No. 16-4027

In the
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Planned Parenthood of Greater Ohio, et al.,

Plaintiff-Appellee,

v.

Lance Himes, in his official capacity as Director of the Ohio Department of Health,

Defendant-Appellant.

Appeal from the United States District Court
Southern District of Ohio
Honorable Michael R. Barrett

BRIEF OF AMICI CURIAE STATES OF MICHIGAN ALABAMA, ARIZONA, ARKANSAS, INDIANA, KANSAS, LOUISIANA, NEBRASKA, OKLAHOMA, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, AND WISCONSIN IN SUPPORT OF LANCE HIMES, IN SUPPORT OF REVERSAL

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STATEMENT OF INTEREST OF AMICI CURIAE STATES

The panel here permanently enjoined an Ohio statute that orders the Ohio Department of Health "to ensure that all funds it receives" through six statutory programs "are not used to . . . [p]erform nontherapeutic abortions." Ohio Rev. Code Ann. § 3701.034(B)–(G). Because of this permanent injunction, public funds Ohio provides through those programs may now be used for elective abortions.

The amici States (Michigan, Alabama, Arizona, Arkansas, Indiana, Kansas, Louisiana, Nebraska, Oklahoma, South Carolina, South Dakota, Tennessee, and Wisconsin) have a significant interest in this issue because they, like most States, ban the use of public funds for abortions. *E.g.*, Guttmacher Institute, https://www.guttmacher.org/state-policy/explore/state-funding-abortion-under-medicaid (listing 32 States that forbid the use of federal funds for nontherapeutic abortions). The Supreme Court has repeatedly held that the Constitution does not require the government (state, local, or federal) to fund a woman's abortion. *Maher v. Roe*, 432 U.S. 464, 474 (1977); *Poelker v. Doe*, 432 U.S. 519, 521 (1977) (per curiam); *Harris v. McRae*, 448 U.S. 297, 315, 317 (1980); *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 511 (1989);

Rust v. Sullivan, 500 U.S. 173, 193 (1991). The amici States file this brief, under Federal Rule of Appellate Procedure 29(a)(2), to preserve their citizens' freedom to choose not to fund abortions.

And the amici States also have an interest in choosing who will act as the State's agent in administering programs that provide benefits to the public. That is, after all, what Planned Parenthood seeks: it seeks to be paid by Ohio to administer six separate Ohio programs through which Ohio has chosen to provide benefits to Ohio citizens and to educate them about health issues relating to sex and childbirth. Planned Parenthood has no right to be selected to administer these programs; to the contrary, because these programs all involve government speech, Ohio has a right to choose its agent—indeed, its spokesperson—in these programs, and no entity has a right to be selected to fill that role.

ARGUMENT

I. This case warrants en banc review because it creates a circuit split on a State's right to deny funds for abortions.

As the panel acknowledged, its decision conflicts with the Seventh Circuit's decision in *Planned Parenthood of Indiana, Inc. v.*

Commissioner of Indiana State Department of Health, 699 F.3d 962 (7th Cir. 2012). Panel Op. 17 ("We are not persuaded by the Seventh Circuit's reasoning . . . ."); Panel Op. 22 ("We reject the Seventh Circuit's analysis in *PPI* . . . ."). In that case, the Seventh Circuit addressed a law that "prohibit[ed] abortion providers from receiving *any* state-administered funds, even if the money is earmarked for other services," 699 F.3d at 967 (emphasis in original), and concluded that the law did not violate any due-process rights: it did "not unduly burden a woman's right to obtain an abortion," and so it also did not violate any derivative due-process rights abortion providers might have, *id.* at 986–88. The Seventh Circuit also concluded that the law did not impose any unconstitutional condition on Planned Parenthood. *Id.*

In direct contrast, the panel here held that Ohio's prohibition on providing public funds to an entity that performs abortions violates the due-process rights of the abortion providers: "§ 3701.034 violates [the Planned Parenthood plaintiffs'] due process rights by imposing unconstitutional conditions." Panel Op. 8. Based on this conclusion, the panel affirmed the district court's permanent injunction against Ohio's funding statute as to both Planned Parenthood and "any others

similarly situated"—i.e., as to any other abortion providers. Panel Op. 30; D. Ct. Op., R. 60, Page ID #2114. By enjoining Ohio's statute, the panel deprived Ohio of its authority to prevent Planned Parenthood from using the public funds it receives through the six programs for performing abortions.

