LESSONS FROM *TRINITY LUTHERAN*: AN ENTITY-BASED APPROACH TO UNCONSTITUTIONAL CONDITIONS AND ABORTION DEFUNDING LAWS

JENNIFER DAVIDSON[∞]

ABSTRACT

This Article argues for a new approach to applying the unconstitutional conditions doctrine to laws that strip abortion providers of public funding. Abortion defunding initiatives are increasingly common at both the state and federal level. The Supreme Court has not squarely addressed the issue in over 25 years. In that time, defunding laws have evolved significantly. Once focused primarily on direct funding of abortions, laws today go much further. Frequently, these laws prevent abortion providers from receiving any *public funds, even for services wholly unrelated to abortion, simply because they provide abortions. All of the federal appeals courts that have looked at these types of measures have upheld them, but their reasoning varies. Thus, the time is ripe for the Court to revisit this issue. This paper turns to the Court's most recent religious liberties case,* Trinity Lutheran v. Comer*, to argue for an entity-based, as opposed to an individual rights-based, approach to challenging defunding measures. It proceeds in four parts. Part I provides a brief review of the right to an abortion. Part II turns specifically to the unconstitutional conditions doctrine as applied to defunding laws. It provides a comprehensive overview of how federal courts have dealt with new defunding laws. It also offers analysis of both inter- and intra-circuit tensions in the current caselaw. Part III argues that the religion clauses of the First Amendment hold underappreciated interpretative value for analyzing the right to an abortion, based on parallel rights and restraints present in both areas of the law. Part IV explains the benefits of this approach and how it overcomes tensions in existing caselaw. Ultimately, this Article presents a new approach to the unconstitutional conditions doctrine for defunding cases that focuses primarily on the status of the entity, modeled off* Trinity Lutheran*. This approach offers a clearer, stronger method for challenging defunding laws.*

[∞] Jennifer Davidson, J.D., University of Virginia School of Law, 2018; A.B., Dartmouth College, 2015. I am thankful to Professor Julia Mahoney for her immense help in the development of this Article. Thank you as well to all of the editors at *The Review of Law & Social Change* for their helpful feedback and hard work on this piece.

I. INTRODUCTION

In 1973, the Supreme Court held that abortion is a constitutionally protected choice in the landmark case *Roe v. Wade*.[1] Nearly as soon as the case was decided, anti-abortion advocates began formulating new ways to target the procedure without running afoul of *Roe*. Some attacked abortion not by targeting the procedure directly, but by lobbying legislators to cut abortion providers' federal and state funding. This tactic has proven effective. At the federal level, funds issued through

1. 410 U.S. 113, 153 (1973).

major grant programs can no longer be used to cover abortion and related services.[2] Many states have gone even further, passing laws that strip abortion providers of all public funding, even for services wholly unrelated to abortion.[3]

It has been over 25 years since the Supreme Court last heard a case on abortion defunding, and that case involved only a ban on the use of federal funds to directly provide abortion-related services.[4] The Court has never heard a case on restrictions that prevent funding from going to abortion providers when the grant money would be used only for non-abortion services. All federal circuit courts that have heard challenges to such blanket bans have upheld them, viewing the laws as extensions of the types of measures upheld by the Supreme Court in the past.[5] This Article argues that those decisions are incorrect because these types of restrictions are impermissible under the unconstitutional conditions doctrine.

The unconstitutional conditions doctrine, most simply stated, holds that the government may not condition a benefit on the would-be recipient's forced relinquishment of a constitutional right.[6] This Article calls for a fresh approach to applying this doctrine to abortion defunding cases by examining it through the lens of the Court's religious liberties cases. Most scholars have either brushed aside or denied the usefulness of looking at religious liberties and abortion defunding cases together.[7] However, there are striking similarities between the right to religious liberty and the right to abortion. With both rights, the government is faced with outer bounds that limit what it can and cannot do, meaning it must balance often inherently conflicting interests. In the religious liberties context, the Free Exercise Clause requires the government to allow people to robustly practice their religion—but the Establishment Clause forbids the government from endorsing or, typically, directly supporting religious practice with government funds. In the abortion context, the government cannot place an undue burden on a woman's[8]

2. *See* Family Planning Services and Population Research Act of 1970, Pub. L. 91-572, § 1008, 84 Stat. 1504, 1508; 42 C.F.R. § 59.205(a)(1) (2011); Rust v. Sullivan, 500 U.S. 173, 190 (1991).

3. *See, e.g.*, Noam Levey, *Indiana Governor Signs Planned Parenthood Funding Ban*, L.A. TIMES (May 11, 2011), http://articles.latimes.com/2011/may/11/nation/la-na-indiana-planned-parenthood-20110511 [https://perma.cc/TR65-GXFD].

4. *Rust*, 500 U.S. at 190.

5. *See, e.g.*, Planned Parenthood Ass'n of Hidalgo Cty. Tex., Inc. v. Suehs, 692 F.3d 343, 349–50 (5th Cir. 2012); Planned Parenthood of Ind., Inc. v. Comm'r of the Ind. State Dep't of Health, 699 F.3d 962, 988 (7th Cir. 2012).

6. Kathleen Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1415 (1989).

7. *See* Douglas Laycock, *Theology Scholarships, the Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes but Missing the Liberty*, 118 HARV. L. REV 155, 176–77 (2004) (Professor Laycock argues that the Supreme Court was mistaken in drawing an analogy between abortion defunding cases and a religious liberties case); Michael McConnell, *The Selective Funding Problem: Abortions and Religious Schools*, 104 HARV. L. REV. 989 (1990) (Professor McConnell observes that the right to privacy embodied in the abortion context is analogous to the separation of church and state in the Establishment Clause. However, he does not flesh out this analysis on a broader level. Professor McConnell ultimately argues that selective funding for abortion is permissible, while selective funding for religious schools is not).

8. The terms "women" and "woman" are at times used in this Article to describe individuals

right to an abortion—but the government can express a policy preference for childbirth over abortion. Both rights require finding the "play in the joints" of acceptable limits between the outer bounds.

This similarity can be seen even more strikingly in *Trinity Lutheran v. Comer*, a case that presented the question whether a state violated the Free Exercise Clause by categorically excluding a church from eligibility for a grant to resurface a playground for the daycare it operated.[9] The money would not, and likely could not, ever go to support an explicitly religious endeavor. However, because of Trinity Lutheran's status as a church, it was categorically forbidden from competing with secular organizations in the community for a grant.[10] This scenario is directly parallel to the situation faced by abortion providers under new defunding legislation: the money is federally forbidden from funding abortion procedures, but because of the entity's status as an abortion provider, it is categorically banned from competing with non-providers in the community.

This Article builds on these parallels to articulate a clear, entity-level rationale for why broad defunding measures are unconstitutional. By looking at the entity level, it focuses on the organization that is denied funding, not the person seeking an abortion. In doing so, it presents a novel framework for how to apply the unconstitutional conditions doctrine in the abortion defunding context.[11] It eschews the common refrain that "religion is special," instead highlighting the way in which religion's unique constitutional protections actually make it parallel in status to the right to abortion. In doing so, this Article presents a cohesive rationale for why defunding measures that withhold money for all services from abortion providers represent an unconstitutional condition on the entity.

This Article proceeds in four parts. Part I provides a brief review of the right to abortion and the modern defunding movement. Part II turns specifically to the unconstitutional conditions doctrine as applied to defunding laws. It provides background on the current state of the law in both the Supreme Court and courts of appeals. It also analyzes the existing tension in the law. Part III argues that the religion clauses of the First Amendment hold underappreciated interpretative value for analyzing the right to an abortion, based on parallel rights and restraints

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who are implicated by abortion regulations. Because opposition to abortion is linked to both historical and contemporary gendered efforts at bodily regulation, it is an issue that affects all women. However, it should be recognized that not all women are capable of pregnancy and that not only women may become pregnant, so these terms are under- and over-inclusive in certain respects.

9. Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2017 (2017).

10. *Id.* at 2020–21.

11. For general discussions of the unconstitutional conditions doctrine, see William Marshall, *Towards a Nonunifying Theory of Unconstitutional Conditions: The Example of the Religion Clauses*, 26 SAN DIEGO L. REV. 243, 248 (1989); Sullivan, *supra* note 6; Cass Sunstein, *Why the Unconstitutional Conditions Doctrine is an Anachronism (with Particular Reference to Religion, Speech, and Abortion)*, 70 B.U. L. REV. 593 (1990). For a discussion of the unconstitutional conditions doctrine specific to abortion, see Roberta Sharp, *Holding Abortion Speech Hostage: Conditions on Federal Funding of Private Population Planning Activities*, 59 GEO. WASH. L. REV. 1218 (1990).

present in both areas of the law. It then turns to *Trinity Lutheran v. Comer* to provide a new model for assessing abortion defunding laws. Part IV explains why this new model has the potential to provide clearer, better results that alleviate the tensions that currently exist in abortion defunding caselaw.

