No. 16-4027

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PLANNED PARENTHOOD OF GREATER OHIO; PLANNED PARENTHOOD OF SOUTHWEST OHIO REGION, Plaintiffs-Appellees, v. RICHARD HODGES, IN HIS OFFICIAL CAPACITY AS DIRECTOR OF THE OHIO DEPARTMENT OF HEALTH, Defendant-Appellant.	:	On Appeal from the United States District Court for the Southern District of Ohio Western Division District Court Case No. 1:16-cv-00539

BRIEF OF APPELLANT RICHARD HODGES

MICHAEL DEWINE
Ohio Attorney General

ERIC E. MURPHY* (0083284)
State Solicitor
**Counsel of Record*
HANNAH C. WILSON (0093100)
Deputy Solicitor
30 East Broad Street, 17th Floor
Columbus, Ohio 43215
614-466-8980; 614-466-5087 fax
eric.murphy@ohioattorneygeneral.gov

Counsel for Appellant Richard Hodges, in his official capacity as Director of the Ohio Department of Health

RYAN L. RICHARDSON (0090382)
ZACHERY P. KELLER (0086930)
Assistant Attorneys General
30 East Broad Street, 16th Floor
Columbus, Ohio 43215
614-466-2872; 614-728-7592 fax

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STATEMENT REGARDING ORAL ARGUMENT

Because this case raises important constitutional issues, Defendant Richard Hodges, Director of the Ohio Department of Health, requests oral argument.

JURISDICTIONAL STATEMENT

The district court had jurisdiction under 28 U.S.C. § 1331. It entered a final judgment on August 12, 2016. Judgment, R.61, PageID#2145. Richard Hodges, Director of Ohio's Department of Health, appealed on September 6, 2016. Notice, R.63, PageID#2207. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

In 2016, Ohio passed a law that regulates state funding for six public-health programs. Ohio Rev. Code § 3701.034 ("Funding Law"). For each program, the Funding Law prevents Ohio's Department of Health (the "Department") from distributing state program funds to entities that engage in certain *conduct* (performing nontherapeutic abortions) or certain *speech* (promoting nontherapeutic abortions). Plaintiffs, two Planned Parenthood entities, challenge the law because they *both* perform *and* promote nontherapeutic abortions. This appeal asks:

1. Does the Funding Law's Conduct Provision, barring state program funds for those that *perform* abortions, violate the Fourteenth Amendment?

Because the Planned Parenthood entities perform abortions, the Department cannot divert funds to them on that basis *alone*. Thus, the Court need only address a potential second question if it invalidates this Conduct Provision:

2. Does the Funding Law's Speech Provision, barring state program funds for those that *promote* abortions, violate the First Amendment?

INTRODUCTION

This case concerns how Ohio chooses to spend public funds. Based on a "'strong and legitimate interest in encouraging normal childbirth,'" *Maher v. Roe*, 432 U.S. 464, 478 (1977) (citation omitted), Ohio decided to favor childbirth over abortion when it distributes public funds for six health and education programs. Unhappy with Ohio's choice, Planned Parenthood tries to force a different allocation. But nothing in the Constitution requires Ohio to use its funding discretion under these programs to support Planned Parenthood. The district court wrongly held that the Funding Law's "Conduct Provision" (barring entities who *perform* abortions from participating in the programs) violates the Fourteenth Amendment. And it wrongly held that the Funding Law's "Speech Provision" (barring entities who *promote* abortions from participating in the programs) violates the First Amendment. This Court should reverse the district court's broad expansion of the elusive "unconstitutional-conditions doctrine."

Three points deserve emphasis. *First*, as the Seventh Circuit held for a similar law, the Conduct Provision comports with longstanding precedent. *Planned Parenthood of Ind. v. Comm'r of Ind. State Dep't of Health*, 699 F.3d 962, 986-88 (7th Cir. 2012). The Supreme Court has said that States may "make a value judgment favoring childbirth over abortion, and . . . implement that judgment by the allocation of public funds." *Maher*, 432 U.S. at 474; *Rust v. Sullivan*, 500

U.S. 173, 192 (1991); *Harris v. McRae*, 448 U.S. 297, 314 (1980). The Court upheld laws in those cases that compelled women to make a choice—exercise any right to abortion or accept public funds for childbirth. It said that the critical unconstitutional-conditions divide in this context is between "state interference with a protected activity" (triggering increased scrutiny) and "state encouragement of alternative activity" (triggering judicial deference). *Maher*, 432 U.S. at 475. Funding childbirth (but not abortion) fell on the latter side of that line. *Id.*

This case is *easier* than these cases. Unlike the laws in *Maher* or *McRae*, the Conduct Provision does not compel women to make a choice that would trigger unconstitutional-conditions scrutiny. Women may *both* participate in the programs *and* choose abortions. The Supreme Court, moreover, has clarified that *women*—not *abortion providers*—hold any abortion right. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 884 (1992) (plurality op.). Taking into account the right at stake, if prohibiting direct funding for abortion is constitutional (as *Maher* and *McRae* hold), a condition further removed from abortion (about provider funding for different services) does not impose any unconstitutional condition.

Second, the constitutional limits on government conditions for public benefits are "less exacting" (and, at least, should be no more exacting) than the constitutional limits on direct regulations. *South Dakota v. Dole*, 483 U.S. 203, 209 (1987). "Constitutional concerns are greatest when the State attempts to

impose its will by force of law; the State's power to encourage actions deemed in the public interest is necessarily far broader." *Maher*, 432 U.S. at 476. So the scrutiny here logically can be no *greater* than the undue-burden standard that applies to direct abortion regulations. *Casey*, 505 U.S. at 876 (plurality op.).

The Funding Law places no undue burden on women. Planned Parenthood conceded that the law would *not* affect its performance of abortions, and offered *no* evidence that the law would affect any other abortion provider. Thus, the record contains no evidence that the Funding Law would reduce *abortion access* in Ohio, or pressure women to sacrifice any abortion right to obtain other services. This evidentiary gap dooms Planned Parenthood's challenge to the Conduct Provision—whether that challenge seeks to label that provision an "undue burden" or an "unconstitutional condition."

Third, applying routine principles of judicial restraint, the Court should not make this case broader than it is. "'[I]f it is not necessary to decide more, it is necessary not to decide more.'" *BellSouth Telecomms., Inc. v. Farris*, 542 F.3d 499, 505 (6th Cir. 2008) (citation omitted). The Planned Parenthood entities perform *and* promote abortions. Thus, to redirect state funding to themselves, these entities must succeed on *both* their Fourteenth Amendment challenge to the Conduct Provision *and* their First Amendment challenge to the Speech Provision.

While both provisions survive review, the Conduct Provision, at a minimum, comports with the line of cases from *Maher* to *Rust*. That ends this case.

At day's end, when providing funding to the States for these programs, Congress could have dictated where the money should go. But it respected our federalist structure by giving the States discretion to spread the funds as they deem best. Ohio, in turn, made the permissible choice to favor childbirth when operating the programs. The Court should respect our Constitution's federalism and separation of powers by respecting those state and congressional choices. Planned Parenthood, by contrast, requests an "extraordinary result." *McRae*, 448 U.S. at 318. It seeks a *constitutional guarantee* to public funding—a guarantee that forces Ohio, against its own judgment, to give public money to large abortion providers. The Constitution contains no such guarantee.

STATEMENT OF THE CASE

A. Ohio Funds Many Programs To Promote Public Health, And Bars Abortion Providers From Participating In Some Of Them

1. Ohio has long administered programs using state and federal funds to promote and improve women's health, including, for example, through Medicaid, 42 U.S.C. § 1396-1, or Title X of the Public Health Service Act, 42 U.S.C. § 300. The State administers programs aimed at, among other things, pregnancy support, maternal and infant health, and disease prevention and control. *E.g.*, Ohio Dep't of Health, *SFY 2017 Sub-grant Start Date Solicitation Calendar*,

https://tinyurl.com/hpec5b3 (last visited Feb. 7, 2017). This case is limited to six programs (the "Public Health Programs") operating outside Medicaid or Title X.

Infant Mortality Reduction Initiative. The Infant Mortality Reduction Initiative, a home visitation program, "serves low income African-American women in high risk neighborhoods." Turner Aff., R.17-6, PageID#279. It seeks to eliminate racial disparities in infant mortality through improved care and by identifying the factors that "contribute to poor birth outcomes." Ohio Dep't of Health, Ohio Infant Mortality Reduction Initiative (OIMRI), http://www.odh.ohio.gov/odhPrograms/cfhs/comcar/precare1.aspx (last visited Feb. 7, 2017). The Initiative relies on community workers to visit women during pregnancy, provide "appropriate education," and make "appropriate referrals to assure positive pregnancy and infant health outcomes." *Id*.

PREP. Ohio's Personal Responsibility Education Program ("PREP") aims "to reduce teen pregnancy and STD transmission rates amongst youth aged 14-19 years old residing in foster care or subject to the oversight of Ohio's juvenile justice system." Norton Aff., R.17-5, PageID#277. It "provide[s] education outside of the school day to youth on both abstinence and contraception for the prevention of pregnancy and sexually transmitted infections . . . and on three adulthood preparation subjects." Ohio Dep't of Health, Personal Responsibility

Education Program (PREP) for Foster Care and Adjudicated Youth, http://tinyurl.com/h8jvc88 (last visited Feb. 7, 2017).

VAWA Program. The federal Violence Against Women Act funds Ohio's Sexual Assault and Domestic Violence Prevention Program ("VAWA Program"). It "seeks to improve the health status of Ohio women by identifying issues that affect women's health and developing programs to address" them. Ohio Dep't of Health, Sexual Assault and Domestic Violence Prevention Program, http://www.odh.ohio.gov/health/sadv/sadv.aspx (last visited Feb. 7, 2017). Its services ensure that sexual-assault survivors "have access and support to medical services, law enforcement, prosecutor and advocacy services." Ohio Dep't of Health, Sexual Assault Response and Recovery, http://www.odh.ohio.gov/health/sadv/sassault/sadvprev1.aspx (last visited Feb. 7, 2017). The VAWA Program administers funds that "provide for the provision of comprehensive, standardized[,] and appropriate crises intervention, support[,] and follow-up services for survivors of sexual assault." *Id*.

