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ONE HUNDRED FOURTEENTH CONGRESS

Congress of the United States

House of Representatives

COMMITTEE ON ENERGY AND COMMERCE
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MEMORANDUM

September 15, 2015

To: Subcommittee on Health Democratic Members and Staff

Fr: Committee on Energy and Commerce Democratic Staff

Re: Hearing on "Protecting Infants: Ending Taxpayer Funding for Abortion Providers Who Violate the Law"

On Thursday, September 17, 2015 at 3 p.m. in room 2123 of the Rayburn House Office Building, the Subcommittee on Health will hold a legislative hearing on the "Protecting Infants from Partial-Birth Abortion Act," introduced by Rep. Renee Ellmers (R-NC) and the "Protecting Infants Born-Alive Act," introduced by Rep. Marsha Blackburn (R-TN). According to Majority press materials, these bills were introduced in response to the misleading videos authored by the Center for Medical Progress (CMP) as an attack on the Planned Parenthood Federation of America (PPFA).[1]

Both pieces of draft legislation would radically expand existing law. As drafted, these bills would roll-back longstanding freedom of choice of provider protections for Medicaid beneficiaries, allowing for an unprecedented standard of involvement by the government in family planning for low-income women in direct opposition to Congressional intent, and would create serious access concerns for patients.

I. BACKGROUND

The "Protecting Infants Born-Alive Act" is based on the Born-Alive Infants Protection Act of 2002, and the "Protect Infants from Partial-Birth Abortion Act" is based on the Partial-Birth Abortion Ban Act of 2003.

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[1] House Committee on Energy and Commerce, *Blackburn & Elmers Author Bills to Protect the Dignity of Human Life* (Sept. 11, 2014) (online at http://energycommerce.house.gov/press-release/blackburn-ellmers-author-bills-protect-dignity-human-life).

A. Planned Parenthood

PPFA has 59 independent affiliates which operate approximately 700 health centers located throughout the country. Planned Parenthood health centers primarily provide preventive, and primary care services such as contraceptives, sexually transmitted infection (STI) testing and treatment, and cervical and breast cancer screenings. More than ninety percent of the services that clients receive are for preventive care like birth control.

In 2013, Planned Parenthood affiliates served 2.7 million patients. Those patients received nearly 400,000 pap tests and 500,000 breast exams. Additionally, patients receive nearly 4.5 million tests and treatments for STIs each year.

Planned Parenthood plays an important role in providing care to low-income and uninsured patients. An estimated 78 percent of patients, who are served by Planned Parenthood each year, have annual incomes of 150 percent of the federal poverty or less. Additionally, in 2013, 52 percent of all patient healthcare visits were from patients covered by Medicaid, and at least 60 percent of patients received Medicaid and/or services funded by Title X.

B. Access to Family Planning and the Medicaid Program

State Medicaid family planning programs provide care for millions of women and men across the country, including contraception, health education and promotion, and testing and treatment for STIs.[2] In 2010 alone, the latest year for which such data is available, estimates are that publicly funded contraceptive services prevented 2.2 million unintended pregnancies—a rate which would result statistically in 1.1 million unplanned births, 760,000 abortions, and 363,000 miscarriages.[3]

Access to family planning providers, like Planned Parenthood, is critical from both a health and economic perspective: every government dollar spent on family-planning services saves the public more than $7 in funds that otherwise would have been spent on Medicaid-related costs. Without publicly funded family-planning clinics, some estimates are that the nation would spend an additional $3.7 billion annually for Medicaid in state and federal expenditures each year ($13.6 billion in total net savings.).[4]

Access to family planning services has long held special status in the Medicaid program. In 1972, Congress added family planning to the short list of mandatory benefits states must

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[2] Guttmacher Institute, *Public Funding for Family Planning, Sterilization and Abortion Services, FY 1980–2010* (Mar. 2012) (online at www.guttmacher.org/pubs/Public-Funding-FP-2010.pdf).

[3] Guttmacher Institute, *Contraceptive Needs and Services, 2010* (July 2013) (online at www.guttmacher.org/pubs/win/contraceptive-needs-2010.pdf).