A. A brief review of the right to an abortion and the defunding movement

In 1973, the Supreme Court handed down *Roe v. Wade*, conclusively holding for the first time that the Fourteenth Amendment's right to privacy is "broad enough to encompass a woman's decision whether or not to terminate her pregnancy."[12] The right, however, is not absolute. As the pregnancy progresses, the state may express increasing interest in the potential life of the fetus.[13] In later cases, the Court adopted a test—known as the "undue burden" test—to determine whether a state's attempt to protect the fetus was too intrusive on the woman's right to choose. Stated simply, statutes unconstitutionally impede abortion access if they are "[u]nnecessary health regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion."[14] Most recently, the Supreme Court reaffirmed both the right to an abortion and the undue burden standard in *Whole Woman's Health v. Hellerstedt.*[15] The Court struck down part of a Texas law that imposed stringent regulations on abortion providers, holding that the measures had the impact of placing significant obstacles in the paths of women seeking abortions without providing sufficient medical benefits to justify the burdens.[16]

Given that the Supreme Court continues to uphold the basic right to an abortion, many abortion opponents have turned instead to attacking public sources of funding earmarked for these procedures, with the end-goal of reducing or eliminating access to abortions. This strategy fuels what has come to be known as the "defunding movement." The defunding movement's overall goal is not only to bar public funds from covering the cost of abortions, but also to prevent funds from covering the cost of any procedure conducted at a facility where abortions are performed.[17] This approach derives support from the "fungibility principle," or the notion that money given to an abortion provider to offset expenses for other types of services "frees up" funds for abortions.[18] The movement additionally

12. Roe v. Wade, 410 U.S. 113, 153 (1973).

13. *Id.* at 154.

14. Planned Parenthood of S.E. Pa. v. Casey, 505 U.S. 833, 878 (1992).

15. 136 S. Ct. 2292 (2016).

16. *Id.* at 2313.

17. Mary Ziegler, *Sexing Harris: The Law and Politics of the Movement to Defund Planned Parenthood*, 60 BUFF. L. REV. 701, 704 (2012).

18. *Id.*; David Zoppo, *The War on Women: Federal Remedies to Fight Back Against States that De-Fund Planned Parenthood*, 37 VT. L. REV. 495, 496 (2012). As discussed further, *infra* note 172, the Supreme Court has rejected this type of argument in other contexts.

claims that defunding is a means of ensuring there is no apparent symbolic support of abortion by the state.[19]

The passage of the Hyde Amendment to the Title X Family Planning Program represents the defunding movement's first major success at the federal level.[20] The Title X Family Planning Program issues grants to state and local organizations to create projects that provide preventative family planning services to low-income women and families.[21] The Amendment forbids federal funds distributed through the program from being used for projects where "abortion is a method of family planning."[22] Under Title X, all grant recipients must keep funds they receive "separate and distinct from abortion-related activities."[23] Thus, the Hyde Amendment is project-specific.

Defunding movements gained renewed political traction federally in 2011. Then-Representative Mike Pence introduced an ultimately unsuccessful proposal in the House of Representatives to specifically ban Planned Parenthood and its affiliates from receiving federal funds for any purpose.[24] In 2017, Congress proposed sweeping changes to the Affordable Care Act.[25] The proposed changes would have prohibited, for one year following enactment, federal funding of certain entities and their affiliates that provide abortions other than in the cases of rape or incest or when necessary to protect the life of the mother.[26]

The defunding movement has taken a stronger hold at the state level. Shortly after the failed federal measure in 2011, Indiana (the home state of then-Representative Pence) became the first state to withhold public funding of any kind from Planned Parenthood.[27] Similar proposals restricting the flow of funding through state agencies to entities that provide abortions have been introduced, and often

19. *See, e.g.*, Planned Parenthood of Mid-Missouri & E. Kan., Inc. v. Dempsey, 167 F.3d 458, 460 (8th Cir. 1999) (noting that the government justified the defunding regulation because it prevented abortion providers from receiving "indirect benefits" from the state and from being given the "imprimatur of the state").

20. *See* Sarah Kliff, *The Hyde Amendment at 35: A New Abortion Divide*, WASH. POST (Oct. 2, 2011), https://www.washingtonpost.com/blogs/ezra-klein/post/the-hyde-amendment-at-35-a-new-abortion-divide/2011/10/02/gIQApQ6cFL_blog.html?noredirect=on [https://perma.cc/U4BQ-S2JQ].

21. Family Planning Services and Population Research Act of 1970, Pub. L. 91-572, 84 Stat. 1504; 42 C.F.R. § 59.205 (2011).

22. Family Planning Services and Population Research Act § 1008.

23. Rust v. Sullivan, 500 U.S. 173, 190 (1991).

24. Kate Nocera & David Nather, *House Defunds Planned Parenthood*, POLITICO (Feb. 18, 2011), https:// www.politico.com/story/2011/02/house-defunds-planned-parenthood-049830 [https://perma.cc/J6QY-PEUX].

25. H.R. 1628, 115th Cong. (2017).

26. *Id.* § 103. The restriction would have applied to any entity that received at least $350,000,000 in expenditures from Medicaid either directly or via affiliates nationwide in the fiscal year 2014. *Id.* § 103(b)(1)(B).

27. IND. CODE § 5-22-17-5.5 (2011); Christine Ramelb, *Public Health Care Funding: The Battle Over Planned Parenthood*, 47 VAL. U. L. REV. 499, 512 (2013); Levey, *supra* note 3.

passed, in numerous states, including Arizona, Kansas, New Hampshire, North Carolina, Texas, and Wisconsin.[28]

When these types of laws have been passed, many individuals and organizations have brought suits to challenge them. Plaintiffs have raised a variety of claims under different provisions of the Constitution, including the Free Speech clause of the First Amendment,[29] the Free Association clause of the First Amendment,[30] the Equal Protection clause of the Fourteenth Amendment,[31] the Substantive Due Process component of the Fourteenth Amendment (as an undue burden on the right to an abortion),[32] the Supremacy Clause,[33] and—at the center of this Article—the "unconstitutional conditions" doctrine.[34]

II. DEFUNDING AND UNCONSTITUTIONAL CONDITIONS DOCTRINES IN ACTION

A. The basic functioning of the unconstitutional conditions doctrine

This Article focuses on how the "unconstitutional conditions" doctrine can be used to address the new types of defunding measures. The doctrine has notoriously eluded a singular unifying theory, although many scholars have attempted to provide one.[35] Others argue that the doctrine simply lacks such coherency.[36] For the purposes of this Article, such unifying theories are not needed. The unconstitutional conditions doctrine holds that the government cannot grant benefits on the condition that the recipient must surrender a constitutional right.[37] For example, the government cannot condition tax benefits to veterans on those veterans' willingness to pledge a specific oath of loyalty to the United States.[38] To deny the applicants an exemption because they engage (or fail to engage) in certain types of speech in effect penalizes the applicants for such speech, thus representing an

28. *See* H.B. 2800, 50th Leg., 2d Sess. (Ariz. 2012); *Planned Parenthood of Gulf Coast, Inc. v. Gee*, 862 F.3d 445 (5th Cir. 2017); *Planned Parenthood Greater Memphis Region v. Dreyzehner*, No. 3:12-cv-00139, 2013 U.S. Dist. LEXIS 40420, at *18 (M.D. Tenn. Mar. 13, 2013); KAN. ADMIN. REGS. § 30-5-60(a); Ramelb, *supra* note 27, at 515; Mary Ziegler, *Roe's Race: The Supreme Court, Population Control, and Reproductive Justice*, 25 YALE J. L. & FEMINISM 1, 47 (2013).

29. *Dreyzehner*, 2013 U.S. Dist. LEXIS 40420, at *1–2.

30. Planned Parenthood of Kan. & Mid-Missouri v. Moser, 747 F.3d 814, 817 (10th Cir. 2014); Planned Parenthood Ass'n of Hidalgo Cty. Tex., Inc. v. Suehs, 692 F.3d 343, 347 (5th Cir. 2012).

31. *Dreyzehner*, 2013 U.S. Dist. LEXIS 40420, at *2.

32. *Moser*, 747 F.3d at 817.

33. *Id.*

34. Planned Parenthood of Ind., Inc. v. Comm'r of the Ind. State Dep't of Health, 699 F.3d 962, 986 (7th Cir. 2012).

35. *See supra* note 11.

36. *See*, *e.g.*, *Suehs*, 692 F.3d at 349 ("Courts often struggle with when to apply the unconstitutional conditions doctrine, and the doctrine's contours remain unclear despite its long history."); *see also* Marshall, *supra* note 11, at 244 (arguing that attempts to develop a general theory of unconstitutional conditions are futile).

37. Sullivan, *supra* note 6, at 1415–16.

38. Speiser v. Randall, 357 U.S. 513, 526 (1958).

unconstitutional condition.[39] As has become oft-repeated in unconstitutional conditions cases, the government "may not do indirectly what it may not do directly."[40] The doctrine applies even if the government would be permitted to legally withhold the benefit at issue in its entirety.[41] In other words, even if a benefit is not a right itself, it cannot be denied to individuals based on the government infringing on or requiring them to give up another constitutional right.[42] The government also cannot force organizations to espouse a specific viewpoint outside the parameters of the funded project as a condition for receiving money.[43]

The doctrine arises in many contexts, but it most commonly appears in First Amendment free association and free speech disputes.[44] The analysis often turns in part on whether the speakers have alternate avenues to continue their speech while still accepting the benefit. In *League of Women Voters*, the Court took issue with a provision that conditioned the receipt of federal funds by certain radio stations on those stations' not engaging in any "editorializing" functions.[45] A station that received even just one percent of its funds from federal grants faced an absolute bar on editorializing.[46] Given its overly onerous nature, the condition was found to be unconstitutional. The Court did, however, suggest that if Congress created a revised version of the Act that allowed stations to establish "affiliate" organizations that could use the station's facilities to editorialize, that version would likely be a valid restriction.[47] This suggestion is particularly important in the abortion defunding context. In a sense, it creates an "exception" to the doctrine. A state can essentially force government-funded organizations to create new affiliates that do not receive funding should they wish to continue speech that the government does not want to support. Proponents of defunding measures and courts in later cases often point towards the affiliate organization exception to argue that a given law does not pose an unconstitutional condition.[48]

The doctrine is applied in the religion clause context as well.[49] Perhaps the most famous case is *Sherbert v. Verner*, which dealt with a South Carolina unemployment benefit program that would not grant benefits to a woman who was fired

39. *Id.* at 528–29.