As a result of the panel's decision, Ohio cannot prohibit public funds from being used to perform abortions, even though Michigan, Kentucky, and Tennessee can continue to maintain that prohibition. Like the citizens of Ohio, the citizens of Michigan, Kentucky, and Tennessee have exercised their right "to make a value judgment favoring childbirth over abortion, and to implement that judgment by the allocation of public funds." *Maher*, 432 U.S. at 474; *see also, e.g.*, *McRae*, 448 U.S. at 315–16 (recognizing that "the constitutional principle recognized in *Wade* and later cases—protecting a woman's freedom of choice—did not translate into a constitutional obligation of [a State] to subsidize abortions").

The people of Tennessee enshrined this principle in their state constitution: "Nothing in this Constitution secures or protects a right to abortion or requires the funding of an abortion." Tenn. Const. art. I,

§ 36. And they also implemented this principle through legislation. E.g., Tenn. Code § 71-5-157(a) ("It is the policy of the state to favor childbirth as integral to the health and welfare of the citizens of the state and therefore to favor family planning services that do not include elective abortions or the promotion of elective abortions within the continuum of care or services offered by the provider and to avoid the direct or indirect use of state funds to promote or support elective abortions."); Tenn. Code § 9-4-5116 ("No state funds shall be expended to perform abortions" except in cases of rape, incest, or danger of death of the mother).

Kentucky's citizens have also made the same decision to favor childbirth over abortion and to not allow public funds to be spent on abortions. Ky. Rev. Stat. § 311.715 ("Public agency funds shall not be used for the purpose of obtaining an abortion or paying for the performance of an abortion."); Ky. Rev. Stat. § 311.800(1) ("No publicly owned hospital or other publicly owned health care facility shall perform or permit the performance of abortions, except to save the life of the pregnant woman.").

And so have Michigan's. Mich. Comp. Laws § 400.109a ("It is the policy of this state to prohibit the appropriation of public funds for the purpose of providing an abortion to a person who receives welfare benefits unless the abortion is necessary to save the life of the mother."); Mich. Comp. Laws § 400.109e ("A health care professional or a health facility or agency shall not seek or accept reimbursement for the performance of an abortion knowing that public funds will be or have been used in whole or in part for the reimbursement . . . .").

As these provisions show, whether to fund abortions is an important issue to the States in the Sixth Circuit. And an unbroken line of Supreme Court cases from *Maher* to *Rust* recognize that these sorts of laws are valid—that the government does not have to provide public funding to support a woman's right for an abortion. But with respect to Ohio's law, the panel concluded that an abortion provider has "the right to provide safe and lawful abortions on its own 'time and dime'" and that an abortion provider's exercise of that right cannot be "a condition of participating in government programs." Panel Op. 11. Relying on this newly created right for providers, Planned Parenthood might now argue in other States that because it has a right to provide

abortions, no State can preclude it from administering state programs—even programs like Ohio's infant mortality reduction program—based on the fact that it performs abortions.

En banc review is thus necessary to correct this erroneous decision that deprives Ohio of the rights States enjoy under the *Maher* line of cases and that forces Ohio to allow public funding to support Planned Parenthood's "right to provide" abortions.

II. The panel's due-process and unconstitutional-conditions rulings conflict with Supreme Court precedent.

The panel's holdings conflict with Supreme Court precedent on both due process and unconstitutional conditions.

As to due process, the panel created a new substantive-due-process right: a right "to provide" an abortion. Panel Op. 11. But the right recognized in *Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833 (1992), is "the right *of the woman*" to choose an abortion, *id.* at 846 (emphasis added), not the right *of an abortion provider* to perform one. *Casey* specifically explained that any constitutional rights doctors might have are, in the context of abortion, "derivative of the woman's position." *Id.* at 884; *see also Planned Parenthood of Indiana*,

699 F.3d at 987 (7th Cir. 2012) ("[A]ny protection for Planned Parenthood as an abortion provider is 'derivative of the woman's position.' "); *Women's Cmty. Health Ctr. of Beaumont, Inc. v. Texas Health Facilities Comm'n*, 685 F.2d 974, 982 (5th Cir. 1982) ("[W]hatever constitutional claims the [abortion-providing medical facility] may have under *Roe v. Wade* must derive from the rights of women."). Yet the panel here made the provider's right even stronger than the woman's right, because while a woman's right extends only to freedom from an "undue burden," *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2309 (2016), as revised (June 27, 2016), the panel concluded that the provider's right was violated without examining whether even one woman had actually suffered any burden at all on her right to an abortion. And the fact that the panel concluded the provider's right could be violated even if no woman's right to an abortion was burdened shows that the panel created a right that is separate and independent of the woman's right, not derivative of the woman's right.