Breast and Cervical Cancer Project. Ohio's Breast and Cervical Cancer Project "provides high quality breast and cervical cancer screening, diagnostic testing and case management services at no cost to eligible women in Ohio." Bickert Aff., R.17-3, PageID#273; *see* Ohio Rev. Code § 3701.601.

STD Prevention Program. Ohio's STD Prevention Program "provides screening and medication for sexually transmitted diseases at no cost to providers." Dennison Aff., R.17-4, PageID#275. It includes prevention and education components. Ohio Dep't of Health, STD Prevention Program, http://www.odh.ohio.gov/odhprograms/bid/stdprev/stdprev.aspx (last visited Feb. 7, 2017).

HIV Prevention Program. Ohio's HIV Prevention Program "develops and implements the Ohio HIV Prevention Plan, coordinates the HIV testing program, and provides capacity building and training for community partners and public health staff." Dennison Aff., R.17-4, PageID#276. It also "provides funding to community-based organizations and public health districts throughout the state to provide prevention interventions." *Id*.

With these programs, providers often deliver state messages. PREP, for example, seeks to reduce teen pregnancies and STD transmissions through education programs. Norton Aff., R.17-5, PageID#277. Providers thus follow a state curriculum to train individuals working with children. PPSWO Depo., R.37, PageID#655; PPGOH Depo., R.35, PageID#409-10. The curriculum covers how to answer questions about pregnancy options. PPSWO Depo., R.37, PageID#691. Likewise, the VAWA Program, a sex-education program, has a state-approved

curriculum. PPSWO Depo., R.37, PageID#659. And the Infant Mortality Reduction Initiative seeks to provide education to combat infant mortality.

2. In February 2016, the Ohio General Assembly passed the Funding Law for the Public Health Programs. The law regulates the entities that may participate in the programs (and thus that may receive public funds and/or deliver public messages). It states, for each program, that the Department "shall ensure that all funds it receives" "are not used to":

> (1) Perform nontherapeutic abortions;
> (2) Promote nontherapeutic abortions;
> (3) Contract with any entity that performs or promotes nontherapeutic abortions;
> (4) Become or continue to be an affiliate of any entity that performs or promotes nontherapeutic abortions.

Ohio Rev. Code § 3701.034(B); *id.* § 3701.034(C)-(G).

B. Planned Parenthood Sued To Enjoin The Funding Law

The Funding Law was scheduled to become effective on May 23, 2016. The Department notified providers in March 2016 that it would no longer contract with entities that provide or promote nontherapeutic abortions. R.17-1, PageID269-70. In April, the Department thus alerted Planned Parenthood that it would no longer receive program funding. R.17-2, PageID#271-72.

During this transition, the Department worked to ensure minimal or no coverage gaps. *See* Affs., R.17-3 to 17-6, PageID#273-80. For some programs, several providers existed. Among the roughly 730 providers in the Breast and

Cervical Cancer Project, for example, only fifteen were Planned Parenthood locations. Bickert Aff., R.17-3, PageID#273. Ohio also had about 75 providers in its STD Prevention Program that were unassociated with Planned Parenthood. *See* Dennison Aff., R.17-4, PageID#275; 2d Lawson Decl., R.40-4, PageID#946.

For programs with fewer providers, the Department and county health districts identified alternatives. *E.g.*, Norton Aff., R.17-5, PageID#277-78; Turner Aff., R.17-6, PageID#279-80. Mahoning County, for instance, agreed to hire community health workers to serve Mahoning and Trumbull Counties as part of the Infant Mortality Reduction Initiative. Turner Aff., R.17-6, PageID#279-80. Hamilton and Summit Counties contracted with other providers for purposes of the HIV Prevention Program. PPSWO Depo., R.37, PageID#651; PPGOH Depo., R.35, PageID#406. The Department also received supplemental applications from VAWA providers. Burke Depo., R.40-14, PageID#1068-69. Efforts to identify providers were ongoing when the district court disrupted this transition by entering a temporary restraining order in this case. *See* Burke Depo., R.40-14, PageID#1056-57; Op., R.19, PageID#327.

In May 2016, the Planned Parenthood entities—Planned Parenthood of Greater Ohio ("PPGOH") and Planned Parenthood Southwest Ohio Region ("PPSWO") (collectively, "Planned Parenthood" or "Planned Parenthood entities")—filed this suit. Compl., R.1, PageID#1-31. Both entities perform and

promote nontherapeutic abortions. *Id.*, PageID#2-8. They challenged (1) the Funding Law's Conduct Provision under the Due Process Clause, (2) the Funding Law's Speech Provision under the Free Speech Clause, and (3) both provisions under the Equal Protection Clause. *Id.*, PageID#27-28.

Planned Parenthood moved for a temporary restraining order, which the district court granted. Op., R.19, PageID#327. The parties then conducted discovery, merged the case's various phases, and submitted the matter to the court through trial briefs. Order, R.22, PageID#332-34.

C. The Funding Law Will Not Affect Planned Parenthood's Performance Of Abortion, And Will Have Limited Effect On Planned Parenthood Otherwise

Discovery revealed several facts. The Funding Law will not affect Planned Parenthood's performance of abortion. It will also have limited impact on Planned Parenthood's finances or non-abortion services.

Abortion. Both Planned Parenthood entities will continue to perform abortions without change even if the Funding Law takes effect. PPSWO has no plans to "close its doors" due to the Funding Law. PPSWO Depo., R.37, PageID#705. It will "still provide abortion services" if the Law goes into effect. *Id.* PPGOH also will continue performing abortions if the Funding Law takes effect; its departure from the Public Health Programs will "have no impact" on those activities. PPGOH Depo., R.35, PageID#451, 456. In short, Planned

Parenthood will provide "abortion services in the same manner" with or without the Funding Law. *Id.* PageID#451. Planned Parenthood also offered no evidence that any other provider would stop performing abortions due to that law.

Financial Impact. The gross value of reimbursements and supplies that the Planned Parenthood entities receive through the Public Health Programs represents a fraction of their revenue. PPSWO indicated that it received some $469,000 in annual program grants and supplies, Compl., R.1, PageID#19, but it had $12,592,000 in net assets for the 2015 fiscal year, *see* PPSWO Report, R.36-1, PageID#566. PPGOH indicated that it received some $1,060,000 in annual program grants and supplies, Compl., R.1, PageID#18, but it had $21,111,815 in total revenue for the 2015 fiscal year, *see* PPGOH Report, R.36-2, PageID#583.

Both entities, moreover, incur costs to participate in these programs. *E.g.*, PPSWO Depo., R.37, PageID#652-54, 660; PPGOH Depo., R.35, PageID#408-09. Factoring in those costs, PPSWO spends more than it receives in reimbursements from some of the programs. *See* PPSWO Depo., R.37, PageID#653, 698 (HIV Prevention Program), PageID#654, 695 (PREP), PageID#660, 696 (VAWA Program). PPSWO testimony also indicated that discontinuing the remaining programs would have little to no financial impact. *See id.*, PageID#698 (STD Prevention Program), PageID#699 (Breast and Cervical Cancer Project); *see also id.*, PageID#655 (PPSWO has no Infant Mortality Reduction Initiative program).

With respect to PPGOH, the costs for most of these programs either equal or exceed the reimbursements. *See* PPGOH Depo., R.35, PageID#408-09 (HIV Prevention Program), PageID#411 (PREP); *see also id.*, PageID#414 (PPGOH has no VAWA Program). Eliminating the Breast and Cervical Cancer Project would also have no financial impact on PPGOH. *Id.*, PageID#450. PPGOH identified only one program that, if discontinued, would result in a financial loss: the STD Prevention Program. *Id.*, PageID#443. It estimated that the loss would be roughly $200,000, or less than one percent of its total 2015 revenue (even excluding all funds/supplies from affected programs). *Id.*; PPGOH Report, R.36-2, PageID#583; Compl., R.1, PageID#18.

Beyond public funding and charging for services, Planned Parenthood raises revenue through private donations. PPSWO Depo., R.37, PageID#666-67. It has used the Funding Law to *encourage* those donations. *Id.* Thus, the Funding Law's ultimate effect on Planned Parenthood's finances may be even less.

Non-Abortion Services. The Planned Parenthood entities will continue their non-abortion services if the Funding Law takes effect. They will continue to provide breast and cervical cancer screening, HIV testing, and STD screening and treatment. *See* PPSWO Depo., R.37, PageID#664, 705; PPGOH Depo., R.35, PageID#438, 445, 450. Although patients may be charged for those services, some low-income patients will still qualify for services free of charge. PPGOH Depo.,

R.35, PageID#438, 445, 450. PPSWO also determined that, if the Funding Law takes effect, it could run its own educational program in place of PREP and the VAWA Program (both of which it operated at a loss). PPSWO Depo., R.37, PageID#654, 661; *see also id.*, PageID#695-96.

Interrelationship of Activities. While Planned Parenthood tries to separate abortion-related activities from the Public Health Programs, potential overlaps exist. Planned Parenthood performs abortions at surgical centers. PPSWO Depo., R.37, PageID#674; PPGOH Depo., R.35, PageID#425. Planned Parenthood also operates health centers (or family planning centers). PPGOH Depo., R.35, PageID#425. Although these centers do not perform abortions, they provide "options counseling." PPSWO Depo., R.37, PageID#657. This counseling includes the discussion of abortion and referrals to abortion facilities, including Planned Parenthood's surgical centers. *Id.*

A patient thus might visit Planned Parenthood to receive program services, but get counseling about abortion and receive a referral for one. PPSWO's representative detailed how a patient could be referred through Ohio's Breast and Cervical Cancer Project, but end up at a surgical center for an abortion:

> A patient might be referred by [the Breast and Cervical Cancer Project], come in, be determined to be pregnant or already know[] that she is pregnant, and the staff members in the health center would do what we call options counseling, and if the patient thought that she might want an abortion, would be given a list of abortion providers

> including us, and could end up making an appointment at the surgical center.

