will help provide some relief to the rising caseloads in the Southern part of the state.
- **AAG Bessie Weiss** left her position as AAG in the Vermont Department of Health to become the first Director of Human Services. In her new role, Bessie will supervise the AAGs within the DAIL, DVHA and ESD legal unit and will also provide general counsel assistance to AHS and its Departments. AHS is lucky to have Bessie's experience and commitment and is happy to have her serve in this new role.
- To fill the vacant Department of Health AAG position left by Bessie's move, **AAG Lillian Colasurdo** has joined AHS in the Department of Health Legal Unit. Lilly was formerly at the VDH in a policy position, and we are happy to welcome her, and her love of chickens and Elvis, to the AHS legal team.

APPELLATE

- A lot has been going on in the Appellate Unit since the last newsletter. **Solicitor General Ben Battles** filed a U.S. Supreme Court amicus brief on behalf of 35 States in support of the federal government in *United States v. Microsoft*, which involved when law enforcement can execute a search warrant for customer data that is stored in a foreign country. Vermont's

amicus brief was featured in *USA Today* and on *SCOTUSblog,* and **Ben** has spoken about the case at Vermont Law School, American University Law School, and on the National Constitution Center's "We the People" podcast.

- **AAG Ella Spottswood** recently accepted a three-month fellowship with NAAG's Center for Supreme Court Advocacy in Washington, D.C. which will begin in October 2019. **Ella** also got married this past June – congratulations!
- **Karen Farnsworth** was recently elected Secretary of the Vermont Paralegal Organization, which is the local chapter of the National Federation of Paralegal Associations.

CRIMINAL

- Michelle Beard was chosen as a recipient of the Exceptional Contribution to a Federal Prosecution award. This was for her outstanding work in the case of U.S. v. Dominion Diagnostics, involving a Rhode Island-based urine testing lab that billed Medicaid and Medicare for unnecessary tests over the course of six years. In the words of U.S. Attorney Christina Nolan, Michele's work was "integral to the investigation" and made it "impossible for Dominion to avoid coming to the settlement table."

  She received this award in May at the Federal Courthouse. Congratulations, Michelle!

- Ultan Doyle and Matt Raymond obtained guilty verdicts on five counts of possession of child pornography case that went to trial in 2018.
- Criminal's own Mojo was featured in the Burlington Free Press for his unique capabilities to detect hidden electronic storage devices.

CIVIL

- There has been a lot of change in the Civil Division of late. **Megan Shafritz** has ascended to the bench and is no acting as Chief of the Division. While this is a significant loss for Civil, it's certainly a win for the Judiciary! We wish her Honor well! Civil has also lost one of its finest – **Eve Jacob**

Carnahan – to retirement. She will be sorely missed, but we are happy she will be able to focus on her artwork and look forward to seeing all that she creates at her next showing. In the meantime, **Kate Gallagher** has taken over as Civil Chief and is looking for candidates to fill these big shoes! Despite all the change, Civil continues to work hard to defend the State and State employees in many civil cases throughout the State. Of note, Civil's **Philip Back**, working with **Ben Battles**, filed a successful motion to dismiss a lawsuit challenging the unconstitutionality of Act 46 – an education-financing law intended to encourage school consolidations in small districts. The plaintiff had alleged the law violated the State Constitution's Education and Common Benefits Clauses, but the Court rejected these arguments. The Board of Education has expressed its appreciation for the Attorney General's Office hard work on the case. Thank you, **Phil** and **Ben**, for such great work on behalf of the State.

ENVIRONMENTAL

- The Environmental Protection Division was sorry to say goodbye to **AAG Kyle Landis-Marinello** in mid-April. Kyle departs the AGO to become General Counsel at the Public Utility Commission. Kyle started with the AGO in 2010 and was the Office's point-person for all things nuclear & energy for many years. Kyle had a real dedication to his job – often working long hours and weekends! We will miss his hard work, his legal skills, and friendly personality. While we are sorry to see Kyle go, we are all happy and proud he is remaining in public service. Good luck, Kyle!
- **AAG Melanie Kehne** is taking Kyle's place in the Division. Melanie moves to Environmental from GCAL, where she was a "Jane-of-all-trades" handling just about every sort of case that goes through that Division. Melanie brings a wealth of environmental legal experience to Environmental, having formerly worked at the Natural Resources Board. The Environmental Protection Division is pleased to get Melanie on board and apologizes to the good people of GCAL for poaching. Welcome to "Granola Gulch," Melanie!
- **AAG Katie Pohl** and her family welcomed a new baby Rider James Falnagan-Phol in late February. Katie reported that Rider is magnificent and everyone was doing well. Congratulations, Katie! Unfortunately for the

Environmental Protection Division, Katie also announced that she would be leaving the Office effective May 1st to take a lawyer job with the National Oceanic and Atmospheric Administration (NOAA) in Massachusetts. Katie has worked in the AGO since 2015 and handled cases as a member of GCAL initially before moving into the Environmental Protection Division as one of the two AAGS providing legal services to the Agency of Agriculture. Katie was a great coworker and will be missed, but we all wish her and her family nothing but the best with so many new adventures and changes!

- Finally, **AAG Ryan Kane** joined the Environmental Protection Division beginning on May 14th, filling the vacancy from when Keith Flynn departed last fall. Ryan is a 2013 graduate of Vermont Law School and comes to use after working for the past three years at a Montpelier law firm. He grew up in Bar Harbor, Maine and now lives in Montpelier with his wife, Kristina, an art teacher at the Montpelier elementary school. Welcome aboard, Ryan!

GCAL

- GCAL has had some great litigation wins and general counseling successes over the last months. **David Borsykowsky** and **Jesse Moorman** have overhauled State agreements used to manage investments and helped streamline IT procurements across State government.
- **Tim Duggan** has a leading role in implementing "Green Mountain Secure," a multi-employer retirement plan administered by the Treasurer's Office for relatively small, private-sector employers.
- **Greg Harris** has been skillfully guiding BGS through everything from a significant sales of real property, to the construction of the state's new Agriculture and Environmental Laboratory at Vermont Technical College, to the legal challenges associated with security of State buildings.
- **Emily Simmons** has fielded issues ranging from school consolidation to safety and has assisted with transitions related to the Agency of Education while handling teacher disciplinary proceedings.
- **David Scherr** is still upright following the State House rodeo that was gun reform
- **Willa Farrell** with the support of **Anne Walker** has kept pre-trial services and Diversion going – and improving – statewide. **Willa** was also instrumental in her work with the International Restorative Justice Conference at UVM.

- **Liz Hannon** had a big win (a unanimous reversal!) at the VT Supreme Court involving four separate appeals, and **Meg Burke** single-handedly litigated a multi-million, hard-fought administrative appeal against well-heeled out of state counsel. Meanwhile, Meg gave birth on March 31st to her second son, Owen James Burke!
- Speaking of multi-tasking, under Director **Will Baker's** leadership, our entire Tax Unit has managed their typical caseloads plus a barrage of issues associated with federal and state tax reform.
- **Suzanne Monte** has handled complex matters of potentially state-wide impact, while **Lauren Curran** continues to get administrative tax cases under her belt.
- Also, we are pleased to welcome **Tara Rogerson** back to Tax as a paralegal.
- Earlier this year, **AAG Barbara Ripley** retired from Tax, which was her last stop in a distinguished career in State government. Barb was secretary of ANR in the Dean Administration and counsel to ACCD before serving as an AAG in Tax since 2011.
- At AOT, **Jenny Ronis** and **Justin Kolber** adeptly handed a week-long Environmental Court trial.
- Earlier this year, **Toni Clithero** and Director **John Dunleavy** helped resolve a false claims matter in conjunction with the U.S. Attorney's Office.
- **Denise Gumpper** has been on a much-anticipated trip to Africa, where she visited one of her daughters. When she gets back, she'll help the U.S. Attorney's Office and City of Burlington's counsel assess new threats of litigation related to the long-delayed Champlain Parkway project.
- **Tom McCormick** participated in the American Association of Motor Vehicle Administrators' Annual Workshop and Law Institute in Denver and able to use a layover for a quick reunion with his son and grandson.
- We were sad to say goodbye to **Hailey Gilmore.**
- We continue to be thankful for the upbeat presence of **Flo Smith** who is shared between the Legal and Hearing Units.
- In the Administrative Law Unit led by the calm, cool, and collected **Jacob Humbert**, we are very sad to see **Melanie Kehne** move to our Environmental Division, but we are thrilled she will continue to be a great asset to the AGO.
- **Alison Powers** is back! "I'm relieved to finally have my son, Emmett, home from five weeks in the hospital after his recent genetic disorder diagnosis. I wish to convey my sincere gratitude to all my AGO colleagues for your

generous support of my family during this time, and I look forward to returning to work in such a caring community."

- **Bill Reynolds** and **Kacie Diederich** have been pressing on with employment defense and general counseling work (Bill) and as prosecutors for the Medical Practice Board (Bill and Kacie), where they regularly square off against some of Vermont's most animated lawyers while handling difficult cases related to, among other things, opioid prescribing.
- Earlier this year, **Karen Farnsworth** held down the GCAL fort for many weeks while we were without **Liz Handwerger**, who we were thrilled to welcome back to the Office in February. In addition to her appellate work, Karen has taken on support for GCAL lawyers, and Karen and Liz together keep approximately 2,000 contracts moving in and out of 109 State GCAL Unit each year. We would be lost without them!
- Last and certainly not least, GCAL – and the AGO – could not function without the day-in, day-out work of **Deb Matthews**, who handles the most difficult calls at the AGO on a daily basis and nevertheless makes all of us smile!

PUBLIC PROTECTION DIVISION

PPD had four significant announcements this year!

AG Settles Tobacco: State Receives $29 Million

The PPD tobacco team negotiated a $29 million settlement resolving fourteen separate disputes between the State of Vermont and tobacco companies. The MSA requires signatory tobacco companies to pay Vermont millions of dollars annually, in perpetuity collectively. In return, Vermont must "diligently enforce" laws against smaller tobacco companies that are not parties to the MSA. If Vermont fails to enforce those laws in a given calendar year diligently, it stands to lose a substantial portion, or potentially all, of its annual MSA payment for that year. Disputes over this diligent enforcement go to arbitration. The tobacco companies and the states were in dispute over every year from 2004-2017. The settlement resolves those disputes. **Charity Clark**, **Jamie Renner, and Helen Wagner** have all played integral roles in the state's arbitration and diligent enforcement efforts.

Vermonters to Receive Money from Shrinedom Resolution

Vermonters and others who purchased tickets to a concert gone wrong will be eligible for up to $10,000 in refunds pursuant to a settlement secured by PPD. **Ryan Kriger** led the investigation and settlement negotiations. The settlement resolves the investigation of Shrinedom 2017, a rock festival that was supposed to take place on Saturday, September 16, 2017, in Irasburg. Seven bands were contracted to play, including local bands and national acts Vince Neil, Slaughter, Warrant, Lita Ford, and Firehouse. On the day of the festival, the organizers had not sold enough tickets to pay the national bands, who did not perform. The groups and the public were told that there were issues with the generators, when in fact not enough tickets were sold to pay the groups. In addition to $10,000 provided by the Shriners as part of the settlement, approximately $10,000 had already been reimbursed to consumers by PayPal, which processed many of the payments.

AG Secures $6.5 Million from Volkswagen

PPD announced a $6.5 million settlement with Volkswagen and related entities Porsche and Audi. The settlement resolves alleged violations of Vermont's consumer protection laws involving VW's false advertising claims about so-called "Clean Diesel" cars and the diesel engine emissions scandal. Under the settlement, VW has agreed to pay Vermont consumers up to $1,000 for every qualifying vehicle. Vermont is one of two states in which consumers will receive restitution payments as a result of a state enforcement action. Under the settlement terms, consumers will receive $2.9 million in restitution and the state will receive a $3.6 million payment. **Merideth Chaudoir** was the primary AAG on the case and (with Jill Abrams) led negotiations resulting in settlement.

Elder Protection Initiative Launched

PPD launched a new permanent unit within the office to support and protect Vermont's aging population: the "Elder Protection Initiative" (EPI). The initiative is the result of a listening tour soliciting ideas and suggestions from stakeholders on how best to assist Vermont's aging population. The Elder Protection Initiative (EPI) is a multi-disciplinary approach involving the Attorney General's Criminal, Public Protection, and Human Service Divisions. Their mission is to collaborate with each other, and other government agencies and nongovernment organizations in order to: (1) stay informed of the greatest common vulnerabilities facing older Vermonters; (2) determine how the AGO can play a role in addressing these systemic concerns; and (3) take action to address these systemic concerns, whether by enforcement efforts, public education, legislation, and/or other collaborative initiatives with government and community partners. **Jamie Renner** chairs this multidisciplinary effort that brings new awareness and resources to elder issues. Stay tuned for more on this critical initiative.

SNAPSHOTS

Mojo (pictured here with Matt Raymond,) the police dog has been recently featured in both 7Days and the Burlington Free Press, highlighting his role with ICAC and helping keep children safe from online predators. Keep up the good work, Mojo!

The AGO Litigation Volkswagen Team (pictured with Governor Scott and Secretary of Administration Susanne Young) were the recipients of the Outstanding State Employees award during Public Service Recognition Week. Congratulations!

New Environmental AAG Ryan Kane with his wife Kristina. Welcome, Ryan!

A.G. Donovan and Julio Thompson continue to deliver talks to students around the state to discuss the role of the A.G.'s office and civil rights, freedom of speech, and tolerance.

"I am relieved to finally have my son, Emmett, home from five weeks in the hospital after his recent genetic disorder diagnosis. I wish to convey my sincere gratitude to all my AGO colleagues for your generous support of my family during this time, and I look forward to returning to work in such a caring community."

Welcome back, Alison!

AAG David Scherr and Willa Farrell met with the "Justice League" at Mercy Connections as part of the AGO's "Vermonter of the Month" Initiative.

AAGs Rob McDougall, Justin Kolber, and Laura Murphy taught two classes for the Natural Resources Program for the Hartford Area Career and Technical Center this spring.

A.G. Donovan, Deputy A.G. Diamond and AAG Ella Spotswood at a press conference with PPNNE to encourage Vermonters to speak out against proposed changes to Title X Funding.

From:	Spottswood, Eleanor
To:	Diamond, Joshua; jlyall@acluvt.org; Leriche, Lucy Rose; Jill Krowinski; cwhite@acluvt.org
Subject:	RE: Abortion Access
Date:	Monday, September 10, 2018 7:27:00 PM
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Subject: Abortion Access

Hello everyone,

It's time to get together and talk next steps and strategy. I am throwing out some dates for your consideration. I am thinking a Montpelier location probably works best for most.

So what about Friday the 21st anytime, or Tuesday the 25th anytime in the morning until 10, or anytime in the afternoon. I am also free on Wednesday the 25th from 11am-2pm. Hoping there might be an hour in there that will works for everyone?

Lucy

Lucy Leriche(she/her/hers)
Vice President of Public Policy Vermont
Planned Parenthood Northern New England
784 Hercules Drive suite 110
Colchester, Vermont 05446
Cell: 802 598-4182
www.ppnne.org<http://www.ppnne.org/>
Lucy.Leriche@ppnne.org

From:	jlyall@acluvt.org
To:	Leriche, Lucy Rose; Jill Krowinski; Diamond, Joshua; Spottswood, Eleanor; cwhite@acluvt.org
Subject:	RE: Abortion Access
Date:	Monday, September 10, 2018 3:20:37 PM
Attachments:	image001.png image002.png image003.png

Thanks Lucy,
Chloe is out today but I think any of those could work for us, with a slight preference for Weds the 26th, or Tuesday the 25th after 3pm.
We're happy to host here if that's helpful.
Talk soon.

James Duff Lyall
Executive Director
American Civil Liberties Union of Vermont
PO Box 277, Montpelier, VT 05601
802.223.6304 x115 | jlyall@acluvt.org

acluvt.org
Get involved: Become a Member
Donate

ACLU Vermont

From: Leriche, Lucy Rose <Lucy.Leriche@ppnne.org>
Sent: Monday, September 10, 2018 2:57 PM
To: Jill Krowinski <JKrowinski@leg.state.vt.us>; Diamond, Joshua <Joshua.Diamond@vermont.gov>; Spottswood, Eleanor <Eleanor.Spottswood@vermont.gov>; jlyall@acluvt.org; cwhite@acluvt.org
Subject: Abortion Access
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Colchester, Vermont 05446
Cell: 802 598-4182
www.ppnne.org<http://www.ppnne.org/>
Lucy.Leriche@ppnne.org

From: Leriche, Lucy Rose
To: Jill Krowinski; Diamond, Joshua; Spottswood, Eleanor; jlyall@acluvt.org; cwhite@acluvt.org
Subject: Abortion Access
Date: Monday, September 10, 2018 2:56:45 PM

Hello everyone,

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Colchester, Vermont 05446
Cell: 802 598-4182
www.ppnne.org<http://www.ppnne.org/>
Lucy.Leriche@ppnne.org

From:	Leriche, Lucy Rose
To:	JKrowinski@leg.state.vt.us; Diamond, Joshua; Spottswood, Eleanor
Subject:	Fwd: Roe?
Date:	Thursday, August 23, 2018 11:12:26 AM
Attachments:	image001.png image002.png image003.png

So word is getting out. Please see message from Chloé below.
Lucy

Sent from my iPhone

Begin forwarded message:

From: "cwhite@acluvt.org" <cwhite@acluvt.org>
Date: August 23, 2018 at 11:04:24 AM EDT
To: "Lucy.Leriche@ppnne.org" <Lucy.Leriche@ppnne.org>
Subject: Roe?

Hi Lucy,
How are you? Hope all is well.
I heard from someone at ACLU National who heard that PPVT may be thinking about pushing to codify protections for abortion rights this next legislative session. True? If so, we'd love to provide any support we can. If not, also totally cool, and we'll provide support on your other work as much as we can! Basically a win-win situation here
All the best,
Chloé

Chloé White
Pronouns: she/her

Policy Director
American Civil Liberties Union of Vermont
PO Box 277, Montpelier, VT 05601
802.223.6304x110 | cwhite@acluvt.org
acluvt.org

From: Leriche, Lucy Rose
To: Spottswood, Eleanor
Subject: RE: Title X Comments
Date: Wednesday, August 22, 2018 2:48:11 PM

That's helpful, Ella. Thank you!
Lucy
Lucy Leriche(she/her/hers)
Vice President of Public Policy Vermont
Planned Parenthood Northern New England
784 Hercules Drive suite 110
Colchester, Vermont 05446
Cell: 802 598-4182
www.ppnne.org<http://www.ppnne.org/>
Lucy.Leriche@ppnne.org

From: Spottswood, Eleanor <Eleanor.Spottswood@vermont.gov>
Sent: Wednesday, August 22, 2018 1:16 PM
To: Leriche, Lucy Rose <Lucy.Leriche@ppnne.org>; Diamond, Joshua <Joshua.Diamond@vermont.gov>
Subject: RE: Title X Comments

Hi Lucy,
Unfortunately we don't have a way of tracking actual comments submitted. The only metric we have is that the page was visited 1031 times by 761 unique viewers.
Ella
Eleanor L.P. Spottswood
Assistant Attorney General
Vermont Attorney General's Office
109 State Street
Montpelier, Vermont 05609
802-828-3178
eleanor.spottswood@vermont.gov

From: Leriche, Lucy Rose <Lucy.Leriche@ppnne.org>
Sent: Wednesday, August 22, 2018 11:16 AM
To: Diamond, Joshua <Joshua.Diamond@vermont.gov>; Spottswood, Eleanor <Eleanor.Spottswood@vermont.gov>
Subject: Title X Comments

Hi Josh and Ella,
I keep forgetting to ask: how many Title X comments were submitted through your website?
Lucy
Lucy Leriche(she/her/hers)
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www.ppnne.org<http://www.ppnne.org/>
Lucy.Leriche@ppnne.org

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From: Spottswood, Eleanor
To: Leriche, Lucy Rose; Diamond, Joshua
Subject: RE: Title X Comments
Date: Wednesday, August 22, 2018 1:15:00 PM

Hi Lucy,
Unfortunately we don't have a way of tracking actual comments submitted. The only metric we have is that the page was visited 1031 times by 761 unique viewers.
Ella

Eleanor L.P. Spottswood
Assistant Attorney General
Vermont Attorney General's Office
109 State Street
Montpelier, Vermont 05609
802-828-3178
eleanor.spottswood@vermont.gov

From: Leriche, Lucy Rose <Lucy.Leriche@ppnne.org>
Sent: Wednesday, August 22, 2018 11:16 AM
To: Diamond, Joshua <Joshua.Diamond@vermont.gov>; Spottswood, Eleanor <Eleanor.Spottswood@vermont.gov>
Subject: Title X Comments

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Cell: 802 598-4182
www.ppnne.org<http://www.ppnne.org/>
Lucy.Leriche@ppnne.org

From:	Spottswood, Eleanor
To:	Bailey, Jay
Subject:	RE: Title X Comments
Date:	Wednesday, August 22, 2018 12:27:00 PM

Ok, thanks.

From: Bailey, Jay
Sent: Wednesday, August 22, 2018 12:26 PM
To: Spottswood, Eleanor <Eleanor.Spottswood@vermont.gov>
Subject: RE: Title X Comments
761
Thanks

Jay

IT Manager
Vermont Attorney General
109 State Street, Montpelier, VT 05609-1001
P (802) 828-2718

From: Spottswood, Eleanor
Sent: Wednesday, August 22, 2018 12:25 PM
To: Bailey, Jay <Jay.Bailey@vermont.gov>
Subject: RE: Title X Comments
Thank you. Can you give me the number of individual/unique people that contributed to the clicks?

From: Bailey, Jay
Sent: Wednesday, August 22, 2018 12:22 PM
To: Spottswood, Eleanor <Eleanor.Spottswood@vermont.gov>
Subject: RE: Title X Comments
Ella,
There have been 1,031 clicks to the webpage to this point; I have no idea on the “Comment Now” button as it doesn’t come to us.
Thanks

Jay

IT Manager
Vermont Attorney General
109 State Street, Montpelier, VT 05609-1001
P (802) 828-2718

From: Spottswood, Eleanor
Sent: Wednesday, August 22, 2018 12:19 PM
To: Bailey, Jay <Jay.Bailey@vermont.gov>
Subject: FW: Title X Comments
Hi Jay,
Can I get a final count on the number of clicks we got through the Title X “comment now” button?
Thanks,
Ella

From: Leriche, Lucy Rose <Lucy.Leriche@ppnne.org>
Sent: Wednesday, August 22, 2018 11:16 AM
To: Diamond, Joshua <Joshua.Diamond@vermont.gov>; Spottswood, Eleanor <Eleanor.Spottswood@vermont.gov>
Subject: Title X Comments

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Lucy.Leriche@ppnne.org

From:	Bailey, Jay
To:	Spottswood, Eleanor
Subject:	RE: Title X Comments
Date:	Wednesday, August 22, 2018 12:25:32 PM

761
Thanks

Jay

IT Manager
Vermont Attorney General
109 State Street, Montpelier, VT 05609-1001
P (802) 828-2718

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Sent: Wednesday, August 22, 2018 12:25 PM
To: Bailey, Jay <Jay.Bailey@vermont.gov>
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Lucy.Leriche@ppnne.org

From:	Spottswood, Eleanor
To:	Bailey, Jay
Subject:	RE: Title X Comments
Date:	Wednesday, August 22, 2018 12:24:00 PM

Thank you. Can you give me the number of individual/unique people that contributed to the clicks?

From: Bailey, Jay
Sent: Wednesday, August 22, 2018 12:22 PM
To: Spottswood, Eleanor <Eleanor.Spottswood@vermont.gov>
Subject: RE: Title X Comments

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From:	Bailey, Jay
To:	Spottswood, Eleanor
Subject:	RE: Title X Comments
Date:	Wednesday, August 22, 2018 12:21:56 PM

Ella,
There have been 1,031 clicks to the webpage to this point; I have no idea on the "Comment Now" button as it doesn't come to us.
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Date:	Wednesday, August 22, 2018 12:19:00 PM

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Subject: Title X Comments
Date: Wednesday, August 22, 2018 11:16:19 AM

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www.ppnne.org<http://www.ppnne.org/>
Lucy.Leriche@ppnne.org

From: Leriche, Lucy Rose
To: Diamond, Joshua; Spottswood, Eleanor; JKrowinski@leg.state.vt.us
Subject: A12F24A8-6670-490C-911E-1554C0DB6D1D
Date: Friday, August 10, 2018 10:45:55 AM
Attachments: DRAFT VT FOCA 7.31.18.docx
ATT00001.txt

PPFA draft as we just discussed.
Lucy

Add Findings section

(a) Every individual has the fundamental right to choose or refuse contraception or sterilization, and to parent their child.

(b) The state shall not deny or interfere with an individual's fundamental rights, in the regulation or provision of benefits, facilities, services, or information, to choose or refuse contraception or sterilization, or to parent their child, except for [child abuse/neglect/custody state statutes].

Commented [SB1]: Not sure about this provision but I am talking to a few disability rights advocates to see if this seems helpful.

(c) Every individual who becomes pregnant has the fundamental right to choose to carry a pregnancy to term, to give birth to a child, or to have an abortion.

(c) The state shall not deny or interfere with an individual's fundamental rights, in the regulation or provision of benefits, facilities, services, or information, to choose to carry a pregnancy to term, to give birth to a child, or to obtain an abortion.

(d) A fertilized egg, embryo, or fetus does not have independent rights under the laws of this state.

(e) The state shall not discriminate in any limitation of these rights based on sex, disability, race, ethnicity, gender identity, national origin, religion, or sexual orientation.