[4] Jennifer J. Frost et al., *Return on Investment: A Fuller Assessment of the Benefits and Cost Savings of the US Publicly Funded Family Planning Program*, Wiley Periodicals, Inc. 1, 30-31 (2014).

provide, and, as a further incentive to expand family planning benefits, established a special federal matching rate of 90 percent.[5] Through passage of the Affordable Care Act, Congress again reinforced family planning access when it required coverage of family planning services for the Medicaid expansion population.[6] This means that for family planning, Congress consistently has held high priority for beneficiary access; indeed, the 90 percent rate is a clear incentive for all states to ensure family planning access to eligible beneficiaries.

The Medicaid statute includes two other key provisions aimed at improving access to family planning for beneficiaries. The first concerns the cost-sharing that may be required of Medicaid beneficiaries. For most services covered under Medicaid, states may require beneficiaries to incur "nominal" out-of-pocket costs. The federal statute, however, prohibits family planning (and a small number of other services) from this action, regardless of the requirements placed on other services, drugs or supplies under the state program. Research has demonstrated that cost-sharing requirements, such as deductibles and copayments can pose barriers to care and result in reduced use of health care services, particularly for low-income women.[7]

The second key access protection concerns the so-called "any willing provider" requirement. Under federal law Medicaid beneficiaries may obtain medical services "from any institution, agency, community pharmacy, or person, qualified to perform the service or services required . . . who undertakes to provide him such services."[8] This provision is often referred to as the "any willing provider" or "free choice of provider" provision. Federal Medicaid funding of abortion services is not permitted under federal law except in extraordinary circumstances (in cases of rape, incest, or when the life of the woman would be in danger). At the same time, Medicaid programs may not exclude qualified health care providers—whether an individual provider, a physician group, an outpatient clinic, or a hospital—from providing services under the program because they separately provide abortion (not funded by federal Medicaid dollars, consistent with the federal prohibition) as part of their scope of practice. [9] This provision is implemented in the Center for Medicare and Medicaid Services' (CMS) "free choice of provider" regulation.

"Family planning services and supplies" continue to be a vital and mandatory Medicaid benefit for the majority of beneficiaries of childbearing age. Steady and significant demand over the years for these services strongly attests to widespread needs for family planning services and supplies. Under the law, eligibility for family planning services has been made flexible enough so as to allow coverage to extend beyond Medicaid covered populations. Through the Medicaid waiver process, states are permitted to provide family planning services to individuals who are

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[5] Social Security Act, § 1905(a)(4)(C), codified at 42 U.S.C. § 1396a(a)(4)(C).

[6] 42 U.S.C. §§ 1396u-7(b)(7) (as added by ACA § 2303(c)), 1396u-7(b)(5) (as added by ACA § 2001(c)).

[7] Kaiser Commission on Medicaid and the Uninsured, *Health Insurance Premiums and Cost-Sharing: Findings from the Research on Low-Income Populations* (Mar. 2003).

[8] Social Security Act, §1902(a)(23

[9] *Id.*

not otherwise eligible for traditional Medicaid coverage (e.g., non-pregnant, non-disabled childless adults) through the Medicaid waiver or state plan amendment process.. Benefits are limited to family planning services and supplies, but include related medical diagnosis and treatment services. As of September 1, 2015, 28 states have taken advantage of federal support for family planning expansion in their Medicaid programs.[10]

C. State Efforts to Exclude Abortion Providers from the Medicaid Program

Over the past several years, there has been movement among states to exclude family planning practitioners that offer abortion services, like Planned Parenthood, from their Medicaid programs.

State efforts to selectively exclude practitioners that provide abortions from the Medicaid program are in direct conflict with historic and public policy priorities of maintaining and improving access to family planning services for Medicaid beneficiaries. Moreover, state legislation to exclude abortion practitioners from the Medicaid program explicitly contradicts the "freedom of choice of providers" (also referred to the as the "any willing provider") provision of Medicaid law. This strong patient access protection has remained constant despite significant changes in the flexibility of the Medicaid program through both Democratic and Republican administrations In short, it is an essential guarantee that state Medicaid programs will provide beneficiaries with the same basic opportunity and rights to choose and receive covered health care services from any qualified provider the same way that any member of the general population seeking health care services.