Id. A similar sequence of events could occur for a patient who comes into Planned Parenthood under the STD Prevention Program. *Id.*, PageID#690-91.

Until recently, PPSWO also offered testing through Ohio's STD Prevention Program at its surgical center. PPSWO Depo. R.37, PageID#689. That abortion facility received a "$10 charge for specimen collection" from qualifying patients. *Id.*, PageID#649. Thus, PPSWO's abortion facility collected money from its patients in connection with the STD Prevention Program. PPSWO discontinued this practice in April 2016. *Id.*, PageID#689. It did so partly in response to the Funding Law, deciding "that it would be best not to have one of the programs that was being defunded attached to surgery." *Id.*; *id.*, PageID#649 ("[W]e decided that we didn't want to have the STD program connected to our abortion services.").

Finally, while Planned Parenthood may separate abortion-related activities through accounting methods, discovery uncovered at least a few areas of interrelationship. For instance, despite coding abortion differently, PPSWO ultimately channels its revenue into one bank account. PPSWO Depo., R.37, PageID#706. Additionally, PPSWO's Chief Operating Officer admitted that PPSWO does not actually compare its costs for Breast and Cervical Cancer Project services to the revenue that comes in through that program's vouchers. *Id.*, PageID#707. Any surplus from these vouchers would go toward Planned

Parenthood's general overhead for health centers, *id.*, PageID#708, the activities of which include abortion counseling and referrals.

D. The District Court Enjoined The Funding Law

The district court enjoined the Funding Law. Op., R.60, PageID#2144. It recognized that Planned Parenthood performs *and* promotes abortions, *id.*, PageID#2123, and so must show that the Conduct and Speech Provisions *both* violate the Constitution. But the court rejected the Director's argument that the Conduct Provision provided the easiest route to decision under precedent allowing the States not to subsidize abortion. The court said that such a constitutional-avoidance concern comes into play *only* where, unlike here, a court must choose between competing interpretations of a statute, one of which raises serious constitutional questions. Op., R.60, PageID#2127.

The court thus started with the Speech Provision and the First Amendment. *Id.*, PageID#2128. It held that the unconstitutional-conditions doctrine barred Ohio from denying funding under the Public Health Programs to entities that *promote* abortion. *Id.*, PageID#2128-37. It reasoned that the "'relevant distinction'" separating constitutional from unconstitutional conditions "'is between conditions that define the limits of the government spending program—those that specify the activities [the legislature] wants to subsidize—and conditions that seek to leverage funding to regulate speech outside the contours of the program itself.'" *Id.*,

PageID#2133 (quoting *Agency for Int'l Dev. v. Alliance for Open Society Int'l, Inc.*, 133 S. Ct. 2321, 2328 (2013) (*AID*)). The court found that the Speech Provision was unconstitutional because it allegedly sought "to leverage funding to regulate speech outside the contours of the six programs." *Id.*

Turning to the Conduct Provision and the Fourteenth Amendment, the court held that the unconstitutional-conditions doctrine barred Ohio from denying funding to entities that *perform* abortions. *Id.*, PageID#2137-42. It acknowledged that the relevant right was a woman's right to "choose to have an abortion," *id.*, PageID#2138, and nowhere suggested that the Funding Law affected women seeking abortions. Instead, the court focused on the alleged right of "abortion providers," *id.*, "to perform abortion services," *id.*, PageID#2140. It found that the Conduct Provision unconstitutionally burdened that alleged "right" based on the same distinction between conditions inside and outside of a program. *Id.*, PageID#2140. In the process, the court refused to consider whether the law imposed an undue burden on a woman's right to abortion, departing from a Seventh Circuit case. *Id.*, PageID#2140-42.

Based on these holdings, the district court found it unnecessary to address Planned Parenthood's equal-protection claim. *Id.*, PageID#2142-43.

SUMMARY OF ARGUMENT

I. The general unconstitutional-conditions framework shows the manner in which the Court should decide this case—by holding simply that the Conduct Provision comports with the *Maher* line of cases. The unconstitutional-conditions doctrine applies only when a condition on a government benefit implicates a constitutional right; it mandates scrutiny that is "less exacting" than the scrutiny applicable to direct regulations; and it does not compel the government to subsidize protected activity. Apart from those general principles, the specific test that applies to a specific condition depends on the specific right. The Supreme Court has adopted different tests for different rights.

That the doctrine is "right specific" has important ramifications. An injunction allowing Planned Parenthood to participate in the Public Health Programs requires it to prove *both* that the Conduct Provision violates the unconstitutional-conditions test under the Fourteenth Amendment, *and* that the Speech Provision violates the unconstitutional-conditions test under the First. If either claim fails, the injunction must be reversed. Furthermore, as the Seventh Circuit ruled in a similar case, the Fourteenth Amendment claim conflicts with binding precedent. Accordingly, basic principles of judicial restraint should lead the Court to reverse on that basis alone.

II. The Conduct Provision passes the applicable unconstitutional-conditions test under the Fourteenth Amendment. Because the Supreme Court has indicated that women have a right to an abortion without *undue* interference from the State, that undue-burden standard informs and caps any unconstitutional-conditions test in the abortion context. The Supreme Court has thus upheld many abortion-related conditions, including government refusals to fund abortions and government refusals to permit public employees or facilities to conduct them.

Those precedents control here. The Conduct Provision imposes *no* condition on women. Women may participate in the Public Health Programs *and* have abortions. The provision also does not impose an undue burden. The Planned Parenthood entities conceded that they would continue to provide abortions if the Funding Law goes into effect, and no evidence suggests that the Conduct Provision would affect abortion access in Ohio. And while the Conduct Provision does impose a condition barring program providers from performing abortions, abortion providers have *no* constitutional right to perform abortions.

The Conduct Provision also furthers important state interests. It promotes potential life, and prevents entanglement between program services and the performance of abortions. It also furthers administrative efficiency; it is far easier to exclude abortion providers from the programs than to monitor their participation

to ensure adequate separation between program services and abortion activities. The law also helps Ohio convey its preference for childbirth effectively.

The district court, by contrast, went astray by transfiguring a *woman's* right to abortion into a *provider's* right to perform abortions; by creating a *one-size-fits-all* unconstitutional-conditions test, and by giving *greater* scrutiny to a funding condition than would apply to a direct abortion regulation.

III. Although the Court need not reach the question, it could alternatively reverse the injunction on the ground that the Speech Provision passes the relevant unconstitutional-conditions test under the First Amendment. At bottom, the unconstitutional-conditions test in this context seeks to determine whether the government has imposed the condition to suppress ideas or to ensure effective government operations.

As the Fifth Circuit held with respect to a similar law, the Spending Provision does not seek to skew the marketplace of ideas. Instead, it merely seeks to ensure that Ohio's childbirth-over-abortion message gets conveyed effectively. And Ohio's own right to speak would be "meaningless" if it were required to hire messengers who held directly contradictory views.

The district court reached a contrary result only by overreading the Supreme Court's *AID* decision. There, the Court repeatedly made clear that the case

involved a condition *compelling speech* outside the contours of the relevant government program. The Spending Provision does no such thing.

STANDARD OF REVIEW

This Court "review[s] challenges to the constitutionality of a statute de novo." *United States v. Honeycutt*, 816 F.3d 362, 377 (6th Cir. 2016); *Entm't Prods., Inc. v. Shelby Cnty., Tenn.*, 721 F.3d 729, 733 (6th Cir. 2013).

ARGUMENT

This case is simple. The Supreme Court has repeatedly held that the government may constitutionally provide public funds or services to women on the *condition* that the funds or services not be used for abortion. It has upheld such laws even though they compel women to choose between (1) exercising their right to abortion (and waiving the offered public assistance) or (2) accepting public assistance for childbirth (and waiving their right to abortion). *Rust*, 500 U.S. at 201; *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 510 (1989); *McRae*, 448 U.S. at 314; *Poelker v. Doe*, 432 U.S. 519, 521 (1977); *Maher*, 432 U.S. at 474. Those cases control this one. The Funding Law's Conduct Provision does *not* compel such a choice. It places *no* conditions on women—who may *both* obtain abortions *and* receive assistance under the Public Health Programs.

The district court disregarded these cases by creating a one-size-fits-all unconstitutional-condition test. A general assessment of the unconstitutional-

conditions doctrine, however, proves that the court should have started—and ended—with the Conduct Provision. *See infra* Part I. That provision comports with the *Maher* line of cases. *See infra* Part II. And if the Court opts to reach the Speech Provision, it, too, survives the governing legal test. *See infra* Part III.

I. THE UNCONSTITUTIONAL-CONDITIONS DOCTRINE IS "RIGHT SPECIFIC," SO THE COURT MUST ONLY DECIDE HERE THAT THE FUNDING LAW'S CONDUCT PROVISION COMPORTS WITH THE *MAHER* LINE OF CASES

The "unconstitutional-conditions doctrine" sometimes limits the government from offering a benefit on the condition that a recipient forgo a constitutional right. But the doctrine's scope depends on the right at stake. That fact offers a roadmap for deciding this case.

A. The "Unconstitutional-Conditions" Test Depends On The Specific Right At Stake

Courts have long struggled with a recurring question: When may the government offer a discretionary benefit (such as public funds, a government job, or a building permit) on the condition that a recipient forgo a constitutional right? *See* Richard A. Epstein, *Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 Harv. L. Rev. 4, 10-11 (1988). Historically, some argued that the government's "greater" power (to deny the benefit) included the "lesser" power (to impose any condition on the benefit). As Justice Holmes famously stated, a policeman "may have a constitutional right to talk politics, but he has no

constitutional right to be a policeman." *McAuliffe v. Mayor of New Bedford*, 29 N.E. 517, 517 (Mass. 1892).