From:	Leriche, Lucy Rose
To:	Jill Krowinski; Diamond, Joshua; Spottswood, Eleanor
Subject:	FW: FOCA examples for VT
Date:	Thursday, August 9, 2018 3:21:33 PM
Attachments:	Statutory Abortion Protections 2018.docx

For our conversation tomorrow, please see attached.

Lucy
Lucy Leriche(she/her/hers)
Vice President of Public Policy Vermont
Planned Parenthood Northern New England
784 Hercules Drive suite 110
Colchester, Vermont 05446
Cell: 802 598-4182
www.ppnne.org<http://www.ppnne.org/>
Lucy.Leriche@ppnne.org

From: Sousa, Bethany <bethany.sousa@ppfa.org>
Sent: Monday, July 23, 2018 4:12 PM
To: Leriche, Lucy Rose <Lucy.Leriche@ppnne.org>
Cc: Keauna Gregory <keauna.gregory@ppfa.org>
Subject: FOCA examples for VT

Hi Lucy,
I think it's worth thinking about what else could go into a FOCA that hasn't yet, but here is a document with links and language of those that exist. I like CA's b/c it is a little broader.
I asked someone to do some research into VT law so will try to get back to you asap with more info.
Best,
Beth
--

Bethany Sousa
Senior Policy Counsel
Public Policy, Litigation and Law
Planned Parenthood Federation of America
123 William St., NYNY 10038
212-261-4572

Statutory Abortion Protections

CALIFORNIA

Citation: CA Health & Safety Code § 123462 (through 2012 Leg Sess)

Text:

The Legislature finds and declares that every individual possesses a fundamental right of privacy with respect to personal reproductive decisions. Accordingly, it is the public policy of the State of California that:

(a) Every individual has the fundamental right to choose or refuse birth control.

(b) Every woman has the fundamental right to choose to bear a child or to choose and to obtain an abortion, except as specifically limited by this article.

(c) The state shall not deny or interfere with a woman s fundamental right to choose to bear a child or to choose to obtain an abortion, except as specifically permitted by this article.

(Added by Stats. 2002, Ch. 385, Sec. 8. Effective January 1, 2003.)

CONNECTICUT

Citation: Conn. Gen. Stat. Ann. § 19a-602(a) (Enacted 1990).

Text:

2012 Connecticut General Statutes
Title 19a - Public Health and Well-Being
Chapter 368y - Abortion

Section 19a-602 - Termination of pregnancy prior to viability. Abortion after viability prohibited; exception.

(a) The decision to terminate a pregnancy prior to the viability of the fetus shall be solely that of the pregnant woman in consultation with her physician.

(b) No abortion may be performed upon a pregnant woman after viability of the fetus except when necessary to preserve the life or health of the pregnant woman.
(P.A. 90-113, S. 3.)

DELAWARE

Universal Citation: *Medical Practice Act*, 24 Del. C. §§ 1790, 1793, 1794

Text:

2017 Delaware Code
Title 24 - Professions and Occupations

CHAPTER 17. MEDICAL PRACTICE ACT
Subchapter IX Termination of Human Pregnancy
§ 1790. Termination of pregnancy before viability not prohibited; termination of pregnancy after viability limited.

(a) A physician may terminate, assist in the termination of, or attempt the termination of a human pregnancy before viability.

(b) A physician may not terminate, attempt to terminate, or assist in the termination or attempt at termination of a human pregnancy otherwise than by birth after viability, unless, in the good faith medical judgment of the physician, the termination is necessary for the protection of the woman's life or health or in the event of a fetal anomaly for which there is not a reasonable likelihood of the fetus's sustained survival outside the uterus without extraordinary medical measures.

24 Del. C. 1953, § 1790; 57 Del. Laws, c. 145, § 2; 57 Del. Laws, c. 235, §§ 1, 2; 58 Del. Laws, c. 511, § 55; 66 Del. Laws, c. 269, § 16; 70 Del. Laws, c. 149, § 211; 70 Del. Laws, c. 186, § 1; 81 Del. Laws, c. 35, § 2.;

HAWAII
Citation: HI Rev Stat § 453-16 (2013)
Text:
§453-16 Intentional termination of pregnancy; penalties; refusal to perform.
(a) No abortion shall be performed in this State unless:

(1) The abortion is performed by a licensed physician or surgeon, or by a licensed osteopathic physician and surgeon; and
(2) The abortion is performed in a hospital licensed by the department of health or operated by the federal government or an agency thereof, or in a clinic or physician's or osteopathic physician's office.

(b) Abortion shall mean an operation to intentionally terminate the pregnancy of a nonviable fetus. The termination of a pregnancy of a viable fetus is not included in this section.

(c) The State shall not deny or interfere with a female's right to choose or obtain an abortion of a nonviable fetus or an abortion that is necessary to protect the life or health of the female.

(d) Any person who knowingly violates subsection (a) shall be fined not more than $1,000 or imprisoned not more than five years, or both.

(e) Nothing in this section shall require any hospital or any person to participate in an abortion nor shall any hospital or any person be liable for a refusal. [L 1970, c 1, §2; am L 2006, c 35, §2; am L 2008, c 5, §18]

MAINE

Citation: Me. Rev. Stat. Ann. tit. 22, § 1598(1) (Enacted 1979; Last Amended 1993).

Text:

§1598. Abortions

1. Policy. It is the public policy of the State that the State not restrict a woman's exercise of her private decision to terminate a pregnancy before viability except as provided in section 1597-A. After viability an abortion may be performed only when it is necessary to preserve the life or health of the mother. It is also the public policy of the State that all abortions may be performed only by a physician.

[1993, c. 61, §2 (AMD) .]

2. Definitions. As used in this section, unless the context otherwise indicates, the following terms shall have the following meanings.

A. "Abortion" means the intentional interruption of a pregnancy by the application of external agents, whether chemical or physical or by the ingestion of chemical agents with an intention other than to produce a live birth or to remove a dead fetus. [1979, c. 405, §2 (NEW).]

B. "Viability" means the state of fetal development when the life of the fetus may be continued indefinitely outside the womb by natural or artificial life-supportive systems. [1979, c. 405, §2 (NEW).]

[1979, c. 405, §2 (NEW) .]

3. Persons who may perform abortions; penalties.

A. Only a person licensed under Title 32, chapter 36 or chapter 48, to practice medicine in Maine as a medical or osteopathic physician, may perform an abortion on another person. [1979, c. 405, §2 (NEW).]

B. Any person not so licensed who knowingly performs an abortion on another person or any person who knowingly assists a nonlicensed person to perform an abortion on another person is guilty of a Class C crime.[1979, c. 405, §2 (NEW).]

[1979, c. 405, §2 (NEW) .]

4. Abortions after viability; criminal liability. A person who performs an abortion after viability is guilty of a Class D crime if:

A. He knowingly disregarded the viability of the fetus; and [1979, c. 405, §2 (NEW).]

B. He knew that the abortion was not necessary for the preservation of the life or health of the mother

MARYLAND

Citation: Md. Code Ann., Health-Gen. § 20-209 (Enacted 1991).

Text:

§ 20-209.

(a) In this section, "viable" means that stage when, in the best medical judgment of the attending physician based on the particular facts of the case before the physician, there is a reasonable likelihood of the fetus's sustained survival outside the womb.

(b) Except as otherwise provided in this subtitle, the State may not interfere with the decision of a woman to terminate a pregnancy:

(1) Before the fetus is viable; or

(2) At any time during the woman's pregnancy, if:

(i) The termination procedure is necessary to protect the life or health of the woman; or

(ii) The fetus is affected by genetic defect or serious deformity or abnormality.

(c) The Department may adopt regulations that:

(1) Are both necessary and the least intrusive method to protect the life or health of the woman; and

(2) Are not inconsistent with established medical practice.

(d) The physician is not liable for civil damages or subject to a criminal penalty for a decision to perform an abortion under this section made in good faith and in the physician's best medical judgment in accordance with accepted standards of medical practice.

Oregon

Citation: ORS § 721

Text:

SECTION 8. A public body as defined in ORS 174.109 or, except as provided in ORS 435.225, an officer, employee or agent of a public body may not:

(1) Deprive a consenting individual of the choice of terminating the individual's pregnancy;

(2) Interfere with or restrict, in the regulation or provision of benefits, facilities, services or information, the choice of a consenting individual to terminate the individual's pregnancy;

(3) Prohibit a health care provider, who is acting within the scope of the health care provider's license, from terminating or assisting in the termination of a patient's pregnancy; or

(4) Interfere with or restrict, in the regulation or provision of benefits, facilities, services or information, the choice of a health care provider, who is acting within the scope of the health care provider's license, to terminate or assist in the termination of a patient's pregnancy.

Washington

Citation: 1992 c 1 § 1 (Initiative Measure No. 120, approved November 5, 1991).

Text:

RCW 9.02.100

Reproductive privacy — Public policy.

The sovereign people hereby declare that every individual possesses a fundamental right of privacy with respect to personal reproductive decisions.

Accordingly, it is the public policy of the state of Washington that:

(1) Every individual has the fundamental right to choose or refuse birth control;

(2) Every woman has the fundamental right to choose or refuse to have an abortion, except as specifically limited by RCW 9.02.100 through 9.02.170 and 9.02.900 through 9.02.902;

(3) Except as specifically permitted by RCW 9.02.100 through 9.02.170 and 9.02.900 through 9.02.902, the state shall not deny or interfere with a woman's fundamental right to choose or refuse to have an abortion; and

(4) The state shall not discriminate against the exercise of these rights in the regulation or provision of benefits, facilities, services, or information.

[1992 c 1 § 1 (Initiative Measure No. 120, approved November 5, 1991).

RCW 9.02.110

Right to have and provide.

The state may not deny or interfere with a woman's right to choose to have an abortion prior to viability of the fetus, or to protect her life or health.

A physician may terminate and a health care provider may assist a physician in terminating a pregnancy as permitted by this section.

[1992 c 1 § 2 (Initiative Measure No. 120, approved November 5, 1991).]

RCW 9.02.140

State regulation.

Any regulation promulgated by the state relating to abortion shall be valid only if:

(1) The regulation is medically necessary to protect the life or health of the woman terminating her pregnancy,

(2) The regulation is consistent with established medical practice, and

(3) Of the available alternatives, the regulation imposes the least restrictions on the woman's right to have an abortion as defined by RCW 9.02.100 through9.02.170 and 9.02.900 through 9.02.902.

[1992 c 1 § 5 (Initiative Measure No. 120, approved November 5, 1991).]

Spottswood, Eleanor

From: Spottswood, Eleanor
Sent: Thursday, August 2, 2018 3:37 PM
To: 'Leriche, Lucy Rose'
Subject: Accepted: Abortion Access

From: Leriche, Lucy Rose
To: Diamond, Joshua; Jill Krowinski
Cc: Spottswood, Eleanor
Subject: RE: Protecting Abortion Rights Working Group
Date: Thursday, August 2, 2018 3:27:24 PM

That would be great if you could host, Josh. Thanks for the offer!

I will send out a meeting invite for Friday, the 10th of August at 10:00am. Thanks!

Lucy
Lucy Leriche(she/her/hers)
Vice President of Public Policy Vermont
Planned Parenthood Northern New England
784 Hercules Drive suite 110
Colchester, Vermont 05446
Cell: 802 598-4182
www.ppnne.org<http://www.ppnne.org/>
Lucy.Leriche@ppnne.org

From: Diamond, Joshua <Joshua.Diamond@vermont.gov>
Sent: Thursday, August 02, 2018 2:51 PM
To: Leriche, Lucy Rose <Lucy.Leriche@ppnne.org>; Jill Krowinski <JKrowinski@leg.state.vt.us>
Cc: Spottswood, Eleanor <Eleanor.Spottswood@vermont.gov>
Subject: RE: Protecting Abortion Rights Working Group

Works for me too.

Where do you want to meet. We can host if that is convenient.

Josh

Joshua R. Diamond, Deputy Attorney General
Vermont Attorney General's Office
109 State Street
Montpelier, Vermont 05609
802-828-3175
joshua.diamond@vermont.gov

From: Leriche, Lucy Rose <Lucy.Leriche@ppnne.org>
Sent: Thursday, August 2, 2018 10:33 AM
To: Jill Krowinski <JKrowinski@leg.state.vt.us>
Cc: Spottswood, Eleanor <Eleanor.Spottswood@vermont.gov>; Diamond, Joshua <Joshua.Diamond@vermont.gov>
Subject: Re: Protecting Abortion Rights Working Group

10am works for me.

Lucy

Sent from my iPhone

On Aug 2, 2018, at 9:20 AM, Jill Krowinski <JKrowinski@leg.state.vt.us> wrote:

> Hello,
> Thanks, Lucy for starting this conversation. I can make the 10th work. Are folks available at 10am?
> Thank you,
> Jill
>
> Sent from my iPhone
>
> On Aug 1, 2018, at 5:49 PM, Spottswood, Eleanor <Eleanor.Spottswood@vermont.gov> wrote:
>
> > The 10th works for me as well.
> > Ella
> >
> > **From:** Diamond, Joshua
> > **Sent:** Wednesday, August 1, 2018 5:47 PM
> > **To:** Leriche, Lucy Rose <Lucy.Leriche@ppnne.org>; Jill Krowinski <JKrowinski@leg.state.vt.us>; Spottswood, Eleanor <Eleanor.Spottswood@vermont.gov>
> > **Subject:** RE: Protecting Abortion Rights Working Group
> >
> > The 10th works best for me.
> > Josh
> > Joshua R. Diamond, Deputy Attorney General
> > Vermont Attorney General's Office
> > 109 State Street
> > Montpelier, Vermont 05609
> > 802-828-3175
> > joshua.diamond@vermont.gov
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> >
> > **From:** Leriche, Lucy Rose <Lucy.Leriche@ppnne.org>

Sent: Wednesday, August 1, 2018 12:38 PM
To: Diamond, Joshua <Joshua.Diamond@vermont.gov>; Jill Krowinski <JKrowinski@leg.state.vt.us>; Spottswood, Eleanor <Eleanor.Spottswood@vermont.gov>
Subject: Protecting Abortion Rights Working Group

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Cell: 802 598-4182
www.ppnne.org<http://www.ppnne.org/>
Lucy.Leriche@ppnne.org

From:	Diamond, Joshua
To:	Leriche, Lucy Rose; Jill Krowinski
Cc:	Spottswood, Eleanor
Subject:	RE: Protecting Abortion Rights Working Group
Date:	Thursday, August 2, 2018 2:51:17 PM

Works for me too.
Where do you want to meet. We can host if that is convenient.
Josh
Joshua R. Diamond, Deputy Attorney General
Vermont Attorney General's Office
109 State Street
Montpelier, Vermont 05609
802-828-3175
joshua.diamond@vermont.gov

From: Leriche, Lucy Rose <Lucy.Leriche@ppnne.org>
Sent: Thursday, August 2, 2018 10:33 AM
To: Jill Krowinski <JKrowinski@leg.state.vt.us>
Cc: Spottswood, Eleanor <Eleanor.Spottswood@vermont.gov>; Diamond, Joshua <Joshua.Diamond@vermont.gov>
Subject: Re: Protecting Abortion Rights Working Group
10am works for me.
Lucy

Sent from my iPhone

On Aug 2, 2018, at 9:20 AM, Jill Krowinski <JKrowinski@leg.state.vt.us> wrote:

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> Jill
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> Sent from my iPhone
>
> On Aug 1, 2018, at 5:49 PM, Spottswood, Eleanor <Eleanor.Spottswood@vermont.gov> wrote:

The 10th works for me as well.
Ella

From: Diamond, Joshua
Sent: Wednesday, August 1, 2018 5:47 PM
To: Leriche, Lucy Rose <Lucy.Leriche@ppnne.org>; Jill Krowinski <JKrowinski@leg.state.vt.us>; Spottswood, Eleanor <Eleanor.Spottswood@vermont.gov>
Subject: RE: Protecting Abortion Rights Working Group

The 10th works best for me.
Josh

Joshua R. Diamond, Deputy Attorney General
Vermont Attorney General's Office
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joshua.diamond@vermont.gov

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Sent: Wednesday, August 1, 2018 12:38 PM
To: Diamond, Joshua <Joshua.Diamond@vermont.gov>; Jill Krowinski <JKrowinski@leg.state.vt.us>; Spottswood, Eleanor <Eleanor.Spottswood@vermont.gov>
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Cell: 802 598-4182
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Lucy.Leriche@ppnne.org

From: Leriche, Lucy Rose
To: Jill Krowinski
Cc: Spottswood, Eleanor; Diamond, Joshua
Subject: Re: Protecting Abortion Rights Working Group
Date: Thursday, August 2, 2018 10:32:51 AM

10am works for me.
Lucy

Sent from my iPhone

On Aug 2, 2018, at 9:20 AM, Jill Krowinski <JKrowinski@leg.state.vt.us> wrote:

> Hello,
>
> Thanks, Lucy for starting this conversation. I can make the 10th work. Are folks available at 10am?
>
> Thank you,
> Jill
>
> Sent from my iPhone
>
> On Aug 1, 2018, at 5:49 PM, Spottswood, Eleanor <Eleanor.Spottswood@vermont.gov> wrote:
>
> > The 10th works for me as well.
> > Ella
> >
> > **From:** Diamond, Joshua
> > **Sent:** Wednesday, August 1, 2018 5:47 PM
> > **To:** Leriche, Lucy Rose <Lucy.Leriche@ppnne.org>; Jill Krowinski <JKrowinski@leg.state.vt.us>; Spottswood, Eleanor <Eleanor.Spottswood@vermont.gov>
> > **Subject:** RE: Protecting Abortion Rights Working Group
> >
> > The 10th works best for me.
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> > Joshua R. Diamond, Deputy Attorney General
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> >

please notify the sender immediately and destroy this E-mail. Vermont's lobbyist registration and disclosure law applies to certain communications with and activities directed at the Attorney General. Prior to any interactions with the Office of the Vermont Attorney General, you are advised to review Title 2, sections 261-268 of the Vermont Statutes Annotated, as well as the Vermont Secretary of State's most recent compliance guide available at https://www.sec.state.vt.us/elections/lobbying.aspx.

From: Leriche, Lucy Rose <Lucy.Leriche@ppnne.org>

Sent: Wednesday, August 1, 2018 12:38 PM

To: Diamond, Joshua <Joshua.Diamond@vermont.gov>; Jill Krowinski <JKrowinski@leg.state.vt.us>; Spottswood, Eleanor <Eleanor.Spottswood@vermont.gov>

Subject: Protecting Abortion Rights Working Group

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Lucy.Leriche@ppnne.org

From: Jill Krowinski
To: Spottswood, Eleanor
Cc: Diamond, Joshua; Leriche, Lucy Rose
Subject: Re: Protecting Abortion Rights Working Group
Date: Thursday, August 2, 2018 9:20:41 AM

Hello,

Thanks, Lucy for starting this conversation. I can make the 10th work. Are folks available at 10am?

Thank you,
Jill

Sent from my iPhone

On Aug 1, 2018, at 5:49 PM, Spottswood, Eleanor <Eleanor.Spottswood@vermont.gov> wrote:

> The 10th works for me as well.
> Ella
>
> **From:** Diamond, Joshua
> **Sent:** Wednesday, August 1, 2018 5:47 PM
> **To:** Leriche, Lucy Rose <Lucy.Leriche@ppnne.org>; Jill Krowinski <JKrowinski@leg.state.vt.us>; Spottswood, Eleanor <Eleanor.Spottswood@vermont.gov>
> **Subject:** RE: Protecting Abortion Rights Working Group
>
> The 10th works best for me.
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>
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Sent: Wednesday, August 1, 2018 12:38 PM
To: Diamond, Joshua <Joshua.Diamond@vermont.gov>; Jill Krowinski <JKrowinski@leg.state.vt.us>; Spottswood, Eleanor <Eleanor.Spottswood@vermont.gov>
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Lucy.Leriche@ppnne.org

From: Spottswood, Eleanor
To: Diamond, Joshua; Leriche, Lucy Rose; Jill Krowinski
Subject: RE: Protecting Abortion Rights Working Group
Date: Wednesday, August 1, 2018 5:48:00 PM

The 10th works for me as well.
Ella

From: Diamond, Joshua
Sent: Wednesday, August 1, 2018 5:47 PM
To: Leriche, Lucy Rose <Lucy.Leriche@ppnne.org>; Jill Krowinski <JKrowinski@leg.state.vt.us>; Spottswood, Eleanor <Eleanor.Spottswood@vermont.gov>
Subject: RE: Protecting Abortion Rights Working Group

The 10th works best for me.
Josh

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Sent: Wednesday, August 1, 2018 12:38 PM
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Lucy.Leriche@ppnne.org

From:	Diamond, Joshua
To:	Leriche, Lucy Rose; Jill Krowinski; Spottswood, Eleanor
Subject:	RE: Protecting Abortion Rights Working Group
Date:	Wednesday, August 1, 2018 5:47:16 PM

The 10th works best for me.

Josh
Joshua R. Diamond, Deputy Attorney General
Vermont Attorney General's Office
109 State Street
Montpelier, Vermont 05609
802-828-3175
joshua.diamond@vermont.gov

From: Leriche, Lucy Rose <Lucy.Leriche@ppnne.org>
Sent: Wednesday, August 1, 2018 12:38 PM
To: Diamond, Joshua <Joshua.Diamond@vermont.gov>; Jill Krowinski <JKrowinski@leg.state.vt.us>; Spottswood, Eleanor <Eleanor.Spottswood@vermont.gov>
Subject: Protecting Abortion Rights Working Group

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Cell: 802 598-4182
www.ppnne.org<http://www.ppnne.org/>
Lucy.Leriche@ppnne.org

From: Leriche, Lucy Rose
To: Diamond, Joshua; Jill Krowinski; Spottswood, Eleanor
Subject: Protecting Abortion Rights Working Group
Date: Wednesday, August 1, 2018 12:38:35 PM

Hello Josh, Ella, and Jill. I am writing to see if we can all meet in the next week or two to start plotting the path forward. I currently have next Thursday and Friday the 9th and 10th of August wide open for a meeting in Montpelier as a place to start. Would either of those days work for you all?
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Colchester, Vermont 05446
Cell: 802 598-4182
www.ppnne.org<http://www.ppnne.org/>
Lucy.Leriche@ppnne.org

From:	Diamond, Joshua
To:	Donovan, Thomas; Clark, Charity; Spottswood, Eleanor
Subject:	FW: Title X letter
Date:	Tuesday, July 31, 2018 2:09:22 PM
Attachments:	Final_Title_X_Comment_Letter_7.31.18 WAMAORVT.PDF

FYI. Josh

Joshua R. Diamond, Deputy Attorney General
Vermont Attorney General's Office
109 State Street
Montpelier, Vermont 05609
802-828-3175
joshua.diamond@vermont.gov

From: Aho, Brionna (ATG) <BrionnaF@ATG.WA.GOV>
Sent: Tuesday, July 31, 2018 2:06 PM
To: Gotsis, Chloe (AGO) <chloe.gotsis@state.ma.us>; kristina.edmunson@doj.state.or.us; Clark, Charity <Charity.Clark@vermont.gov>; Diamond, Joshua <Joshua.Diamond@vermont.gov>
Subject: RE: Title X letter

In case you don't have the final from your teams:

From: Aho, Brionna (ATG)
Sent: Tuesday, July 31, 2018 10:24 AM
To: 'Gotsis, Chloe (AGO)' <chloe.gotsis@state.ma.us>; 'kristina.edmunson@doj.state.or.us' <kristina.edmunson@doj.state.or.us>; 'Charity.Clark@vermont.gov' <Charity.Clark@vermont.gov>; 'Joshua.Diamond@vermont.gov' <Joshua.Diamond@vermont.gov>
Subject: Title X letter

Hi all,

Just wanted to update you, our plan is to send the letter at 11 a.m. Pacific/2 p.m. Eastern. Let me know if you have any questions.

Best regards,

Brionna

Brionna Aho
Communications Director | Office of State Attorney General Bob Ferguson
Office: 360-753-2727 | Cell: 360-338-2743 | Email: brionna.aho@atg.wa.gov
1125 Washington Street SE, Mailstop 40100 | Olympia| WA | 98504
For the latest news from the AG's office, visit our website at www.atg.wa.gov or follow us on Twitter and Facebook!

Bob Ferguson
ATTORNEY GENERAL OF WASHINGTON
Administration Division
PO Box 40100 ● Olympia, WA 98504-0100 ● (360) 753-6200

July 31, 2018

VIA FEDERAL eRULEMAKING PORTAL

Secretary Alex M. Azar II
Assistant Secretary ADM Brett P. Giroir, M.D.
Deputy Assistant Secretary Diane Foley, M.D., FAAP
Attention: Family Planning
U.S. Department of Health and Human Services
Hubert H. Humphrey Building, Room 716G
200 Independence Avenue SW
Washington, DC 20201

RE: HHS–OS–2018–0008, Comments on Proposed Rule: *Compliance With Statutory Program Integrity Requirements*, Docket No.: HHS-OS-2018-0008

Dear Secretary Azar, Assistant Secretary Giroir, and Deputy Assistant Secretary Foley:

The undersigned, Attorneys General for the States of Washington, Oregon, and Vermont and the Commonwealth of Massachusetts, respectfully urge the Department of Health and Human Services (the Department) to withdraw its Proposed Rule: *Compliance with Statutory Program Integrity Requirements*, 83 Fed. Reg. 25,502 (June 1, 2018). We have grave concerns with the legality of the proposed rule, and do not believe it would survive judicial review in its current form.