The "any willing provider" requirement of federal Medicaid law directs state Medicaid programs to allow eligible individuals to receive care "from any institution, agency, community pharmacy, or person, qualified to perform the service or services required…who undertakes to provide him such services, and enrollment of an individual eligible for medical assistance."[11] This provision is implemented in the Center for Medicare and Medicaid Services' (CMS) "free choice of provider" regulation, which explicitly states that under no circumstance can the "free choice of provider" protection be compromised with respect to providers of family planning services.[12]

The states do have broad authority to exclude unqualified providers from participating in Medicaid. A state can exclude an individual or entity for any reason for which the Secretary of Health and Human Services (HHS) could exclude the individual or entity for participation in Medicare, such as a conviction for a crime related to patient neglect or abuse, or suspension by a state medical board or licensing authority.[13] States may also deny payment to a person or entity

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[10] Guttmacher Institute, *State Policies in Brief: Medicaid Family Planning Eligibility Expansions*, (Sept. 1, 2015) (online at www.guttmacher.org/statecenter/spibs/spib_SMFPE.pdf).

[11] Social Security Act, § 1902(a)(23)(A), codified at 42 U.S.C. § 1396a(a)(23)(A).

[12] Free Choice of Providers, 42 C.F.R. § 431.51(a)(3).

[13] 42 U.S.C. § 1320a-7.

convicted of a felony.[14] States may set "reasonable standards relating to the qualifications of providers."[15] These qualification standards "must be related to the ability of health care providers to provide those services, or appropriately bill for them."[16]

States do not, however, have unfettered discretion to terminate providers from the Medicaid program.[17] Despite states' express termination authority, federal district and appellate courts have construed that a number of certain state actions to exclude qualified providers violate federal law and patients' statutory rights.

D. Recent State Efforts to Restrict Access to Certain Family Planning Providers

A handful of states have tried repeatedly to eliminate family planning providers that also, separately, provide abortion services from their state's Medicaid programs. For example, in 2011, a law enacted in Indiana would have blocked public funds from going to any organization that provided—or referred for—abortion services with private, non-state dollars. In response to Indiana's new law, the Obama Administration issued the state a strongly worded letter and released a memo stating that "Medicaid programs may not exclude qualified health care providers—whether an individual provider, a physician group, an outpatient clinic, or a hospital—from providing services under the program because they separately provide abortion services…."[18] In July 2013, a US federal district court in Indiana issued a permanent injunction blocking the state from enforcing the ban, after the U.S. Supreme Court refused to hear Indiana's appeal. Before the court could act to block the law, 9,300 women who were Medicaid beneficiaries were left without access to any medical care, leaving them essentially uncovered.

Also in 2011, a law was enacted in Texas that blocked Medicaid family-planning funds from going to any organization or affiliated organization that provided, referred, or counseled for abortion. Similar to Indiana, Texas received guidance from CMS notifying the state that it was illegal to exclude a qualified health-care provider from Medicaid simply because of the provider's scope of practice. Unfortunately, Texas chose to forfeit all federal funding for the Texas Women's Health Program, choosing instead to use only state dollars, at a loss of 90 percent to the program's budget.[19] The impact on access to care was significant, concerning, and

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[14] 42 U.S.C. § 1395cc(b)(2)(D); 42 C.F.R. § 1002.2(a).

[15] 42 C.F.R. § 431.51(c)(2); *see* CMS State Medicaid Manual § 2100 (*States may impose reasonable and objective standards for providers*).

[16] *Id.*

[17] Statement of Interest of The United States, Planned Parenthood Gulf Coast, Inc. v. Kliebert, dkt. # 24, 3:15-cv-565, (M.D. La) (Aug. 25, 2015).

[18] CMCS Informational Bulletin, *Medicaid Requirement of Freedom of Choice* (June 1, 2011) (online at www.medicaid.gov/Federal-Policy-Guidance/downloads/6-1-11-Info-Bulletin.pdf).