The Supreme Court has rejected this absolutist view that the government may impose *any* condition on a benefit—most notably for speech conditions on employment. *Bd. of Cnty. Comm'rs, Wabaunsee Cnty. v. Umbehr*, 518 U.S. 668, 674 (1996). "In some cases," the Court has held, a "condition can result in an unconstitutional burden on" a right. *AID*, 133 S. Ct. at 2328. Yet the Court has not been clear on which "cases" trigger the doctrine. It "roams about constitutional law like Banquo's ghost, invoked in some cases, but not in others." Epstein, *supra*, at 10-11. A public employee cannot be fired for refusing to join a political party, *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 65 (1990), but can be fired for engaging in core political expression, *Broadrick v. Oklahoma*, 413 U.S. 601, 616-17 (1973). A criminal defendant cannot be forced to waive the right against self-incrimination to keep a job, *Garrity v. New Jersey*, 385 U.S. 493, 497 (1967), but can be forced to waive the right to a jury trial to get a reduced sentence, *Corbitt v. New Jersey*, 439 U.S. 212, 218-20 (1978). Thus, courts "struggle with when to apply the unconstitutional conditions doctrine." *Planned Parenthood Ass'n of Hidalgo Cnty. Texas, Inc. v. Suehs*, 692 F.3d 343, 349 (5th Cir. 2012).

At bottom, while a few universal principles delineate the doctrine's outer reaches, specific standards hinge on the specific right at stake.

1. *General Guideposts*. Three principles limit the doctrine's reach. *First*, it "only applies if the government places a condition on the exercise of a constitutionally protected right." *Petrella v. Brownback*, 787 F.3d 1242, 1265 (10th Cir. 2015). "It is clear that a funding condition cannot be unconstitutional if it could be constitutionally imposed directly." *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 59-60 (2006). When a condition on a benefit does not require the waiver of a right, Congress has "wide latitude to attach [the] condition[]" "to further its policy objectives." *United States v. Am. Library Ass'n, Inc.*, 539 U.S. 194, 203 (2003) (plurality op.). If "a party objects to" the condition, the party's "recourse is to decline the" benefit. *AID*, 133 S. Ct. at 2328.

Second, even if a condition affects a right, the constitutional limits regulating that *condition* are less demanding than the constitutional limits regulating civil or criminal *prohibitions*. "Constitutional concerns are greatest when the State attempts to impose its will by force of law; the State's power to encourage actions deemed in the public interest is necessarily far broader." *Maher*, 432 U.S. at 476. Thus, "constitutional limitations" that regulate conditions "are less exacting" than those that regulate direct regulations. *Dole*, 483 U.S. at 209. Even for speech, "the Government may allocate competitive funding according to criteria that would be impermissible were direct regulation of speech or a criminal penalty at stake." *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 587-88 (1998). Restrictions

that might compel strict scrutiny if directly imposed, *cf. Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984), could be subject to a mere "reasonableness" test if made the condition on a benefit, *cf. Grove City Coll. v. Bell*, 465 U.S. 555, 575-76 (1984).

Third, the unconstitutional-conditions doctrine never requires a government subsidy. The "'decision not to subsidize the exercise of a fundamental right does not infringe that right.'" *Rust*, 500 U.S. at 193 (citation omitted). Thus, the refusal to extend a benefit (such as funding) to a protected activity is *not* the same as imposing an unconstitutional condition on that activity. For example, parents have a right against government interference with their children's private education. *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534-35 (1925). But they do not have a right to public funds for the private tuition. *Norwood v. Harrison*, 413 U.S. 455, 462 (1973). Likewise, the Supreme Court has said that women have a right against government interference in their abortion choice. *Casey*, 505 U.S. at 846 (plurality op.). But they do not have a right to public funds for the abortion. *Rust*, 500 U.S. at 201-02. Even for speech, the Court has "reject[ed] the 'notion that First Amendment rights are somehow not fully realized unless they are subsidized by the State.'" *Regan v. Taxation With Representation of Wash.*, 461 U.S. 540, 546 (1983) (citation omitted).

2. *Specific Tests*. Apart from these guideposts, specific standards turn on the specific right at issue. The Supreme Court, for example, has stated that the unconstitutional-conditions doctrine "especially" applies to speech. *Perry v. Sindermann*, 408 U.S. 593, 597 (1972). That follows from the solicitude given to free expression, which requires unique "breathing space." *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 52 (1988) (internal quotation marks omitted). The Supreme Court's cases have addressed speech conditions that "span a spectrum," ranging from conditions on public employees, to conditions on independent contractors, to conditions on funding recipients. *Umbehr*, 518 U.S. at 680. In all of these cases, the Court ultimately seeks to protect the marketplace of ideas by asking whether the government has used a speech condition "in such a way as to 'aim[] at the suppression of dangerous ideas.'" *Regan*, 461 U.S. at 548 (citation omitted). In that respect, the government may not impose conditions "to leverage funding to regulate speech outside the contours of" the relevant government action, *AID*, 133 S. Ct. at 2328, but may impose conditions to ensure that it can "operate efficiently and effectively," *Garcetti v. Ceballos*, 547 U.S. 410, 419 (2006).

Beyond speech, the relevant test turns on the relevant right. The Religion Clauses, for example, evince a "'governmental obligation of neutrality'"—so they permit and (often) require the government to offer benefits *neutrally* without reference to religion. *Maher*, 432 U.S. at 474 n.8 (citation omitted); *Rosenberger*

v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 839-46 (1995). When the Court has departed from this neutrality rule—such as by allowing the government to bar students from using public funds for theology degrees—it has done so based on the Religion Clauses' unique history. *Locke v. Davey*, 540 U.S. 712, 721-24 (2004).

Similarly, the Takings Clause's test implements its text, which prohibits property from being "taken" without "just compensation." *See Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2594-95 (2013). Land-use regulation may sometimes bar landowners from developing their land. But the government lacks unlimited discretion to permit land development on *condition* that the owner give it *other* property. For "the government to condition approval of a permit on the dedication of property to the public," "a 'nexus' and 'rough proportionality'" must exist "between the property that the government demands and the social costs of the applicant's proposal." *Id.* at 2595. This framework enforces the text: While the government has "taken" property, the owner receives "just compensation" in the form of its ability to impose the social costs associated with its development.

The Fourth Amendment's test likewise implements its text, which prohibits "unreasonable searches and seizures." If a party consents to a search in exchange for a benefit (such as a probation sentence, government job, or public welfare), the search is more likely reasonable under the "general Fourth Amendment approach of 'examining the totality of the circumstances.'" *United States v. Knights*, 534

U.S. 112, 118 (2001) (citation omitted). The Court has thus upheld a search of a probationer's home (as a condition of probation), *id.*, a search of an employee's text messages (as a condition of employment), *City of Ontario v. Quon*, 560 U.S. 746, 756-57 (2010), and a home inspection of a welfare recipient (as a condition of funds), *Wyman v. James*, 400 U.S. 309, 324 (1971).

In short, the scope of the unconstitutional-conditions doctrine in a given case depends on the text, structure, and history of the relevant right. Thus, the Supreme Court's evaluation of conditions on benefits in the *abortion context* establish the critical boundaries for decision here. And, in that context, the Supreme Court has been clear that a decision not to subsidize abortion does not amount to an unconstitutional "obstacle[]" on any right to abortion. *Maher*, 432 U.S. at 474.

B. This Right-Specific Framework Shows That The Court Should Start—And End—With The Funding Law's Conduct Provision

The right-specific nature of the unconstitutional-conditions doctrine has important ramifications. Planned Parenthood performs and promotes abortion. Compl., R.1, PageID#2-8. And any due-process right to *perform* abortion differs from any free-speech right to *promote* it. An injunction allowing Planned Parenthood to participate in the Public Health Programs thus requires it to prove *both* that the Conduct Provision violates whatever test applies under the Fourteenth Amendment, *and* that the Speech Provision violates whatever test applies under the First. If *either* the Conduct Provision *or* the Speech Provision is constitutional

under the applicable test, Planned Parenthood is not entitled to funding and this challenge fails. This fact shows the easiest path to resolve this case.

Because Supreme Court precedent readily confirms the Conduct Provision's constitutionality, the Court's inquiry should start (and end) there. The Supreme Court has consistently rejected any notion that public benefits must be *neutral* with respect to abortion. The government "may validly choose to fund childbirth over abortion and 'implement that judgment by the allocation of public funds' for medical services relating to childbirth but not to those relating to abortion." *Rust*, 500 U.S. at 201 (citation omitted). As detailed below, *infra* Part II, these cases control this one, because the Conduct Provision is *less* intrusive. In prior cases, the conditions *affected* women seeking abortion by requiring them to pick between public benefits and abortion. The Conduct Provision compels no such choice. Instead, it imposes a condition on *providers* (a condition that Planned Parenthood has admitted will not affect abortion access).

Furthermore, because precedent rebuffs the Fourteenth Amendment claim, this Court need not reach the First Amendment issue. "[I]t is 'a well-established principle governing the prudent exercise of this Court's jurisdiction that normally the Court will not decide a constitutional question if there is some other ground upon which to dispose of the case.'" *Bond v. United States*, 134 S. Ct. 2077, 2087 (2014) (citation omitted). Under "the fundamental principle of judicial restraint,"

"courts should neither anticipate a question of constitutional law in advance of the necessity of deciding it nor formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied." *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 450 (2008) (internal quotation marks omitted); *Pearson v. Callahan*, 555 U.S. 223, 241 (2009). Any ruling on the First Amendment question would instead amount to an improper "advisory opinion[]." *United States v. Asakevich*, 810 F.3d 418, 421 (6th Cir. 2016).