40. *Id.* at 526 ("It is apparent that a constitutional prohibition cannot be transgressed indirectly by the creation of a statutory presumption any more than it can be violated by direct enactment. The power to create presumptions is not a means of escape from constitutional restrictions."); Sullivan, *supra* note 6, at 1415.

41. Koontz v. St. Johns River Water Mgmt. Dist., 570 U.S. 595, 608 (2013) ("Virtually all of our unconstitutional conditions cases involve a gratuitous governmental benefit of some kind."); Sullivan, *supra* note 6, at 1415.

42. Perry v. Sindermann, 408 U.S. 593, 597 (1972).

43. Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l, Inc., 570 U.S. 205, 213–14 (2013).

44. *Perry*, 408 U.S. at 597.

45. FCC v. League of Women Voters, 468 U.S. 364, 400 (1984).

46. *Id.*

47. *Id.*

48. *See*, *e.g.*, Planned Parenthood of Hous. v. Sanchez, 403 F.3d 324, 342 (5th Cir. 2005).

49. The application of the doctrine to the religion clauses will be discussed later in further

because she refused to work on her faith's Sabbath.[50] The Court found that the plaintiff's ineligibility stemmed solely from her practice of religion, making the resulting pressure to forgo her religious practice "unmistakable."[51] However, not all government regulations that touch religion are unconstitutional conditions. In *Locke v. Davey*, the Court upheld a state program that gave students college scholarships, provided that recipients did not pursue a degree in devotional theology.[52] The program allowed recipients to study religion in numerous other ways, such as by attending a religiously affiliated institution—they simply could not use the scholarship to train for a religious profession, which the Court found to be an "essentially religious endeavor."[53] This Article builds off the contrast developed between these two cases, with a particular focus on *Locke*. These cases highlight how the Court attempts to distinguish between when a condition is burdening the exercise of a constitutional right and when it is simply denying funding in a context where funding is not required. This distinction is key to this Article's argument: unlike the law in *Locke*, modern defunding laws are penalizing the exercise of a constitutional right, not simply refusing to provide funding in a context where funding is not required. With these underpinning frameworks in mind, this Article next turns to the Supreme Court's abortion funding cases.

B. The Supreme Court landscape on defunding

1. Supreme Court guidance on abortion funding

Maher v. Roe was the Court's first major defunding case.[54] *Maher* dealt with a Connecticut regulation that limited Medicaid coverage of first trimester abortions to only those that were deemed "medically necessary."[55] The Court held that there was no violation posed by the state regulation, as it placed "no obstacles—absolute or otherwise—in the pregnant woman's path to an abortion."[56] While poverty may make it more difficult for women to access abortion if Medicaid will not reimburse the procedure, that problem is not created by the state, nor is living in poverty considered a suspect class requiring higher scrutiny.[57] Although there are limits on the ability of a state to impose its will "by force of [criminal] law," it has broad authority to "encourage actions deemed to be in the public interest."[58]

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detail. *Infra* Part III.A.

50. Sherbert v. Verner, 374 U.S. 398, 399–401 (1963).
51. *Id.* at 404.
52. Locke v. Davey, 540 U.S. 712, 715 (2004).
53. *Id.* at 721, 724.
54. 432 U.S. 464 (1977).
55. *Id.* at 466.
56. *Id.* at 474.
57. *Id.* at 470, 474.
58. *Id.* at 476.

Three years after *Maher*, the Court granted certiorari in *Harris v. McRae* to decide whether the Hyde Amendment's denial of public funding for certain medically necessary abortions violated the liberty or equal protection clauses of Fifth Amendment due process.[59] The Court conducted an analysis almost identical to that in *Maher*,[60] finding that the Hyde Amendment presented no issue, as it "leaves an indigent woman with at least the same range of choice in deciding whether to obtain a medically necessary abortion as she would have had if Congress had chosen to subsidize no health care costs at all."[61] Two particularly important principles for future defunding cases come from this case. First, the Court framed the issue around the right to a subsidy. It held that whether constitutionally protected "freedom of choice" warrants "federal subsidization" is a question for Congress, not the Court.[62] Second, the Court found that abortion is "inherently different" from other medical procedures because it involves termination of potential life.[63] As a result, Congress is allowed to establish incentives to make childbirth more attractive than abortion to indigent women.[64] By focusing on the lack of an entitlement to a subsidy and the unique nature of the right in the first place, the Court was able to distance itself from the underlying constitutional right to an abortion.

Finally, the most recent Supreme Court case dealing directly with defunding measures is *Rust v. Sullivan*.[65] The Secretary of Health and Human Services promulgated regulations that prevented Title X recipients from providing any abortion counseling or referrals within the project scope and required "physical and financial" separation between the project and abortion services.[66] The Court upheld the regulations.[67] As in *Maher* and *Harris*, the Court held that Congress could selectively fund programs it believes to be in the public interest without funding others.[68] Forbidding counseling on abortion, according to the Court, reasonably fulfilled Congress' goals of forbidding federal funding of abortion itself and promoting childbirth.[69] The plaintiffs in *Rust* also argued that the restrictions impermissibly conditioned a benefit—funding—on giving up a constitutional right—the right to engage in abortion advocacy and counseling.[70] The Court rejected this argument, stating that the "Government is not denying a benefit to anyone, but is instead simply insisting that public funds be spent for the purposes for

59. 448 U.S. 297, 301 (1980).
60. *Id.* at 316–17.
61. *Id*. at 317.
62. *Id.* at 318.
63. *Id.* at 325.
64. *Id.*
65. 500 U.S. 173 (1991).
66. *Id.* at 180.
67. *Id.* at 184.
68. *Id.* at 193.
69. *Id.*
70. *Id.* at 196.

which they were authorized."[71] In doing so, the Court noted that the regulations just "required a certain degree of separation from the Title X project in order to ensure the integrity of the federally funded program."[72] The two moves established in *Harris* can be seen in full effect in *Rust*. Abortion is a unique constitutional right for which no one is entitled any form of subsidization. This case took it even further, as it dealt with mere speech related to abortion, not abortion itself. It established that the government could robustly regulate any program it funds and laid the groundwork for future state laws that require extensive separation between the funded organization and its abortion-providing affiliate. Thus, this case in many ways set the stage for increasingly restrictive funding laws.

2. Key differences between existing precedent and current defunding statutes

It has been over 25 years since *Rust v. Sullivan* was decided. Since then, defunding efforts have taken on significantly different forms. *Maher*, *Harris*, and *Rust* all involved measures to limit federal grant money from covering or supporting abortion services in the context of funded grant programs.[73] In *Rust*, the Court specifically noted that Congress, consistent with precedent, did not deny providers the right to engage in abortion-related activities overall, but rather refused to fund those activities using the public treasury.[74] The laws and regulations merely required organizations to undertake projects separate and independent from grant-funded initiatives in order to carry out abortion and related activities.[75]

While the new statutes vary in approach, they have significantly broader effects that are far less constrained to the Title X project. For example, the proposed change to the Affordable Care Act did not simply say that Title X grantees were forbidden from referring patients who receive benefits via the project to abortion services—it excluded entities that provide abortions from inclusion at all, regardless of the funding purpose.[76] At the state level, in 2011, Kansas passed a law restricting entities eligible for Title X sub-grants to public entities, hospitals, and certain federally qualified health centers.[77] This law had the effect of excluding Planned Parenthood entirely from funding, which seemingly was, as evidenced by numerous statements from drafters of the law, an explicit goal.[78] Indiana was indeed far more explicit, passing a law that prohibited "any entity that performs abortions or maintains or operates a facility where abortions are performed" from

71. *Id.*
72. *Id.* at 198.
73. Rust v. Sullivan, 500 U.S. 173, 180 (1991); Harris v. McRae, 448 U.S. 297, 301 (1980); Maher v. Roe, 432 U.S. 464, 466 (1977).
74. *Rust*, 500 U.S. at 198.
75. Ziegler, *Roe's Race*, *supra* note 28, at 46.
76. H.R. 1628, 115th Cong. (2017).
77. Planned Parenthood of Kan. & Mid-Missouri v. Moser, 747 F.3d 814, 816 (10th Cir. 2014).
78. *Id.* at 839–40.

receiving state or federal funds.[79] Texas, likewise, passed regulations denying funding to entities that "perform or promote elective abortions."[80] Other states, notably North Carolina and Utah,[81] attempted to specifically single out Planned Parenthood for defunding due to the organization's involvement with abortion.

These types of defunding measures present new challenges to the Court's holding that neither Congress nor states are required to subsidize abortion. While the Supreme Court rejected unconstitutional conditions-type arguments in *Rust*,[82] it appears these new laws and regulations do not fit *Rust*'s mold. The broad scope of the measures and the lengthy gap in time since the Court last heard a defunding case indicate that the constitutionality of defunding measures remains a topic rife with uncertainty. It also indicates an increasing likelihood that the Court will revisit this topic in the near future, with the terms of analysis remaining quite open.