[19] Kinsey Hasstedt, *The State of Sexual and Reproductive Health and Rights in the State of Texas: A Cautionary Tale*, Guttmacher Policy Review, Spring 17, 2 (2014).

beyond question. Two years after the program lost federal funding, enrollment dropped by 20,000 – a decrease of 9 percent.[20] Contraceptive claims also declined by more than half, meaning that the women enrolled in the program received far fewer services.[21] Overall, Texas experienced a 73 percent decline in net savings from family planning services.[22]

Most recently, the state of Louisiana has received considerable attention for efforts to exclude Planned Parenthood from its Medicaid program. On August 3, 2015, Louisiana Governor Bobby Jindal announced that the state was exercising its right to terminate its Medicaid provider agreement with Planned Parenthood Gulf Coast (PPGC). The press release announcing this decision cited the videos released by the CMP as the rationale for the termination, and cited contractual terms that allow the state to unilaterally cancel the contract after providing 30-days written notice.[23] Notably, PPGC does not provide abortion services in Louisiana and a recent state audit found PPGC in compliance with federal and state laws.[24] It is clear Louisiana's actions are baseless and politically motivated.

PPGC filed suit in federal district court seeking a temporary restraining order (TRO) to prevent the contract termination, and alleging that the termination violates the free-choice-of provider provision of the Medicaid statute by preventing its patients from receiving services from the qualified, willing provider of their choice.[25]

The U.S. Department of Justice filed a "Statement of Interest" in support of PPGC, arguing that Louisiana's expulsion of competent Medicaid providers from its Medicaid program without cause would violate federal law.[26] According to the Administration, Louisiana has not offered sufficient reasons to terminate PPGC from its Medicaid program, and terminating PPGC without providing any justifications related to PPGC's qualifications to provide medical services would violate Louisiana's obligations under the Medicaid statute's free choice of provider provision, 42 U.S.C. § 1396a(a)(23).[27]

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[20] Texas Health and Human Services Commission, *Texas Women's Health Program: Savings and Performance Reporting* (2015) (online at www.hhsc.state.tx.us/reports/2015/tx-womens-health-program-rider-44-report.pdf).

[21] *Id.*

[22] Kinsey Hasstedt, *How Texas Lawmakers Continue To Undermine Women's Health,* Health Affairs Blog (May 20, 2015) (online at http://healthaffairs.org/blog/2015/05/20/how-texas-lawmakers-continue-to-undermine-womens-health/).

[23] *Governor Jindal Announces the Termination of Medicaid Contract with Planned Parenthood,* Office of the State of Louisiana (Aug. 3, 2015).

[25] Planned Parenthood Gulf Coast, Inc. v. Kliebert, dkt. # 24, 3:15-cv-565, (M.D. La) (Aug. 25, 2015).

[26] Statement of Interest of The United States, Planned Parenthood Gulf Coast, Inc. v. Kliebert, dkt. # 24, 3:15-cv-565, (M.D. La) (Aug. 25, 2015).

[27] Statement of Interest of The United States, Planned Parenthood Gulf Coast, Inc. v. Kliebert, dkt. # 24, 3:15-cv-565, (M.D. La) (Aug. 25, 2015).

In a hearing on the TRO, the state of Louisiana asserted that "there are 1,146 actively enrolled Medicaid providers in region one covering the greater New Orleans area and 864 actively enrolled Medicaid providers in region two covering the greater Baton Rouge area that can provide family planning and related services."[28] However, upon questioning by the judge, attorneys for the state acknowledged that this list included dentists, audiologists, ophthalmologists, dermatologists, cosmetic surgeons, and ear, nose and throat doctors.[29] The state later amended its declaration, acknowledging that these specialists did not belong on the list, and resubmitted a list of just 29 health care providers that could provide family planning and related services in the greater Baton Rouge and New Orleans areas.[30]

In the past month, Arkansas and Alabama have also announced plans to cut off Medicaid funding to Planned Parenthood's health centers in those states.[31] Again, there is no evidence of Planned Parenthood affiliates in either state have engaged in fraud or criminal activity, and there is no evidence of non-compliance with state law or policies that could warrant sanction from the Medicaid program.