The district court failed to heed this roadmap, calling it a "misapplication of the constitutional avoidance doctrine." Op., R.60, PageID#2127. According to the court, avoidance principles help *only* to decide between competing statutory interpretations. *Id.* Not so. Those principles extend well beyond that canon of constitutional avoidance. In Justice Brandeis's classic summary, the canon is just one of seven "rules under which [courts] ha[ve] avoided passing upon a large part of all the constitutional questions pressed upon [them] for decision." *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 346-48 (1936) (Brandeis, J., concurring). Courts also should "not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of." *Id.* at 347; *e.g.*, *Adams v. City of Battle Creek*, 250 F.3d 980, 986 (6th Cir. 2001). This case falls within that rule. No abortion exception displaces

the rule that "'if it is not necessary to decide more, it is necessary not to decide more.'" *BellSouth Telecomms.*, 542 F.3d at 505 (citation omitted).

II. UNDER THE FOURTEENTH AMENDMENT, OHIO MAY PROHIBIT ABORTION PROVIDERS FROM PARTICIPATING IN THE PUBLIC HEALTH PROGRAMS

The unconstitutional-conditions doctrine, at most, prohibits conditions that unduly burden women seeking abortions. The Conduct Provision passes that test because it imposes *no* conditions on women and does not unduly burden any abortion right. The district court concluded otherwise by treating abortion providers as the right-holders *and* by ignoring that undue-burden test.

A. In The Abortion Context, The Unconstitutional-Conditions Doctrine, At Most, Bars Conditions Imposing An Undue Burden

"The first step in any unconstitutional-conditions claim is to identify the nature and scope of the constitutional right arguably imperiled by the denial of a public benefit." *Planned Parenthood of Ind.*, 699 F.3d at 986. Here, the Supreme Court has said that *women* have a right to an abortion without *undue interference* from the State, so the relevant unconstitutional-conditions framework should incorporate those principles.

1. Even with respect to direct regulations, the undue-burden test rejects any unconditional right to abortion

The Supreme Court has held that in some circumstances a woman has a right to an abortion "without undue interference from the State." *Casey*, 505 U.S. at 846 (plurality op.). An undue burden exists, the Court has held, "if the 'purpose or

effect' of the [challenged] provision 'is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability.'" *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2300 (2016) (citation and emphases omitted). For a *direct* "regulation of abortion," this test "consider[s] the burdens a law imposes on abortion access together with the benefits those laws confer." *Id.* at 2309. The Court, for example, invalidated certain Texas regulations because their burdens severely limited abortion *access* and their health-related benefits were minimal. *Id.* at 2310-18.

Yet this framework does not create "an unqualified 'constitutional right to an abortion.'" *Maher*, 432 U.S. at 473. Even through *direct regulations*, "[t]he government may use its voice and its regulatory authority to show its profound respect for the life within the woman." *Gonzales v. Carhart*, 550 U.S. 124, 157 (2007). The Supreme Court has thus upheld laws regulating abortion—including laws requiring informed consent, *Casey*, 505 U.S. at 881-87 (plurality op.), or banning certain methods, *Gonzales*, 550 U.S. at 168—because the laws did not impose an undue burden. Direct regulations do not infringe any right so long as they do "not impact[] upon the woman's freedom to make a constitutionally protected decision," even if they "ma[k]e the physician's work more laborious or less independent." *Whalen v. Roe*, 429 U.S. 589, 604 n.33 (1977).

2. The unconstitutional-condition test for abortion can be no more demanding than this undue-burden framework

The unconstitutional-conditions test governing abortion *conditions* logically should be "less exacting" than the undue-burden test for *direct regulations*. *Dole*, 483 U.S. at 209. Unsurprisingly, therefore, the Supreme Court has upheld many abortion-related conditions on public funding or services. *See Rust*, 500 U.S. at 201; *Webster*, 492 U.S. at 510-11; *McRae*, 448 U.S. at 314-15; *Poelker*, 432 U.S. at 521; *Maher*, 432 U.S. at 474. To do so, the Court has applied a relaxed undue-burden analysis with two prominent features.

First, a decision to subsidize childbirth but not abortion does not amount to an "unduly burdensome interference" with any abortion right. *Maher*, 432 U.S. at 474. Such a decision "places *no obstacles* absolute or otherwise in the pregnant woman's path to an abortion." *Id.* (emphasis added). The government "may have made childbirth a more attractive alternative, thereby influencing the woman's decision, but it has imposed no restriction on access to abortions that was not already there." *Id.* And while indigency may make it difficult for a woman to obtain an abortion without assistance, that is not a government-created obstacle. *Id.* "[A]lthough government may not place obstacles in the path of a woman's exercise of her freedom of choice, it need not remove those not of its own creation." *McRae*, 448 U.S. at 316.

The Court has made this point in cases involving public funding. *Maher* upheld a Medicaid regulation that paid for an indigent woman's childbirth but not for a medically unnecessary abortion. 432 U.S. at 466, 478-80. The Court explained that the woman's right "implie[d] no limitation on the authority of the State" to make funding decisions implicating abortion. *Id.* at 474. The Court extended *Maher* to the federal Hyde Amendment's broader prohibition on the federal funding of any abortion. *McRae*, 448 U.S. at 302, 315-18. The Court again disagreed that "a woman's freedom of choice carries with it a constitutional entitlement to . . . financial resources[.]" *Id.* at 316; *see Rust*, 500 U.S. at 201-03.

The Court has also made this point in cases involving public services. *Poelker* upheld a policy barring public hospitals from providing certain abortions. 432 U.S. at 520-21. The Court found no constitutional problem with a city "electing, as a policy choice, to provide publicly financed hospital services for childbirth without providing corresponding services for nontherapeutic abortions." *Id.* at 521. The Court extended this logic in *Webster*, which upheld a law barring public employees and facilities from providing nontherapeutic abortions. 492 U.S. at 507-11. "If the State may 'make a value judgment favoring childbirth over abortion and . . . implement that judgment by the allocation of public funds,' . . . surely it may do so through the allocation of other public resources, such as hospitals and medical staff." *Id.* at 510 (quoting *Maher*, 432 U.S. at 474).

Second, a condition's impact on *women*—not on *providers*—determines whether it is "undue." That is because "the constitutional entitlement of a physician who administers medical care to an indigent woman is no broader than that of his patient." *McRae*, 448 U.S. at 318 n.21. *Rust* illustrates this principle. It considered regulations governing family-planning funding under Title X of the Public Health Services Act. 500 U.S. at 177-78. The regulations barred providers from promoting abortion while using program funds, and enacted strict separation rules requiring them to keep program activities "'physically and financially separate'" from abortion activities. *Id.* at 180-81 (quoting regulation). In the *free-speech* context, the Court actually considered (but ultimately rejected) the providers' unconstitutional-conditions argument because the regulations affected *their* speech rights. 500 U.S. at 196-97. In the *due-process* context, however, the Court made no implication that the *providers* had any rights that could be "burdened." *See id.* at 201-03. Instead, *Rust* found it "evident from the line of cases beginning with *Maher* and *McRae*" that the regulations did "not impermissibly burden the woman's" right. *Id.* at 201.

Importantly, *Rust* upheld the regulations even though they imposed *onerous* conditions on providers. As the challengers said, "the organizational and physical restructuring necessary to satisfy these requirements would impose prohibitive costs, . . . and make it impossible to run multi-service reproductive health programs

under a single roof." Br. for Pet'rs, *Rust v. Sullivan*, 500 U.S. 173 (1991) (No. 89-1391), 1990 WL 505724, at *9. And, as a *reversed* court asked: "How then, without incurring impractically high, extra costs, could family planning clinic operators build separate rooms, entrances, or buildings solely for the purpose of taking a patient in the midst of family planning, moving her to a separate place, and counseling her about the availability of abortions?" *Massachusetts v. Sec'y of Health and Human Servs.*, 899 F.2d 53, 74 (1st Cir. 1990).

B. The Conduct Provision Does Not Impose An Undue Burden On Women, And Serves Important State Interests

Applying these principles, the Seventh Circuit has upheld a law similar to the Conduct Provision against a similar attack. *Planned Parenthood of Ind.*, 699 F.3d at 986-88. This Court should avoid a circuit conflict by holding that the provision imposes no undue burden and serves Ohio's important interests.

1. The Conduct Provision does not impose any unconstitutional conditions

The Conduct Provision does not impose any unconstitutional conditions for two reasons: (a) it does not create an undue burden on women, and (b) it does not affect any rights held by abortion providers.

a. *Woman's Abortion Right.* The Conduct Provision does not directly or indirectly impose an undue burden on women. It does not *directly* impose *any* condition on them. The provision's constitutionality is thus "evident from the line

of cases beginning with *Maher* and *McRae* and culminating in" *Rust*. *Rust*, 500 U.S. at 201. Ohio women may *both* (1) receive benefits under the Public Health Programs *and* (2) have an abortion. If the laws in *Rust*, *McRae*, and *Maher* passed muster even though they *did* impose a (constitutional) condition on women, the Conduct Provision must survive review because it does not.

The Conduct Provision also does not *indirectly* affect a woman's ability to obtain an abortion. The Planned Parenthood entities *conceded* that they would continue to provide abortions—without change—if the Funding Law goes into effect. PPSWO Depo., R.37, PageID#705; PPGOH Depo., R.35, PageID#451, 456. Likewise, they presented no evidence even suggesting that any other provider would curtail abortions because of the Funding Law. *Cf. Planned Parenthood of Ind.*, 699 F.3d at 988. Thus, it is undisputed that the Funding Law will change nothing about abortion access in Ohio.