The Title X family planning program was created to provide access to high-quality family planning and related preventive health care for low-income and underserved individuals. The proposed rule has a host of legal flaws. In some states, if implemented, it will eliminate from the Title X program many Title X providers and leave thousands of residents without reasonable options for critical family planning services. In other states, it will frustrate the ability of providers to deliver high-quality and complete care to their patients and will undermine the efficacy of the network as a whole. The proposed rule thus frustrates rather than promotes the purposes of Title X. The proposed rule shifts the burden and costs to the states, including myriad reproductive health services related to unintended pregnancies, treatment of sexually transmitted infections (STIs), cervical and breast cancer screening and treatment, and other public health

services that the Title X program currently covers. The public health impact will fall the heaviest on our States' most vulnerable populations – including low-income and rural women and families, immigrants and people of color that the program is intended to help.

Further, the proposed rule requires directive counseling, which is in violation of a federal statute governing Title X.[1] It illegally injects the government into the Title X medical examination room, and it violates the constitutional rights of providers and patients under the First and Fifth Amendments. The proposed rule also violates the Department's current statutory interpretation of "acceptable and effective family planning methods and services" without mentioning the current interpretation or the evidence justifying it. Various parts of the rule are unsupported by any evidence and are thus arbitrary and capricious. Finally, the proposed rule violates Executive Orders 12866 and 13562.

A. Relevant Background of Title X to the Public Health Service Act, 42 U.S.C. §§ 300-300a-6

The Family Planning and Services Population Research Act of 1970, which added Title X to the Public Health Service Act, authorizes the Secretary of Health and Human Services:

> 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 . . . .

42 U.S.C. § 300(a).

Title X projects serve an estimated four million women annually.[2] In 2015, 64 percent of U.S. counties had at least one safety-net family planning center supported by Title X, and 90 percent of women in need of publicly funded family planning care lived in those counties.[3] Title X clients are among the nation's most vulnerable populations: two-thirds have incomes at or below the Federal Poverty Level (FPL)($20,090 for a family of three in 2015), nearly half are uninsured—even after implementation of the Affordable Care Act's (ACA) major insurance

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[1] Public Law No. 115-141, § 118, https://www.congress.gov/bill/115th-congress/house-bill/1625/text.

[2] Fowler CI et al., Family Planning Annual Report: 2015 National Summary, Research Triangle Park, NC: RTI International, 2016, http://www.hhs.gov/opa/sites/default/files/title-x-fpar-2015.pdf (last accessed 7/17/18).

[3] Frost JJ and Zolna MR, Response to inquiry concerning the availability of publicly funded contraceptive care to U.S. women, memo to U.S. Senator Patty Murray, Senate Health, Education, Labor and Pensions Committee, New York: Guttmacher Institute, May 3, 2017, https://www.guttmacher.org/article/2017/05/guttmacher-murray-memo-2017 (last accessed 7/17/18).

expansions—and another 35 percent have coverage through Medicaid and other public programs.[4]

In 2015, the contraceptive care delivered by Title X–funded providers helped women avoid 822,000 unintended pregnancies, which would have resulted in 387,000 unplanned births and 278,000 abortions.[5] Without the contraceptive care provided by these health centers, the U.S. rates of unintended pregnancy and abortion would have been 31 percent higher, and the teen unintended pregnancy rate would have been 44 percent higher.[6] Title X is a vital program, especially for low-income women and teens as:

> access to and consistent use of the most effective contraceptive methods are not enjoyed equally by all U.S. women. Disparities in contraceptive use are a major reason why half of U.S. pregnancies—3.2 million each year—are unplanned. . . . [U]nplanned and teen pregnancies occur disproportionately to poor women (those with incomes below the federal poverty level), whose unplanned pregnancy rate is five times that of higher income women.[7]

Concern for low-income women led President Nixon to push for national family planning assistance in the 1960s, stating that "unwanted or untimely childbearing is one of the several forces which are driving many families into poverty or keeping them in that condition."[8] That remains a driving concern today. Studies have shown that access to family planning assistance makes it more likely that a teen will graduate high school, that a woman will achieve her educational and career goals, and that a woman will earn more money (positively impacting not only her life, but the lives of her family).[9] Access to family planning also leads to healthier

---

[4] Fowler CI et al., Family Planning Annual Report: 2015 National Summary, Research Triangle Park, NC: RTI International, 2016, http://www.hhs.gov/opa/sites/default/files/title-x-fpar-2015.pdf (last accessed 7/17/18).

[5] Frost JJ, et al., Publicly Funded Contraceptive Services at U.S. Clinics, 2015, New York: Guttmacher Institute, 2017, https://www.guttmacher.org/report/publicly-funded-contraceptive-services-us-clinics-2015 (last accessed 7/17/18).

[6] Hasstedt K, Why We Cannot Afford to Undercut the Title X National Family Planning Program, Guttmacher Institute, Jan. 30, 2017, https://www.guttmacher.org/gpr/2017/01/why-we-cannot-afford-undercut-title-x-national-family-planning-program (last accessed 7/17/18).

[7] Adam Sonfield, *What Women Already Know: Documenting the Social and Economic Benefits of Family Planning*, Guttmacher Institute (Mar. 2013), *available at* https://www.guttmacher.org/gpr/2013/03/what-women-already-know-documenting-social-and-economic-benefits-family-planning.

[8] Special Message to the Congress on Problems of Population Growth (Jul. 18, 1969), *available at* http://www.presidency.ucsb.edu/ws/?pid=2132.

[9] Adam Sonfield et al., *The Social and Economic Benefits of Women's Ability To Determine Whether and When to Have Children*, Guttmacher Institute, *available at* https://www.guttmacher.org/report/social-and-economic-benefits-womens-ability-determine-whether-and-when-have-children, and *Staff of J. Economic Comm., 114th Cong. The Economic Benefits of Access to Family Planning, available at*

relationships, better health outcomes, and better parenting.[10] Title X is critical in assuring that teens and low-income women can achieve these same positive outcomes.

For many women, a visit to a family planning provider is about far more than birth control. During a visit for contraceptive services at a Title X site, women commonly receive other preventive sexual and reproductive health services, including preconception health care and counseling, STI testing and treatment, human papillomavirus (HPV) vaccinations, cancer screening, Pap tests for early detection of cervical cancer, and referrals for mammograms. Title X providers also screen for a host of other potential health issues, such as high blood pressure, diabetes, and depression, connecting clients to further care when needed.[11] For four in 10 women who obtain their contraceptive care from a safety-net family planning center that focuses on reproductive health, that provider is their only source of care.

Title X improves the health of our States' residents beyond helping them plan for their pregnancies. In 2010, the services provided within the Title X network prevented 87,000 preterm or low-weight births, 63,000 STIs and 2,000 cases of cervical cancer.[12]

B. Title X Is a Critical Program That Provides High-Quality Care To Thousands of Residents of Washington, Massachusetts, Oregon, and Vermont Every Year.

1. *Washington*

The Washington State Department of Health (DOH) is the sole grantee of Title X funds in Washington State and runs the program. Washington's current grant project period is one year and six months and ends August 31, 2018.

Washington's Title X expenditure for 2017 was approximately $13 million. The state-funded amount was approximately $9 million, and the federally funded amount was approximately $4 million.

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https://www.jec.senate.gov/public/_cache/files/d0a67745-74ff-439c-a75a-aacc47e0abc1/jec-fact-sheet---economic-benefits-of-access-to-family-planning.pdf.

[10] *Id.*

[11] Frost JJ, Gold RB and Bucek A, Specialized family planning clinics in the United States: why women choose them and their role in meeting women's health care needs, Women's Health Issues, 2012, 22(6):e519–e525, http://www.whijournal.com/article/S1049-3867(12)00073-4/pdf (last accessed 7/17/18).

[12] Sonfield A, Beyond preventing unplanned pregnancy: the broader benefits of publicly funded family planning services, *Guttmacher Policy Review*, 2014, 17(4):2–6, http://www.guttmacher.org/gpr/2014/12/beyond-preventing-unplanned-pregnancy-broader-benefits-publicly-funded-family-planning (last accessed 7/17/18). 2010 is the most recent year for which these data are available.

Washington served 91,284 patients through Title X in 2017, with 128,296 patient visits. In 2017, 57 percent of Washington's Title X-funded patients were at or below the FPL, and 81 percent had incomes below 200 percent of the FPL. Sixteen percent of Title X clients were women of color. Nine percent of patients were under the age of 18. The DOH projects that Title X services prevented 16,233 unintended pregnancies in 2017; the resulting cost savings for Title X services (including STI, HIV, HPV, and Pap tests) was $113,434,910.

DOH distributes Washington's Title X funds by an approved allocation process. DOH broadly distributes information about an upcoming competition for Title X funds toward the end of the project period. It conducts a formal Request for Proposals process to select providers. After the due date for proposals is past, they are reviewed by objective reviewers and scored on criteria that includes choosing the entities that can best utilize the available funding to carry out Title X requirements.

In addition to Title X funds, Washington separately funds contracted Title X health care providers for Title X-allowable services. Further, some Medicaid providers in Washington offer Title X-allowable services but are not Title X projects. The funding from Title X and Medicaid is separate and distinct. However, if an entity receives Title X funding, all clients that have received services according to Title X guidelines are counted as Title X clients in the data system regardless of their funding source.

There are 12 Title X sub-grantee agencies with 70 clinic sites across Washington State. Five of the 12 agencies that receive Title X funds in Washington perform abortions outside of the Title X project. There are several counties in Washington that only have one Title X provider, including Clallam, Grays Harbor, Pacific, Kitsap, Wahkiakum, Lewis, Thurston, Mason, Jefferson, Whatcom, Skagit, Clark, Skamania, Kittitas, Chelan, Ferry, Pend Oreille, Whitman, and Walla Walla. All sites have physicians on staff as medical directors, but nurse practitioners primarily provide care to patients. All sites have nurse practitioners accessible during all business hours.

Washington subjects Title X providers to numerous contractual requirements. These include: (1) they must be non-profit agencies; (2) they must be able to meet reporting requirements (including the ability to extract data from their Electronic Medical Records system to report to the contracted data vendor); (3) they must follow all regulations; (4) they must be able to separate abortion activities from Title X funding; and (5) they must have qualified personnel and licensed providers.

2. *Massachusetts*

Approximately $6,155,000 in Title X funding flows into Massachusetts annually. These funds support, either directly or indirectly, 90 family planning providers. In 2016 alone, Title X

providers in Massachusetts served 66,072 people.[13] Data from fiscal year 2017 shows that 88 percent of all Title X visits were made by female patients, 50 percent of all patients were between 18 and 29 years old, and 88 percent of all patients were at or below 200 percent of the FPL.

Title X providers in Massachusetts offer a wide range of services and care, including pregnancy testing and options counseling; contraceptive services and supplies; pelvic exams; screenings for cervical and breast cancer; screenings for high blood pressure, anemia, and diabetes; screenings and treatment for STIs; infertility services; health education; and referrals for other health and social services. These services not only have a profound and positive impact on patients' lives, but also save Massachusetts and the federal government money. In fact, according to one estimate, Title X services save Massachusetts and the federal government approximately $140 million per year in Massachusetts alone.[14] Beyond the significant fiscal impact, the services provided have a real and profound impact on the lives of Massachusetts women and their families. In 2014, Title X-funded centers met 15 percent of all contraceptive needs in Massachusetts[15] and helped avert 13,600 unintended pregnancies.[16]

Title X funds are crucial and must be spent wisely. Programs that currently receive these funds do so in a culturally competent and welcoming manner. They offer an array of services. They understand the health needs of their patients. The proposed rule does not advance Title X's purpose and undermines the ability of its recipients to do the important work that they do every day on behalf of some of Massachusetts' most vulnerable patients.

3. *Oregon*

The state of Oregon has been the umbrella grantee for Title X services throughout Oregon since 1970. The Oregon Health Authority's Reproductive Health Program administers the state's Title X grant. In fiscal year 2018, Oregon's Title X award was $3,076,000. This funding provides direct support to a network of 35 agencies with 106 clinic sites and is comprised of local public

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[13] *Title X in Massachusetts: Improving Public Health and Saving Taxpayer Dollars*, National Family Planning & Reproductive Health Association, at 1 (Dec. 2017), available at https://www.nationalfamilyplanning.org/file/state-snapshots-2017/Massachusetts.pdf.

[14] *Contraception, Cost Savings at Title X-Funded Centers: From Contraceptive Services*, Guttmacher Institute Data Center, https://data.guttmacher.org/states/table?state=MA&dataset=data&topics=96 (last visited July 30, 2018).

[15] *Contraception, Title X-Funded Centers: Percentage of Need Met By Title X-Funded Centers*, Guttmacher Institute Data Center, https://data.guttmacher.org/states/table?state=MA&dataset=data&topics=257 (last visited July 30, 2018).

[16] *Contraception, Outcomes Averted By Title X-Funded Centers: From Contraceptive Services*, Guttmacher Institute Data Center, https://data.guttmacher.org/states/table?state=MA&topics=120&dataset=data (last visited July 30, 2018).

health authorities, federally qualified health centers (FQHCs), Planned Parenthood clinics, rural health centers, and other community health centers. Almost every county has at least one Title X Program provider, often with multiple clinic sites per provider.

A total of 37,012 unduplicated clients were served by Title X sub-recipient clinics in 2017. Of these clients, 15,225 (41 percent) were uninsured, meaning they have limited options for accessing affordable reproductive health services.

Oregon's Title X clinics provide essential, high-quality preventive reproductive health services to underserved individuals. Data from 2017 show that of the 37,012 clients served by Oregon's Title X clinics:

- 93 percent were female;
- 47 percent were females between the ages of 18 and 29;
- 95 percent were at or below 250 percent of the FPL and 66 percent were at or below 100 percent of the FPL; and
- 60,647 clinic visits were provided, including:
  - 6,511 cervical cancer screenings
  - 49,366 STI screenings
  - 12,649 annual/well-woman exams

Further evidence of the high quality of care in Oregon's Title X clinics comes from clients themselves. According to Oregon's 2015 Reproductive Health Client Satisfaction Survey, 99 percent of clients reported the following: that medical staff respected their values, they trust the medical staff to help them make decisions, and they would recommend the clinic to friends or family.

In addition to offering high quality care, Oregon's Title X program is also cost effective. In 2017, over 6,000 unintended pregnancies were averted through the provision of effective contraceptive methods and high-quality counseling services in Oregon's Title X clinics. Using a conservative estimate of $16,000 for an average delivery and the first year of infant health care under Oregon's Medicaid program, even if less than half of these 6,000 unintended pregnancies resulted in births, the savings to the state were in excess of $40 million in taxpayer funds in Oregon alone in 2017.

4. *Vermont*

The Vermont Department of Health, the sole grantee for Vermont, has relied on Title X grant funding for decades. The Vermont Department of Health receives about $775,000 annually from Title X, of which the majority is passed on directly to the sole sub-grantee, Planned Parenthood of Northern New England (PPNNE). With these funds, PPNNE provides reproductive health

services at 10 different clinics located throughout Vermont. These clinics serve a largely rural population—none are located in Chittenden County, the most populous county of Vermont.

Through these clinics, Title X provided family planning services to 9,808 Vermonters in 2016. Of these, 44 percent reported income of less than 100 percent of the FPL, and 76 percent had income less than 250 percent of the FPL. Vermont's Title X patients were 11 percent male, and 20 percent were under age 20. And 22 percent had no health insurance.[17]

Services provided by Title X funds in Vermont include "a broad range of family planning and related preventive health services for Vermont women, men, and their partners."[18] As required in 42 C.F.R. Part 59, all pregnancy counseling at Title X clinics in Vermont is nondirective.[19] In addition, Title X funds provided "patient education and counseling; breast and pelvic examinations; breast and cervical cancer screening according to nationally recognized standards of care; STI and Human Immunodeficiency Virus (HIV) prevention education, counseling, testing and referral; and pregnancy diagnosis and counseling."[20]

Title X funding has been an essential part of the success that Vermont has seen in reproductive health outcomes over time. For example, while the current Title X rules and program have been in place, the number of teen pregnancies in Vermont has steadily declined.[21] And, the number of teen abortions occurring in Vermont has steadily declined.[22] This is consistent with the overall drop in abortion rates in Vermont and nationwide.[23] Title X-specific analyses show that these trends over time are at least partly attributable to Title X funding. One estimate shows that approximately 1900 unintended pregnancies were averted by Title X-funded clinics in Vermont

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[17] Office of Population Affairs, Title X Family Planning Annual Report: Vermont (April 2017) (on file with Vermont Attorney General's Office).

[18] Office of Population Affairs, Program Review: Title X Family Planning Project: Vermont Department of Health, 1, 33 (May 2017) (on file with Vermont Attorney General's Office).

[19] *Id.* at 34-35.

[20] *Id.* at 1.

[21] Kathryn Kost et al., *Pregnancies, Births and Abortions Among Adolescents and Young Women in the United States, 2013: National and State Trends by Age, Race and Ethnicity*, 36 (Guttmacher Inst. Aug. 2017) (data going back to 1988), *available at* https://www.guttmacher.org/sites/default/files/report_pdf/us-adolescent-pregnancy-trends-2013.pdf

[22] *Id.* at 40.

[23] Vt. Dept. of Health, "Fig. 11: Vermont and U.S. Abortion Ratios 1980 – 2016," *2016 Vital Statistics: 132nd Report Relating to the Registry and Return of Births, Deaths, Marriages, Divorces, and Dissolutions*, 129 (Agency of Human Servs. 2016) (data going back to 1980), *available at* http://www.healthvermont.gov/sites/default/files/documents/pdf/Vital%20Statistics%20Bulletin%202016.pdf

in 2014.[24] Of those, 400 would have been teen pregnancies.[25] In addition, Title X's successes have not been limited to pregnancy outcomes. Although Title X is not the only public health program addressing these issues, cervical cancer rates[26] and new HIV/AIDS diagnoses[27] in Vermont have been generally declining as well. In 2016, Title X clinics screened 1,344 clients for cervical cancer and 2,834 clients for HIV.[28]

The successes of the Title X program translate from public health to the public fisc. By one estimate, Title X services in Vermont saved the state and federal governments $7,868,000 in 2010.[29] Of that money, the majority ($7,520,000) was saved in annual maternity and birth-related costs as a result of contraceptive services.[30] An additional $215,000 was saved in annual miscarriage and ectopic pregnancy costs.[31] Tens of thousands of dollars in public health costs were saved from STI and cancer screening at Title X clinics.[32]

C. The Fatal Deficiencies in the Proposed Rule

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[24] *Number of Unintended Pregnancies Averted by Title X-Funded Centers*, Data Ctr., Guttmacher Inst., https://data.guttmacher.org/states/table?state=VT&topics=114 (last visited July 30, 2018).

[25] *Number of Unintended Pregnancies Averted to Clients Aged <20 by Title X-Funded Centers*, Data Ctr., Guttmacher Inst., https://data.guttmacher.org/states/table?state=VT&topics=114 (last visited July 30, 2018).

[26] Vermont Cancer Registry, *HPV Associated Cancers—Data Brief*, 1 (Vt. Dept. of Health May 2018) (data going back to 1994), *available at* http://www.healthvermont.gov/sites/default/files/documents/pdf/stat_cancer_HPV_Assoc_Ca_Data_Brief.pdf.

[27] Decrease seen since the height of the epidemic, and the introduction of the first effective treatments, in the early 1990s. Vt. Dept. of Health, "History of the HIV/AIDS epidemic, Vermont residents at diagnoses 1984 – 2014," *Vermont HIV/AIDS Annual Report*, 2 (May 2015), *available at* http://www.healthvermont.gov/sites/default/files/documents/pdf/ID_HIV_surveillance_Vt%20HIV%20Annual%20Rep%202014.pdf; *see also* Vt. Dept. of Health, *2016 Vermont HIV Annual Report*, 2-3 (May 2018), *available at* http://www.healthvermont.gov/sites/default/files/documents/pdf/ID_HIV_VermontHIVAnnualReport2016.pdf.

[28] Office of Population Affairs, Title X Family Planning Annual Report: Vermont, 10, 13 (April 2017) (on file with Vermont Attorney General's Office).

[29] *Total Annual Gross Savings from Services Provided During Family Planning Visits at Title X-Funded Centers*, Guttmacher Institute Data Center, https://data.guttmacher.org/states/table?state=VT&topics=98 (last visited July 30, 2018).

[30] *Annual Maternity and Birth Related Costs (Through 60 Months) Saved from Contraceptive Services*, Guttmacher Institute Data Center, https://data.guttmacher.org/states/table?state=VT&topics=96 (last visited July 30, 2018).

[31] *Annual Miscarriage and Ectopic Pregnancy Costs Saved from Contraceptive Services*, Guttmacher Institute Data Center, https://data.guttmacher.org/states/table?state=VT&topics=96 (last visited July 30, 2018).

[32] *Annual Costs Saved From Chlamydia, Gonorrhea and HIV Testing at Title X-Funded Centers; Annual Costs Saved from Pap and HPV Testing at Title X-Funded Centers*, Guttmacher Institute Data Center, https://data.guttmacher.org/states/table?state=VT&topics=97 (last visited July 30, 2018).

1. *The proposed rule requires directive counseling in violation of the Consolidated Appropriations Act, 2018.*

In numerous ways, the proposed rule imposes unethical requirements to provide directive, mandatory patient counseling. This is contrary to the Consolidated Appropriations Act, 2018, which states that, with respect to the amounts appropriated "for carrying out the program under title X of the PHS Act to provide for voluntary family planning projects, . . . all pregnancy counseling shall be nondirective."[33] While Congress is free to "make a value judgment favoring childbirth over abortion,"[34] once Congress makes a policy choice executive agencies are not at liberty to ignore it. Here Congress has required that counseling of patients using Title X funds may not be slanted, and HHS may not direct Title X providers to disregard Congress's directive.

The proposed rule requires Title X funds be used for directive counseling in several ways. First, the rule prohibits Title X providers from referring a patient who discovers she is pregnant to abortion providers, except in the narrow circumstances where the patient "clearly states" that she has "already decided" she will have an abortion.[35] Of course, such a "clear decision" for someone who learned minutes earlier that she was pregnant would be unlikely, meaning the vast majority of patients will be referred away from abortion providers. Second, providers are prohibited from even "present[ing]" the option of abortion. Third, providers must refer patients for "appropriate prenatal and/or social services (such as prenatal care and delivery, infant care, foster care, or adoption)" whether or not the patient desires such referrals.[36] Fourth, providers are required to assist in setting up these referral appointments—unless the patient wants an abortion.[37] In short, if a pregnant patient says that she wants advice on birth or adoption options the provider is unencumbered, but if she wants to discuss the option of abortion, the provider may not assist her. Only if the patient states she wants an abortion may the provider offer her a list that includes abortion providers, but that list must obfuscate which clinics offer what she seeks and which do not.[38]

These provisions are intended to, and do, slant Title X counseling against termination and in favor of childbirth, in violation of Congress's directive otherwise. Indeed, the text of the proposed rule says nothing about nondirective counseling, instead eliminating the former

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[33] Pub. L. No. 115-141, div. H, tit. II, 132 Stat. 348, 716 (2018), https://www.congress.gov/bill/115th-congress/house-bill/1625/text.

[34] *Rust v. Sullivan*, 500 U.S. 173, 192 (1991) (quoting *Maher v. Roe*, 432 U.S. 464, 474 (1977)).

[35] 83 Fed. Reg. 25,531 (proposed § 59.14(a), (c)).

[36] 83 Fed. Reg. 25,531 (proposed § 59.14(b)).

[37] *Id*.

[38] 83 Fed. Reg. 25,531 (proposed § 59.14(c)).

requirement to provide "neutral, factual information and nondirective counseling . . . ." 42 C.F.R. 59.5(a)(5)(ii). Through the repeal of the nondirective counseling requirement and the addition of severe restrictions on referrals, the proposed rule seeks to replace what has been a patient-guided, provider-informed approach to care with a system that jeopardizes both providers' ethical obligations and patients' health.

2. *The proposed rule illegally injects the government into the provider-patient relationship.*

We are deeply troubled by the Department's proposed government interference in the relationship between a medical provider and a patient, and not only because it violates a federal law. The proposed rule purports to tell providers paid with Title X funds what they can and cannot say when a patient discovers she is pregnant. The government should have no role telling a health care provider what to say to a patient. Here, the proposed rule prohibits nurses and nurse practitioners, who see the majority of Title X patients, from mentioning abortion, and doctors may do so only in the very limited circumstances permitted in proposed section 59.14(c) and (d).[39] Under the proposed rule, Title X providers could not simply take off their "Title X hats" and offer the same nondirective advice that they currently offer because the rule would require Title X providers to comply with Title X requirements, whether or not Title X funds a particular patient's service.

As America's women's health providers have jointly stated in opposing the proposed rule, "[p]oliticians have no role in picking and choosing among qualified providers."[40] This government script for providers when addressing their Title X patients violates the American Medical Association's Code of Ethics, which states that "withholding information without the patients' knowledge or consent is ethically unacceptable."[41] Similarly, the Code of Ethics for Nursing requires nurses to give complete – not slanted – information to patients.[42]

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[39] 83 Fed. Reg. 25,531.

[40] "America's Women's Health Providers Oppose Efforts to Exclude Qualified Providers from Federally-Funded Programs," Join Statement of the American College of Obstetricians and Gynecologists, the American Academy of Pediatrics, the American College of Nurse-Midwives, the American College of Physicians, the Association for Physician Assistants in Obstetrics and Gynecology, the National Association of Nurse Practitioners in Women's Health, Nurses for Sexual and Reproductive Health, and the Society for Adolescent Health and Medicine (May 23, 2018), https://www.acog.org/About-ACOG/News-Room/Statements/2018/Health-Providers-Oppose-Efforts-to-Exclude-Qualified-Providers-from-Federally-Funded-Programs (last accessed on July 17, 2018).