II. LEGISLATION

The two draft pieces of legislation before the Committee during this hearing, the "Protecting Infants from Partial-Birth Abortion Act" and the "Protecting Infants Born-Alive Act," seeks, essentially, to accomplish three things:

- Redefine freedom of choice of providers. Both bills would restrict a beneficiary's ability to seek care from a provider who has violated or is only suspected of having violated the provisions in the bills. This essentially removes the freedom of choice protection and permits each state to limit or terminate participation of certain providers, even those who provide family planning services. The provision would allow states to circumvent any requirement to show proof of wrongdoing, and to also be able to act unilaterally without HHS' involvement.

- Prohibit federal Medicaid payment. Prohibit federal Medicaid payment for any medical care provided by individuals who have been convicted of performing partial birth

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[28] Defendant's Opposition to Plaintiffs' Motion for Temporary Restraining Order, Planned Parenthood Gulf Coast, Inc. v. Kliebert, dkt. # 13, 3:15-cv-565, (M.D. La) (Aug. 27, 2015).

[29] Motion Hearing, Planned Parenthood Gulf Coast, Inc. v. Kliebert, 3:15-cv-565, (M.D. La) (Sept. 2, 2015).

[30] Amended Declaration of Director Ruth Kennedy, Planned Parenthood Gulf Coast, Inc. v. Kliebert, 3:15-cv-565, dkt. # 34-2 (M.D. La) (Sept. 8, 2015).

[31] Laurel Brubaker Calkins, *Louisiana Will Cut Planned Parenthood Medicaid Funds Monday*, Bloomberg (Sept. 11, 2015) (online at http://www.bloomberg.com/politics/articles/2015-09-12/louisiana-will-cut-planned-parenthood-medicaid-funds-monday).

abortions (Protecting Infants from Partial-Birth Abortion Act) or terminating a fetus "born alive" (Protecting Infants Born-Alive Act) -- even if the provider is performing other, non-abortion services.

- Redefine the grounds for mandatory exclusion from participation in Medicare and Medicaid. Redefine the grounds for mandatory exclusion from participation in Medicare and Medicaid to automatically exclude individuals who have been convicted of performing partial birth abortions (Protecting Infants from Partial-Birth Abortion Act) or terminating a fetus "born alive" (Protecting Infants Born-Alive Act). It is not clear what the grounds for conviction are, or even if a conviction would be required under the "Protecting Infants Born-Alive Act," as a conviction or prosecution of any kind is not specified in the language.

A. H.R. ___, the "Protecting Infants from Partial-Birth Abortion Act"

The "Protecting Infants from Partial-Birth Abortion Act" would undermine the Medicaid "free choice of provider" protection, and therefore provide states with the authority to terminate providers or entities, or restrict participation of providers or entities, that a state "suspects" has violated the Partial-Birth Abortion Ban Act of 2003. The legislation does not define what states would have to show to terminate a provider under this provision, and therefore would seem to give states the ability to terminate state Medicaid payments to providers based on wholly unmerited or unsubstantiated allegations. This means that under this legislation, in real terms, not just one provider but the full practice or umbrella entity could be completely excluded from providing preventive and lifesaving care for low-income women, purely based on an unsubstantiated allegation.

The Partial-Birth Abortion Ban Act of 2003 imposes fines and criminal penalties of up to two years imprisonment for physicians who knowingly perform a "partial-birth abortion."[32] A partial birth abortion is defined as an abortion in which the physician: 1) deliberately and intentionally vaginally delivers a living fetus until, in the case of a head-first presentation, the entire fetal head is outside of the body of the mother, or in the case of a breech presentation, any part of the fetal trunk past the navel is outside the body of the mother, for the purpose of performing an overt act that the person knows will kill the partially delivered living fetus; and 2) performs the overt act, other than completion of delivery, that kills the partially delivered living fetus.[33]

The legislation amends the Medicaid 'any willing provider' statutory language by adding the following provision: "nothing in this paragraph shall be construed…as requiring a State to provide medical assistance for such services furnished by a person or entity who employs a person who a State suspects has performed, or who has been convicted under Federal law of

[32] 18 U.S.C. § 1531(a).