At most, the Conduct Provision's only practical impact on women will be to separate *program* providers from *abortion* providers. Yet the regulations upheld by *Rust* did the same. 500 U.S. at 203. *Rust* said: "It would undoubtedly be easier for a woman seeking an abortion if she could receive information about abortion from a Title X project, but the Constitution does not require that the Government distort the scope of its mandated program in order to provide that information." *Id.* Applying the undue-burden test, moreover, the Court has upheld far more stringent

laws that *directly regulated* abortion. *E.g.*, *Casey*, 505 U.S. at 879-87, 899-901 (plurality op.).

b. *Abortion Providers*. The Conduct Provision does impose a condition on providers—they must choose between participating in the programs or performing abortions. But the unconstitutional-conditions "doctrine only applies if the government places a condition on the exercise of a constitutionally protected right." *Petrella*, 787 F.3d at 1265. Providers have no right to perform abortions. *Casey* clarified that "[w]hat is at stake is the woman's right to make the ultimate decision." 505 U.S. at 877 (plurality op.). Thus, "[w]hatever constitutional status the doctor-patient relation may have as a general matter, in the present context it is derivative of the woman's position." *Id.* at 884 (plurality op.). Because the Conduct Provision imposes *no* undue burden on women, it does not matter here (just as it did not matter in *Rust*) how the law affects providers.

Nor can Planned Parenthood claim that its inability to participate in these programs would affect its ability to keep operating (and thereby indirectly affect abortion access). The Planned Parenthood entities receive a minuscule percentage of their budgets from some of these programs. *Compare* Compl., R.1, PageID#18-19, *with* PPSWO Report, R.36-1, PageID#566; PPGOH Report, R.36-2, PageID#583. And they operate other programs at a loss. *E.g.*, PPSWO Depo.,

R.37, PageID#653, 698 (HIV Prevention Program), PageID#660, 696 (VAWA Program); PPGOH Depo., R.35, PageID#408-09 (HIV Prevention Program).

2. The Conduct Provision advances Ohio's interests

Because the Conduct Provision does not affect any abortion right, Ohio "has wide latitude to attach conditions to the receipt of [state] assistance in order to further its policy objectives." *Am. Library Ass'n*, 539 U.S. at 203 (plurality op.). Absent an undue burden, a statute addressing abortion need only be "reasonably related" to a legitimate interest—a deferential standard. *Casey*, 505 U.S. at 878 (plurality op.); *Maher*, 432 U.S. at 478 (applying rational-basis review).

The Conduct Provision furthers important state interests. *First*, it serves the interest in promoting life. *McRae*, 448 U.S. at 324. Ohio uses public funding to guide program participants away from providers that perform abortions. Its lawmakers could reasonably decide that this nudge might lead some women down a path that ultimately results in childbirth rather than abortion. Instead of channeling women toward Planned Parenthood to receive testing, for example, a pregnant woman eligible for public services might go to a provider with a different position on abortion. This difference might ultimately affect the guidance the woman receives. And, even assuming such differences may have only influence at the margins, Ohio should be free to engage in this "encouragement of an alternative activity" with potential life at stake. *Maher*, 432 U.S. at 474-75.

Second, the Conduct Provision prevents entanglement between program services and abortion services—ensuring that taxpayer dollars do not subsidize abortion. Despite Planned Parenthood's attempts to separate program services from abortion-related activities, overlap remains. Until April 2016, for example, PPSWO offered services through the STD Prevention Program out of its abortion facility. PPSWO Depo. R.37, PageID#689. With abortion providers as program servicers, moreover, a woman might be referred to Planned Parenthood for program services, but end up receiving abortion counseling, or even scheduling an appointment for an abortion. *E.g.*, *id.*, PageID#657. PPSWO's testimony also revealed the possibility of reimbursements from the Breast and Cervical Cancer Project going towards the organization's general operations. *Id.*, PageID#707-08. In light of these potential connections, the Conduct Provision serves the same purposes of the separation regulations upheld by *Rust*—it reasonably safeguards against public funds facilitating abortion. 500 U.S. at 180-81.

Third, the Conduct Provision serves "administrative considerations." *Armour v. City of Indianapolis*, 132 S. Ct. 2073, 2081 (2012). To ensure that taxpayer funds do not directly or indirectly subsidize abortion, it is much easier for the government simply to preclude abortion providers from participating in the programs than to allow their participation subject to costly oversight and audits. Indeed, the separation regulations in *Rust* arose as a result of government reports

detailing that Title X participants were not adequately separating program services from abortion services. *See* Statutory Prohibition on Use of Appropriated Funds in Programs Where Abortion is a Method of Family Planning, 53 Fed. Reg. 2922, 2923-24 (Feb. 2, 1988). A State could legitimately decide that the costs associated with such oversight would be better spent on the health-care programs themselves.

Fourth, the Conduct Provision helps Ohio convey its childbirth preference. Even if other Ohio laws prevent public money from directly funding abortion, *see* Ohio Rev. Code § 5101.56, supplying abortion providers with public funding for these programs muddles Ohio's message. A tension exists between Ohio *both* (1) saying it favors childbirth *and* (2) giving well-known abortion providers taxpayer dollars so that they can serve as the face of Ohio's programs. With both of these things occurring (as was the case before the Funding Law), an observer could question Ohio's commitment to its position. By separating abortion providers from these programs, the Conduct Provision clarifies Ohio's message. The Conduct Provision is no different from a law barring tobacco companies from receiving public funds for an anti-smoking campaign. One might debate these policy decisions, but they do not rise to a constitutional dimension.

C. The District Court's Contrary Analysis Was Mistaken

In reaching a contrary result, the district court made two mistakes.

1. The district court incorrectly treated abortion providers as holding an independent abortion right

When determining that the Conduct Provision imposed an unconstitutional condition, the district court conceded that the "patients' right" was at issue. Op., R.60, PageID#2138. Yet it repeatedly analyzed this claim as if abortion providers hold the right. It said that the Conduct Provision affected a funding "*recipient's* exercise of due process rights *to perform abortion services*." *Id.*, PageID#2140 (emphases added). And it invalidated the Conduct Provision because the provision gave an "entity" that performs abortion no way to engage in that conduct outside of the Public Health Programs. *Id.* The court erred by conflating a woman's rights with a provider's rights.

Inanimate entities, such as Planned Parenthood, do not have a right to an abortion. Because "[w]hat is at stake is the *woman's* right," *Casey*, 505 U.S. at 877 (plurality op.) (emphasis added), a *provider's* rights are "derivative of the woman's position," *id.* at 884 (plurality op). Thus, "the law need not give abortion doctors unfettered choice in the course of their medical practice, nor should it elevate their status *above other physicians in the medical community*." *Gonzales*, 550 U.S. at 163 (emphasis added). If, for example, a State opted to "socialize[] medicine" such that public facilities could safely provide all abortions in a manner that facilitated the woman's right, private providers would have no claim that they had a "right" to perform abortions. *See Webster*, 492 U.S. at 510 n.8. So long as a

law does not impose an undue burden on women, the law can "ma[k]e the physician's work more laborious or less independent." *Whalen*, 429 U.S. at 604 n.33; *McRae*, 448 U.S. at 318 n.21.

Here, however, the district court transformed a woman's right to abortion into a provider's right. Because the court did so, its analysis contains a glaring omission. The court nowhere considered the Conduct Provision's effect *on women*. Instead, it focused on the effect *on abortion providers* alone, refusing "to import the undue burden analysis" into this context. Op., R.60, PageID#2141. Yet because abortion providers lack *any* abortion right of their own, no burden on them could ever amount to an unconstitutional burden—without a *separate* showing of an unconstitutional effect on women.

The district court attempted to remedy this omission in two ways—neither of which withstands scrutiny. For one thing, the district court compared the Conduct Provision to a hypothetical law (mentioned in a footnote in *McRae*) that withheld "all Medicaid benefits" from women "'simply because [they] exercised [their] constitutionally protected freedom to terminate [their] pregnancy by abortion.'" *Id.*, PageID#2140 (quoting *McRae*, 448 U.S. at 317 n.19). The Conduct Provision does no comparable thing. Unlike the *McRae* hypothetical, the provision does not affect a *woman's* eligibility for services at all. Even considering the interests of the Planned Parenthood entities, the Conduct Provision barely affects their bottom

line. This is simply not a case in which a condition is placed on a government benefit that a recipient practically cannot refuse. So the Court need not consider when, if ever, a condition could be deemed "so coercive as to pass the point at which 'pressure turns into compulsion." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2604 (2012) (plurality op.) (internal quotation marks omitted).

For another thing, the district court suggested that abortion providers "have standing to enforce their patients' right to choose to have an abortion." Op., R.60, PageID#2138 (citing *Singleton v. Wulff*, 428 U.S. 106, 117 (1976) (plurality op.)). That confirms its error. The doctrine of third-party standing permits a party "to assert the *rights of another*" even though the party lacks constitutionally cognizable rights of its own. *Kowalski v. Tesmer*, 543 U.S. 125, 130 (2004) (emphasis added). To prove a violation, the party must show that the *missing party's* rights have been violated. That abortion providers must rely on the rights of women confirms that they do not hold the constitutional rights here.

In short, the district court invalidated the Conduct Provision by creating an abortion-provider right to perform abortions—a right that the Supreme Court has held does not exist.

2. The district court wrongly created a uniform (and uniformly broad) unconstitutional-conditions test

The district court took three missteps in its unconstitutional-conditions analysis: (a) it assumed that a uniformly broad test applies to all constitutional

rights; (b) it treated a condition on a benefit as if it were a direct regulation; and (c) it ignored the undue-burden standard.

a. *One-Size-Fits-All Test*. The district court found that the Conduct Provision violated the Fourteenth Amendment for the same reason that the Speech Provision allegedly violated the First. Citing the Supreme Court's *AID* decision, it ruled that *both* conditions were subject to a uniform unconstitutional-conditions test that tied their validity to whether they fell "inside" or "outside" the Public Health Programs. Op., R.60, PageID#2132-33, 2139-40. That was wrong. Both principle and precedent illustrate that an identical unconstitutional-conditions test does not roam the Constitution.