[41] American Medical Association, Code of Medicaid Ethics Opinion 2.1.3, Withholding Information from Patients, available at https://www.ama-assn.org/delivering-care/withholding-information-patients (last accessed on July 17, 2018).

[42] Code of Ethics for Nursing, Provision 1.4, www.bc.edu/content/dam/files/schools/son/pdf2/ANA code of ethics.pdf (last accessed on July 17, 2018) (patients must be given "accurate, complete, and understandable information in a manner that facilitates an informed decision").

Further, the proposed rule is arbitrary and capricious because it only permits "a medical doctor" to provide the very limited referral for abortion the proposed rule allows.[43] In our States, this severely restricts the nondirective counseling Title X patients would receive. In Oregon, for example, over 93 percent of visits to Title X clinics in 2017 were conducted by non-physician caregivers such as nurse practitioners and physician assistants. The preamble to the proposed rule itself recognizes that only 22 percent of clinical service FTEs delivered to Title X patients were provided by medical doctors.[44] As a result, the proposed rule would prevent 78 percent of the medical professionals who see patients at Title X providers from providing even the limited and intentionally obfuscated abortion referral it claims to authorize. The Department does not explain why prohibiting such a large percentage of Title X caregivers from providing any kind of counseling on the legally available option of abortion comports with the statutory requirement that Title X funds be used only for nondirective counseling, and we request such an explanation.

The proposed rule's roadblocks for a patient seeking complete and accurate health information also are arbitrary and capricious. First, the patient must already know that she wants an abortion. This precludes the patient from engaging in an important conversation with her health care provider about the pros and cons of abortion. The Department fails to address the fact that many women do not ask directly about abortions immediately upon learning they are pregnant, and instead consider it as one of many medical options. We ask that the Department explain how its proposed restrictions can be reconciled with this experience of clinicians. Second, only a doctor can give the patient the referral list. This appears designed to undermine the provision of healthcare. Moreover, it is not clear what, if any, counseling a physician is entitled to provide to a woman who has decided to have an abortion given that the proposed rules prohibit providers from "promot[ing]" and "support[ing]" abortion as a method of family planning. Limiting the medical information that physicians can offer their patients unreasonably intrudes upon the physician-patient relationship and undermines ethical standards of care.

The preamble to the proposed rule relies on "Federal conscience statutes" to justify its diverging from the requirement in the Consolidated Appropriations Act that Title X-funded counseling must be nondirective.[45] This reliance is misplaced. The proposed rule does not merely create an exception to nondirective counseling for conscience objectors. Instead, it allows conscience objectors to dictate what all Title X providers may say. Purportedly to uphold conscience protections, the proposed rule prohibits nearly 80 percent of the medical professionals who treat patients at Title X clinics from saying anything about abortion, regardless of their religious or moral beliefs. Likewise, it severely restricts the information medical doctors can impart, again regardless of their religious or moral convictions. In doing so, it makes no accommodation for providers who have religious or moral convictions contrary to the proposed rule, for instance

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[43] 83 Fed. Reg. 25,531 (§ 59.14(a); *see also*, § 59.14(c)).

[44] 83 Fed. Reg. 25,523.

[45] 83 Fed. Reg. 25,506-507.

those whose convictions align more closely with professional ethics rules. These prohibitions go substantially further than necessary to vindicate a select number of providers' conscience objections, and we ask the Department to better explain its reasoning.

3. *The proposed rule is contrary to, and ignores, the Department's authoritative recommendations for evidence-based "family planning methods and services" without reason or explanation.*

A federal agency cannot simply ignore its prior statutory interpretations. This is especially true where, as here, the prior interpretation is based on factual findings or cited evidence, and the new interpretation fails to consider that evidence. "[T]he consistency of an agency's position is a factor in assessing the weight that position is due." *Good Samaritan Hospital v. Shalala*, 508 U.S. 402, 417 (1993). "To be sure, the requirement that an agency provide reasoned explanation for its action would ordinarily demand that it display awareness that it is changing position." *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).

In 2014, the Department's Centers for Disease Control and Prevention (CDC) issued a Recommendations and Report entitled "Providing Quality Family Planning Services: Recommendations of CDC and the U.S. Office of Population Affairs."[46] The report provided the agency's view on what are "acceptable and effective family planning methods and services."[47] The CDC stated:

> This report provides recommendations developed collaboratively by CDC and the Office of Population Affairs (OPA) of the U.S. Department of Health and Human Services (HHS). The recommendations outline how to provide quality family planning services, which include contraceptive services, pregnancy testing and counseling, helping clients achieve pregnancy, basic infertility services, preconception health services, and sexually transmitted disease services. The primary audience for this report is all current or potential providers of family planning services, including those working in service sites that are dedicated to family planning service delivery as well as private and public providers of more comprehensive primary care.[48]

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[46] Gavin, L, Moskosky, S, Carter, M, Curtis, K, Glass, E, Godfrey, E, Marcell, A, Mautone-Smith, N, Pazol, K, Zapata, L, "Providing Quality Family Planning Services: Recommendations of CDC and the U.S. Office of Population Affairs." Morbidity and Mortality Weekly Report, 63 Recommendations and Reports No. 4 (April 25, 2014), available at https://www.cdc.gov/mmwr/pdf/rr/rr6304.pdf (last accessed July 19, 2018) (hereinafter "CDC Report and Recommendations").

[47] 42 U.S.C. § 300(a).

[48] CDC Report and Recommendations at 1.

The report provided "recommendations for how to help prevent and achieve pregnancy, emphasize[d] offering a full range of contraceptive methods for persons seeking to prevent pregnancy, highlight[ed] the special needs of adolescent clients, and encourage[d] the use of the family planning visit to provide selected preventive health services for women, in accordance with the recommendations for women issued by the Institute of Medicine and adopted by HHS."[49] In other words, it was a careful, evidence-based description of the best practices for family planning in the United States.

Without explanation, the proposed rule contradicts this report in numerous ways, and it does so without mentioning the report. The CDC report's "recommendations support offering a full range of Food and Drug Administration (FDA)-approved contraceptive methods,"[50] while the proposed rule eliminates "medically approved" from the requirement that projects provide a broad range of family planning methods.[51] The CDC report advocates a "[c]lient-centered approach" where the patient is offered a "broad range of contraceptive methods so that clients can make a selection based on their individual needs and preferences,"[52] while the proposed rule offers Title X funds to a clinic that chooses to offer only a single method of family planning.[53] The CDC report states that a provider, after administering a pregnancy test, should present "options counseling" and "appropriate referrals,"[54] while the proposed rule mandates concealing the full range of options available to the patient, including abortion, and directs omitting abortion providers from referral lists.[55] These changes undermine long-held, evidence-based standards of care.

The Department fails to explain why it is rejecting its own recommendations expressly "based on scientific knowledge."[56] Indeed, it fails even to acknowledge the existence of those

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[49] *Id*.

[50] CDC Report and Recommendations at 2.

[51] 83 Fed. Reg. 25,530 (proposed § 59.5).

[52] CDC Report and Recommendations at 2.

[53] 83 Fed. Reg. 25,530 (proposed § 59.5). Without doubt, the proposed regulations' emphasis on fertility awareness-based methods of family planning over all other forms of contraception will result in increased numbers of unintended pregnancies, including teen pregnancies. Table 3-2, Contraceptive Technology, http://www.contraceptivetechnology.org/wp-content/uploads/2013/09/CTFailureTable.pdf (last visited July 30, 2018) (listing a 24% failure rate for typical use of fertility awareness-based methods, compared to a less than 10% failure rate for typical use of hormonal contraceptives and less than 1% failure rate for long-acting reversible contraceptives).

[54] CDC Report and Recommendations at 14.

[55] 83 Fed. Reg. 25,531 (proposed § 59.14).

[56] CDC Report and Recommendations at 4.

recommendations. The proposed rule lacks the "reasoned analysis" the Department concedes is required.[57]

4. *The financial separation requirement reverses a prior agency interpretation and is unsupported by any evidence.*

The proposed rule imposes a new requirement of physical separation between Title X projects and the abortion activities of the Title X grantee/sub-recipient.[58] This requirement reverses the Department's prior interpretation, is imposed without supporting evidence, and does not reflect agency consideration of substantial evidence contradicting the Department's conclusion.

The proposed rule reverses the Department's longstanding interpretation that, "[i]f a Title X grantee can demonstrate [separation] by its financial records, counseling and service protocols, administrative procedures, and other means. . . …, then it is hard to see what additional statutory protection is afforded by the imposition of a requirement for 'physical' separation."[59] The Department states that this reversal is necessary to avoid the risk of (i) intentional or unintentional use of Title X funds for impermissible purposes or the commingling of funds, and (ii) public confusion that Title X funds being used by a family planning organization may be supporting the program's abortion activities.[60]

Despite the need for *evidence* to justify an agency's reversal of course, the preamble to the proposed rule cites no evidence of commingled funds or public confusion. The preamble states that the Department's concerns are "acute" because, according to a Guttmacher Institute report, the percentage of "nonspecialized clinics" such as doctors' offices accounting for abortions performed in the United States inched up 6 percent from 2008 to 2014, which may increase the risk of confusion and misuse of Title X funds.[61] However, the Department has no evidence that any of these nonspecialized clinics receive Title X funds. The Guttmacher Institute itself noted that the data its report relied on included inaccuracies and out-of-date information.[62] This is the only evidence the Department cites of potential public confusion and commingling of funds, yet

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[57] 83 Fed. Reg. 25,505.

[58] 83 Fed. Reg. 25,532 (proposed § 59.15).

[59] Standards of Compliance for Abortion Related Services in Family Planning Services Projects, 65 Fed. Reg. 41,270, 41,276 (Jul. 3, 2000).

[60] 83 Fed. Reg. 25,507.

[61] *Id*.

[62] Jones, RK, Jerman, J, Abortion Incidence and Service Availability In the United States, 2014, Guttmacher Institute Perspectives on Sexual and Reproductive Health (March 2017) ("Limitations"), https://www.guttmacher.org/journals/psrh/2017/01/abortion-incidence-and-service-availability-united-states-2014 (last accessed July 18, 2018).

it evinces no actual *use* of Title X funds.[63] In fact, unlike the Title X regulations proposed in 1988—which relied in part on two reports, one from the Department's Office of Inspector General (OIG) and the other from The General Accounting Office—the Department currently points to no reports or relevant evidence as justification for the proposed rule.

The Department fails to cite its own safeguards it already has in place to ensure that Title X funds are kept separate from abortion-related services. "According to [the Office of Population Affairs], family planning projects that receive Title X funds are closely monitored to ensure that federal funds are used appropriately and that funds are not used for prohibited activities, such as abortion."[64] These "[s]afeguards to maintain this separation include (1) careful review of grant applications to ensure that the applicant understands the requirements and has the capacity to comply with all requirements; (2) independent financial audits to examine whether there is a system to account for program-funded activities and non-allowable program activities; (3) yearly comprehensive reviews of the grantees' financial status and budget report; and (4) periodic and comprehensive program reviews and site visits by OPA regional offices."[65] Despite this thorough monitoring, the Department fails to provide any evidence of actual threats to Title X funding and instead relies on reports from the 1980s, old Medicaid audits, and unsupported assertions.

The Department's monitoring has been thorough. For example, the 2017 OPA Program Review Report for the Vermont Department of Health found the following:

> Financial documentation at service sites demonstrates that Title X funds are not being used for abortion services and adequate separation exists between Title X and non-Title X activities. (42 C.F.R. § 59.5(a)(5))
>
> REVIEW OF EVIDENCE
> The grantee does not provide abortion services. However, the sub-recipient does provide these services. The sub-recipient has established policies, procedures, and practices to ensure the adequate separation of Title X activities from non-Title X activities. Staff separates their time, after the fact, into clearly defined cost centers in the TimeForce system. This is done each day, is checked by the site supervisor,

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[63] In a separate part of the preamble addressing the purported need for monitoring of the use of Title X funds, the Department cites a Washington Medicaid Fraud Control Unit investigation. 83 Fed. Reg. 25,509. The Medicaid Fraud Control Unit is part of the Washington Attorney General's Office. Our investigation found that the individuals reporting the alleged violations relied only a newsletter sent out by American Life League and had no additional information or any firsthand knowledge, the state Medicaid agency auditor did not see any indication of fraudulent billing, and there was no pattern of intentional billing misconduct.

[64] Angela Napili, Cong. Research Serv., R45181, *Family Planning Program Under Title X of the Public Health Service Act* 16 (2018), *available at* https://fas.org/sgp/crs/misc/R45181.pdf.

[65] *Id*.

> and is further checked through an analysis of the number and type of services provided each day in the clinic setting by administrative staff.
>
> The sub-recipient demonstrated that no abortion-related activities were provided as part of the Title X project. This included policies and procedures and the actual practices in the clinic setting, counseling and service protocols, intake and referral procedures, and fiscal and other administrative procedures.
>
> This requirement [compliance with Section 1008] was MET.[66]

No evidence indicates that the Vermont Department of Health has ever had any issues complying with Section 1008.

In addition, the Department does not address the steps states like ours take to ensure sub-recipients' separation of Title X funds from any abortion-related activities. In Washington, the State Department of Health Family Planning Program ensures the separation of Title X funds from abortion services through contract language, desk reviews, and on-site monitoring. The goal of monitoring is to document the extent of sub-recipient agencies' compliance with state and federal laws and regulations. Monitoring helps the Family Planning Program assist local agencies with compliance with Federal Title X and state rules related to funding. This ensures accountability.

The Washington Department of Health (DOH) does three types of monitoring: Administrative, Clinical, and Fiscal. As federal grant funds flow through the Family Planning Program to a sub-recipient, the Family Planning Program maintains primary responsibility for ensuring enforcement of federal and state requirements. Those requirements pertain to sub-recipients as they receive state and federal funds. When a sub-recipient signs the Family Planning Program contract with the DOH, they agree to enforce those same certifications, assurances, cost principles, and administrative rules. All of these requirements are incorporated in contract language. Title X sub-recipient contract standard clauses include that the Contractor does "not provide abortion as a method of family planning within the Title X Project. (42 CFR 59.5(5))," and "[t]he Title X Project must not include sterilizations, abortions, or any flat rated service (for instance some STD or HIV testing) or income/revenue generated from them."

Furthermore, the DOH Fiscal Monitoring and Review Guide and On-site Monitoring Tool is used by site consultants and agency fiscal experts to perform on-site reviews every three years or more often if needed. They monitor for documentation that:

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[66] Office of Population Affairs, Program Review: Title X Family Planning Project: Vermont Department of Health, 21 (May 2017) (on file with Vermont Attorney General's Office).

i. The financial system provides for financial separation of Title X family planning service dollars and abortion service dollars;
ii. Agency personnel must be informed that they could be prosecuted, under Federal law, if they coerce, or try to coerce, anyone to undergo abortion or a sterilization procedure, and the agency has a policy in place to this end;
iii. The agency has written policies that clearly state that no Title X funds will be used in programs where abortion is a method of family planning;
iv. The agency is in compliance with Title X, specifically calling out Section 1008; and
v. Staff members have been trained about separating Title X family planning services and abortion services.

The site consultant verifies this onsite through the sub-recipients' policies and procedures, personnel records, and a review of the accounting system.

In addition, the Washington State Family Planning Manual[67] advises about separating Title X services from abortion, including that Contractors must be in full compliance with Section 1008 prohibiting the use of Title X funds for abortion as a method of family planning.

Oregon's Reproductive Health Program maintains a robust process for monitoring compliance among its Title X agencies. Ongoing and routine compliance reviews ensure that Title X agencies adhere to administrative, clinical, and fiscal requirements. The monitoring process includes:

i. Annual recertification of agencies;
ii. Onsite compliance reviews of consent forms, policies, procedures and protocols; chart audits; onsite clinical observation; and onsite observation of patient and physical environment; and
iii. Regular billing, client enrollment, and quality assurance reviews.

Like Washington's DOH, Oregon's Reproductive Health Program uses a comprehensive Program Certification Verification Tool to monitor its Title X agencies. Specific policies relating to abortion, including the requirement that no federal funds are used for abortion services and that abortion is not provided as a birth control method, are reviewed and verified.

In Massachusetts, the Department of Public Health's robust oversight of sub-recipients providing abortion services ensures compliance with current Title X requirements. The Department of Public Health requires that these sub-recipients establish and follow written policies that clearly indicate that Title X funds will not be used for abortion services, clearly segregate Title X funds to prevent allocation of Title X funding to abortion services; maintain separate inventory for

[67] *Family Planning Manual*, Washington State Department of Health, September 2016, available at https://www.doh.wa.gov/portals/1/Documents/Pubs/930-122-FPRHManualComplete.pdf (last visited July 30, 2018)

abortion and non-abortion services; and implement fiscal review and oversight procedures to assure that no Title X funds are used for abortion services. The Massachusetts Department of Public Health also engages in regular monitoring, and requires all providers to inform them of any changes in their practice.

In Vermont, in addition to the safeguards noted above, PPNNE undergoes an annual financial audit, which specifically examines its Title X expenditures. PPNNE passes its audit every year, including its accounting of Title X funds.[68]

The Department has not explained why these thorough guidance, monitoring, and auditing steps taken by our state agencies and by the Department itself are insufficient to prevent commingling of funds, and we ask the Department to provide this explanation.

5. *The proposed rule would violate the constitutional rights of Title X providers and their patients.*

The proposed rule imposes government restrictions on speech and denies women freedom from government interference in their most intimate and personal decisions that courts will find fatal under the First and Fifth Amendments. It should be withdrawn for these reasons.

In *Rust v. Sullivan*, the Supreme Court recognized that "funding by the government, even when coupled with the freedom of the fund recipients to speak outside of the scope of the Government-funded project," is not "invariably sufficient to justify Government control over the content of expression." 500 U.S. at 199. In some areas, particularly rural areas, the proposed rule is likely to drive all Title X providers from the program, leaving patients without reasonable access to any Title X services. And for those Title X providers remaining in the program, the Department's restriction on speech will extend beyond the Title X program to every patient encounter by every Title X provider, whether or not Title X funds are used. As a consequence, the proposed rule will force all Title X grantees to give up neutral abortion-related speech, whether or not they are wearing a "Title X hat." These facts are different from those presented in *Rust v. Sullivan*, which makes that decision distinguishable.

The massive contraction of the Title X program that would occur under the proposed rule, and is shown herein as to our States, results in a violation of the unconstitutional conditions doctrine and the vagueness and overbreadth doctrines of the First Amendment. The proposed rule interferes with a doctor's ability to provide, and a woman's right to receive, information concerning abortion and abortion-related services, both within and outside of the Title X program. This violates women's Fifth Amendment rights to be free of government interference

[68] Financial audits for 2015 – 2017 may be downloaded at the Federal Audit Clearinghouse, https://harvester.census.gov/facdissem/Main.aspx. Financial audits for 2013 and 2014 on file with the Vermont Attorney General's Office. Financial audits older than five years were not readily available.

in their decisions whether to continue pregnancies to term. It is also contrary to the First Amendment, especially given the Supreme Court's recent recognition that "[a]s with other kinds of speech, regulating the content of professionals' speech 'pose[s] the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information.'" *National Institute of Family and Life Advocates v. Becerra*, 138 S. Ct. 2361, 2374 (2018) (quoting *Turner Broadcasting System v. FCC*, 512 U.S. 622, 641 (1994)). And it contravenes Supreme Court cases that reject "confin[ing] the attending physician in an undesired and uncomfortable straitjacket in the practice of his profession." *Planned Parenthood of Central Mo. v. Danforth*, 428 U.S. 52, 67 n.8 (1976). Finally, it interferes in the states' rights to design and implement health care programs in their states by causing the Title X regulations to be applicable outside the Title X program.

If the Department does not voluntarily withdraw the proposed rule, we ask it to explain, in light of these facts, how the proposed rule is consistent with the Constitution.

6. *The proposed rule includes many requirements that are unsupported by any evidence and, if not abandoned, will be found to be arbitrary and capricious.*

    a. *The primary care requirement is unsupported and arbitrary.*

The proposed rule requires that Title X providers "should offer either comprehensive primary health services onsite or have a robust referral linkage with primary health providers who are in close physical proximity to the Title X site."[69] This requirement is supposedly meant to "promote holistic health and provide seamless care."[70] This call for holistic and seamless care rings hollow considering that the Department is simultaneously proposing specific steps to limit the provision of complete health information and seamless care to patients through abortion counseling and referral restrictions. Instead, the primary care requirement appears intended to push out long-standing Title X providers who have specialized in family planning services and rural Title X providers who may not have "robust referral linkage[s] . . . in close physical proximity."[71]

This requirement alone could dramatically reduce the scope of the Title X program in our States depending upon how the Department defines "close physical proximity." This requirement is not stated in the statute. The Department must explain how it can be reconciled with the goals of the Title X program.

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[69] 83 Fed. Reg. 25,530.

[70] *Id.*

[71] *Id.*

b. *The provisions requiring reporting on minors are unsupported and irrational.*

Currently, Title X providers must attempt to encourage a minor to involve her or his family in the decision-making process when the minor seeks contraceptive services. Under the proposed rule, this "encouragement" would be replaced with undue pressure on both the provider and the minor. The proposed rule requires that a Title X provider document "in the minor's medical records the specific actions taken by the provider to encourage the minor to involve her/his family (including her/his parents or guardian) in her/his decision to seek family planning services."[72] The only exception to this requirement, which must be documented in the minor's medical record, is if the provider "suspects the minor to be the victim of child abuse or incest" and this has been reported in compliance with state or local law.

Today, if a minor explains to a Title X provider that she wishes not to involve her family, that wish is respected. Minors may choose not to involve their families in their health care decisions due to differences of religious belief, fear of violence, fear of abandonment, lack of a suitable adult to involve, or simply a desire for confidential care. By requiring that the providers' efforts to encourage family involvement be recorded in the medical record, the proposed rule could force providers to apply pressure on minor patients to involve their families even when doing so is not in the minor's best interests. The proposed rule could ultimately have a chilling effect on honest and open conversations between providers and minor patients. Further, the proposed rule imperils patient confidentiality to such a degree that minors could be discouraged from seeking care altogether.[73] This will serve neither the purposes of the Title X program nor patients.

c. *The other reporting requirements are unsupported, vague, and beyond the Department's legal authority.*

The proposed rule would bury Title X projects and sub-recipients in overly burdensome reporting requirements. For example, a Title X project would need to report for each sub-recipient and referral agency not only the exact services provided, but also a "[d]etailed description of the extent of the collaboration" even down to the individuals involved and inclusive of undefined "less formal partners within the community."[74]

Along with the inclusion of the "less formal partners," the proposed rule's definition of "referral agency" makes the reporting requirements overly broad. The proposed rule suggests that even if a referral agency does not receive Title X funds, it may still be "subject to the same reporting

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[72] *Id.*

[73] *See, e.g.*, *Planned Parenthood Fed'n of Am. v. Heckler*, 712 F.2d 650, 659-61 (D.C. Cir. 1983) (describing Congress's decision not to mandate family involvement in Title X care for minors).

[74] 83 Fed. Reg. 25,530.

requirements as a grantee or sub-recipient."[75] These requirements improperly overreach into relationships not otherwise governed by Title X regulations and burden projects, sub-recipients, and referral agencies. Rather than achieving the stated goal of creating a robust referral system, these requirements will cause projects and sub-recipients to limit their referral networks in order to control the amount of reporting.

These changes will have significant impacts. For example, the proposed regulations' applicability to "referral agencies"[76] of Title X clinics would impact a significant number of Vermont's health care providers. As a small and rural state, Vermont's pool of available health care referral partners is also small. PPNNE maintains a "comprehensive referral data base" of other local health care providers.[77] But the proposed regulations would be unnecessarily and prohibitively restrictive on those health care providers that do not receive Title X funds, interfering with those providers' and their patients' rights and their ability to provide ethical and professional care.

7. *The proposed rule does not comply with Executive Orders 12866 and 13562.*

Executive Orders 12866 and 13562 require agencies to "assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits." 83 Fed. Reg. 25521. Executive Order 12866 requires that a "significant regulatory action" comply with additional regulatory requirements. This proposed rule meets all the definitions of a "significant regulatory action" because it would (1) have an annual effect on the economy of $100 million or more and will "adversely and materially affect" the health sector of the economy, public health, and state and local governments; (2) create a serious inconsistency and interfere with an action taken or planned by another agency; (3) materially alter budgetary impacts of entitlement grants or the right and obligations of recipients thereof; and (4) raise novel legal or policy issues arising out of legal mandates.

The restrictive requirements of the proposed rule disqualify many current Title X grantees from the program across the country. Some Title X patients currently served by these providers will lose access altogether to family planning services, particularly among the uninsured and those residing in rural areas. In 2017, Title X services saved our four States alone many millions of dollars in costs for health care services. Extrapolating those cost savings across all states, the fiscal impact of the proposed rule on the economy will exceed $100 million and will adversely affect public health, the health care sector, and state treasuries. Additionally, the proposed rule materially changes the outflow of entitlement grants and the rights and obligations of grant

[75] 83 Fed. Reg. 25,514.

[76] 83 Fed. Reg. 25514.

[77] Office of Population Affairs, Program Review: Title X Family Planning Project: Vermont Department of Health, 11 (May 2017) (on file with Vermont Attorney General's Office).

applicants and recipients. It also raises novel legal and policy issues because of new restrictions on speech. The preamble wrongly concludes that the proposed rule is not economically significant and fails to address these considerations.