C. Applying the doctrine in the lower courts

A brief review of how federal courts have applied *Rust* and the unconstitutional conditions doctrine to defunding cases reveals a lack of consistency in approach. But assessing these cases' varying approaches is useful for understanding the recurring types of challenges litigants face.

1. Cases upholding defunding measures

The Sixth Circuit upheld an Ohio law prohibiting public funds from going to entities that provide abortions.[83] The court described the unconstitutional conditions doctrine as turning "not on a freestanding prohibition against restricting public funds but on a pre-existing obligation not to violate constitutional rights."[84] It defined the right at play in the case as the right to be free from an "'undue burden' on a woman's access to an abortion before fetal viability."[85] Thus, Ohio may choose "not to subsidize [the] constitutionally protected" right to an abortion, but it cannot condition a benefit on requiring "recipients to sacrifice their constitutional rights."[86] The Ohio law is permissible because the "plaintiffs do not have a Fourteenth Amendment right to perform abortions."[87] So long as the law does not

79. Planned Parenthood of Ind., Inc. v. Comm'r of the Ind. State Dep't of Health, 699 F.3d 962, 967 (7th Cir. 2012).

80. Planned Parenthood Ass'n of Hidalgo Cty. Tex., Inc. v. Suehs, 692 F.3d 343, 346 (5th Cir. 2012).

81. Both of these provisions were struck down by federal courts. Planned Parenthood Ass'n of Utah v. Herbert, 828 F.3d 1245, 1262 (10th Cir. 2016); Planned Parenthood of Cent. N.C. v. Cansler, 804 F. Supp. 2d 482, 495–96 (M.D.N.C. 2011).

82. Rust v. Sullivan, 500 U.S. 173, 196 (1991).

83. Planned Parenthood of Greater Ohio v. Hodges, 917 F.3d 908, 910–11 (6th Cir. 2019) (en banc).

84. *Id.* at 911.

85. *Id.*

86. *Id.* at 912.

87. *Id.*

condition women's access to health programs on their refusal to have an abortion, it is not an unconstitutional condition.[88]

The Tenth Circuit views unconstitutional conditions cases as falling into two categories. First, there are conditions that prospectively limit a government benefit to only those who refrain from certain expression or association.[89] Second, there are conditions that act retrospectively through a discretionary executive action to terminate a government-provided benefit—typically employment or government contracts—in retaliation for constitutionally protected speech or association not favored by the executive.[90] Using this framework, the Tenth Circuit upheld a law restricting the eligible recipients for Title X sub-grants to public entities, hospitals, and federally qualified health centers, thereby (allegedly intentionally) excluding Planned Parenthood.[91] The court held that the law fit into neither of the categories. First, it did not prevent Planned Parenthood from engaging in abortion advocacy, and Planned Parenthood could still qualify under the statute if it expanded its services to meet the requirements.[92] Second, the case involved a law passed by the legislature, not a discretionary executive action, and therefore the motives for passing it were irrelevant.[93] The entity level framework presented in this Article refocuses on the harms suffered by the organization. In doing so, it presents an analysis in which these defunding laws can be construed as falling under "category one."

The Seventh Circuit upheld the constitutionality of an Indiana law prohibiting state or federal funds from going to entities that perform abortions or maintain facilities to perform abortions.[94] The court described the unconstitutional conditions doctrine as preventing the government from "awarding or withholding a public benefit for the purpose of coercing the beneficiary to give up a constitutional right or to penalize his exercise of a constitutional right."[95] It held that the right at issue in defunding measures "necessarily derives from a woman's constitutional right to obtain an abortion."[96] Because it was "settled law" that the government's refusal to directly subsidize abortion does not impermissibly burden the right to an abortion, Indiana banning other types of public subsidies for abortion providers did not present an unconstitutional condition that indirectly violated that right.[97]

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88. Judge White, joined by five other judges, dissented from the en banc opinion. *Id.* at 917 (White, J., dissenting). In short, she argued that because the funding conditions would amount to an undue burden if imposed directly on women, and the funded programs have nothing to do with abortion, the law presents an unconstitutional condition. *Id.*

89. *Moser*, 747 F.3d at 839.

90. *Id.*

91. *Id.* at 816, 843.

92. *Id.* at 839.

93. *Id.* at 839–40.

94. Planned Parenthood of Ind., Inc. v. Comm'r of the Ind. State Dep't of Health, 699 F.3d 962, 967 (7th Cir. 2012).

95. *Id.* at 986.

96. *Id.*

97. *Id.* at 969, 988.

The court did not view the ban on subsidies to any abortion provider as creating an undue burden, and thus, the government remained free to treat abortion providers differently from all other providers, even when funding would never have gone to abortions in any scenario.[98]

The Fifth Circuit first addressed defunding measures in *Planned Parenthood v. Sanchez*.[99] The case dealt with a challenge to a Texas regulation, "Rider 8," on Title X funds that provided that "no funds . . . shall be distributed to individuals or entities that perform elective abortion procedures or that contract with or provide funds to individuals or entities for the performance of elective abortion procedures."[100] The district court granted a preliminary injunction preventing the implementation of Rider 8 using an unconstitutional conditions analysis.[101] It held that Planned Parenthood demonstrated a likelihood of success on the merits for its claim that Rider 8 withheld funding from the organization because the organization engages in the constitutionally protected activity of providing abortions, even when using its own private funds.[102] The Fifth Circuit dissolved the preliminary injunction, finding that, although the district court's reading of the law was not implausible, "nothing in the plain language of Rider 8 precludes the creation of affiliates" that could use private funds to perform abortions.[103] The Fifth Circuit remanded with instructions that Planned Parenthood must demonstrate that the affiliate requirements would "so hinder their operations" as to create an "impermissible prohibition" on their ability to continue abortion services using their own funds.[104]

The Fifth Circuit revisited Texas defunding measures in *Planned Parenthood Association of Hidalgo County, Texas v. Suehs*.[105] This case involved regulations promulgated by a Texas "Medicaid-like" program that denied funding to any entity that performs or promotes abortion services.[106] The regulations contained a limited exception for affiliating only with a hospital that provides elective abortions—the organization could not create its own affiliate that provided abortion services.[107] The Fifth Circuit held that there was no unconstitutional condition.[108] Because the government is allowed to directly refuse to fund abortions, it can also refuse to provide grants that "indirectly" support abortion providers.[109] Texas'

98. *Id.*

99. 403 F.3d 324 (5th Cir. 2005).

100. *Id.* at 328.

101. Planned Parenthood of Hous. & Se. Tex. v. Sanchez, 280 F. Supp. 2d 590, 608–09 (W.D. Tex. 2003).

102. *Id.*

103. Planned Parenthood of Hous. & Se. Tex. v. Sanchez, 403 F.3d 324, 337, 343 (5th Cir. 2005).

104. *Id.* at 343.

105. 692 F.3d 343, 346–47 (5th Cir. 2012).

106. *Id.* at 346.

107. *Id.* at 347.

108. *Id.* at 349.

109. *Id.* at 349–50.

policy choice to not endorse abortion would be rendered "meaningless if it were forced to enlist organizations as health care providers and message-bearers that were also abortion advocates."[110] Thus, the restrictions were within the state's appropriate control of its program.[111] The court acknowledged *Sanchez* only in a footnote explaining that plaintiff Planned Parenthood already maintained an affiliate for providing abortions in conformance with *Sanchez*, which, prior to the new restrictions, had been sufficient.[112]

These two cases highlight the degree to which the affiliate requirement is in flux under the current state of the law. *Sanchez* shows the allowance of affiliates can be used to uphold even highly restrictive laws, so long as there is at least a hypothetical option for an affiliate organization. *Suehs* seems to broaden the affiliate exception to make a law permissible so long as it allows even just the smallest avenue for affiliation. Although *Suehs* does not purport to overrule *Sanchez*, it appears at minimum in tension over the importance of being allowed to maintain an affiliate that provides abortion.

The Eighth Circuit upheld an act that prohibited entities that provide or promote abortion services from acquiring any family-planning funds.[113] The court emphasized, however, that nothing in the act expressly prohibited grantees from maintaining an affiliation with an abortion provider and from engaging in abortion advocacy if it is fully outside the scope of the program.[114] It specifically noted that if the court interpreted the act to prohibit grantees from having any affiliation with abortion providers, it would be an unconstitutional condition.[115]

2. Cases striking down defunding measures

The Tenth Circuit, in *Planned Parenthood Association of Utah v. Herbert*, used the same two-category framework discussed earlier to strike down a directive issued by the Utah governor to stop federal funds in the state from going to Planned Parenthood.[116] The directive was made in response to videos released by an organization called the Center for Medical Progress that "selectively edited . . . Planned Parenthood staff members discussing the health care provider's fetal tissue donation program" to make it appear, according to the Center, that some Planned Parenthoods were profiting off selling fetal tissue from abortions.[117] But it was undisputed that the Planned Parenthood office at issue in Herbert was never accused of misusing federal funds, nor was it directly implicated by the videos in

110. *Id.* at 350.
111. *Id.*
112. *Id.* at 347 n.3.
113. Planned Parenthood of Mid-Missouri & E. Kan., Inc. v. Dempsey, 167 F.3d 458, 460 (8th Cir. 1999).
114. *Id.* at 463.
115. *Id.*
116. Planned Parenthood Ass'n of Utah v. Herbert, 828 F.3d 1245 (10th Cir. 2016).
117. *Id.* at 1250.

any way.[118] The court found that this directive "fit comfortably" within the second category of cases, because issuing the defunding directive was a discretionary executive action to terminate Planned Parenthood's contracts that was motivated by the organization's association with abortion.[119] The action therefore was an unconstitutional condition.