[33] 18 U.S.C. § 1531(b).

performing, partial-birth abortions in violation of section of 1531 of title 18, United States Code."[34]

The legislation also prohibits states from receiving the federal Medicaid share of payments for "items and services furnished by a person or entity who employs a person who has been convicted for a criminal offense consisting of performing partial-birth abortions in violation of section 1531 of title 18, United States Code."[35] Finally, the legislation requires the Secretary to exclude "any individual or entity who employs a person who has been convicted for a criminal offense consisting of performing partial birth abortions" from participation in any Federal health care program.[36]

B. H.R. __, the "Protecting Infants Born Alive Act"

The "Born-Alive Infant Protection Act of 2002 (BAIPA) defined the words "person," "human being," "child" and "individual" to include "every infant member of the species homo sapiens who is born alive at any stage of development." BAIPA further defined the term "born alive" as "the complete expulsion or extraction from his or her mother of that member, at any stage of development, who after such expulsion or extraction breathes or has a beating heart, pulsation of the umbilical cord, or definite movement of voluntary muscles, regardless of whether the umbilical cord has been cut, and regardless of whether the expulsion or extraction occurs as a result of a natural or induced labor, cesarean section, or induced abortion."[37]

The "Protecting Infants Born Alive Act," similar to the "Protecting Infants from Partial Birth Abortion Act" would amend the freedom of choice of provider provision such that a state could exclude or restrict participation of providers whose actions are suspected to have caused the termination of any pregnancy that would meet the definition of an infant according to BAIPA. Specifically, the legislation would clarify that a state may exclude any provider, or any entity who has employed a provider, "whose services or actions are suspected by the state of causing the termination of a human infant…" Again, this means that under this legislation, in real terms, not just one provider but the full practice or umbrella entity could be completely excluded from providing preventive and lifesaving care, purely based on an unsubstantiated allegation.

The legislation also prohibits states from receiving the federal share of payments for such an Act, and allows for exclusion from all federal health programs of such a provider or entity, for any service. The legislation references termination, but whether the intent is a suspected or confirmed violation is unclear, and particularly concerning given that the original BAIPA included no civil or criminal penalties for violating the act. In fact, the underlying statue merely defines terminology for "born-alive", and this legislation does not appear to contemplate any regulations to implement the Act further.

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[34] H.R.____, Protect Infants from Partial-birth Abortion Act.

[35] *Id.*

[36] *Id.*

[37] 1 U.S.C. § 8.

Thus, the legislation's drafting therefore could be construed to give state governments unilateral ability to terminate providers from state Medicaid programs based on unmerited or unsubstantiated allegations; and, because of the lack of reference in the legislation or in BAIPA itself to due process, conviction or prosecution, this legislation could result in whole exclusion of providers at every level (both state and federal), in every program, for allegations alone.

III. COMMITTEE INVESTIGATION INTO PLANNED PARENTHOOD

The Committee is conducting an ongoing investigation into claims regarding the alleged sale of fetal tissue by affiliates of PPFA. The review has included bipartisan briefings by PPFA officials as well as representatives from StemExpress, Novogenix Laboratories, and Advanced Bioscience Resources –three tissue procurement organizations (TPO) that partner with PPFA affiliates and other healthcare providers to collect specimens to supply to researchers working with fetal tissue. In addition to these briefings, the Committee has received documents and written responses to a series of questions it posed in writing to PPFA regarding its "practices relating to fetal tissue collection and sale or donation."[38]

Last week, the Democratic staff of the committee released a memo to update Democratic members on the status of the investigation. The memorandum can be found here. To date, the committee has received no evidence to substantiate the allegations that Planned Parenthood has engaged in the sale of fetal tissue for profit. Furthermore, the committee has received no evidence to support the allegations that fetal tissue was procured without consent, that Planned Parenthood physicians altered the timing, method, or procedure of an abortion solely for the purposes of obtaining fetal tissue, or that Planned Parenthood physicians performed violated the Partial-Birth Abortion Act in order to preserve fetal tissue for research. Thus far, the investigation has revealed that PPFA requires all affiliates to ensure compliance with all state and federal laws and that specific PPFA guidance does exist that requires affiliates to ensure that reimbursement for fetal tissue is limited to actual costs.

IV. WITNESSES

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[38] Letter from Chairman Fred Upton, House Committee on Energy and Commerce, to Cecile Richards, President, Planned Parenthood Federation of America (July 17, 2015).

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