8. *The proposed rule is contrary to Congress's intent because it would exclude qualified and experienced Title X providers from the program and reduce access to essential preventive health services.*

The impact of the proposed rule is contrary to the Title X statute. The proposed rule appears to be designed to deny Title X funds to many of the current Title X providers in our States and nationwide, and it does not address the impact this rule will have on our States' residents and budgets. The proposed rule, if implemented, will leave many counties without a Title X provider. Because the proposed rule will undermine the quality of health care provided and impose burdensome and counterproductive separation and reporting requirements, many providers in our States will be unable or unwilling to comply. Further, the proposed rule falls particularly hard on uninsured patients and those in rural areas, who in some cases will have no other reasonable option for obtaining family planning services. As a result, thousands of people who rely on Title X providers for contraception and other family planning services will lose access to those services. The proposed rule thus frustrates, rather than promotes, the purpose of Title X.

It is no secret that the Department wants to expel Planned Parenthood from the network of Title X providers. As then-candidate Donald Trump stated, "We're not going to allow, and we're not going to fund, as long as you have the abortion going on at Planned Parenthood."[78] More recently, when introducing the proposed rule, President Trump stated: "For decades American taxpayers have been wrongfully forced to subsidize the abortion industry through Title X federal funding so today, we have kept another promise. My administration has proposed a new rule to prohibit Title X funding from going to any clinic that performs abortions."[79] The proposed rule would certainly achieve the President's goal, but as described herein, it would go much further than that.

For some Title X providers, creating a separate corporate entity with complete physical and financial separation will be prohibitively expensive. In Massachusetts, at least one Title X provider, if forced to create a separate corporate entity to continue providing abortion care, will have to stop participating in Title X at one of its locations, resulting in the loss of a geographically important Title X clinic. In Oregon, two major Title X agencies with 12 clinic sites would likely be unable to continue as Title X providers due to the onerous physical

[78] Danielle Paquette, "Donald Trump's Incredibly Bizarre Relationship with Planned Parenthood," *Washington Post* (Mar. 2, 2016), https://www.washingtonpost.com/news/wonk/wp/2016/03/02/donald-trumps-incredibly-bizarre-relationship-with-planned-parenthood/?utm_term=.db131f627e96 (last accessed 7/13/18).

[79] https://www.whitehouse.gov/briefings-statements/remarks-president-trump-susan-b-anthony-list-11th-annual-campaign-life-gala/ (last accessed 7/13/18).

separation requirements set forth in the rules. The same is true in Washington and Massachusetts. All of Vermont's Title X clinics would be ineligible to continue under the program. A wide range of Title X provider types will have no choice but to forgo Title X funds, thus reducing their capacity to provide much needed family planning services. For example, it is unclear whether a hospital that runs a Title X clinic (on or off site) that also provides abortion would be able to comply with the requirement to have "separate, accurate accounting records" or "separate personnel, electronic or paper-based health care records."[80] Would funds attributed to the clinic also be attributable to the hospital as a whole? In addition to the practical issues created by the proposed rule's separation requirement, it also creates serious risk to patient safety by requiring separate medical record systems and further stigmatizes legal medical procedures.

In 2017, in Washington, over 14,000 Title X-funded patients received their Title X services at Planned Parenthood or other clinics that provided abortions outside the Title X project. In fact, in 20 of Washington's 39 counties, the only Title X provider is one that performs abortions outside the Title X project.[81] If these Title X providers no longer could offer Title X-funded family planning services due to the separation and other requirements, these patients would need to either locate new Title X providers for their contraception and other family planning services, or forego the benefits of the Title X program. In all of eastern Washington, which is comprised of 20 counties, only four of those counties would have any Title X provider at all. In western Washington, the proposed rule would drive out the Title X providers in 10 additional counties. This includes six of the 10 most populous counties in Washington.

If the proposed regulations take effect, for the first time in the history of Title X, the Vermont Department of Health's Title X funding will be jeopardized. None of the current Title X clinics in Vermont will be eligible for Title X funds. Nor does Vermont have the health care infrastructure to make up for the anticipated loss in funding. Although Vermont has several FQHCs and rural health centers, they are not equipped to absorb all the family planning patients currently served by Title X clinics. Vermont FQHCs saw a total of 4,047 patients for contraceptive management in 2016.[82] By comparison, Vermont's Title X clinics served 9,808 family planning patients in 2016. The FQHCs would have to more than double their family planning patient services in rural areas to absorb the needs of all Title X patients. FQHCs in Vermont are not equipped to do this.

In the Department's zeal to punish providers that perform abortions *outside* of the Title X project, the Department is harming many recipients of Title X services in our States. The

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[80] 83 Fed. Reg. 25,519.

[81] *See* Attachment 1 (map of Washington counties without Title X services if organizations that also provide abortions are removed from Title X).

[82] 2016 Health Center Data: Vermont Data, Health Resources & Servs. Admin., https://bphc.hrsa.gov/uds/datacenter.aspx?q=tall&year=2016&state=VT (last visited July 30, 2018).

Department has not explained why issuing a rule to govern Title X that requires thousands of Title X-funded patients to search for a new Title X family planning provider—or go without one entirely—is consistent with Congress's intent in establishing the Title X program, and we ask the Department to provide this explanation.

The harmful consequences of the proposed rule uniquely impact rural and uninsured patients. In five Washington counties, for example, one quarter or more of Title X patients are uninsured, and the only Title X providers are ones that perform abortions outside the Title X project.[83] And in five other counties in rural Washington, Title X patients are served by small Title X clinics associated with providers that perform abortions outside the Title X project. These clinics are in Ellensburg (in Kittitas County), Walla Walla (in Walla Walla County), Wenatchee (in Chelan County), Pullman (in Whitman County), and Moses Lake (in Grant County). We are advised that, because they are so small and a significant amount of their work involves Title X-funded services, at least some of these clinics would not survive the loss of Title X funds. If these current Title X providers are driven from the Title X program, many of these patients will not be able to shift to another provider.[84] Even if some current Title X providers remain in the program, the distance these patients would have to travel to another Title X provider is impracticable. We ask that the Department explain how it reconciles the significant impact the proposed rule will have on rural and uninsured patients with the mission of the Title X program.

In Oregon, significant portions of the state, primarily the rural and frontier areas, are designated as Medically Underserved Areas because they have a shortage of primary health care providers and facilities coupled with high levels of need. The proposed rule will likely cause providers to decline Title X funds in order to maintain their quality of care, further straining access to reproductive health care for Oregonians in these areas. For the 40 percent of Oregon's Title X clients who are uninsured, this burden is heightened because the high quality of care at Title X clinics may not be available to them at other clinics. Title X clinics currently are required to provide the same high quality of care to all clients regardless of ability to pay, whereas other clinics may limit services for patients without coverage sources.

A remarkably broad coalition of Vermont health care providers has joined the nationwide medical community's condemnation of the proposed rule.[85] This Vermont coalition "strongly

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[83] These counties are Mason (24 percent of Title X patients were uninsured in 2017), San Juan (30 percent), Skagit (29 percent), Douglas (28 percent), and Whitman (27 percent). These counties do not have local health jurisdictions providing family planning services.

[84] In addition, under the proposed rule, eliminating Planned Parenthood and other abortion providers from Title X will cause the following colleges and universities in Washington to lose their Title X providers: Washington State University, Western Washington University, Central Washington University, Eastern Washington University, Big Bend Community College, Columbia Basin College, and Yakima Valley Community College.

[85] *Vermont Health Care Coalition Title X Statement*, Vt. Ass'n of Hosps. and Health Sys. (June 15, 2018), https://vahhs.org/title-x-statement.html (endorsing, among other things, a statement from the American Nurses Association stating, "The Code of Ethics for Nurses outlines that the nurse's primary commitment is to the patient,

opposes" the proposed regulations and warns that those regulations "will significantly restrict access to necessary care for both women and men particularly in rural, hard to serve areas of Vermont."[86] Vermont is a small state, and the Vermont coalition represents a significant majority of all health care providers in Vermont. It is therefore unlikely that the number of Vermont medical professionals who would consent to work in a clinic governed by the proposed regulations would be sufficient to replace the current robust number of Title X-funded providers statewide.

9. *The proposed rule would impose tens of millions of dollars of costs on the treasuries in Washington, Massachusetts, Oregon, and Vermont.*

The costs imposed on our States, along with all other states, by the proposed rule will be well over $100 million. Because the cost or burdens of compliance with the proposed rule will be prohibitively high for many providers, the network of Title X providers will shrink in our States and around the country. Further, some Title X patients will lose all access to family planning services as a result of the proposed rule. As mentioned, in Oregon 41 percent of Title X patients were uninsured in 2017, and in Washington there are counties where upwards of 30 percent of Title X patients are uninsured.

Yet the Department fails to analyze either the significant public health impact or the fiscal impact to states. The Department fails to grapple with the fact that, unless it is expecting the states to step in to plug the fiscal hole created by the loss of Title X funding, unplanned pregnancies and births will occur, cervical cancers will not be diagnosed in early stages, and complications will occur due to untreated STIs, among other things, all resulting in significant increased health care costs for states that Title X is meant to address.

The Department provides no analysis explaining why these impacts are consistent with the fundamental mission of the Title X program. In fact, they are not. Analyses show that significant cost savings are achieved by funding family planning services. Nationally, an estimated $7.09 is saved for every dollar spent.[87] In short, a significant portion of the cost savings created by

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whether an individual, family, group, community, or population. This proposed rule interferes with that relationship and violates the basic ethics of the profession."); *see also* Mike Faher, *Vermont health care coalition protests Title X change*, VTDigger.com (June 12, 2018), https://vtdigger.org/2018/06/12/vermont-health-care-coalition-protests-title-x-change/ (calling the Vermont Health Care Coalition opposing the proposed regulations "an unlikely group of allies in Vermont").

[86] *Vermont Health Care Coalition Title X Statement*, Vt. Ass'n of Hosps. and Health Sys. (June 15, 2018), https://vahhs.org/title-x-statement.html

[87] Jennifer J. Frost, *Return on Investment: A Fuller Assessment of the Benefits and Cost Savings of the US Publicly Funded Family Planning Program*, Milbank Quarterly, Vol. 92, No. 4, p. 668 (2014) (*available at* https://www.guttmacher.org/sites/default/files/pdfs/pubs/journals/MQ-Frost_1468-0009.12080.pdf).

funding family planning services is jeopardized by the proposed rule and would fall on our States, among others.

D. Conclusion

The proposed rule will drive many family planning providers from the Title X program. As a result, thousands of patients will lose reasonable access to family planning services and other critical reproductive health services. The Title X providers that remain will be prevented from delivering the high-quality and complete medical care that they have always provided. This frustrates rather than achieves the purposes of Title X, and the courts will strike down the proposed rule, if implemented, accordingly. The proposed rule would limit health care services to vulnerable populations that Congress intended to help. It also would shift the costs of reproductive health care, including services for unintended pregnancies, breast and cervical cancer diagnoses, spread of STIs, and other serious health conditions to our states. For these and the other reasons stated in our comments, we urge the Department to withdraw the proposed rule.

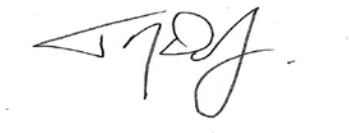
Thank you for considering our views.

Sincerely,

Bob Ferguson
Washington Attorney General

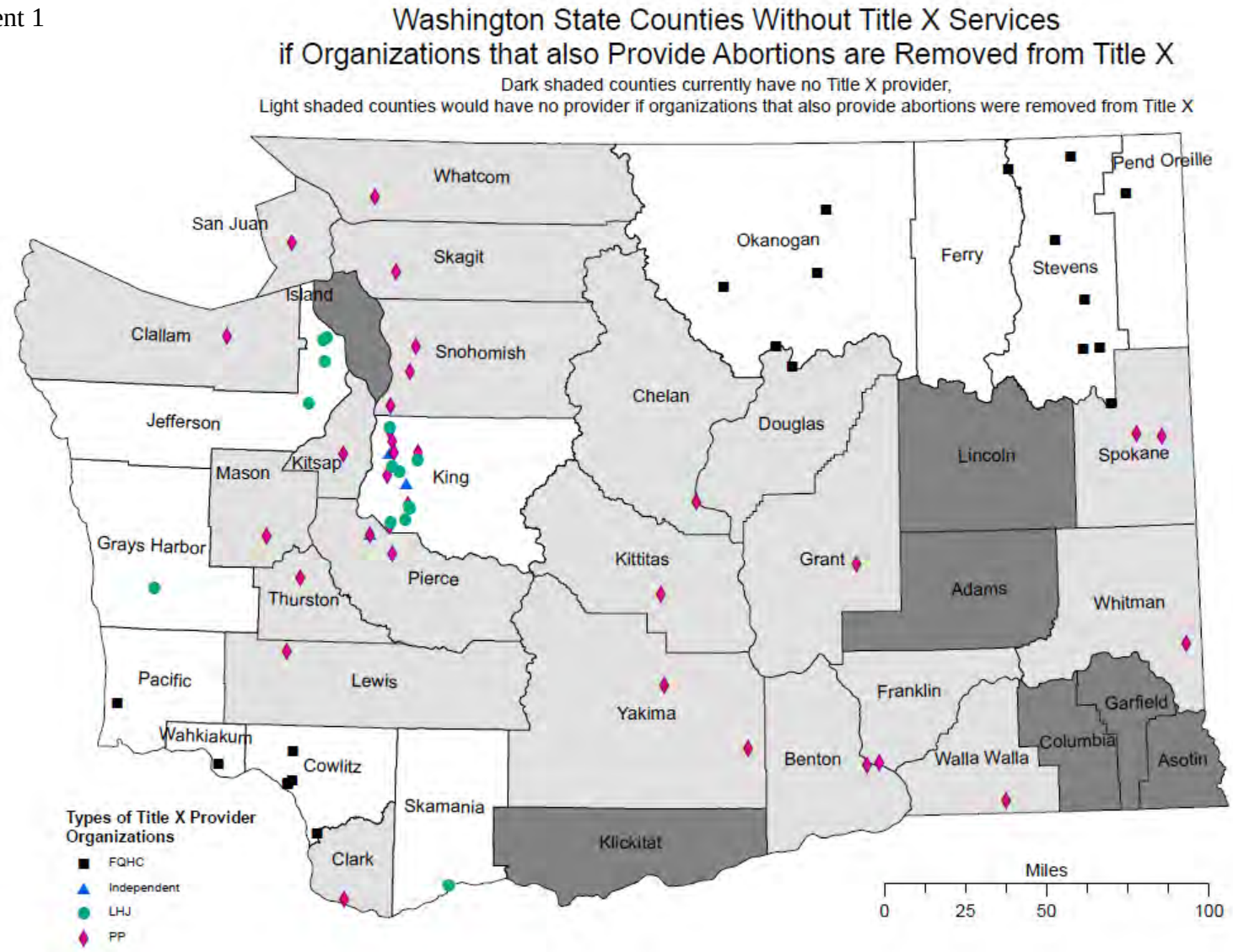
Maura Healey
Massachusetts Attorney General

Ellen Rosenblum
Oregon Attorney General



Thomas J. Donovan, Jr.
Vermont Attorney General

Attachment 1



From: Spottswood, Eleanor
To: Clark, Charity
Subject: RE: Title X comments from the public to date?
Date: Wednesday, July 25, 2018 12:41:00 PM

Cool! Happy to talk more about this any time.

-----Original Message-----
From: Clark, Charity
Sent: Wednesday, July 25, 2018 12:24 PM
To: Diamond, Joshua <Joshua.Diamond@vermont.gov>; Spottswood, Eleanor <Eleanor.Spottswood@vermont.gov>; Donovan, Thomas <Thomas.Donovan@vermont.gov>
Subject: FW: Title X comments from the public to date?

FYI.

-----Original Message-----
From: Sullivan, Eileen [mailto:Eileen.Sullivan@ppnne.org]
Sent: Wednesday, July 25, 2018 12:16 PM
To: Wemple, Doug <Doug.Wemple@partner.vermont.gov>
Cc: Clark, Charity <Charity.Clark@vermont.gov>
Subject: Re: Title X comments from the public to date?

Hi Doug! 860 clicks is amazing! Thank you, thank you!!
Eileen

Sent from my iPhone

On Jul 25, 2018, at 11:55 AM, Wemple, Doug <Doug.Wemple@partner.vermont.gov<mailto:Doug.Wemple@partner.vermont.gov>> wrote:

Hi Eileen,

Per our IT department, 860 clicks have been made to the page on our website!

I just looked on the comment page and almost 100,000 comments have been submitted.

Thanks!

Doug

Doug Wemple
Executive Assistant
Vermont Attorney General's Office
109 State Street - Montpelier, VT
Office: (802)828-5515

From: Sullivan, Eileen [mailto:Eileen.Sullivan@ppnne.org]
Sent: Wednesday, July 25, 2018 11:13 AM
To: Clark, Charity <Charity.Clark@vermont.gov<mailto:Charity.Clark@vermont.gov>>; Wemple, Doug <Doug.Wemple@partner.vermont.gov<mailto:Doug.Wemple@partner.vermont.gov>>
Subject: Title X comments from the public to date?

Hello Charity and Doug!

I hope you're both doing well! I'm checking in to see if you know how many people have visited the AG's site to submit their comments about Title X?

This is NOT for publication, just for me to get a sense of how many people in Vermont have commented to date. On our end, it's just over 1,200 people.

Many thanks!

Eileen

Eileen Sullivan (She/Her/Hers)
Communications Director, Vermont
Planned Parenthood of Northern New England
784 Hercules Drive, Suite 110
Colchester, Vermont 05446
O: 802-448-9714 | C: 646-467-0674
www.ppnne.org<http://www.ppnne.org/> | Eileen.Sullivan@ppnne.org<mailto:Eileen.Sullivan@ppnne.org>

From: Clark, Charity
To: Diamond, Joshua; Spottswood, Eleanor; Donovan, Thomas
Subject: FW: Title X comments from the public to date?
Date: Wednesday, July 25, 2018 12:24:22 PM

FYI.

-----Original Message-----
From: Sullivan, Eileen [mailto:Eileen.Sullivan@ppnne.org]
Sent: Wednesday, July 25, 2018 12:16 PM
To: Wemple, Doug <Doug.Wemple@partner.vermont.gov>
Cc: Clark, Charity <Charity.Clark@vermont.gov>
Subject: Re: Title X comments from the public to date?

Hi Doug! 860 clicks is amazing! Thank you, thank you!!
Eileen

Sent from my iPhone

On Jul 25, 2018, at 11:55 AM, Wemple, Doug <Doug.Wemple@partner.vermont.gov<mailto:Doug.Wemple@partner.vermont.gov>> wrote:

Hi Eileen,

Per our IT department, 860 clicks have been made to the page on our website!

I just looked on the comment page and almost 100,000 comments have been submitted.

Thanks!

Doug

Doug Wemple
Executive Assistant
Vermont Attorney General's Office
109 State Street - Montpelier, VT
Office: (802)828-5515

From: Sullivan, Eileen [mailto:Eileen.Sullivan@ppnne.org]
Sent: Wednesday, July 25, 2018 11:13 AM
To: Clark, Charity <Charity.Clark@vermont.gov<mailto:Charity.Clark@vermont.gov>>; Wemple, Doug <Doug.Wemple@partner.vermont.gov<mailto:Doug.Wemple@partner.vermont.gov>>
Subject: Title X comments from the public to date?

Hello Charity and Doug!

I hope you're both doing well! I'm checking in to see if you know how many people have visited the AG's site to submit their comments about Title X?

This is NOT for publication, just for me to get a sense of how many people in Vermont have commented to date. On our end, it's just over 1,200 people.

Many thanks!

Eileen

Eileen Sullivan (She/Her/Hers)
Communications Director, Vermont
Planned Parenthood of Northern New England
784 Hercules Drive, Suite 110
Colchester, Vermont 05446
O: 802-448-9714 | C: 646-467-0674
www.ppnne.org<http://www.ppnne.org/> | Eileen.Sullivan@ppnne.org<mailto:Eileen.Sullivan@ppnne.org>

From: Spottswood, Eleanor
To: Moino, Peter
Subject: RE: Planned Parenthood of Northern New England (PPNNE) A-133 Audits
Date: Friday, July 20, 2018 2:25:00 PM

Wonderful. Thank you!

From: Moino, Peter
Sent: Friday, July 20, 2018 2:09 PM
To: Spottswood, Eleanor <Eleanor.Spottswood@vermont.gov>
Subject: RE: Planned Parenthood of Northern New England (PPNNE) A-133 Audits

See attachments.

From: Spottswood, Eleanor
Sent: Friday, July 20, 2018 1:54 PM
To: Moino, Peter <Peter.Moino@vermont.gov>
Subject: RE: Planned Parenthood of Northern New England (PPNNE) A-133 Audits

Yes, if you could send me the actual audit reports for 2014 and 2013, that would be ideal.
Thanks for your help.
Ella

From: Moino, Peter
Sent: Friday, July 20, 2018 1:52 PM
To: Spottswood, Eleanor <Eleanor.Spottswood@vermont.gov>
Subject: RE: Planned Parenthood of Northern New England (PPNNE) A-133 Audits

For older than 2015, if you click on the "Form" link and go to the second tab entitled "Audit Info", you'll get the audit information you're looking for. If you need the actual audit report, I do have PPNNE audit reports going as far back as FY 2013.
Peter

From: Spottswood, Eleanor
Sent: Friday, July 20, 2018 1:43 PM
To: Moino, Peter <Peter.Moino@vermont.gov>
Subject: RE: Planned Parenthood of Northern New England (PPNNE) A-133 Audits

Peter,
Thank you, that worked for 2015, 2016, and 2017. Should I assume you don't have anything older than that?
Ella

From: Moino, Peter
Sent: Friday, July 20, 2018 1:32 PM
To: Spottswood, Eleanor <Eleanor.Spottswood@vermont.gov>
Subject: Planned Parenthood of Northern New England (PPNNE) A-133 Audits

Hi Ella,
After the conclusion of our phone call, I remembered a better way of getting what you're looking for….
For a complete listing of A-133 audits for PPNNE, go to the Federal Audit

Clearinghouse:

https://harvester.census.gov/facdissem/SearchResults.aspx

Let me know if you have any questions.

Peter

VERMONT

Peter G. Moino CPA, CGMA, CIA
Director of Internal Audit
Agency of Human Services – Office of the Secretary
280 State Drive, Waterbury, VT 05761
802-241-0446
peter.moino@vermont.gov

From:	Moino, Peter
To:	Spottswood, Eleanor
Subject:	RE: Planned Parenthood of Northern New England (PPNNE) A-133 Audits
Date:	Friday, July 20, 2018 2:08:55 PM
Attachments:	FY14 Planned Parenthood of Northern NE.pdf FY13 Planned Parenthood 1121 1 of 2.pdf FY13 Planned Parenthood 1121 2 of 2.pdf

See attachments.

From: Spottswood, Eleanor
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Peter G. Moino CPA, CGMA, CIA
Director of Internal Audit
Agency of Human Services – Office of the Secretary
280 State Drive, Waterbury, VT 05761
802-241-0446
peter.moino@vermont.gov

GRANTEE AUDIT ROUTING

GRANTEE: Planned Parenthood

PRIMARY PASS THRU: Health

AUDITED YEAR: 2013

VISION #: 1121

REPORT RECEIPT

DATE: 9/15/14

INITIALS: MM

mm [✓] AUDIT REPORT PHYSICALLLY RECEIVED IN OFFICE

mm [✓] DATE STAMPED

mm [✓] ENTERED INTO VISION

mm [✓] FORWARD COPIES TO REVIEWER

mm [✓] CONTACT ANY SECONDARY PASS-THROUGH ENTITY

REPORT REVIEW:

ms AUDITOR'S REPORTS FOR GAAP WAS:

[ ] UNQUALIFIED
[✓] unmodified
[ ] ADVERSE

[ ] QUALIFIED

RE:

AUDITOR'S REPORT FOR MAJOR PROGRAMS WAS:

ms

[✓] UNQUALIFIED
[ ] QUALIFIED
[ ] ADVERSE
[ ] NOT A-133

R&D CLUSTER
MEDICAL CLUSTER

ms AUDITEE QUALIFIED AS LOW RISK: [✓] YES [ ] NO [ ] NOT A-133

RE: WITHIN CURRENT AND PRIOR **TWO** YEARS AUDITEE HAD:

ms

A) SINGLE AUDITS NOT PERFORMED ANNUALLY
B) OPINIONS OTHER THAN UNQUALIFIED
C) MATERIAL DEFICIENCIES IN INTERNAL CONTROL No
D) FEDERAL TYPE A PROGRAMS HAD FINDINGS

ms SPECIAL NOTES:

FINANCIAL STATEMENT FINDING:

FEDERAL AWARD FINDINGS: n/a

AUDIT COMPLETION:

ms

THE FOLLOWING ARE REQUIRED IN ORDER FOR THE AUDITEE TO BE IN COMPLIANCE
BE IN COMPLIANCE WITH OMB CIRCULAR A-133

RESOLVED:

[n/a] MISSING SCHEDULES

[n/a] CORRECTIVE ACTION PLAN

[n/a] OTHER- FINANCIAL STATEMENTS ARE NOT INCLUDED; FINDINGS HAVE RESPONSES DPS AND FINANCE WORKING TOGETHER ON THIS AUDIT

SIGN OFF:

ms [✓] ALL SECTIONS OF ATTACHED REVIEW ARE COMPLETE AND SATIFY COMPLIANCE WITH CIRCULAR A-133

ms REVIEWER INITIALS: MM DATE: 10/13/14

[✓] REPORT ENTERED INTO VISION AS COMPLETED REVIEW

ms

mm [✓] SUMMARY REVIEWED FOR COMPLETION

mm [ ] SUMMARY OF FINDINGS COMPLETION RETURNED TO REVIEWER

mm [ ] REQUEST FOR MANAGEMENT RESPONSE SENT TO PASS-THROUGH

mm [ ] COPY OF MANAGEMENT RESPONSE RECEIVED

mm [✓] VISION UPDATED FOR AUDIT ACCEPTANCE

mm [ ] COPY OF MANGEMENT RESPONSE FILED WITH AUDIT

mm INITIALS: MM DATE: 10/13/14

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BerryDunn

Planned Parenthood®
of Northern New England

CONSOLIDATED FINANCIAL STATEMENTS

December 31, 2013

(with Comparative Totals for 2012)

With Independent Auditor's Report

CONFIDENTIAL

PLANNED PARENTHOOD OF NORTHERN NEW ENGLAND, INC.