The panel did not grapple with whether any woman suffered any burden for a simple reason: a woman's right to an abortion is not

affected by Ohio's statute. Planned Parenthood has conceded that excluding it from the six programs will have no impact on its ability to provide abortion services. PPGOH Dep., R. 35, p. 251, Page ID #451; *see also* Hodges Appeal Br. 11 (citing the sealed deposition of Planned Parenthood of Southwest Ohio for similar admission). In short, § 3701.034 imposes no conditions on a woman's right to an abortion because denying funding imposes "no obstacles absolute or otherwise in the pregnant woman's path to an abortion." *Maher*, 432 U.S. at 474.

As to the unconstitutional-conditions doctrine, the panel's analysis was flawed for multiple reasons. Under that doctrine, the government "may not deny a benefit to a person on a basis that infringes his constitutionally protected interests . . . ." *Perry v. Sindermann*, 408 U.S. 593, 597 (1972). But as just explained, Planned Parenthood does not have a constitutionally protected interest of its own in providing abortions. And not only does it lack any constitutional right to engage in the conduct at issue (providing abortions), it is also not the person receiving the benefit. It is the individual who receives services under the infant mortality reduction program, § 3701.034(F), or who participates in the personal responsibility education program,

§ 3701.034(G), that is the recipient of the government benefit, not the entity that contracts with the government to administer the program in exchange for a fee. To use another example, under the Breast and Cervical Cancer Mortality Prevention Act addressed in § 3701.034(C), the government benefit goes to individual women who receive cancer screening procedures for free or at a reduced cost; the entity administering the program, in contrast, is not getting a benefit, but rather a payment that comes from the State instead of from the woman for the procedure. 42 U.S.C. § 300k(3) (addressing payments for screenings). And Planned Parenthood's argument that it cannot be deprived of that publicly funded payment because of the unconstitutional-conditions doctrine is the equivalent of holding that it is entitled to public funding for its "right" to provide abortions, even though *Maher* through *Rust* hold that even a woman's right to an abortion does not entitle her to public funding for her exercise of that right.

In the end, the panel decision creates a new substantive-due-process right for an abortion provider to provide an abortion (contrary to *Casey*, which recognizes that the right belongs to the woman) and

then creates a right for abortion providers to administer state programs that provide benefits to citizens. These actions deprive the States of their own rights to define the content of these programs and to administer them consistently with state policy.

Specifically, the six programs at issue involve government speech, not private speech. For example, the grant under the Violence Against Women Act is "for the purpose of education," § 3701.034(B), and the "personal responsibility education program" is also, as its name indicates, for education, § 3701.034(G). Similarly, the infant mortality reduction initiative requires health workers administering it to "[p]rovide appropriate education" relating to childbirth. Ohio Dep't of Health, http://www.odh.ohio.gov/odhPrograms/cfhs/comcar/precare1.aspx. Ohio's STD Prevention Program also includes education. Ohio Dep't of Health, http://www.odh.ohio.gov/odhprograms/bid/stdprev/stdprev.aspx. Further, Ohio has a clear policy, set out in law, about the viewpoint it wants to promote in conjunction with these programs: it does not want to promote abortion. § 3701.034(B)–(G). And in any of these programs, Ohio faces the risk that Planned Parenthood, though serving as Ohio's agent in administering its programs, might decide to

promote abortion. *See, e.g.*, Hodges Appeal Br. 14 (discussing examples from a sealed deposition where a Planned Parenthood representative admitted that a patient coming for services relating to the Breast and Cervical Cancer Project or the STD Prevention Program might also receive what Planned Parenthood calls "options counseling" and so walk away with a list of abortion providers).

The government is allowed to choose a viewpoint, including on the issue of abortion. *Planned Parenthood of Indiana*, 699 F.3d at 987 ("The [Supreme] Court has explicitly rejected a neutrality-based view of abortion rights."); *see also Freedom from Religion Found., Inc. v. City of Warren, Mich.*, 707 F.3d 686, 690 (6th Cir. 2013) ("[T]he First Amendment does not prohibit a government from making content or viewpoint distinctions when it comes to its own speech."). It is a necessary corollary that if the government is allowed to choose a viewpoint, it must be allowed to choose the agent who will convey that viewpoint. If it can choose the message, it can also choose the messenger. As the Supreme Court has explained, citing *Rust*, "[w]hen the government disburses public funds to private entities to convey a governmental message, it may take legitimate and appropriate steps to

ensure that its message is neither garbled nor distorted by the grantee." *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 833 (1995). And what could be a more legitimate and appropriate step to keep one's message of preferring childbirth over abortion from being garbled than to decide not to choose a speaker who spends much of its time communicating the opposite message?

CONCLUSION AND RELIEF REQUESTED

The Court should grant the petition for rehearing en banc.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on May 9, 2018, the foregoing document was served on all parties or their counsel of record through the CM/ECF system for registered users.

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