Several district courts have also struck down defunding measures. In two of those cases, like in *Herbert*, Planned Parenthood was specifically singled out for negative treatment.[120] First, in Tennessee, Planned Parenthood's existing contracts with the state for services such as sexually transmitted disease testing were unilaterally revoked.[121] Strong evidence established that the intent was to punish Planned Parenthood for its abortion advocacy.[122] The district court thus held the revocation was a penalty on constitutionally protected activity and speech by the plaintiffs, thereby making it unconstitutional.[123] Second, in North Carolina, a law cut funding only to Planned Parenthood, by name, for all types of programs and grants.[124] The court held that while a state may choose to completely not fund abortion, it cannot bar an entity from benefits it would otherwise be eligible for just on the basis of their unrelated, legal conduct.[125]

The Northern District of Florida struck down a similar defunding measure that forbade granting any funds to entities that own, operate, or are affiliated with abortion providers.[126] The court held that the funds were refused "solely because the recipients of the funds choose to provide abortions separate and apart from any public funding."[127] Because the state cannot constitutionally forbid an entity from providing abortions using private funds, it also cannot try to indirectly achieve this end.[128]

3. Implications of the lower court decisions

Every circuit that has addressed a general abortion defunding measure has upheld it.[129] The only time a circuit struck down a law was when the law specifically targeted Planned Parenthood. But despite the similarity in outcomes, there is a significant degree of variation amongst courts' reasoning.

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118. *Id.* at 1251.

119. *Id.* at 1259.

120. Planned Parenthood Greater Memphis Region v. Dreyzehner, No. 3:12-cv-00139, 2013 U.S. Dist. LEXIS 40420, at *11 (M.D. Tenn. Mar. 13, 2013); Planned Parenthood of Cent. N.C. v. Cansler, 804 F. Supp. 2d 482, 484 (M.D.N.C. 2011).

121. *Dreyzehner*, 2013 U.S. Dist. LEXIS 40420, at *41–42.

122. *Id.*

123. *Id.* at *45–46.

124. *Cansler*, 804 F. Supp. 2d at 485.

125. *Id.* at 494.

126. Planned Parenthood of Sw. & Cent. Fla. v. Philip, 194 F. Supp. 3d 1213, 1215, 1224 (N.D. Fla. 2016).

127. *Id.* at 1216.

128. *Id.* at 1216–17.

129. *See supra* Section II.C.

The allowable degree of separation and disaffiliation between the grant recipient and the abortion provider is where the most variation in reasoning can be seen. For example, the Eighth Circuit noted in dicta that prohibiting entities from any type of affiliation with abortion providers would present an unconstitutional condition.[130] The Fifth Circuit in *Sanchez* implicitly agreed with the lower court that, had any affiliation with abortion providers been forbidden, it would have been unconstitutional—the court disagreed, however, that such a ban on affiliation was present.[131] Yet, seven years later, the Fifth Circuit upheld a restriction that did essentially that, indicating either a disagreement with the prior panel, or at the very least, uncertainty as to how far the limitation runs.[132]

The most common justification given by courts upholding these laws is that because it is constitutional to not fund abortion at all, it is equally constitutional to not provide any funding to abortion providers, even if the funding would never be used for abortions. In short, this reasoning views a law forbidding any affiliation between a grant recipient and abortion provider as a proper extension of *Rust*'s holding that grant recipients may be forbidden from so much as recommending that a client serviced within the scope of the grant visit a separate entity to have an abortion.[133] Much of the force behind this argument stems from *Rust*'s emphasis that the state need not be neutral between abortion and childbirth, and that there is no constitutional entitlement to having abortion funded.[134]

It is, at best, unclear that these new regulations aiming to limit all or most affiliation comport with the holding of *Rust v. Sullivan*. These types of restrictions might best be viewed not as an extension of *Rust*, but as something fundamentally different that prohibits conduct squarely outside the scope of the grant. Indeed, *Rust* is explicit that part of why the Hyde Amendment was permissible was that Congress, consistent with the Court's prior precedents, did not deny entities the right to engage in abortion-related activities, but instead merely refused to directly fund the activities.[135] Most of the defunding measures passed or proposed in recent years severely limit (or even totally eliminate) the ability of providers to maintain separate facilities for abortion while still receiving state funds. The laws impose continually higher standards of separation that pose significant problems for the organizations.[136] Upholding these laws is not a straightforward application of *Rust* in the way that *Harris* was a straightforward application of *Maher*.

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130. Planned Parenthood of Mid-Missouri & E. Kan., Inc. v. Dempsey, 167 F.3d 458, 463 (8th Cir. 1999).

131. Planned Parenthood of Hous. & Se. Tex. v. Sanchez, 403 F.3d 324, 338, 341–42 (5th Cir. 2005).

132. Planned Parenthood Ass'n of Hidalgo Cty. Tex., Inc. v. Suehs, 692 F.3d 343, 349 (5th Cir. 2012).

133. *Cf.* Planned Parenthood of Ind., Inc. v. Comm'r of the Ind. State Dep't of Health, 699 F.3d 962, 987–88 (7th Cir. 2012).

134. Rust v. Sullivan, 500 U.S. 173, 201 (1991).

135. *Id.* at 196–97.

136. Thomas Berg & Douglas Laycock, *The Mistakes in* Locke v. Davey *and the Future of State Payments for Services Provided by Religious Institutions*, 40 TULSA L. REV. 227, 237 (2004).

Ultimately, the law on new defunding measures remains highly unsettled. Courts lack a unified reasoning. Although many discuss the unconstitutional conditions doctrine, they vary in how they conceptualize both the doctrine itself and the underlying rights as they apply to defunding. So long as the text of the statute itself appears neutral, it is currently legal in many circuits for states to explicitly deny funding to abortion providers that offer other, unrelated medical services on the grounds that they allocate private funds to constitutionally protected abortions.[137] This inconsistency and uncertainty calls for a clearer approach that deals with the competing interests of the challenged entity in providing abortions and of the state in, if it chooses, encouraging childbirth over abortion.

III. A NEW APPROACH: TURNING TO THE RELIGION CLAUSES AND *TRINITY LUTHERAN*

A. Unconstitutional conditions and the religion clauses

Defunding cases are typically litigated under the Fourteenth Amendment's Substantive Due Process clause and the First Amendment's Speech and Association clauses.[138] Most analysis is thus drawn primarily by analogy to other cases in those areas. The value the religion clauses offer for analyzing defunding cases has been vastly under-recognized. The religion clauses contain two components that, in most analyses, weigh against each other. Put simply, the Free Exercise Clause forbids the government from penalizing religious activity, and the Establishment Clause forbids the government from taking any steps to formally endorse religious activity.[139] Famously, there must be a "wall of separation between Church and State."[140] Under the Establishment Clause, the government is constrained in how it can spend its money, as using taxpayer money to directly support explicitly religious endeavors is considered a distinctive harm under the Constitution.[141] At the same time, however, the amendment confers special protections to religion through the Free Exercise Clause. For example, states cannot deny benefits to persons who are unemployed due to religious reasons, but can deny such benefits to persons unemployed for other reasons.[142] In between these two outer limits, there is space where the state can make laws that touch on or impact religion without

137. *See* Ziegler, *Sexing Harris*, *supra* note 17, at 741. *See also supra* Section II.C.

138. *See, e.g.*, *Planned Parenthood of Ind., Inc.*, 699 F.3d at 986–87.

139. *See* Michael W. McConnell, *Unconstitutional Conditions: Unrecognized Implications for the Establishment Clause*, 26 SAN DIEGO L. REV. 255, 264 (1989).

140. Everson v. Bd. of Educ., 330 U.S. 1, 15–16 (1947).

141. Sunstein, *supra* note 11, at 609.

142. *See* Sherbert v. Verner, 374 U.S. 398, 406 (1963); McConnell, *Unconstitutional Conditions*, *supra* note 139, at 255. For a discussion of the general evolution of the Court's approach to funding in the religion clause context, *see* Laycock, *Theology Scholarships*, *supra* note 7, at 164–66.

violating either clause. As it is often put, there is "play in the joints" between the clauses.[143]

It can be easy to instinctively dismiss the religion clauses as special and unique among protections in the Constitution, as even the Supreme Court appears to have done in dicta.[144] This is, however, a mistake. Although the dual nature of the Establishment Clause and Free Exercise Clause make the protections over religion somewhat distinctive, the basic functioning when it comes to unconstitutional conditions remains structurally comparable. Particularly within the realm of the Free Exercise Clause, unconstitutional conditions cases operate in their most standard form. Would-be recipients are in effect told that in order to receive the benefit, they must give up an otherwise constitutionally protected right.[145] While the dual role of the Establishment Clause and Free Exercise Clause may make religion a somewhat different form of protection from other constitutional rights, the crux of the debate is over whether a regulation places an unconstitutional condition on free exercise only, leaving the operation of the doctrine analytically the same.[146]

B. The religion clauses and abortion compared

The religion clauses and the right to an abortion are, in fact, particularly analogous to each other in ways that have not been fully appreciated. In religious liberties cases, courts are regularly forced to grapple with the dual roles of the clauses. The nature of the underlying right requires an analysis of whether the state is providing too much support to religion in such a way as to intermingle church and state, while at the same time respecting a competing need to ensure government regulations are not burdening individuals' right to practice their religion fully. In abortion cases, the nature of the underlying right requires courts to respect states' ability to favor childbirth over abortion if they so choose, while at the same time balancing an individual's right to access an abortion without the state placing an undue burden on that choice. In both of these areas, funding measures must be judged against explicitly competing interests. The nature of the interests on either side is admittedly not identical, given that the state is allowed to take a position for or against abortion but must remain neutral on religion.[147] However, the inherent need for balancing interests that seemingly compete with each other makes the religion clauses a clearer point of analysis for the unconstitutional conditions doctrine in the abortion context than other clauses, like free speech or association.

143. Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2019 (2017); Cutter v. Wilkinson, 544 U.S. 709, 713 (2005); Locke v. Davey, 540 U.S. 712, 718 (2004).

144. Sullivan, *supra* note 6, at 1438 (citing Lyng v. Int'l Union, UAW, 485 U.S. 360 (1988)).

145. *Id.* at 1421–22.

146. For an in-depth analysis of how the unconstitutional conditions doctrine interacts with the religion clauses, particularly the Establishment Clause, see McConnell, *Unconstitutional Conditions*, *supra* note 139.

147. Laycock, *Theology Scholarships*, *supra* note 7, at 176.

In the free speech context, for example, the operation of the right is relatively straightforward: the government cannot interfere with your speech. Likewise, the application of the unconstitutional conditions doctrine to free speech is straightforward: the government cannot condition your right to speak based on whether or not you vocalize a specific idea. Its application to religion and abortion, by contrast, is not so straightforward. Take, for example, *Locke v. Davey*. The plaintiff wanted to use a state scholarship in part to train to be a member of the clergy.[148] The Court ruled in favor of the state, holding that it did not violate the plaintiff's free exercise rights to deny him the ability to use his scholarship for such training.[149] Granting the scholarship would not have violated the Establishment Clause—but the Court held that the "State's interest in not funding the pursuit of devotional degrees is substantial," and it was therefore acceptable for the State to require a higher degree of separation between church and state than the baseline required by the Establishment Clause.[150] The State cannot penalize the exercise of religion, but it can require a greater amount of separation between its funds and religious activity.[151] This interest is parallel to the interest in abortion unconstitutional conditions cases. The State cannot penalize or outlaw abortions, but it does have an interest it may fully pursue in not funding abortion procedures or counseling.[152]

The analogy goes one step further: in both the religion and abortion contexts, there are explicit restrictions on whether the money can ever be allocated to the ultimate activity at issue. In the religion context, the Establishment Clause generally restricts the government from directly funding and supporting explicitly religious endeavors. In the abortion context, the Hyde Amendment prevents the government from directly funding abortion procedures. Thus, while one is a constitutional restriction and the other is statutory, the operative effect of both is to restrict funding of the right at issue. The circuit courts that have taken on defunding cases seem to undervalue the role of the Hyde Amendment and the distinction between whether a state may refuse to fund abortion and whether a state may refuse to fund non-abortion services offered by an abortion provider.[153] Using the parallel restriction in the religion clauses as an analogy can help avoid this conflation.

148. *Locke*, 540 U.S. 712.

149. *Id.* at 725.

150. *Id.* (emphasis added).

151. Religious liberties scholar Professor Douglas Laycock argues that, although not cited, the Court in *Locke* is pulling its analysis directly from *Rust*, a reliance he believes is flawed. One of his arguments is that, while the Court has never required neutrality towards abortion, the religion clauses create a "right to government neutrality." Laycock, *Theology Scholarships*, *supra* note 7, at 176–77. In focusing on strict neutrality, however, this argument does not account for the broader comparisons that can be drawn relating to the outer bounds of what the government can and cannot do, and the ways in which the government can express policy interests in both scenarios.

152. Rust v. Sullivan, 500 U.S. 173, 192–93 (1991).

153. *See supra* Section II.C.

C. Trinity Lutheran *as a model for defunding litigation*

With the background similarities between the religion clauses and right to an abortion in mind, one of the most recent Supreme Court cases to deal with unconstitutional conditions, *Trinity Lutheran v. Comer*, provides a fruitful model for understanding and applying the doctrine in the abortion defunding context.[154]

1. Factual parallels between Trinity Lutheran *and defunding measures*

Trinity Lutheran is a church that also operates a childcare center ("the Center").[155] The Center applied for a grant from the Missouri Department of Natural Resources ("the Department") to replace the gravel on its playground with recycled rubber.[156] The Department had a categorical policy of denying grants to applicants that were owned or controlled by a church.[157] Thus, even though the Center would otherwise have been eligible for a grant, it was denied because it was church-owned.[158] The similarity of this fact pattern to abortion defunding cases is striking. Many defunding laws categorically ban abortion providers from receiving funding for any projects because they provide abortions.[159] In both scenarios, the funds at issue would not go towards the specific prohibited activity (religion or abortion), but the ban is placed categorically on entities that provide the prohibited activity in other contexts to create a higher level of separation. In *Trinity Lutheran*, both parties agreed that allowing the Center to have the grant would not present an Establishment Clause violation because the money was not going to a religious purpose—it was going to a playground.[160] The question before the Court was not whether awarding a grant to the Center would create an establishment of religion, but whether denying the grant to the Center on the grounds that it was a church violated the free exercise of religion. This concern is comparable to the one raised in the defunding context: does denying funding to an entity because it provides abortions violate the Constitution?[161] The issue is not whether the state

154. The Court does not explicitly invoke the unconstitutional conditions doctrine in this case. However, its analysis closely maps traditional unconstitutional conditions analysis.

155. Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2017 (2017).

156. *Id.*

157. *Id.*

158. *Id.* at 2018.

159. *See, e.g.*, Planned Parenthood Ass'n of Hidalgo Cty. Tex., Inc. v. Suehs, 692 F.3d 343, 346 (5th Cir. 2012).

160. *Trinity Lutheran*, 137 S. Ct. at 2019. Justices Thomas and Gorsuch did not sign on to a footnote in the majority opinion limiting the opinion only to playgrounds. In his concurrence, Justice Thomas suggests that a line between religious and non-religious use of funds would be untenable. *Id.* at 2025 (Thomas, J., concurring).

161. *Id*. at 2019.

is allowed to deny funding to abortion, but whether the state imposes an unconstitutional condition on an entity providing a protected right[162] by categorically denying it a benefit.

2. Applying the analysis at the entity level: use versus status

Trinity Lutheran's religious status is key to the Court's holding, a framing that is useful for understanding how the condition operates. The Court explains that the Free Exercise Clause "subjects to the strictest scrutiny laws that target the religious for 'special disabilities' based on their 'religious status.'"[163] It cites to an earlier case, *McDaniel v. Paty*, when the Court struck down a statute that forbade ministers from participating in a political convention.[164] The result was that the plaintiff could not participate while maintaining his role as a minister: "[T]o pursue one, he would have to give up the other."[165] This, the Court held, effectively penalized the free exercise of his constitutional liberties; the law denied him a benefit solely because of his "status as a 'minister.'"[166] Likewise, in *Trinity Lutheran*, the Department's policy expressly discriminated against otherwise eligible recipients by disqualifying them from a benefit solely because of their religious character.[167]

The Court made this status argument even clearer when it distinguished *Trinity Lutheran* from *Locke v. Davey*. In *Locke*, the Court upheld the exclusion of devotional theology majors from a state scholarship program.[168] The Court explained that "Davey was not denied a scholarship because of who he was; he was denied a scholarship because of what he proposed to do—use the funds to prepare

162. The unconstitutional conditions doctrine requires the condition impact an underlying protected right. Most often in defunding cases, the underlying right is conceived as either the right to an abortion or the right to associate with abortion providers. There is some degree of mismatch in defunding cases because the entity or doctors providing the abortion often are the ones to bring these cases, not the women seeking an abortion. That was the case in *Rust v. Sullivan*; doctors raised both their own First Amendment Rights and their patients' Fourteenth Amendment Rights. *Rust v. Sullivan*, 500 U.S. 173, 181 (1991). The Court gave no indication that this distinction was in any way meaningful for the purposes of the unconstitutional conditions doctrine. *See also* Planned Parenthood of Greater Ohio v. Hodges, 917 F.3d 908, 918 (6th Cir. 2019) (White, J., dissenting) ("An abortion provider's constitutional right may be derivative of the patient's right—but it is a right nonetheless."). Ultimately, this Article does not rely heavily on the nature of the underlying right and who holds it. Instead, it focuses on the way in which new laws are leveraging a protected right to force entities into a choice.

163. *Trinity Lutheran*, 137 S. Ct. at 2019. While Free Exercise claims face a more rigorous standard of review than abortion cases do (strict scrutiny versus undue burden), that does not significantly impact this analysis. Instead, as will be explained in further detail, the analysis argued for here deals not per se with the rigor of review of the underlying right, but instead with the choice the entity is forced to make. Thus, the basic analysis, conducted against the backdrop of restraint set out by the Establishment Clause, remains wholly applicable.

164. *Id.* at 2020 (citing McDaniel v. Paty, 435 U.S. 618, 627 (1978)).