December 31, 2013

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BerryDunn

INDEPENDENT AUDITOR'S REPORT

To the Board of Trustees of
Planned Parenthood of Northern New England, Inc.

Report on the Consolidated Financial Statements

We have audited the accompanying consolidated financial statements of Planned Parenthood of Northern New England, Inc. (PPNNE), which comprise the consolidated statement of financial position as of December 31, 2013, and the related consolidated statements of activities, cash flows and functional expenses for the year then ended, and the related notes to the consolidated financial statements.

Management's Responsibility for the Consolidated Financial Statements

Management is responsible for the preparation and fair presentation of these consolidated financial statements in accordance with U.S. generally accepted accounting principles; this includes the design, implementation and maintenance of internal control relevant to the preparation and fair presentation of consolidated financial statements that are free from material misstatement, whether to due to fraud or error.

Auditor's Responsibility

Our responsibility is to express an opinion on these consolidated financial statements based on our audit. We conducted our audit in accordance with U.S. generally accepted auditing standards and the standards applicable to financial audits contained in *Government Auditing Standards* issued by the Comptroller General of the United States. Those standards require that we plan and perform the audit to obtain reasonable assurance about whether the consolidated financial statements are free of material misstatement.

An audit involves performing procedures to obtain audit evidence about the amounts and disclosures in the consolidated financial statements. The procedures selected depend on the auditor's judgment, including the assessment of the risks of material misstatement of the financial statements, whether due to fraud or error. In making those assessments, the auditor considers internal control relevant to the entity's preparation and fair presentation of the financial statements in order to design audit procedures that are appropriate in the circumstances, but not for the purpose of expressing an opinion on the effectiveness of PPNNE's internal control. Accordingly, we express no such opinion. An audit also includes assessing the accounting principles used and significant estimates made by management, as well as evaluating the overall presentation of the financial statement presentation.

We believe that the audit evidence we have obtained is sufficient and appropriate to provide a basis for our opinion.

Opinion

In our opinion, the consolidated financial statements referred to above present fairly, in all material respects, the consolidated financial position of PPNNE as of December 31, 2013, and the consolidated changes in its net assets and its consolidated cash flows for the year then ended, in conformity with U.S. generally accepted accounting principles.

Report on Summarized Comparative Information

We have previously audited PPNNE's 2012 consolidated financial statements, and we expressed an unmodified audit opinion on those audited consolidated financial statements in our report dated May 2, 2013. In our opinion, the summarized comparative information presented herein as of and for the year ended December 31, 2012 is consistent, in all material respects, with the audited consolidated financial statements from which it has been derived.

Other Reporting Required by *Government Auditing Standards*

In accordance with *Government Auditing Standards*, we have also issued our report dated May 2, 2014 on our consideration of PPNNE's internal control over financial reporting and on our tests of its compliance with certain provisions of laws, regulations, contracts and grant agreements and other matters. The purpose of that report is to describe the scope of our testing of internal control over financial reporting and compliance and the results of that testing, and not to provide an opinion on the internal control over financial reporting or on compliance. That report is an integral part of an audit performed in accordance with *Government Auditing Standards* in considering PPNNE's internal control over financial reporting and compliance.

Berry Dunn McNeil & Parker, LLC

Portland, Maine
May 2, 2014

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PLANNED PARENTHOOD OF NORTHERN NEW ENGLAND, INC.

Consolidated Statement of Financial Position

December 31, 2013
(With Comparative Totals for 2012)

ASSETS

	Unrestricted	Temporarily Restricted	Permanently Restricted	2013 Total	2012 Total
Current assets					
Cash and cash equivalents	$ -	$ 1,458,975	$ -	**$ 1,458,975**	$ 662,370
Accounts receivable, net	1,334,840	-	-	**1,334,840**	1,251,488
Pledges receivable, net	241,343	1,066,474	1,000	**1,308,817**	933,638
Grants and other receivables	439,957	-	-	**439,957**	270,478
Inventories	279,229	-	-	**279,229**	338,761
Prepaid expenses and other current assets	248,841	-	-	**248,841**	249,076
Total current assets	2,544,210	2,525,449	1,000	**5,070,659**	3,705,811
Property and equipment					
Land	247,561	-	-	**247,561**	247,561
Buildings	2,621,466	-	-	**2,621,466**	2,610,771
Leasehold improvements	4,098,087	-	-	**4,098,087**	4,095,287
Furniture, fixtures and equipment	3,149,894	-	-	**3,149,894**	3,018,065
Construction-in-progress	208,535	-	-	**208,535**	279,130
	10,325,543	-	-	**10,325,543**	10,250,814
Less accumulated depreciation and amortization	(5,858,730)	-	-	**(5,858,730)**	(5,273,575)
Total property and equipment	4,466,813	-	-	**4,466,813**	4,977,239
Other assets					
Pledges receivable, net of current portion	-	219,722	-	**219,722**	428,798
Asset held for sale	-	-	-	**-**	277,961
Beneficial interest in trusts	50,621	511,892	-	**562,513**	478,910
Deposits	144,821	-	-	**144,821**	143,321
Long-term investments	3,452,240	85,791	1,274,764	**4,812,795**	5,192,104
Total other assets	3,647,682	817,405	1,274,764	**5,739,851**	6,521,094
Total assets	$10,658,705	$ 3,342,854	$ 1,275,764	**$15,277,323**	$15,204,144

The accompanying notes are an integral part of these consolidated financial statements.

LIABILITIES AND NET ASSETS

	Unrestricted	Temporarily Restricted	Permanently Restricted	**2013 Total**	2012 Total
Current liabilities					
Current portion of long-term debt	$ 924,000	$ -	$ -	**$ 924,000**	$ 1,210,000
Current portion of capital lease obligation	8,200	-	-	**8,200**	80,500
Cash overdraft	1,416,325	-	-	**1,416,325**	856,909
Line of credit	418,411	-	-	**418,411**	719,772
Accounts payable and accrued expenses	745,926	-	-	**745,926**	963,757
Accrued payroll	286,768	-	-	**286,768**	297,106
Accrued vacation	303,854	-	-	**303,854**	296,186
Unearned revenue	632,135	-	-	**632,135**	487,375
Total current liabilities	4,735,619	-	-	**4,735,619**	4,911,605
Other liabilities					
Long-term debt, net of current portion	638,539	-	-	**638,539**	866,464
Capital lease obligation, net of current portion	8,667	-	-	**8,667**	16,881
Total other liabilities	647,206	-	-	**647,206**	883,345
Total liabilities	5,382,825	-	-	**5,382,825**	5,794,950
Commitments and contingencies (Notes 11 and 12)					
Net assets					
Undesignated	2,645,458	-	-	**2,645,458**	3,016,213
Board-designated for long-term investment	2,630,422	-	-	**2,630,422**	2,842,346
Temporarily restricted	-	3,342,854	-	**3,342,854**	2,276,721
Permanently restricted	-	-	1,275,764	**1,275,764**	1,273,914
Total net assets	5,275,880	3,342,854	1,275,764	**9,894,498**	9,409,194
Total liabilities and net assets	$10,658,705	$ 3,342,854	$ 1,275,764	**$15,277,323**	$15,204,144

CONFIDENTIAL

PLANNED PARENTHOOD OF NORTHERN NEW ENGLAND, INC.

Consolidated Statement of Activities

Year Ended December 31, 2013
(With Comparative Totals for 2012)

	Unrestricted	Temporarily Restricted	Permanently Restricted	**2013 Total**	2012 Total
Operating revenue and support					
Gross patient service revenue	$ 32,586,173	$ -	$ -	**$ 32,586,173**	$ 30,521,773
Less contractual allowances and discounts	20,803,166	-	-	**20,803,166**	19,373,085
Patient service revenue (net of contractual allowances and discounts)	11,783,007	-	-	**11,783,007**	11,148,688
Less provision for bad debts	614,870	-	-	**614,870**	524,788
Net patient service revenue	11,168,137	-	-	**11,168,137**	10,623,900
Federal funding	2,435,960	-	-	**2,435,960**	2,512,739
State funding	300,316	-	-	**300,316**	180,931
Local grants and contracts	183,985	-	-	**183,985**	62,767
Contributions and bequests	2,722,085	1,519,432	-	**4,241,517**	4,795,478
Investment income	170,947	61,053	-	**232,000**	237,000
Rental and other income	69,873	-	-	**69,873**	47,584
Meaningful use income	212,500	-	-	**212,500**	276,250
Loss on sale of property	(4,668)	-	-	**(4,668)**	-
	17,259,135	1,580,485	-	**18,839,620**	18,736,649
Net assets released from restrictions	1,259,450	(1,259,450)	-	-	-
Total operating revenue and support	18,518,585	321,035	-	**18,839,620**	18,736,649
Operating expenses					
Program services					
Direct patient services	14,273,130	-	-	**14,273,130**	13,730,087
Education and outreach	82,328	-	-	**82,328**	109,746
Public policy	832,596	-	-	**832,596**	768,650
Marketing and communication	163,462	-	-	**163,462**	175,552
Total program services	15,351,516	-	-	**15,351,516**	14,784,035
Support services					
General and administrative	2,742,881	-	-	**2,742,881**	3,670,506
Fundraising	980,496	-	-	**980,496**	1,007,584
PPFA program support	226,312	-	-	**226,312**	216,701
Total support services	3,949,689	-	-	**3,949,689**	4,894,791
Total expenses	19,301,205	-	-	**19,301,205**	19,678,826
Change in net assets from operations	(782,620)	321,035	-	**(461,585)**	(942,177)
Other changes					
Non-operating investment income	120,207	34,492	-	**154,699**	424,377
Contributions	-	790,340	1,850	**792,190**	421,368
Net assets released from restrictions	79,734	(79,734)	-	-	-
Total other changes	199,941	745,098	1,850	**946,889**	845,745
Change in net assets	(582,679)	1,066,133	1,850	**485,304**	(96,432)
Net assets, beginning of the year	5,858,559	2,276,721	1,273,914	**9,409,194**	9,505,626
Net assets, end of the year	$ 5,275,880	$ 3,342,854	$ 1,275,764	**$ 9,894,498**	$ 9,409,194

The accompanying notes are an integral part of these consolidated financial statements.

CONFIDENTIAL

PLANNED PARENTHOOD OF NORTHERN NEW ENGLAND, INC.

Consolidated Statement of Cash Flows

Year Ended December 31, 2013
(With Comparative Totals for 2012)

	2013	2012
Cash flows from operating activities		
Change in net assets	$ 485,304	$ (96,432)
Adjustments to reconcile change in net assets to net cash used by operating activities		
Depreciation and amortization	704,091	692,661
Change in allowance for uncollectible accounts	198,000	220,000
Unrealized/realized gains on investments	(277,981)	(537,447)
Contributions restricted to long-term purposes	(792,190)	(421,368)
Change in value of beneficial interest in trusts	(83,603)	(43,827)
Loss on sale of property	4,668	-
(Increase) decrease in		
Accounts receivable	(281,352)	(521,711)
Pledges receivable	(279,587)	(783,373)
Grants and other receivables	(169,479)	177,935
Prepaid expenses	235	3,613
Deposits	(1,500)	(3,000)
Inventories	59,532	(48,218)
Increase (decrease) in		
Accounts payable and accrued expenses	(120,500)	352,620
Accrued payroll	(10,339)	114,812
Accrued vacation	7,669	(32,970)
Unearned revenue	144,760	75,887
Net cash used by operating activities	(412,272)	(850,818)
Cash flows from investing activities		
Purchases of property and equipment	(292,704)	(1,180,470)
Proceeds from sale of property	275,000	-
Proceeds from sale of investments	495,507	2,248,677
Purchases of investments	(138,716)	(1,164,443)
Net cash provided (used) by investing activities	339,087	(96,236)
Cash flows from financing activities		
Increase in cash overdraft	559,416	496,738
Contributions received for long-term purposes	905,674	313,300
Borrowings on line of credit	10,434,451	10,971,223
Payments on line of credit	(10,735,812)	(10,278,042)
Principal payments on long-term debt and capital lease	(293,939)	(274,508)
Net cash provided by financing activities	869,790	1,228,711
Net increase in cash and cash equivalents	796,605	281,657
Cash and cash equivalents, beginning of year	662,370	380,713
Cash and cash equivalents, end of year	$ 1,458,975	$ 662,370

The accompanying notes are an integral part of these consolidated financial statements.

CONFIDENTIAL

PLANNED PARENTHOOD OF NORTHERN NEW ENGLAND, INC.

Consolidated Statement of Functional Expenses

Year Ended December 31, 2013
(With Comparative Totals for 2012)

	Direct Patient Services	Education and Outreach	Public Policy	Marketing and Communication	Total Program Services	General and Administrative	Fundraising	Total Support Services	**2013 Total**	2012 Total
Payroll and related costs	$ 7,752,269	$ 48,873	$ 367,934	$ 78,827	$ 8,247,903	$ 1,489,837	$ 674,619	$ 2,164,456	**$ 10,412,359**	$10,917,027
Contraceptive supplies	1,995,594	-	150	-	1,995,744	-	-	-	**1,995,744**	1,831,509
Outside laboratory fees	588,519	-	-	-	588,519	-	-	-	**588,519**	647,871
Space rent	825,201	7,369	64,903	11,053	908,526	214,288	62,601	276,889	**1,185,415**	1,061,662
Medical supplies	527,403	-	-	-	527,403	-	-	-	**527,403**	516,158
Telephone	351,792	3,864	20,785	9,520	385,961	90,064	24,909	114,973	**500,934**	503,616
Travel	178,452	408	22,517	206	201,583	33,179	14,365	47,544	**249,127**	370,969
Space repair and maintenance	290,374	18	5,508	27	295,927	4,971	5,983	10,954	**306,881**	274,740
Professional services	434,530	19,400	106,315	2,433	562,678	406,694	44,318	451,012	**1,013,690**	916,160
Advertising	3,052	-	105,297	18,392	126,741	17,330	-	17,330	**144,071**	50,990
Malpractice insurance	142,419	-	320	-	142,739	-	-	-	**142,739**	148,347
Outside printing	40,306	17	12,294	30,043	82,660	1,218	43,466	44,684	**127,344**	136,228
Office supplies	114,604	272	2,404	3,028	120,308	31,067	2,209	33,276	**153,584**	173,804
Utilities	129,713	583	2,692	875	133,863	16,268	5,196	21,464	**155,327**	145,233
Postage and shipping	66,148	38	392	5,907	72,485	5,786	20,244	26,030	**98,515**	104,366
Dues and materials	44,311	70	45,388	63	89,832	19,647	1,754	21,401	**111,233**	139,575
Equipment maintenance	78,199	501	3,644	899	83,243	73,226	12,006	85,232	**168,475**	238,682
Miscellaneous	95,402	-	151	136	95,689	9,137	5,022	14,159	**109,848**	112,166
Events	20,044	530	10,069	1,151	31,794	25,125	278	25,403	**57,197**	66,942
External patient assistance	28,801	-	-	-	28,801	-	-	-	**28,801**	118,458
Interest expense	41,512	177	9,611	265	51,565	69,669	4,072	73,741	**125,306**	147,232
Property tax and insurance	55,140	208	1,341	312	57,001	11,518	1,806	13,324	**70,325**	65,166
Licensed professionals	41,843	-	-	-	41,843	-	-	-	**41,843**	22,630
Direct mail	-	-	3,733	325	4,058	-	52,064	52,064	**56,122**	59,933
Total expenses before depreciation and PPFA program support	13,845,628	82,328	785,448	163,462	14,876,866	2,519,024	974,912	3,493,936	**18,370,802**	18,769,464
Depreciation and amortization	427,502	-	47,148	-	474,650	223,857	5,584	229,441	**704,091**	692,661
Total expenses before PPFA program support	14,273,130	82,328	832,596	163,462	15,351,516	2,742,881	980,496	3,723,377	**19,074,893**	19,462,125
PPFA program support	-	-	-	-	-	226,312	-	226,312	**226,312**	216,701
Total expenses	$ 14,273,130	$ 82,328	$ 832,596	$ 163,462	$ 15,351,516	$ 2,969,193	$ 980,496	$ 3,949,689	**$ 19,301,205**	$19,678,826

The accompanying notes are an integral part of these consolidated financial statements.

Nature of Activities

Planned Parenthood of Northern New England, Inc. (PPNNE) is a Vermont nonprofit corporation organized for the purpose of providing reproductive health and education services. PPNNE is also an advocacy organization working for public policies which guarantee reproductive rights and ensure access to services. PPNNE is registered to conduct business in Maine, New Hampshire and Vermont.

In 1990, PPNNE established the Planned Parenthood of Northern New England Action Fund, Inc. (Action Fund), a nonprofit corporation, for the purpose of expanding lobbying activities. Operations and balances of the Action Fund are considered immaterial to PPNNE, but are included in the accompanying financial statements.

1. Summary of Significant Accounting Policies

Principles of Consolidation

The consolidated financial statements include the accounts of Planned Parenthood of Northern New England, Inc. and Planned Parenthood of Northern New England Action Fund, Inc. The Action Fund is consolidated since PPNNE has both an economic interest in the Action Fund and control of the Action Fund through a majority voting interest in its governing board. All material inter-organizational transactions have been eliminated.

Comparative Financial Information

The consolidated financial statements include certain prior-year summarized comparative information in total, but not by net asset class. Such information does not include sufficient detail to constitute a presentation in conformity with U.S. generally accepted accounting principles (U.S. GAAP). Accordingly, such information should be read in conjunction with PPNNE's consolidated financial statements for the year ended December 31, 2012, from which the summarized information was derived.

Use of Estimates

The preparation of the consolidated financial statements, in conformity with U.S. GAAP, requires management to make estimates and assumptions that affect the reported amounts of assets and liabilities and disclosure of contingent assets and liabilities at the date of the consolidated financial statements. Estimates also affect the reported amounts of revenues and expenses during the reporting period. Actual results could differ from those estimates.

Basis of Presentation

Net assets and revenues, expenses, gains and losses are classified as follows based on existence or absence of donor-imposed restrictions:

Unrestricted net assets - Net assets that are not subject to donor-imposed stipulations.

Temporarily restricted net assets - Net assets subject to donor-imposed stipulations that may or will be met by actions of PPNNE and/or the passage of time. When a donor restriction expires, that is, when a stipulated time restriction ends or purpose restriction is accomplished, temporarily restricted net assets are reclassified to unrestricted net assets and reported in the statement of activities as net assets released from restrictions. Net assets subject to donor-imposed stipulations that are met in the same reporting period are reported as unrestricted support.

Permanently restricted net assets - Net assets subject to donor-imposed stipulations that they be maintained permanently by PPNNE. Generally, the donors of these assets permit PPNNE to use all or part of the income earned on related investments for general or specific purposes.

Donor Restricted Gifts

Unconditional promises to give cash and other assets are reported at fair value at the date the promise is received, which is then treated as cost. The gifts are reported as either temporarily or permanently restricted support if they are received with donor stipulations that limit the use of the donated assets.

Donated Services

PPNNE receives noncash contributions in the form of volunteers performing various clerical functions to support program and administrative activities. No amounts have been recorded for these services. PPNNE recognized donated services of $126,193 and $39,407 in 2013 and 2012, respectively, for professional services provided to PPNNE.

Income Taxes

The Internal Revenue Service has determined that PPNNE and its subsidiary, the Action Fund, are exempt from taxation under Internal Revenue Code Sections 501(c)(3) and 501(c)(4), respectively. Accordingly, no provision for income taxes has been reflected in these financial statements.

Cash and Cash Equivalents

PPNNE maintains its cash and investments in bank deposit accounts which, at times, may exceed federally insured limits. PPNNE has not experienced any losses in such accounts. Management believes it is not exposed to any significant risk on cash and cash equivalents.

For purposes of the statement of cash flows, PPNNE considers all unrestricted, highly-liquid investments with an initial maturity of three months or less to be cash equivalents.

Accounts Receivable

Accounts receivable are stated at the amount management expects to collect from outstanding balances. Management provides for probable uncollectible amounts through a charge to earnings and a credit to a valuation allowance based on its assessment of the current status of individual accounts. Balances that are still outstanding after management has used reasonable collection efforts are written off through a charge to the valuation allowance and a credit to accounts receivable.

In evaluating the collectability of patient accounts receivable, PPNNE analyzes past results and identifies trends for each of its major payor sources of revenue to estimate the appropriate allowance for doubtful accounts and provision for bad debts. Data for each major source is regularly reviewed to evaluate the allowance for doubtful accounts. For receivables relating to services provided to patients having third-party coverage, PPNNE analyzes contractually due amounts and provides an allowance for doubtful accounts and a corresponding provision for bad debts. For receivables relating to self-pay patients (which includes both patients without insurance and patients with deductible and copayment balances for which third-party coverage exists for part of the bill), PPNNE records a provision for bad debts in the period of service based on past experience, which indicates that many patients are unable or unwilling to pay amounts for which they are financially responsible. The difference between the standard rates and the amounts actually collected after all reasonable collection efforts have been exhausted is charged against the allowance for doubtful accounts.

During 2013, PPNNE increased its estimate from $570,000 to $768,000, in the allowance for doubtful accounts relating to self-pay patients. Self-pay write-offs increased from $304,788 in 2012 to $416,870 in 2013. These changes resulted from trends experienced in the collection of amounts from self-pay patients.

Inventories

Inventories consist primarily of contraceptive supplies and are stated at the lower of cost (first-in, first-out basis) or market.

Property and Equipment

Property and equipment is stated at cost at the date of acquisition or fair market value at the date of the gift. Donated property and equipment is reported as unrestricted support unless the donor has restricted the donated asset to a specific purpose. Assets donated with explicit restrictions regarding their use and contributions of cash that must be used to acquire property and equipment are reported as restricted support. Absent donor stipulations regarding how long those donated assets must be maintained, PPNNE reports expirations when the donated or acquired assets are placed in service as instructed by the donor. PPNNE reclassifies temporarily restricted net assets to unrestricted net assets at that time. Depreciation is computed using the straight-line method over the estimated useful lives of the underlying assets. Amortization of leasehold improvements is computed using the straight-line method over the lesser of the useful lives or the term of the underlying leases. The cost of maintenance and repairs is charged to expense as incurred; renewals and betterments greater than $1,000 are capitalized.

Investments

PPNNE is required to report covered investments in the statement of financial position at fair value with any realized or unrealized gains and losses reported in the statement of activities. Covered investments include all equity securities with readily determinable fair values and all investments in debt securities. All of PPNNE's investments are held in cash and cash equivalents, exchange traded funds or mutual funds.

Gifts of securities are reported at fair value on the date of the gift. PPNNE's policy is to liquidate all donated securities as soon as possible. Any resulting gain or loss is recognized in the unrestricted category.

An amount equal to investment income appropriated for operating purposes is included in operating revenue and support in the consolidated statement of activities. The remainder of investment income is excluded from the consolidated change in net assets from operations.

Change in Net Assets from Operations

The statements of activities report changes in net assets from operations. The changes in net assets which are excluded from this measurement include investment income recognized on investments less the annual spending policy, contributions which are permanently restricted by the donor or which are donor restricted to be used for the purpose of acquiring long-term assets and the release thereof when PPNNE has complied with the donative restrictions.

Net Patient Service Revenue

PPNNE has agreements with third-party payors that provide for payments at amounts different from their established rates. Net patient service revenue is reported at the estimated net realizable amounts from patients, third-party payors and others for services rendered. For the years ended December 31, 2013 and 2012, net patient service revenue was reduced by $11,073,484 and $8,799,727, respectively, as a result of third-party contractual allowances and other adjustments.

The census mix percentage by patients and third-party payors for the years ended December 31 was as follows:

	2013	2012
Private pay	29%	35%
Other third-party payors	34%	37%
Federal and state	37%	28%
	100%	100%

Charity Care

PPNNE also provides patient services under sliding fee arrangements. These discounts from charges are available for eligible patients whose income and family size meet the criteria outlined in the federal poverty guidelines updated each year. Because PPNNE does not pursue collection of amounts determined to qualify as charity care as described above, they are not reported as patient service revenue. PPNNE maintains records to identify the amount of charges foregone for services and supplies furnished under its sliding fee/charity care policy, as well as the estimated cost of those services and supplies and equivalent service statistics.

The following information measures the level of charity care provided during the year ended December 31:

	2013	2012
Charges foregone, based on established rates	$ 9,046,066	$ 9,665,377
Estimated costs and expenses incurred to provide charity care	$ 5,282,000	$ 6,163,000
Equivalent percentage of charity care charges to patient charges	27.76%	31.67%

Cost of providing charity care services has been estimated based on an overall financial statement ratio of costs to charges applied to charity charges forgone.