As a matter of principle, the Constitution nowhere includes an "Unconstitutional Conditions Clause" applicable to every government condition that touches every right. The unconstitutional-conditions doctrine thus cannot establish "an overarching principle of constitutional law that operates with equal force regardless of the nature of the rights and powers in question." *Dolan v. City of Tigard*, 512 U.S. 374, 407 n.12 (1994) (Stevens, J., dissenting). Instead, the specific test governing the specific condition rests on the specific right. *See* Cass R. Sunstein, *Is There an Unconstitutional Conditions Doctrine?*, 26 San Diego L. Rev. 337, 338 (1989). The Free Speech Clause and the Due Process Clause contain different text and history. And one should be "troubled . . . by an approach

to constitutional interpretation that by watering down a strongly worded clause of the Constitution (the [free speech] clause) and thickening a watery clause (the due process clause) homogenizes a diverse text." *Chi. Bd. of Realtors v. City of Chi.*, 819 F.2d 732, 744 (7th Cir. 1987).

As a matter of precedent, the courts have rejected a one-size-fits-all approach. That is why "[t]he first step in any unconstitutional-conditions claim is to identify the nature and scope of the constitutional right" at issue. *Planned Parenthood of Ind.*, 699 F.3d at 986. Nothing suggests that the Supreme Court intends to extend the *AID* test to *other* rights. *Rust* analyzed the challengers' *speech* claims differently from how it analyzed their *due-process* claims. *Compare* 500 U.S. at 192-200, *with id.* at 201-03. It nowhere suggested that the same standards applied to both. When considering the due-process claim, moreover, *Rust* nowhere asked whether the condition fell inside or outside the Title X program at issue. Yet the district court here chose a compelled-speech inquiry to *replace* the specific due-process inquiry consistently used from *Maher* to *Rust*.

b. *Condition v. Prohibition*. The district court equally erred by suggesting an alternative unconstitutional-conditions formula: If a State cannot prohibit something directly, it cannot encourage the same result indirectly through a condition on a benefit. Op., R.60, PageID#2138. That is untrue. What is "clear" under the doctrine is that *if* a requirement could be "imposed directly" *then* a

corresponding funding condition is constitutional. *Rumsfeld*, 547 U.S. at 59-60. Yet it is a fallacy—an "improper transposition"—to assume from this proposition that *if* a requirement could not be imposed directly, *then* a corresponding condition is likewise unconstitutional.

The Supreme Court has rejected this reasoning. "Constitutional concerns are greatest when the State attempts to impose its will by force of law," *Maher*, 432 U.S. at 476, so the "constitutional limitations" on conditions for a public benefit are "less exacting," *Dole*, 483 U.S. at 209. That is true even in the speech context where the unconstitutional-conditions doctrine reaches its apex. The Court has allowed the government to condition a benefit (a job) on banning political speech that, "if engaged in by private persons[,] would plainly be protected" speech. *Broadrick*, 413 U.S. at 616; *see Finley*, 524 U.S. at 587-88. It is also true in the abortion context. *Casey* held that the government may not ban all abortions. 505 U.S. at 846 (plurality op.). But *Rust*, *McRae*, and *Maher* held that the government may condition public funding on the women's decision not to have one. This Court should follow these precedents.

c. *Undue-Burden Standard*. The district court wrongly rejected the Seventh Circuit decision upholding a similar Indiana law under the undue-burden standard. Op., R.60, PageID#2141-42. Relying on a dissent from a Second Circuit case, the district court expressed "doubts" about extending that undue-burden framework to

the unconstitutional-conditions context. *Id.* Its analysis missed that dissent's point. The quoted passage was explaining that judicial review of a *funding condition* should be more deferential than judicial review of a *direct regulation*. Here, the undue-burden test applies to direct abortion regulations. *Whole Woman's Health*, 136 S. Ct. at 2309. Whatever the unconstitutional-conditions test should be, therefore, the undue-burden standard sets its *ceiling*. If anything, States should receive "wider latitude" in imposing abortion-related conditions on benefits. *Maher*, 432 U.S. at 479. At the least, Ohio has met that undue-burden test because the Conduct Provision imposes no burdens on women.

At bottom, therefore, the district court used the unconstitutional-conditions doctrine to sidestep the undue-burden test and apply a *stricter* standard than applies to a direct abortion regulation. That is unprecedented. No unconstitutional-conditions case has held the government must meet *stricter* standards to impose a condition on a benefit than it must meet to directly regulate protected activity. Only in the abortion context could a district court reach such a counterintuitive result. *Cf. Thornburgh v. Am. Coll. of Obstetricians and Gynecologists*, 476 U.S. 747, 814 (1986) (O'Connor, J., dissenting) (finding "it painfully clear that no legal rule or doctrine is safe from ad hoc nullification by this Court when an occasion for its application arises in a case involving state regulation of abortion"). This Court should squarely reject such reasoning.

III. UNDER THE FIRST AMENDMENT, OHIO MAY BAR THOSE WHO PROMOTE ABORTION FROM PARTICIPATING IN ITS PUBLIC HEALTH PROGRAMS

As explained above, *supra* Part I.B., settled norms of judicial restraint show that the Court should not reach any additional issues. But if the Court decides, alternatively, to consider the Speech Provision, it must reverse the injunction against the Funding Law on separate First Amendment grounds. Ohio may, without violating the First Amendment, place reasonable speech conditions on entities that receive public funding to effectively implement its programs.

A. The First Amendment Distinguishes Between Conditions Seeking To Skew Public Debate Outside Of A Program And Conditions Seeking To Prevent A Program From Itself Being Skewed

The Supreme Court's unconstitutional-conditions cases in the speech context "span a spectrum." *Umbehr*, 518 U.S. at 680. The Court has addressed speech conditions on public employees, speech conditions on independent contractors, and speech conditions on parties receiving subsidies. *See id.* For funding programs, the Court has stated that "the relevant distinction" in this speech context "is between conditions that define the limits of the government spending program—those that specify the activities Congress wants to subsidize—and conditions that seek to leverage funding to regulate speech outside the contours of the program itself." *AID*, 133 S. Ct. at 2328.

"There is no question" under this dichotomy that the government may impose a condition on speech *within* its own program. *Rust*, 500 U.S. at 194. That

is one application of the government-speech doctrine: "When government speaks, it is not barred by the Free Speech Clause from determining the content of what it says." *Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2246 (2015). The government may use its *own* employees to speak, and can control their speech if made pursuant to their duties. *Garcetti*, 547 U.S. at 421-22. Or the government may "use private speakers to transmit" its messages, and bar those speakers from proclaiming other messages. *Rosenberger*, 515 U.S. at 833. *Rust*, therefore, upheld the regulations barring program providers from discussing abortion *within* Title X programs because "when the government appropriates public funds to promote a particular policy of its own it is entitled to say what it wishes." *Id.* The government is not obliged to fund programs that "encourage competing lines of . . . philosophy" contradicting its views. *Rust*, 500 U.S. at 194.

Yet it is not "always self-evident" how to distinguish "between conditions that define the federal program" like those in *Rust* "and those that reach outside it." *AID*, 133 S. Ct. at 2330. That divide often turns on an inquiry into the *reason* for the condition. If the government has sought to "discriminate invidiously in its subsidies in such a way as to 'aim[] at the *suppression of dangerous ideas*,'" the condition must fall. *Regan*, 461 U.S. at 548 (citation omitted; emphasis added); *Finley*, 524 U.S. at 587-88. The government may not "leverage" its large funding power to skew the marketplace of ideas. *AID*, 133 S. Ct. at 2328. If, on the other

hand, the condition has merely sought to protect the government's own programs from *themselves* being skewed, the condition passes muster. The government may take "appropriate steps to ensure that its message is neither garbled nor distorted." *Rosenberger*, 515 U.S. at 833. That is, it may impose restrictions designed to ensure that it can "operate efficiently and effectively." *Garcetti*, 547 U.S. at 419.

Two examples give context to this divide. In *AID*, the Supreme Court invalidated a law seeking to leverage Congress's funding power to skew public debate—by *compelling speech* outside the program. 133 S. Ct. at 2332. The case involved a condition requiring entities to have an official policy opposing prostitution if they wanted to receive funds for combatting HIV/AIDS. *Id.* at 2326. The Court rejected the condition because, by compelling the recipient to *proclaim* that policy, the condition extended far beyond the HIV/AIDS program to compel speech on other matters. *Id.* at 2332. Indeed, Congress had expressly sought to eradicate the promotion of prostitution, so the case was "not about the Government's ability to enlist the assistance of those with whom it already agrees. It [was] about compelling a grant recipient to adopt a particular belief as a condition of funding." *Id.* at 2330. Again and again, the Court highlighted that the government had *compelled speech* as the critical basis for its conclusion that the speech fell outside the program at issue. *Id.* at 2330-32.