165. *Id.* (citing *McDaniel*, 435 U.S. at 627).

166. *Id.* (citing *McDaniel*, 435 U.S. at 627 (emphasis in original)).

167. *Id.* at 2021.

168. Locke v. Davey, 540 U.S. 712, 715 (2004).

for the ministry. Here there is no question that Trinity Lutheran was denied a grant simply because of what it is—a church."[169] In essence, in *Locke*, the plaintiff sought to use state funds specifically for a religious endeavor, which is the potentially problematic activity. Such action can be regulated without violating the Free Exercise Clause. In *Trinity Lutheran*, the Center (owned by the church) sought to use state money to fix a playground, which is not restricted by the Constitution. Thus, prohibiting churches from accessing the funds was a problem.

This analysis provides a significantly clearer way to think about what is at issue in defunding cases than previous approaches did. The federal funds, such as Title X grants, that abortion providers seek do not and cannot go towards abortions.[170] Courts frequently acknowledge that there have been no credible allegations that Planned Parenthood has or will use those funds for purposes that violate the Hyde Amendment.[171] Thus, this scenario is not comparable to *Locke*, where the issue centers on what the applicant wanted to do with the state's money. Instead, it is analogous to *Trinity Lutheran*, where the issue is who the applicant was. Most of the state and federal provisions deny all funding to abortion providers because they are abortion providers. Thus, this scenario is no longer a "use" problem, as it was in *Rust*. Instead, it is a status issue. The state is penalizing the mere status of providing constitutionally protected abortions.[172]

Forced choice also plays a central role in the Court's status analysis, highlighting the unconstitutional conditions nature of the case. The Court took issue with the choice the Department policy forced the church to make: "It may participate in an otherwise available benefit program or remain a religious institution."[173] While Trinity Lutheran was free to continue being a church—just as the plaintiff in *McDaniel* was free to continue being a minister—that freedom was at the cost of "automatic and absolute exclusion from the benefits of a public program for which the Center is otherwise fully qualified."[174] According to the Court, when a state "conditions a benefit" in this way, it plainly punishes the free exercise

169. *Trinity Lutheran*, 137 S. Ct. at 2023.

170. This is due to the Hyde Amendment. Family Planning Services and Population Research Act of 1970, Pub. L. 91-572, 84 Stat. 1504; 42 C.F.R. § 59.205 (2011).

171. *See*, *e.g.*, Planned Parenthood Ass'n of Utah v. Herbert, 828 F.3d 1245, 1251 (10th Cir. 2016); Planned Parenthood of Ind., Inc. v. Comm'r of the Ind. State Dep't of Health, 699 F.3d 962, 967 (7th Cir. 2012).

172. Many defunding proponents raise the "fungibility" argument: even if the grant is not going directly towards abortion, it "frees up" money for the entity that it would have otherwise spent on the funded services, thus facilitating the provision of abortions. Particularly when there is no evidence to back up this proposition, the Court has in other unconstitutional conditions cases decisively rejected the validity of this argument. *See* Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l, Inc., 570 U.S. 205, 220 ("[The fungibility argument] assumes that federal funding will simply supplant private funding, rather than pay for new programs or expand existing ones. The Government offers no support for that assumption as a general matter, or any reason to believe it is true here. And if the Government's argument were correct, *League of Women Voters* would have come out differently, and much of the reasoning of *Regan* and *Rust* would have been beside the point.").

173. *Trinity Lutheran*, 137 S. Ct. at 2021–22.

174. *Id.* at 2022.

of religion.[175] This choice is arguably far more salient for organizations like Planned Parenthood than it was for Trinity Lutheran. In *Trinity Lutheran*, the issue was mainly conceptual—it is highly unlikely that the Church would have given up its church status for the sole purpose of resurfacing its playground, but it was theoretically forced to make that choice. The stakes are much higher in abortion defunding cases, when government funds are often necessary to the facility's provision of key non-abortion healthcare services. Clinics use government grants to fund family planning and sexually transmitted infection screenings, among other services, that are central to the organizations' missions.[176] In many cases, the entities facing defunding have been running these healthcare programs for years and could be forced to shut down services to millions of patients if defunded.[177] Far from merely conceptual, the choice faced by providers is akin to an ultimatum: either they continue providing abortions or continue providing other well-funded family planning and sexual health services.[178] The burden and difficulty of that choice is neither hypothetical nor minimal.

3. Reframing subsidization: community membership

Trinity Lutheran also provides a clear way for thinking about how government subsidization fits into analyzing defunding measures and unconstitutional conditions. The Department argued in *Trinity Lutheran* that the Center was seeking an entitlement to a subsidy, and no entity held such a constitutional entitlement.[179] This is likewise raised regularly in the defunding context, on the grounds that Planned Parenthood is not entitled to a government subsidy (for abortion or otherwise) via Title X funding.[180] In *Trinity Lutheran*, however, the Court reframed the issue not as an entitlement to a subsidy, but as a "right to participate in a government benefit program without having to disavow its religious character."[181] The discrimination against religious exercise was not the denial of the

175. *Id.*

176. *See* Planned Parenthood Greater Memphis Region v. Dreyzehner, No. 3:12-cv-00139, 2013 U.S. Dist. LEXIS 40420, at *11 (M.D. Tenn. Mar. 13, 2013) (discussing termination of Planned Parenthood's contract with the state to provide services such as sexually transmitted disease screening); *Mission*, PLANNED PARENTHOOD, https://www.plannedparenthood.org/about-us/who-we-are/mission [https://perma.cc/MR5F-WTBQ].

177. *See, e.g.*, *The Impact of Defunding Planned Parenthood*, I STAND WITH PLANNED PARENTHOOD, https://www.istandwithpp.org/defund-defined/impact-defunding-planned-parenthood [https://perma.cc/QQP8-QJZG].

178. It is worth noting that even if the regulation does not succeed in actually forcing an entity to stop providing abortions, it nonetheless remains an unconstitutional condition if the goal was to coerce that outcome. *Cf.* Koontz v. St. Johns River Water Mgmt. Dist., 570 U.S. 595, 606 (2013) (explaining that "regardless of whether the government ultimately succeeds in pressuring someone into forfeiting a constitutional right, the unconstitutional conditions doctrine forbids burdening the Constitution's enumerated rights by coercively withholding benefits from those who exercise them").

179. *Trinity Lutheran*, 137 S. Ct. at 2022.

180. *See* Rust v. Sullivan, 500 U.S. 173, 201 (1991).

181. *Trinity Lutheran*, 137 S. Ct. at 2022.

grant per se, but instead the state's refusal to allow the Church to compete with secular organizations for a grant.[182] Because Trinity Lutheran was a member of the community, and not just because it was a church, the Court found the grant denial to be particularly problematic.[183]

The Court already established the baseline for abortion funding: women have no constitutional entitlement to a subsidy for an abortion.[184] No matter the type of entity, if the activity at issue is abortion, the Hyde Amendment constitutionally denies funding under Title X. However, the subsidy issue presented in broader defunding measures that seek to disqualify abortion providers from all grants is more comparable to the argument leveraged against Trinity Lutheran than it is to challenges to the Hyde Amendment. Just as Trinity Lutheran likely would not have a right to a subsidy if it sought to use it for explicitly religious purposes, organizations do not have a right to a subsidy if they seek to use it to provide abortions. However, that should not impact whether the organization can compete on equal footing for other types of grants—hence why Trinity Lutheran had to be allowed to compete for grants for non-religious uses. This reframes the issue from one of women having no individual right to a subsidized abortion to the more cognizable harm of an organization having a right to compete for grants, something the Court in *Trinity Lutheran* said must be assessed with the "strictest scrutiny."[185]

4. The role of targeting

Finally, there is an underlying concern throughout *Trinity Lutheran* with singling out an organization for negative treatment. The status argument in particular highlights the Court's focus in religion clause cases on the distinction between laws that are neutral and apply without regard to religion, and laws that single out the religious for disfavored treatment.[186] The Department's policy was found to single out religious entities for negative treatment. Once reframed as an entity-level issue, the same problem arises in the defunding cases. The cases do not reflect neutral laws regulating Title X funding, nor are they circumscribed efforts to promote childbirth. Instead, the laws and regulations single out entities that provide a constitutionally protected right because they provide that right. Thus, for all the reasons tied into the analysis above, this presents an entity-level issue distinct from the individual right to an abortion.

182. *Id.*

183. *Id.*

184. Harris v. McRae, 448 U.S. 297, 316–19 (1980).

185. The Court, as emphasized in *Trinity Lutheran*, has recognized this type of harm in other scenarios beyond religion. For example, it recognized an injury-in-fact stemming from the inability of independent contractors to compete on an equal footing in a bidding contract. It was the loss of equal *opportunity*, not the loss of the contract, that presented the issue. *Trinity Lutheran*, 137 S. Ct. at 2022 (citing Ne. Fla. Chapter, Assoc. Gen. Contractors of Am. v. Jacksonville, 508 U.S. 656, 666 (1993)).

186. *Id.* at 2020.