Meaningful Use Income

The Medicare and Medicaid electronic health record (EHR) incentive programs provide a financial incentive for achieving "meaningful use" of certified EHR technology. The meaningful use attestation is subject to audit by the Centers for Medicare and Medicaid Services in future years. As part of this process, a final settlement amount for the incentive payments could be established that differs from the initial calculation and could result in return of a portion of all of the incentive payments received by PPNNE.

Payments to Affiliated Organization

PPNNE is a member of the Planned Parenthood Federation of America, Inc. (PPFA), a national organization, and pays quarterly dues to the national organization for program support provided.

Retirement Plan

PPNNE has a contributory, defined contribution retirement plan covering substantially all its employees who meet minimum service requirements. Employee contributions to the plan are based on a percentage of salary and are 100% vested when made. Through December 31, 2012, the employer contributions matched employee contributions up to 2% provided the employee contributed a minimum of 2.5%. Employer contributions are fully vested when made. Retirement expense was $105,455 in 2012. As of January 1, 2013, PPNNE froze all matching contributions to the retirement plan and incurred no retirement expense in 2013.

Functional Allocation of Expenses

PPNNE's expenses are presented on a functional basis, showing basic program activities and support services. PPNNE allocates expenses based on the organizational cost centers (functional units) in which expenses are incurred. In certain instances, expenses are allocated between support functions and program services based on an analysis of personnel time and space utilized for the related services.

Subsequent Events

For purposes of the preparation of these consolidated financial statements in conformity with U.S. GAAP, PPNNE has considered transactions or events occurring through May 2, 2014, which was the date that the consolidated financial statements were available to be issued.

2. Accounts Receivable

Accounts receivable consist of the following:

	2013	2012
Patient accounts receivable	$ 2,934,840	$ 2,731,488
Less: allowance for contractual adjustments	(832,000)	(910,000)
Less: allowance for uncollectible accounts	(768,000)	(570,000)
	$ 1,334,840	$ 1,251,488

3. Grants and Other Receivables

Grants and other receivables consist of the following:

	2013	2012
Federal and state grants	$ 407,689	$ 256,792
Miscellaneous	32,268	13,686
	$ 439,957	$ 270,478

4. Pledges Receivable

Pledges receivable consist of the following:

	2013	2012
Contributions for:		
Unrestricted purposes	$ 241,584	$ 271,009
Unrestricted purposes, time restrictions	1,180,645	968,849
Upper Valley Relocation Project	25,000	90,334
Cancer Screening Access Fund	-	10,000
Laura Fund	-	200
Environmental Toxin Initiative	-	10,000
Other purposes	120,000	39,850
Pledges receivable	1,567,229	1,390,242
Less: Allowance for uncollectible contributions and unamortized discounts	(38,690)	(27,806)
Pledges receivable, net	1,528,539	1,362,436
Less: pledges receivable, current portion	1,308,817	933,638
Pledges receivable, net of current portion	$ 219,722	$ 428,798

Expected payments on pledges are as follows at December 31:

	2013	2012
Less than one year	$ 1,339,691	$ 944,517
One to five years	227,538	445,725
Pledges receivable	$ 1,567,229	$ 1,390,242

5. Beneficial Interest in Trusts

PPFA administers various charitable gift annuity and pooled income fund gift programs and a charitable remainder annuity trust in which PPNNE is designated to receive any remaining assets at the end of the program's term. PPNNE's interest in these trusts is reported as a contribution in the year in which it is notified of its interest.

Several donors have established trusts naming PPNNE as the beneficiary of charitable remainder trusts, which are administered by a third-party. The charitable remainder trusts provide for the payment of distributions to the grantor or other designated beneficiaries over the trust's term (usually the designated beneficiary's lifetime).

The beneficial interest in these trusts is calculated based on the present value of the underlying assets using the beneficiaries' life expectancies and a 1% discount rate in 2013 and 2012.

Beneficial interest in trusts consists of the following:

	2013	2012
Charitable gift annuities	$ 168,954	$ 113,242
Pooled income funds	61,341	55,345
Charitable remainder annuity trust	11,008	11,050
Charitable remainder unitrusts	321,210	299,273
	$ 562,513	$ 478,910

6. Investments

The market value of the investments is as follows:

	2013	2012
Cash and cash equivalents	$ 146,384	$ 142,179
Short-term bonds	469,956	488,456
Bond funds	954,696	1,013,172
U.S. stocks	1,019,253	1,060,604
Non-U.S. stocks	975,840	1,115,956
Real estate securities	636,448	709,353
Commodity-linked securities	610,218	662,384
	$ 4,812,795	$ 5,192,104

Investment income is summarized as follows:

	2013	2012
Interest and dividend income	$ 134,808	$ 151,745
Realized gain	16,316	20,384
Change in unrealized gain	261,665	517,063
Investment fees	(26,090)	(27,815)
	$ 386,699	$ 661,377

Net investment income is reported in the statement of activities as follows:

	2013	2012
Operating investment income	$ 232,000	$ 237,000
Non-operating investment income	154,699	424,377
	$ 386,699	$ 661,377

Investments in general are exposed to various risks, such as interest rates, credit and overall market volatility. As such, it is reasonably possible that changes could materially affect the amounts reported in the statements of financial position and activities.

7. Unearned Revenue

Unearned revenue consists of the following:

	2013	2012
Patient fees	$ 540,357	$ 409,558
Grants and contracts	91,478	77,517
Other	300	300
	$ 632,135	$ 487,375

8. Long-Term Debt

Long-term debt consists of the following:

	2013	2012
Mortgage note payable to People's United Bank, with monthly installments due of $14,302, through July of 2015, collateralized by buildings. In March 2013, PPNNE's fixed interest rate was modified from 5.5% to 4%.	$ 262,536	$ 419,221
Tenant improvement loan payable to CLAPP Building Partners, LLC, due in monthly installments of $8,774, including interest at 7.5% through May 2013, and monthly installments of $9,119, including interest at 8.5% through May 2021, uncollateralized.	600,503	657,243
Margin loan payable to Fidelity Investments, due on demand, requiring monthly payments of interest only at 3.5%, collateralized by investments.	699,500	1,000,000
	1,562,539	2,076,464
Less: current portion	924,000	1,210,000
Long-term debt, excluding current portion	$ 638,539	$ 866,464

Future maturities of long-term debt are approximately as follows:

2014	$ 924,000
2015	165,000
2016	72,000
2017	78,000
2018	85,000
Thereafter	238,539
	$ 1,562,539

Cash paid for interest approximates interest expense for the years ended December 31, 2013 and 2012.

9. Line of Credit

PPNNE has a $1,500,000 line of credit agreement at People's United Bank. The line of credit bears interest at People's United Bank prime rate, subject to a floor (3.50% at December 31, 2013 and 2012). The agreement expires August 1, 2014. Under the terms of the agreement, unrestricted investments not to exceed $2,300,000, margined at 70% and subject to securities mix and bond rates, as well as 70% of PPNNE's accounts receivable aged 90 days and less, are pledged as collateral. As of December 31, 2013 and 2012, the outstanding balance on the line of credit was $418,411 and $719,772, respectively.

In connection with the 2013 line of credit agreement, PPNNE is required to maintain a debt service coverage ratio. The debt service coverage ratio decreased from a required 1.2 to 1 in 2012 to a ratio of 1 to 1 in 2013. PPNNE was not in compliance with this ratio for the years ended December 31, 2013 and 2012.

10. Capital Lease Obligation

PPNNE purchased a new phone system in December 2010, financed with a capital lease. The cost of the system was $247,784. The lease calls for monthly payments of $6,930 through January 2014, at which point the payments are reduced to $734 until the maturity date of January 2016. Accumulated depreciation on the phone system was $247,784 and $165,189 as of December 31, 2013 and 2012, respectively.

The minimal annual lease payments under this lease are as follows:

2014	$ 8,808
2015	8,808
2016	734
Total minimum lease payments	18,350
Less: imputed interest at 4.456%	1,483
Present value of total minimum lease payments	16,867
Less: current principal obligation	8,200
	$ 8,667

11. Operating Leases

PPNNE rents certain facilities and leases office equipment from third-parties under agreements reflected as operating leases. The total facility rent expense was $1,185,415 and $1,061,662 in 2013 and 2012, respectively. Total equipment lease expense was $56,117 and $77,793 in 2013 and 2012, respectively. Rental income was $11,500 and $12,000 in 2013 and 2012, respectively.

Future minimum lease commitments are as follows:

2014	$ 1,111,400
2015	986,700
2016	999,500
2017	1,012,400
2018	1,037,400
Thereafter	2,993,896
	$ 8,141,296

12. Commitments and Contingencies

Grants and Contracts

Grants and contracts require the fulfillment of certain conditions as set forth in the instrument of the grant or contract. Failure to fulfill the conditions could result in the return of funds to the grantor. Although that is a possibility, management deems the contingency remote.

Risk Management

PPNNE maintains medical malpractice insurance coverage on a claims-made basis. PPNNE is subject to complaints, claims and litigation due to potential claims which arise in the normal course of business. Generally accepted accounting principles require PPNNE to accrue the ultimate cost of malpractice claims when the indicant that gives rise to the claim occurs, without consideration of insurance recoveries. Expected recoveries are presented as a separate asset. PPNNE has evaluated its exposure to losses arising from potential claims and to determine no such accrual is necessary for the year ended December 31, 2013. PPNNE intends to renew coverage on a claims made basis and anticipates coverage will be available in future periods.

Litigation

PPNNE is involved in legal matters arising from the ordinary course of business. In the opinion of management, these matters will not materially affect PPNNE's financial position.

13. Restrictions on Net Assets

Temporarily restricted net assets consist of donor contributions to the following programs or future periods not expended at year-end:

	2013	2012
PPFA - planned gifts	$ 190,682	$ 179,637
Planned Gifts - other	321,210	299,273
Laura Fund	42,600	26,433
Restricted to future programs	1,874,790	1,072,043
Environmental Toxin Initiative	15,574	39,609
Cancer Screening Access Fund	21,613	26,737
CAPS Grant	14,234	30,054
The David Wagner Fund	7,346	4,803
Justice Fund	-	4,713
New Hampshire Public Policy	-	25,000
Upper Valley Relocation Project	854,805	568,419
	$ 3,342,854	$ 2,276,721

Net assets released from restrictions consist of the following:

	2013	2012
Operating purpose restrictions accomplished:		
Laura Fund	$ 17,096	$ 118,568
Environmental Toxin Initiative	24,035	27,322
Cancer Screening Access Fund	15,778	7,847
CAPS Grant	213,820	218,586
The David Wagner Fund	1,545	1,479
Justice Fund	5,744	13
New Hampshire Public Policy	25,000	25,000
PPFA - planned gifts	50,620	-
Time restrictions met	731,316	-
Other programs	174,496	194,432
	$ 1,259,450	$ 593,247
Nonoperating purpose restrictions accomplished:		
Acquisition of long-term assets	$ 79,734	$ 115,166

Permanently restricted net assets consist of endowment fund assets to be held in perpetuity. Permanently restricted net assets consist of the following:

	2013	2012
Key to the Future Fund, income unrestricted	$ 940,197	$ 940,197
Laura Fund, income unrestricted	128,169	128,169
The David Wagner Fund, income restricted	49,359	48,359
Maine endowment, income unrestricted	76,209	76,209
Other endowment funds, income unrestricted	81,830	80,980
	$ 1,275,764	$ 1,273,914

14. Endowment

PPNNE's endowment includes both donor-restricted endowment funds and funds designated by the Board of Trustees to function as endowments. As required by U.S. GAAP, net assets associated with endowment funds, including funds designated by the Board of Trustees to function as endowments, are classified and reported based on the existence or absence of donor-imposed restrictions.

Interpretation of Relevant Law

PPNNE has interpreted the State of Vermont Uniform Prudent Management of Institutional Funds Act (the Act) which became effective May 5, 2009, as requiring the preservation of the contributed value of the donor-restricted endowment funds absent explicit donor stipulations to the contrary. As a result of this interpretation, PPNNE classifies as permanently restricted net assets (1) the original value of gifts donated to the permanent endowment, (2) the original value of subsequent gifts to the permanent endowment, and (3) accumulations to the permanent endowment made in accordance with the direction of the applicable donor gift instrument at the time the accumulation is added to the fund. If the donor-restricted endowment assets earn investment returns beyond the amount necessary to maintain the endowment assets' corpus value, the excess is available for appropriation and, therefore, classified as temporarily restricted net assets until appropriated by the Board of Directors for expenditure. Funds designated by the Board of Directors to function as endowments are classified as unrestricted net assets.

In accordance with the Act, PPNNE considers the following factors in making a determination to appropriate or accumulate donor restricted endowment funds:

(1) The duration and preservation of the fund
(2) The purposes of the organization and the donor-restricted endowment fund
(3) General economic conditions
(4) The possible effect of inflation and deflation
(5) The expected total return from income and the appreciation of investments
(6) Other resources of the organization
(7) The investment policies of the organization

Endowment Composition and Changes in Endowment

The endowment net assets composition by type of fund as of December 31, 2013 is as follows:

	Board Designated	Temporarily Restricted	Permanently Restricted	Total
Donor-restricted endowment funds	$ -	$ 85,791	$ 1,274,764	$ 1,360,555
Board-designated endowment funds	2,630,422	-	-	2,630,422
Total funds	$ 2,630,422	$ 85,791	$ 1,274,764	$ 3,990,977

The changes in endowment net assets for the fiscal year ended December 31, 2013 are as follows:

	Board Designated	Temporarily Restricted	Permanently Restricted	Total
Endowment net assets, December 31, 2012	$ 2,842,346	$ 44,916	$ 1,272,914	$ 4,160,176
Investment return				
Investment income	76,652	32,066	-	108,718
Net appreciation	206,776	71,205	-	277,981
Total investment return	283,428	103,271	-	386,699
Contributions	-	-	1,850	1,850
Transfers to unrestricted	(112,481)	(1,343)	-	(113,824)
Withdrawals	(211,924)	-	-	(211,924)
Endowment assets appropriated for expenditure	(170,947)	(61,053)	-	(232,000)
Endowment net assets, December 31, 2013	$ 2,630,422	$ 85,791	$ 1,274,764	$ 3,990,977

The endowment net assets composition by type of fund as of December 31, 2012 is as follows:

	Board Designated	Temporarily Restricted	Permanently Restricted	Total
Donor-restricted endowment funds	$ (1,290)	$ 44,916	$ 1,272,914	$ 1,316,540
Board-designated endowment funds	2,843,636	-	-	2,843,636
Total funds	$ 2,842,346	$ 44,916	$ 1,272,914	$ 4,160,176

The changes in endowment net assets for the fiscal year ended December 31, 2012 are as follows:

	Board Designated	Temporarily Restricted	Permanently Restricted	Total
Endowment net assets, December 31, 2011	$ 3,837,536	$ 3,070	$ 1,236,025	$ 5,076,631
Investment return				
Investment income	106,043	35,017	-	141,060
Net appreciation	417,910	119,537	-	537,447
Total investment return	523,953	154,554	-	678,507
Contributions	4,810	4,568	36,889	46,267
Transfers to unrestricted	-	(29,584)	-	(29,584)
Withdrawals	(1,374,645)	-	-	(1,374,645)
Endowment assets appropriated for expenditure	(149,308)	(87,692)	-	(237,000)
Endowment net assets, December 31, 2012	$ 2,842,346	$ 44,916	$ 1,272,914	$ 4,160,176

Funds with Deficiencies

From time to time, the fair value of assets associated with individual donor-restricted endowment funds may fall below the level that the donor or the Act requires PPNNE to retain as a fund of perpetual duration. In accordance with U.S. GAAP, deficiencies of this nature that are reported in board designated net assets were $1,290 as of December 31, 2012. There were no deficiencies of this nature as of December 31, 2013.

Return Objectives and Risk Parameters

PPNNE has adopted investment and spending policies for endowment assets that attempt to provide for equal treatment of present and future needs, with neither group favored at the expense of the other. To meet these objectives, the Board seeks to provide reasonably stable and predictable funds from the endowment for PPNNE's operating budget, to grow capital and to preserve and grow the real (inflation-adjusted) purchasing power of assets as indicated by the aggregate value of appreciation and income. PPNNE seeks to provide a total return approach maximizing overall return; long-term returns should either match or exceed the total of the set payout, fees and inflation.

Strategies Employed for Achieving Objectives

To satisfy its long-term rate-of-return objectives, PPNNE relies on a total return strategy in which investment returns are achieved through both capital appreciation (realized and unrealized) and current yield (interest and dividends). PPNNE targets a diversified asset allocation that places a greater emphasis on equity-based investments to achieve its long-term return objectives within prudent risk constraints. As a long-term policy guideline, equity investments will normally constitute at least 56% and fixed income securities no more than 36% of endowment assets.

Spending Policy

PPNNE's investment policy states that spendable investment income will be calculated as 4% of the average endowment portfolio value based on the portfolio market value at the end of the most recent twelve quarters. Appropriations and withdrawals in excess of this policy must be approved by the Board of Directors. Under this policy, PPNNE appropriated for distribution of $232,000 and $237,000 for operating purposes as of December 31, 2013 and 2012, respectively.

15. Fair Value Measurements and Disclosures

FASB ASC Topic 820-10-20, *Fair Value Measurements and Disclosures*, defines fair value as the exchange price that would be received for an asset or paid to transfer a liability (an exit price) in the principal or most advantageous market for the asset or liability in an orderly transaction between market participants on the measurement date. FASB ASC 820-10-20 also establishes a fair value hierarchy which requires an entity to maximize the use of observable inputs and minimize the use of unobservable inputs when measuring fair value. The standard describes three levels of inputs that may be used to measure fair value:

Level 1: Quoted prices (unadjusted) or identical assets or liabilities in active markets that the entity has the ability to access as of the measurement date.

Level 2: Significant other observable inputs other than Level 1 prices, such as quoted prices for similar assets or liabilities, quoted prices in markets that are not active and other inputs that are observable or can be corroborated by observable market data.

Level 3: Significant unobservable inputs that reflect PPNNE's own assumptions about the assumptions that market participants would use in pricing an asset or liability.

Assets measured at fair value on a recurring basis are as follows:

	Fair value measurements at December 31, 2013			
	Total	Level 1	Level 2	Level 3
Cash and cash equivalents	$ 146,384	$ 146,384	$ -	$ -
Short-term bonds	469,956	469,956	-	-
Bond funds	954,696	954,696	-	-
U.S. stocks	1,019,253	1,019,253	-	-
Non-U.S. stocks	975,840	975,840	-	-
Real estate securities	636,448	636,448	-	-
Commodity-linked securities	610,218	610,218	-	-
Investments	$ 4,812,795	$ 4,812,795	$ -	$ -
Pledges receivable	$ 1,528,539	$ -	$ -	$ 1,528,539
Charitable gift annuities	$ 168,954	$ -	$ 168,954	$ -
Pooled income funds	61,341	-	61,341	-
Charitable remainder annuity trust	11,008	-	11,008	-
Charitable remainder unitrusts	321,210	-	321,210	-
Beneficial interest in trusts	$ 562,513	$ -	$ 562,513	$ -

Assets measured at fair value on a recurring basis are as follows:

	Fair value measurements at December 31, 2012			
	Total	Level 1	Level 2	Level 3
Cash and cash equivalents	$ 142,179	$ 142,179	$ -	$ -
Short-term bonds	488,456	488,456	-	-
Bond funds	1,013,172	1,013,172	-	-
U.S. stocks	1,060,604	1,060,604	-	-
Non-U.S. stocks	1,115,956	1,115,956	-	-
Real estate securities	709,353	709,353	-	-
Commodity-linked securities	662,384	662,384	-	-
Investments	$ 5,192,104	$ 5,192,104	$ -	$ -
Pledges receivable	$ 1,362,436	$ -	$ -	$ 1,362,436
Charitable gift annuities	$ 113,242	$ -	$ 113,242	$ -
Pooled income funds	55,345	-	55,345	-
Charitable remainder annuity trust	11,050	-	11,050	-
Charitable remainder unitrusts	299,273	-	299,273	-
Beneficial interest in trusts	$ 478,910	$ -	$ 478,910	$ -

Fair value is best determined based upon quoted market prices. However, in certain instances, there are no quoted market prices for PPNNE's various financial instruments. The fair value for Level 2 investments is primarily based on the quoted market prices of the underlying assets, net of any associated liabilities.

The fair value for Level 3 assets is based upon the present value of expected cash flows using current market interest rates.

Significant activity for assets measured at fair value on a recurring basis using significant unobservable inputs are as follows:

	Pledges Receivable
December 31, 2011	$ 470,995
Contributions/additions	2,060,628
Pledges written off	(50,000)
Change in value	(20,507)
Receipts/distributions	(1,098,680)
December 31, 2012	1,362,436
Contributions/additions	**2,254,194**
Pledges written off	**(12,303)**
Receipts/distributions	**(2,075,788)**
December 31, 2013	**$ 1,528,539**

16. Cash Flow Information

PPNNE had the following noncash activity for the years ended December 31:

	2013	2012
Capital expenditures	**$ 195,371**	$ 764,996
Less: accounts payable as of year-end	**-**	(97,333)
Add: payments on prior year short-term accounts used to finance capital expenditures	**97,333**	512,807
Purchases of property and equipment	**$ 292,704**	$ 1,180,470

In 2013, PPNNE made a principal payment on the margin loan payable to Fidelity Investments of $300,500 through a transfer from its long-term investments.

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Planned Parenthood®
of Northern New England

AUDITOR'S REPORTS AS REQUIRED BY OMB CIRCULAR A-133 AND *GOVERNMENT AUDITING STANDARDS* AND RELATED INFORMATION

Year Ended December 31, 2013

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PLANNED PARENTHOOD OF NORTHERN NEW ENGLAND, INC.

A-133 Compliance

Year Ended December 31, 2013

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INDEPENDENT AUDITOR'S REPORT ON INTERNAL CONTROL OVER FINANCIAL REPORTING AND ON COMPLIANCE AND OTHER MATTERS BASED ON AN AUDIT OF FINANCIAL STATEMENTS PERFORMED IN ACCORDANCE WITH *GOVERNMENT AUDITING STANDARDS*

The Board of Trustees
Planned Parenthood of Northern New England, Inc.

We have audited, in accordance with U.S. generally accepted auditing standards and the standards applicable to financial audits contained in *Government Auditing Standards*, issued by the Comptroller General of the United States, the consolidated financial statements of Planned Parenthood of Northern New England, Inc. (PPNNE), which comprise the consolidated statement of financial position as of December 31, 2013, and the related consolidated statements of activities, cash flows and functional expenses for the year then ended, and the related notes to the consolidated financial statements, and have issued our report thereon dated May 2, 2014.

Internal Control Over Financial Reporting

In planning and performing our audit of the consolidated financial statements, we considered PPNNE's internal control over financial reporting (internal control) to determine the audit procedures that are appropriate in the circumstances for the purpose of expressing our opinion on the consolidated financial statements, but not for the purpose of expressing an opinion on the effectiveness of PPNNE's internal control. Accordingly, we do not express an opinion on the effectiveness of PPNNE's internal control.

A *deficiency in internal control* exists when the design or operation of a control does not allow management or employees, in the normal course of performing their assigned functions, to prevent or detect and correct misstatements on a timely basis. A *material weakness* is a deficiency, or combination of deficiencies, in internal control such that there is a reasonable possibility that a material misstatement of PPNNE's consolidated financial statements will not be prevented, or detected and corrected on a timely basis. A *significant deficiency* is a deficiency, or a combination of deficiencies, in internal control that is less severe than a material weakness, yet important enough to merit attention by those charged with governance.

Our consideration of internal control was for the limited purpose described in the first paragraph of this section and was not designed to identify all deficiencies in internal control over financial reporting that might be material weaknesses or significant deficiencies. Given these limitations, during our audit we did not identify any deficiencies in internal control that we consider to be material weaknesses. However, material weaknesses may exist that have not been identified.

Compliance and Other Matters

As part of obtaining reasonable assurance about whether PPNNE's consolidated financial statements are free of material misstatement, we performed tests of its compliance with certain provisions of laws, regulations, contracts and grant agreements, noncompliance with which could have a direct and material effect on the determination of financial statement amounts. However, providing an opinion on compliance with those provisions was not an objective of our audit and, accordingly, we do not express such an opinion. The results of our tests disclosed no instances of noncompliance or other matters that are required to be reported under *Government Auditing Standards*.

Purpose of this Report

The purpose of this report is solely to describe the scope of our testing of internal control and compliance and the results of that testing, and not to provide an opinion on the effectiveness of PPNNE's internal control or on compliance. This report is an integral part of an audit performed in accordance with *Government Auditing Standards* in considering PPNNE's internal control and compliance. Accordingly, this communication is not suitable for any other purpose.

Berry Dunn McNeil & Parker, LLC

Portland, Maine
May 2, 2014

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INDEPENDENT AUDITOR'S REPORT ON COMPLIANCE FOR EACH MAJOR FEDERAL PROGRAM; REPORT ON INTERNAL CONTROL OVER COMPLIANCE; AND REPORT ON THE SCHEDULE OF EXPENDITURES OF FEDERAL AWARDS REQUIRED BY OMB CIRCULAR A-133

The Board of Trustees
Planned Parenthood of Northern New England, Inc.

Report on Compliance for Each Major Federal Program

We have audited Planned Parenthood of Northern New England, Inc.'s (PPNNE) compliance with the types of compliance requirements described in the *U.S. Office of Management and Budget (OMB) Circular A-133 Compliance Supplement* that could have a direct and material effect on each of its major federal programs for the year ended December 31, 2013. PPNNE's major federal programs are identified in the summary of auditor's results section of the accompanying schedule of findings and questioned costs.