Employment cases offer a good contrast to *AID*. The Supreme Court has repeatedly held that the government *can* restrict the "political expression" of public employees—even expression *outside* the workplace—as a condition of employment. *Broadrick*, 413 U.S. at 616; *see Civil Serv. Comm'n v. Letter Carriers*, 413 U.S. 548, 556 (1973). That is so even though the expression, "if engaged in by private persons[,] would plainly be protected." *Broadrick*, 413 U.S. at 616. In other words, the government need not treat the speech of its employees or contractors in the same way that it treats the speech of its citizens. *Garcetti*, 547 U.S. at 418-19; *Umbehr*, 518 U.S. at 680. It, instead, can control that speech when necessary "for the efficient provision of public services." *Garcetti*, 547 U.S. at 418. This Court thus upheld a university's decision to fire a vice president for publishing an op-ed on an issue of public concern—the gay-rights movement—even assuming that she had engaged in her speech *outside* her job. *See Dixon v. Univ. of Toledo*, 702 F.3d 269, 277 (6th Cir. 2012). The university could fire this official, the Court reasoned, because her outside speech had "directly contradict[ed]" the government's *inside* official position. *Id.*

B. The Speech Provision Protects Ohio's Message By Ensuring That The State Does Not Hire Contractors Who Directly Contradict It

The Speech Provision seeks to ensure that contractors who convey Ohio's messages do so "efficiently and effectively." *Garcetti*, 547 U.S. at 419. Conversely, it does not seek to "leverage" the funding provided under the Public

Health Programs to skew public debate. *AID*, 133 S. Ct. at 2328. Indeed, a Fifth Circuit decision, while issued before *AID*, has rejected a similar unconstitutional-conditions claim against a similar Texas law. *Suehs*, 692 F.3d at 346. Texas created a health program—designed to increase access to preventive-health and family-planning services—with government funds. *Id.* Like the Speech Provision, the law barred Texas from contracting with entities that "promote elective abortions[.]" *Id.* The Fifth Circuit held that Texas could "disfavor abortion within its own subsidized program" without violating the First Amendment. *Id.* at 350. Even though Texas's funding condition applied to *participants*, not just *programs*, the court reasoned that this was a proper safeguard for Texas's program: "Texas's authority to promote [its childbirth-over-abortion] policy would be meaningless if it were forced to enlist organizations as health care providers and message-bearers that were also abortion advocates." *Id.*

This logic applies here. Ohio has made the permissible policy choice to encourage childbirth. Consistent with this message, Ohio has decided, when it distributes funds for health and education programs, to restrict entities promoting abortion from also acting as its providers and messengers. This rule reasonably protects Ohio's childbirth-over-abortion message from distortion. Indeed, the record shows that, in various ways, these programs can become intertwined with abortion-related speech. *Supra* at 14-16. The Funding Law avoids confusing

Ohio's message by eliminating the possibility that providers of state-administered services will (at or near the same time they provide state-administered services) offer a contradictory message.

Even beyond this overlap, Ohio's approach before the Funding Law was inherently contradictory. The State (through its elected lawmakers) wanted to favor childbirth over abortion, but it had abortion advocates acting as its ground-level providers for women's health. At the very least, this juxtaposition "garbled" Ohio's message, *Rosenberger*, 515 U.S. at 833, if it did not render it "meaningless," *Suehs*, 692 F.3d at 350, with Ohio seemingly endorsing abortion providers through its distribution of state-administered funds.

The affected programs, moreover, involve not just services, but also communication. The PREP and VAWA Programs, for example, deliver educational messages through state-approved curricula. PPSWO Depo., R.37, PageID#655, 659. As in *Rust*, therefore, Ohio is not encouraging "private speech but instead us[ing] private speakers to transmit specific information pertaining to its own program[s]." *Rosenberger*, 515 U.S. at 833 (citing *Rust*, 500 U.S. at 194). Having abortion advocates deliver Ohio's message through these programs raises complex concerns. For instance, while state-approved curricula contain guidance on various topics (including pregnancy for PREP), "all kinds of questions come up in the training" and "not everything is covered by the protocol." PPSWO Depo.,

R.37, PageID#691. Ohio must trust providers to act as its messengers, a role that includes answering any questions (anticipated or unanticipated) that may arise about pregnancy and/or abortion.

That the Speech Condition presents prospective providers with a reasonable, and readily declinable, choice confirms that Ohio has merely sought to run an effective program, not to suppress "'dangerous ideas.'" *Regan*, 461 U.S. at 548 (citation omitted). Removal from these programs will have little effect on Planned Parenthood, whether viewed in terms of financial impact or services. *Supra* at 11-14. Thus, Planned Parenthood, after weighing the pros and cons of accepting funding, can decline (and intends to do so). Given that the law applies so little pressure, this Court should apply the constitutional default, allowing Ohio to make its own policy choices when distributing funds. Ohio should not be forced to fund abortion advocates for state-administered health and education programming at the risk of clouding its childbirth-over-abortion position.

C. The District Court's Analysis Was Mistaken

The district court mistakenly concluded that the Speech Provision violated the First Amendment. As with its due-process analysis, the court oversimplified the unconstitutional-conditions doctrine. Quoting *AID*, the court found the relevant constitutional distinction to be between funding conditions that define the limits of a program, and funding conditions that fall "outside the contours" of the

program. Op., R.60, PageID#2132-33. Although *AID* outlined this distinction, it also cautioned that this "line is hardly clear," due in part to the subjectivity of assessing the exact contours of any program. 133 S. Ct. at 2328. The key question—the one the district court overlooked—asks whether the condition is "'aim[ed] at the suppression of dangerous ideas.'" *Regan*, 461 U.S. at 548 (citation omitted). That is, the question asks whether the government has sought to "leverage" its funding power to suppress speech, or instead used the condition to run an effective program. *AID*, 133 S. Ct. at 2328. Yet the district court nowhere found that the Speech Provision was designed to suppress speech.

The court also took an overly narrow view of the Public Health Programs' contours. It deemphasized the interrelationship between these programs and abortion-related activities: "There is nothing within the scope of these programs related to performing abortions, promoting abortions or affiliating with an entity that performs or promotes abortions." Op., R.60, PageID#2133. But, based on Planned Parenthood's concessions, the court's statement is wrong. Before the Funding Law, PPSWO's STD Prevention Program services were "connected to [its] abortion services." PPSWO Depo., R.37, PageID#649. A referral to Planned Parenthood for government services could also lead down the path of Planned Parenthood providing abortion counseling and abortions. *Id.*, PageID#657.

Additionally, training on pregnancy options falls within the PREP curriculum. PPSWO Depo., R.37, PageID#691.

In addition, the district court undervalued the State's interest in protecting its childbirth message. Finding such an interest "not applicable," the court stated "there is no potential that Ohio's message of favoring childbirth over abortion will be garbled or distorted." Op., R.60, PageID#2134. This is incorrect. At the very least, providing funding to abortion advocates weakens Ohio's position. Faced with (1) a State providing public funds to abortion advocates for public-health programs and (2) a State that denies those funds to abortion advocates, anyone would naturally conclude that the latter State is taking the firmer stance.

The district court next failed to recognize the Spending Provision's limited nature. A comparison to the stricter funding condition in *AID* shows this. In that case, the government went beyond trying to protect its policy, and instead required participants to adopt their own "'policy explicitly opposing prostitution and sex trafficking.'" *AID*, 133 S. Ct. at 2324 (citation omitted). Thus, the law sought to compel participants "to adopt a particular belief as a condition of funding." *Id.* at 2330. Because this condition *compelled speech*, the Court found it outside the scope of the program. *Id.* Ohio's Funding Law, by contrast, does not compel *any* speech. Nor does it require that program participants "pledge allegiance" to Ohio's

message. *See id.* at 2332. It only "prevent[s] recipients from using private funds in a way that would undermine" Ohio's message. *Id.*

At day's end, it would be a strange First Amendment dichotomy if the government were *allowed* to convey its own childbirth-over-abortion message, *Walker*, 135 S. Ct. at 2246, but *required* to convey that message through entities holding directly contradictory views. The Constitution does not contain such a "meaningless" government-speech doctrine. *Suehs*, 692 F.3d at 350.

CONCLUSION

The Court should reverse the district court, and direct it to issue a final judgment for Director Hodges.

Respectfully submitted,

MICHAEL DEWINE
Ohio Attorney General

/s/ Eric E. Murphy
ERIC E. MURPHY* (0083284)
State Solicitor
**Counsel of Record*
HANNAH C. WILSON (0093100)
Deputy Solicitor
RYAN L. RICHARDSON (0090382)
ZACHERY P. KELLER (0086930)
Assistant Attorneys General
30 East Broad Street, 17th Floor
6l4-466-8980; 614-466-5087 fax
eric.murphy@ohioattorneygeneral.gov

Counsel for Appellant Richard Hodges, in his official capacity as Director of the Ohio Department of Health

CERTIFICATE OF COMPLIANCE

I hereby certify, in accordance with Rule 32(g) of the Federal Rules of Appellate Procedure, that this *Brief of Appellant Richard Hodges* complies with the type-volume requirements for a principal brief and contains 12,961 words. *See* Fed. R. App. P. 32(a)(7)(B)(i).

/s/ Eric E. Murphy
ERIC E. MURPHY

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of February 2017, this *Brief of Appellant Richard Hodges* was filed electronically. Notice of this filing will be sent to all parties for whom counsel has entered an appearance by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

/s/ Eric E. Murphy
ERIC E. MURPHY

DESIGNATION OF DISTRICT COURT RECORD

Defendant-Appellant, pursuant to Sixth Circuit Rule 30(g), designates the following filings from the district court's electronic records:

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

Date Filed	R. No.; PageID#	Document Description
5/11/16	1; 1-31	Complaint
5/18/16	17-1; 269-70	March 2016 ODH Letter to Program Participants
5/18/16	17-2; 271-72	April 2016 ODH Letter to Planned Parenthood
5/18/16	17-3; 273-74	Bickert Aff.
5/18/16	17-4; 275-76	Dennison Aff.
5/18/16	17-5; 277-78	Norton Aff.
5/18/16	17-6; 279-80	Turner Aff.
5/23/16	19; 308-27	TRO Op.
6/1/16	22; 332-34	Scheduling Or.
7/18/16	35; 389-458	PPGOH Depo.
7/18/16	35-1; 459-60	PPGOH Depo. Errata
7/18/16	36; 527-62	Def. Tr. Br.
7/18/16	36-1; 563-74	PPSWO Annual Report
7/18/16	36-2; 575-86	PPGOH Annual Report
7/18/16	36-3; 587-611	PPSWO Interrogatories
7/18/16	36-4; 612-40	PPGOH Interrogatories
7/18/16	37; 641-709	PPSWO Depo.
7/18/16	37-2; 821	PPSWO Depo. Errata

Date Filed	R. No.; PageID#	Document Description
7/18/16	R. 40-4; 945-49	2d Lawson Decl.
7/18/16	R.40-14; 999-1249	Burke Depo.
7/27/16	R. 53; 2049-67	Def. Resp. Br.
7/27/16	53-1; 2068-70	Trumbull/Mahoning Cnty. Contract
8/12/16	60; 2122-44	Permanent Injunction Op.
8/12/16	61; 2145	Judgment Entry
9/6/16	63; 2207	Notice of Appeal