IV. ADVANTAGES OF THE ENTITY-BASED APPROACH

Using *Trinity Lutheran* and the religion clauses as a model allows a clearer application of the unconstitutional conditions doctrine to the unique aspects of defunding. Courts applying the doctrine have often focused on the underlying right to an abortion. For example, the Seventh Circuit defined the first step in an unconstitutional conditions claim as identifying the nature and scope of the arguably imperiled constitutional right.[187] It wrote, "Planned Parenthood's unconstitutional-conditions claim necessarily derives from a woman's constitutional right to obtain an abortion."[188] However, apparent here is a mismatch: the entity forced to make the choice is not the woman—her choice is circumscribed by the Hyde Amendment and other restrictions on Medicaid reimbursement for abortions. Instead, the issue as properly defined is over the provider's right as an entity to compete for grants while still offering constitutionally protected abortions using private funding. Understood this way, the nature of the constitutional protection of the underlying service for which an entity is punished becomes far less important. The state may continue to prefer childbirth over abortion, but the entity has a broader right to compete on equal footing for funding in other areas. This analysis also addresses the Seventh Circuit's argument that, because it is constitutional to not fund abortion directly, it is also constitutional to refuse to fund abortion indirectly.[189] By shifting the analysis to the entity-level choice, the issue is no longer whether the refusal to fund is an impediment on the right to an abortion itself.[190] The Seventh Circuit missed a key facet of how and to whom the forced choice applied.

Trinity Lutheran thus provides a cohesive rationale for how to think about these types of claims from the entity, not individual, level. On the entity level, looking at a distinction between status and use of funding is fruitful for understanding what exact condition is being placed. This analysis overcomes one of the major shortcomings of *Rust*, when the Court suggests that funding conditions might only be unconstitutional if they force the grantee to give up the constitutionally protected activity in question.[191] The Court seems to explain in cases like *Rust* that, so long as the speaker is left in the same position as they would be in were there to be no state funding at all, the subsidization scheme is acceptable.[192]

187. Planned Parenthood of Ind., Inc. v. Comm'r of the Ind. State Dep't of Health, 699 F.3d 962, 986 (7th Cir. 2012).

188. *Id.*

189. *Id.* at 969. *See also* Planned Parenthood Ass'n of Hidalgo Cty. Tex., Inc. v. Suehs, 692 F.3d 343, 346–47 (5th Cir. 2012).

190. The fact that the providers are being penalized for performing abortions does of course matter, as abortion is the constitutionally protected right. However, the relevant problematic behavior is the state denying abortion providers the ability to compete with non-providers for grants.

191. Rust v. Sullivan, 500 U.S. 173, 196 (1991); Ziegler, *Sexing Harris*, *supra* note 17, at 741–42.

192. *Id.*

This analysis may work for the individual choice. Denying Medicaid reimbursement to an indigent woman seeking an abortion does not force her to choose between getting the abortion or getting benefits for something non-pregnancy related. Rather, it leaves her in a position as if she had no Medicaid benefits.[193] But, as explained above, *Trinity Lutheran* made it clear that this is not how the analysis should run when the issue is an entity's provision of a protected service and access to unrelated grant funding. The question is not whether the entity is forced to give something up, but instead whether it, as a member of the community, is forced to make a choice based on its status.[194] This alters the issue of baselines presented by the Medicaid/abortion discussion.[195] The baseline becomes one of equal access by entities in the community to grant programs, without penalizing them for their status as a provider of a protected activity. The concern is that these measures strip an entity of its ability to compete for non-abortion-related grants—a form of exclusion that is problematic under the Court's jurisprudence.[196]

Refocusing the issue to highlight the entity's access to funding helps overcome the unique challenges presented by the right to abortion that plague defunding litigation. It is well established that the state does not have to be neutral in its disposition toward abortion and childbirth.[197] As such, the state is not required to fund abortions, nor does it have to use any of its resources to advise women that abortion is a potential option. However, that does not mean the state can leverage funding for other procedures to prevent entities from performing abortions, which is exactly what newer defunding measures attempt to do. This type of analysis is neither wholly novel nor constrained to the religious liberty setting. In *Agency for International Development v. Alliance for Open Society International*, for example, the Court emphasized that Congress cannot place conditions on subsidized activities to regulate speech outside of the program itself.[198] The Court used *Rust* as a specific example in laying out the contours of this rule, explaining that *Rust* stands for the proposition "that Congress can, without offending the Constitution, selectively fund certain programs to address an issue of public concern, without funding alternative ways of addressing the same problem."[199] It struck down the regulations in *Agency for International Development* precisely because the regulations impacted speech that went beyond the scope of the grant.[200] Thus, the type of argument the Court made in *Trinity Lutheran* is fully applicable to other types

193. Indeed, the Court has stated that to force her to make such a choice would be unconstitutional. Harris v. McRae, 448 U.S. 297, 317, n.19 (1980).

194. Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2020 (2017).

195. Sunstein, *supra* note 11, at 602–03.

196. *Trinity Lutheran*, 137 S. Ct. at 2022. *See also* Ne. Fla. Chapter, Assoc. Gen. Contractors of Am. v. Jacksonville, 508 U.S. 656, 666 (1993) (holding that mere inability to compete for a contract on an equal basis constitutes a cognizable injury for purposes of standing).

197. *McRae*, 448 U.S. at 314.

198. Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l, Inc., 570 U.S. 205, 214–15 (2013). *See also* FCC v. League of Women Voters, 468 U.S. 364, 400 (1984).

199. *Agency for Int'l Dev.*, 570 U.S. 205 at 217.

200. *Id.*

of unconstitutional conditions cases that deal with regulation of rights outside of the religion context.

As *Agency for International Development* highlights, the framework presented in this Article is not incompatible with the Court's analysis in *Rust*—both can co-exist. This framework instead simply provides a clearer way to understand the competing interests when courts are faced with increasingly restrictive defunding laws. The weight of the state's interest in providing no funding whatsoever to entities that provide abortions will require much more rigorous scrutiny when the issue is one of categorical denial of all funding based on both the entity's status as a provider of a protected right and its place within the community. This is a restriction the Court held to be uniquely concerning. Therefore, because of both the parallel workings of the religious liberty clauses and equal access within the community arguments explained above, *Trinity Lutheran* provides the best model for applying the unconstitutional conditions doctrine to restrictions based on the services an entity provides.

The clarity this approach provides can particularly be seen when it is applied to the Tenth Circuit's "two categories" framework.[201] Analyzed as forcing the entity to choose between continuing to operate as an abortion provider and receiving funding for other programs, the claim now fits far more comfortably into category one, acts that prospectively limit a government-provided benefit to those who refrain from certain types of expression or association.[202] It also captures, however, something more that was missing from the Tenth Circuit's analysis: on the entity level, as *Trinity Lutheran* and other related cases show, it can be the choice, in and of itself, that poses the problem. The Tenth Circuit's approach fails to adequately account for the ways in which the unconstitutional conditions doctrine operates to protect entities, not just individuals. Thus, turning to *Trinity Lutheran* and the religion clauses both highlights a major shortcoming of the current approach to applying the doctrine to defunding cases and shows how this approach can create clearer, better answers.

V. CONCLUSION

It has been over 25 years since the Supreme Court squarely addressed the constitutionality of an act intended to strip government funding from abortion providers. In the time since, the defunding movement has switched its focus from defunding abortion specifically to defunding all services provided by an entity that also provides abortions.[203] All of the circuit courts that heard blanket challenges to defunding measures have upheld them.[204] Much of their analyses hinged on the

201. Planned Parenthood of Kan. & Mid-Missouri v. Moser, 747 F.3d 814, 839 (10th Cir. 2014).

202. *Id.*

203. *See supra* Section I.A.

204. Planned Parenthood of Hous. & Se. Tex. v. Sanchez, 403 F.3d 324, 342 (5th Cir. 2005); Planned Parenthood of Greater Ohio v. Hodges, 917 F.3d 908, 916–17 (6th Cir. 2019) (en banc);

nature of the right to an abortion—a right qualified by the state's right to explicitly advocate for childbirth instead.[205] This Article calls for a new approach to analyzing defunding measures. By looking through the framing of the Supreme Court's most recent religious liberties decision, *Trinity Lutheran v. Comer*, one can see the way in which broad defunding measures force entities to make a choice between accessing generally available public funding and retaining their status as a provider of a constitutionally protected right.[206] It is precisely here, at the entity level, that the new defunding measures should be challenged on the basis of the unconstitutional choice it forces abortion providers to make. This reframing allows for a proper balancing of the state and individual interest, while ultimately making it clear that the issue is nonetheless at a broader level than individual rights.

This Article focuses on the ways in which the religious liberties and abortion rights are especially strong comparators. However, the analysis of *Trinity Lutheran* and rationale this Article provides for an entity-level approach to the unconstitutional conditions doctrine is not limited only to the abortion context. Any regulation that seeks to leverage the status of a would-be funding recipient to deny it a chance at funding would benefit from using the proposed *Trinity Lutheran*-style analysis. Additionally, while this Article focuses on entity defunding, the parallels between the religion clauses and the fundamental right to abortion may be a fruitful starting point for considering fresh approaches to challenging other types of limits on the right to an abortion, particularly as threats to the right continue to arise in new forms.

Planned Parenthood of Ind., Inc. v. Comm'r of the Ind. State Dep't of Health, 699 F.3d 962, 988 (7th Cir. 2012); Planned Parenthood of Mid-Missouri & E. Kan., Inc. v. Dempsey, 167 F.3d 458, 465 (8th Cir. 1999); *Moser*, 747 F.3d 814 at 817. *But see* Planned Parenthood Ass'n of Utah v. Herbert, 828 F.3d 1245, 1248 (10th Cir. 2016) (striking down a law that specifically targeted Planned Parenthood).

205. *Supra* Section II.C.

206. *Supra* Section III.