Management's Responsibility

Management is responsible for compliance with the requirements of laws, regulations, contracts, and grants applicable to its major federal programs.

Auditor's Responsibility

Our responsibility is to express an opinion on compliance for each of PPNNE's major federal programs based on our audit of the types of compliance requirements referred to above. We conducted our audit of compliance in accordance with U.S. generally accepted auditing standards; the standards applicable to financial audits contained in *Government Auditing Standards*, issued by the Comptroller General of the United States; and OMB Circular A-133, *Audits of States, Local Governments, and Non-Profit Organizations*. Those standards and OMB Circular A-133 require that we plan and perform the audit to obtain reasonable assurance about whether noncompliance with the types of compliance requirements referred to above that could have a direct and material effect on a major federal program occurred. An audit includes examining, on a test basis, evidence about PPNNE's compliance with those requirements and performing such other procedures as we considered necessary in the circumstances.

We believe that our audit provides a reasonable basis for our opinion on compliance for each major federal program. However, our audit does not provide a legal determination of PPNNE's compliance.

Opinion on Each Major Federal Program

In our opinion, PPNNE complied, in all material respects, with the requirements referred to above that could have a direct and material effect on each of its major federal programs for the year ended December 31, 2013.

Report on Internal Control Over Compliance

Management of PPNNE is responsible for establishing and maintaining effective internal control over compliance with the types of compliance requirements referred to above. In planning and performing our audit of compliance, we considered PPNNE's internal control over compliance with requirements that could have a direct and material effect on each major federal programs in order to determine the auditing procedures that are appropriate in the circumstances for the purpose of expressing an opinion on compliance for each major federal program and to test and report on internal control over compliance in accordance with OMB Circular A-133, but not for the purpose of expressing an opinion on the effectiveness of internal control over compliance. Accordingly, we do not express an opinion on the effectiveness of PPNNE's internal control over compliance.

A *deficiency in internal control over compliance* exists when the design or operation of control over compliance does not allow management or employees, in the normal course of performing their assigned functions, to prevent, or detect and correct, noncompliance with a type of compliance requirement of a federal program on a timely basis. A *material weakness in internal control over compliance* is a deficiency, or combination of deficiencies, in internal control over compliance, such that there is a reasonable possibility that material noncompliance with a type of compliance requirement of a federal program will not be prevented, or detected and corrected, on a timely basis. A *significant deficiency in internal control over compliance* is a deficiency, or a combination of deficiencies, in internal control over compliance with a type of compliance requirement of a federal program that is less severe than a material weakness in internal control over compliance, yet important enough to merit attention by those charged with governance.

Our consideration of internal control over compliance was for the limited purpose described in the first paragraph of this section and was not designed to identify all deficiencies in internal control over compliance that might be material weaknesses or significant deficiencies. We did not identify any deficiencies in internal control over compliance that we consider to be material weaknesses. However, material weaknesses may exist that have not been identified.

The purpose of this report on internal control over compliance is solely to describe the scope of our testing of internal control over compliance and the results of that testing based on the requirements of OMB Circular A-133. Accordingly, this communication is not suitable for any other purpose.

Schedule of Expenditures of Federal Awards

We have audited the consolidated financial statements of PPNNE as of and for the year ended December 31, 2013, and have issued our report thereon dated May 2, 2014, which contained an unmodified opinion on those financial statements. Our audit was performed for the purpose of forming an opinion on the consolidated financial statements as a whole. The accompanying schedule of expenditures of federal awards is presented for purposes of additional analysis as required by OMB Circular A-133 and is not a required part of the consolidated financial statements. Such information is the responsibility of management and was derived from and relates directly to the underlying accounting and other records used to prepare the consolidated financial statements. The information has been subjected to the auditing procedures applied in the audit of the consolidated financial statements and certain additional procedures, including comparing and reconciling such information directly to the underlying accounting and other records used to prepare the consolidated financial statements or to the consolidated financial statements themselves, and other additional procedures in accordance with U.S. generally accepted auditing standards. In our opinion, the schedule of expenditures of federal awards is fairly stated in all material respects in relation to the consolidated financial statements as a whole.

Berry Dunn McNeil & Parker, LLC

Portland, Maine
May 2, 2014

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PLANNED PARENTHOOD OF NORTHERN NEW ENGLAND, INC.

Schedule of Expenditures of Federal Awards

Year Ended December 31, 2013

Federal Grantor Program Title Pass-Through Grantor	Federal CFDA Number	Contract/Pass-Through Identifying Number	Federal Expenditures
U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES (DHHS)			
Family Planning Services (Title X)			
Direct:			
Family Planning Services 12/31/2012 - 12/30/2013	93.217	6FPHPA016064-01-01	$ 656,213
Family Planning Services 12/31/2012 - 12/30/2013	93.217	6FPHPA016125-01-01	29,410
Passed-through:			
State of Vermont, Department of Health, Agency of Human Services			
Family Planning Services 01/01/2013 - 12/31/2013	93.217	03420-6077S	741,875
Family Planning Association of Maine			
Family Planning Services - Clinical 07/01/2012 - 06/30/2013 07/01/2013 - 06/30/2014	93.217 93.217	FPA-2013-07 FPA-2014-07	186,004 179,430
Total Family Planning Services (Title X)			1,792,932
Social Services Block Grant			
State of Vermont, Department of Health, Agency of Human Services			
Social Services Block Grant 04/01/2012 - 06/30/2013 07/01/2013 - 06/30/2014	93.667 93.667	03420-5894S 03420-6129S	163,752 150,824
Total Social Services Block Grant			314,576

PLANNED PARENTHOOD OF NORTHERN NEW ENGLAND, INC.

Schedule of Expenditures of Federal Awards (Concluded)

Year Ended December 31, 2013

Federal Grantor Program Title Pass-Through Grantor	Federal CFDA Number	Pass-Through Identifying Number	Federal Expenditures
Other Grants			
State of Vermont, Department of Health, Agency of Human Services			
Preventive Health Services - Sexually Transmitted Diseases Control Grants			
07/01/2012 - 06/30/2013	93.977	03420-5911P	17,130
07/01/2013 - 06/30/2014	93.977	03420-6119S	17,130
Total Preventive Health Services Sexually Transmitted Diseases Control Grants			34,260
Centers for Disease Control and Prevention (CDC) - Investigations and Technical Assistance			
04/25/05 - open ended	93.283	N/A	3,361
Department of Health and Human Centers for Medicare and Medicaid Cooperative Agreement to Support Navigators in Federally-facilitated and State Partnership Exchanges			
08/15/2013 - 08/14/2014	93.750	1NAVCA130057-01-00	33,251
Department of Vermont Health Access Cooperative Agreement to Support Establishment of the Affordable Care Act's Health Insurance Exchange			
07/3/2013 - 06/30/2014	93.525	03410-1155-14	37,686
Maine Department of Health and Human Services			
Cooperative Agreements for State-Based Comprehensive Breast and Cervical Cancer Early Detection Programs			
07/01/12 - 06/30/15	93.919	CDC-13-1383	14,157
Total Other Grants			122,715
Total DHHS and Total Federal Awards Expended			$ 2,230,223

PLANNED PARENTHOOD OF NORTHERN NEW ENGLAND, INC.

Notes to Schedule of Expenditures of Federal Awards

Year Ended December 31, 2013

1. Basis of Presentation

The accompanying schedule of expenditures of federal awards (the Schedule) includes the federal grant activity of Planned Parenthood of Northern New England, Inc. (PPNNE) under programs of the federal government for the year ended December 31, 2013. The information in this Schedule is presented in accordance with the requirements of OMB Circular A-133, *Audits of States, Local Governments, and Non-Profit Organizations*. Because the Schedule presents only a selected portion of the operations of PPNNE, it is not intended to and does not present the financial position, changes in net assets or cash flows of PPNNE.

2. Summary of Significant Accounting Policies

Expenditures reported on the Schedule are reported on the accrual basis of accounting. Such expenditures are recognized following the cost principles contained in OMB Circular A-122, *Cost Principles for Non-profit Organizations*, wherein certain types of expenditures are not allowable or are limited as to reimbursement. Pass-through entity identifying numbers are presented where available.

3. Program Descriptions

Programs subsidized by Title X consist of the following:

Family Planning Program

Comprehensive reproductive health services and counseling, including federally-mandated Title X services, provided to approximately 32,939 women and men at 19 sites in Maine, New Hampshire, and Vermont.

Education Program

Education program provided to teens on topics related to sexuality and reproductive health.

Public Information Program

Informs the public about the activities and programs provided by PPNNE.

Programs not subsidized by Title X consist of the following:

Family Planning Program

Comprehensive reproductive health services and counseling provided to approximately 5,793 women and men at two sites in Vermont and Maine.

PLANNED PARENTHOOD OF NORTHERN NEW ENGLAND, INC.

Notes to Schedule of Expenditures of Federal Awards (Concluded)

Year Ended December 31, 2013

Abortion

Medical and surgical abortion services to patients at the Portland, Maine; Barre, Burlington, Rutland and Williston, Vermont; and Keene, West Lebanon and Manchester, New Hampshire sites.

Lobbying and Advocacy

Includes input on legislative issues, which are of vital interest to PPNNE, and information to the public about these issues.

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Schedule of Findings and Questioned Costs

Year Ended December 31, 2013

Section I **Summary of Auditor's Results**

Financial Statements

Type of auditor's report issued:	Unmodified	
Internal control over financial reporting:		
Material weakness(es) identified?	____yes	__x__no
Significant deficiency(ies) identified not considered to be material weaknesses?	____yes	__x__none reported
Noncompliance material to financial statements noted?	____yes	__x__no

Federal Awards

Internal control over major programs:		
Material weakness(es) identified?	____yes	__x__no
Significant deficiency(ies) identified not considered to be material weaknesses?	____yes	__x__none reported
Type of auditor's report issued on compliance for major programs:	Unmodified	
Any audit findings disclosed that are required to be reported in accordance with Circular A-133, Section 510(a)?	____yes	__x__no

Identification of Major Programs:

CFDA Numbers	Name of Federal Program or Cluster
93.217	Family Planning Services - Title X
93.667	Social Services Block Grant

Dollar threshold used to distinguish between Type A and Type B programs:	$300,000
Auditee qualified as low-risk auditee?	__x__yes ____no

Section II **Findings Related to the Financial Statements Which are Required to be Reported in Accordance with *Government Auditing Standards***

NONE

Section III **Findings and Questioned Costs for Federal Awards**

NONE

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The Board of Trustees
Planned Parenthood Northern New England, Inc.

We have audited the consolidated financial statements of Planned Parenthood Northern New England, Inc. (PPNNE) for the year ended December 31, 2013, and have issued our report thereon dated May 2, 2014. Professional standards require that we communicate to you the following information related our audit.

REQUIRED COMMUNICATIONS

Our Responsibility Under U.S. Generally Accepted Auditing Standards, *Government Auditing Standards* and U.S. Office of Management and Budget (OMB) Circular A-133

As stated in our engagement letter dated October 29, 2013, our responsibility, as described by professional standards, is to express an opinion about whether the consolidated financial statements prepared by management with your oversight are fairly presented, in all material respects, in conformity with U.S. generally accepted accounting principles. Our audit of the consolidated financial statements does not relieve you or management of your responsibilities.

In planning and performing our audit, we considered PPNNE's internal control over financial reporting in order to determine our auditing procedures for the purpose of expressing our opinion on the consolidated financial statements and not to provide assurance on the internal control over financial reporting. We also considered internal control over compliance with requirements that could have a direct and material effect on a major federal program in order to determine our auditing procedures for the purpose of expressing our opinion on compliance and to test and report on internal control over compliance in accordance with OMB Circular A-133.

As part of obtaining reasonable assurance about whether PPNNE's consolidated financial statements are free of material misstatement, we performed tests of its compliance with certain provisions of laws, regulations, contracts and grants, noncompliance with which could have a direct and material effect on the determination of consolidated financial statement amounts. However, providing an opinion on compliance with those provisions was not an objective of our audit. Also, in accordance with OMB Circular A-133, we examined, on a test basis, evidence about compliance with the types of compliance requirements described in the OMB Circular A-133 *Compliance Supplement* applicable to each of its major federal programs for the purpose of expressing an opinion on PPNNE's compliance with those requirements. While our audit provides a reasonable basis for our opinion, it does not provide a legal determination on PPNNE's compliance with those requirements.

Significant Audit Findings

Qualitative Aspects of Accounting Practices

Management is responsible for the selection and use of appropriate accounting policies. The significant accounting policies used by PPNNE are described in Note 1 to the consolidated financial statements. No new accounting policies were adopted and the application of existing policies was not changed during 2013. We noted no transactions entered into by PPNNE during the year for which there is a lack of authoritative guidance or consensus. All significant transactions have been recognized in the consolidated financial statements in the proper period.

Accounting estimates are an integral part of the consolidated financial statements prepared by management and are based on management's knowledge and experience about past and current events and assumptions about future events. Certain accounting estimates are particularly sensitive because of their significance to the financial statements and because of the possibility that future events affecting them may differ significantly from those expected.

The most sensitive estimates affecting the consolidated financial statements were:

- Management's estimates of allowance for uncollectible accounts and allowance for contractual adjustments based on historical data and current contracted reimbursement rates,
- Management's estimate of its discount on beneficial interest in trusts based on a discount rate of 1% and actuarially determined life expectancy tables,
- Management's estimate of depreciable lives on capital assets held based on industry standards, and
- Management's estimates of cost allocations based on estimated utilization of support services by functional cost centers.

We evaluated the key factors and assumptions used to develop the estimates in determining that they are reasonable in relation to the consolidated financial statements taken as a whole.

The financial statement disclosures are neutral, consistent and clear.

Difficulties Encountered in Performing the Audit

We encountered no significant difficulties in dealing with management in performing and completing our audit.

Corrected and Uncorrected Misstatements

For purposes of this letter, professional standards define an audit adjustment as a proposed correction of the financial statements that, in our judgment, may not have been detected, except through our auditing procedures. An audit adjustment may or may not indicate matters that could have a significant effect on PPNNE's financial reporting process (that is, cause future consolidated financial statements to be materially misstated). There were no such adjustments.

A passed audit adjustment is an adjustment that is not proposed as a current year audit adjustment because the dollar amount of the adjustment is not considered material to the financial statements. The attached schedule identifies an uncorrected misstatement of the consolidated financial statements. Management has determined the effect is immaterial to the consolidated financial statements taken as a whole.

Disagreements with Management

For purposes of this letter, a disagreement with management is a financial accounting, reporting or auditing matter, whether or not resolved to our satisfaction, which could be significant to the consolidated financial statements or the auditor's report. We are pleased to report that no such disagreements arose during the course of our audit.

Management Representations

We have requested certain representations from management that are included in the management representation letter dated May 2, 2014.

Management Consultations with Other Independent Accountants

In some cases, management may decide to consult with other accountants about auditing and accounting matters, similar to obtaining a "second opinion" on certain situations. If a consultation involves application of an accounting principle to PPNNE's consolidated financial statements or a determination of the type of auditor's opinion that may be expressed on those statements, our professional standards require the consulting accountant to check with us to determine that the consultant has all the relevant facts. To our knowledge, there were no such consultations with other accountants.

Other Audit Findings or Issues

We generally discuss a variety of matters, including the application of accounting principles and auditing standards, with management each year prior to retention as PPNNE's auditor. However, these discussions occurred in the normal course of our professional relationship and our responses were not a condition to our retention.

Other Matters

With respect to the schedule of expenditures of federal awards, we made certain inquiries of management and evaluated the form, content, and methods of preparing the information to determine that the information complies with U.S. generally accepted accounting principles, the method of preparing it has not changed from the prior period, and the information is appropriate and complete in relation to our audit of the consolidated financial statements. We compared and reconciled the schedule of expenditures of federal awards to the underlying accounting records used to prepare the consolidated financial statements or to the consolidated financial statements themselves.

INTERNAL CONTROL MATTERS

In planning and performing our audit of the consolidated financial statements of PPNNE as of and for the year ended December 31, 2013, in accordance with U.S. generally accepted auditing standards, we considered PPNNE's internal control over financial reporting (internal control) as a basis for designing audit procedures that are appropriate in the circumstances for the purpose of expressing our opinion on the consolidated financial statements, but not for the purpose of expressing an opinion on the effectiveness of PPNNE's internal control. Accordingly, we do not express an opinion on the effectiveness of PPNNE's internal control.

A *deficiency in internal control* exists when the design or operation of a control does not allow management or employees, in the normal course of performing their assigned functions, to prevent, or detect and correct, misstatements on a timely basis. A *material weakness* is a deficiency, or a combination of deficiencies, in internal control, such that there is a reasonable possibility that a material misstatement of PPNNE's consolidated financial statements will not be prevented, or detected and corrected, on a timely basis.

Our consideration of internal control was for the limited purpose described in the first paragraph and was not designed to identify all deficiencies in internal control that might be material weaknesses. Given these limitations, during our audit we did not identify any deficiencies in internal control that we consider to be material weaknesses. However, material weaknesses may exist that have not been identified.

****

We sincerely appreciate the cooperation, courtesy and working environment provided to our personnel by management and the employees of PPNNE during the engagement. We have previously discussed the comments and suggestions contained herein with management, and we will be pleased to discuss them further at your request.

This communication is intended solely for the information and use of the Board of Trustees, management and others within PPNNE, and is not intended to be, and should not be, used by anyone other than these specified parties.

Berry Dunn McNeil & Parker, LLC

Portland, Maine
May 2, 2014

STATE OF VERMONT

Review for Compliance with Office of Management & Budget Circular A-133, "Audits of States, Local Governments, and Non-Profit Organizations"

Auditee: Planned Parenthood
Audit Period: 12/31/2013
Conclusion:

In my opinion, this auditee:

[✓] has materially complied with OMB Circular A-133.
[ ] has not materially complied with OMB Circular A-133.

Signature of Reviewer

10/13/14
Date

CHECKLIST

The following checklist is meant as a *guide* to assist the reviewer in determining if the auditee has complied with the Office of Management and Budget (OMB) Circular A-133. The questions listed below are based on requirements included in OMB Circular A-133, generally accepted government auditing standards (GAGAS), and generally accepted accounting principles (GAAP). The checklist applies only to subrecipients that expend federal awards of at least $300,000 per year (this threshold has been increased to $500,000, effective for fiscal years ending after December 31, 2003) and are required to have an audit in accordance with OMB Circular A-133.

General

	Yes	No	N/A
1. Unless a longer period is previously agreed upon were the required reports submitted the earlier of: (a) no later than 9 months from the end of the audit period; or (b) no later than 30 days after the receipt of the auditor's report(s) to the auditee? [A-133, §. 235 (c) (1) and §. 320 (a)].	✓		
2. Does the audit cover only one year? If there was a biennial audit, have both years been audited and does the organization meet the restrictions on which organizations are allowed to have a biennial audit? [A-133, §. 220]	✓		

	Yes	No	N/A
Auditor's Report on the Financial Statements			
3. Is the auditor an independent licensed CPA or a public accountant licensed on or before December 31, 1970? [GAGAS, Yellow Book, §3.10, e. 2.]	✓		
Scope Paragraph			
4. Does the report state that the audit was conducted in accordance with Generally Accepted Government Auditing Standards (GAGAS)? [Yellow Book, Section 5.11; A-133, §. 500 (e)]			
5. Is the report free from any identified scope limitation?	✓		
6. If the auditor refers to the work of another auditor, does the report indicate the division of responsibility and the magnitude of the portion of the financial statements examined by the other auditor?	✓		
Opinion and Explanatory Paragraphs			
7. If the financial statements are intended to be presented in accordance with GAAP, does the report contain an opinion on whether the financial statements present fairly, in all material respects, the financial position and the results of operations and are in conformity with GAAP? If not, does the report include an assertion that an opinion cannot be expressed?	✓		
8. If the financial statements are intended to be presented in accordance with another comprehensive basis of accounting:			
A. Is there a separate explanatory paragraph or note which describes the basis of presentation and how the basis differs from GAAP?			✓
B. Does the report contain a disclaimer on whether the financial statements are fairly presented in accordance with the basis of accounting described?			✓
9. If a disclaimer of opinion is issued, are the reasons stated?			✓
10. Are there separate explanatory paragraphs disclosing each substantive reason for withholding an unqualified opinion?			✓

	Yes	No	N/A
Schedule of Expenditures of Federal Awards			
11. Does the Schedule of Expenditures of Federal Awards [A-133, §.310 (b)]:			
A. List individual federal programs by federal agency? List individual federal programs included in a cluster of programs, if applicable? List R&D total federal awards expended by either individual award or by federal agency and major subdivision within the federal agency?	✓		
B. For federal awards received as a subrecipient, the name of the pass-through entity and identifying number assigned by the pass-through entity?	✓		
C. Provide total awards expended for each individual federal program and the Catalog of Federal Domestic Assistance (CFDA) number or other identifying number when the CFDA number is not available?	✓		
D. Include notes that describe the significant accounting policies used in preparing the schedule?			
E. To the extent practical, identify the total amount from pass-through entities provided to subrecipients from each federal program?	✓		
F. Include, in either the schedule or a note to the schedule, the value of federal awards expended in the form of noncash assistance, the amount of insurance in effect during the year, and loans or loan guarantees outstanding at year-end?	✓		
Audit Reporting			
12. The auditor's report(s) may be in either combined or separate reports. Does(Do) the report(s) include the following [A-133, §.235 (b) (4) and §.505]:			
A. An opinion on whether the schedule of expenditures of federal awards is presented fairly in all material respects in relation to the financial statements taken as a whole?	✓		

	Yes	No	N/A
B. A report on internal control related to the financial statements and major programs? This report shall describe the scope of testing of internal control and the results of the tests, and, where applicable, refer to the separate schedule of findings and questioned costs.	/		
C. A report on compliance with laws, regulations, and the provisions of contracts or grant agreements, noncompliance with which could have a material effect on the financial statements? Does this report also include an opinion as to whether the auditee complied with laws, regulations, and the provisions of contracts or grant agreements which could have a direct and material effect on each major program, and, where applicable, refer to the separate schedule of findings and questioned costs?	/		
D. A schedule of findings and questioned costs, which include the following three components:	/		
1) A summary of the auditor's results, which shall include:			
a) The type of report the auditor issued on the financial statements (i.e., unqualified, qualified, adverse, or disclaimer of opinion)? Unmodified	/		
b) Where applicable, a statement that reportable conditions in internal control were disclosed by the audit of the financial statements and whether any such conditions were material weaknesses?			/
c) A statement as to whether the audit disclosed any noncompliance which is material to the financial statements of the auditee?			/
d) Where applicable, a statement that reportable conditions in internal control over major programs were disclosed by the audit and whether any such conditions were material weaknesses?			/
e) The type of report the auditor issued on compliance for major program (i.e., unqualified, qualified, adverse, or disclaimer of opinion)? Unmodified	/		
f) A statement as to whether the audit disclosed any audit findings that the auditor is required to report?			/

	Yes	No	N/A
g) An identification of major programs?	/		
h) The dollar threshold used to distinguish between Type A and Type B programs?	/		
i) A statement as to whether the auditee qualified as a low-risk auditee?	/		
2) Findings related to the financial statements that are required to be reported in accordance with GAGAS?	/		
3) Findings and questioned costs for federal awards?			
a) Are audit findings (e.g., internal control findings, compliance findings, questioned costs, or fraud) which relate to the same issue presented as a single audit finding?			
b) Are audit findings that relate to both the financial statements and federal awards reported in both sections of the schedule? (One schedule may be in summary form if the other is in detail.)			
E. Does the schedule of audit findings and questioned costs include:			
1) Reportable conditions in internal control over major programs? The auditor shall identify reportable conditions that are individually or cumulatively material weaknesses.			
2) Material noncompliance with the provisions of laws, regulations, contracts, or grant agreements related to a major program?			
3) Known questioned costs and likely questioned costs that are greater than $10,000 for a type of compliance requirement for a major program?			
4) Known questioned costs that are greater than $10,000 for a federal program that is not audited as a major program but comes to the attention of the auditor?			

	Yes	No	N/A
5) The circumstances concerning why the auditor's report on compliance for major programs is other than an unqualified opinion, unless reported elsewhere?	___	___	___
6) Known fraud affecting a federal award unless such fraud is otherwise reported as an audit finding in the schedule of findings and questioned costs for federal awards?	___	___	___
7) Instances where the results of audit follow-up procedures disclosed that the summary schedule of prior audit findings prepared by the auditee materially misrepresents the status of any prior audit findings?	___	___	___
8) Do audit findings include the following, if applicable: (a) federal award identification (such as a CFDA number); (b) criteria for finding; (c) condition found; (d) identification of questioned costs and how computed; (e) information for judging prevalence and consequences of findings; (f) cause; (g) recommendations; (h) views of responsible officials?	___	___	___
Summary Schedule of Prior Audit Findings			
13. The summary schedule of prior audit findings shall report the status of all audit findings included in the prior audit's schedule of findings and questioned costs relative to federal awards. [A-133, §.315 (b)]	___	___	___
A. When audit findings were fully corrected, does the summary schedule list the audit findings and state that corrective action was taken?	___	___	___
B. When audit findings were not corrected or were partially corrected, does the summary schedule describe the planned corrective action as well as any partial corrective action taken?	___	___	___
C. When corrective action taken is significantly different from corrective action previously reported in a corrective action plan or in the federal agency's or pass-through entity's management decision, does the summary schedule provide an explanation?	___	___	___