

December 2014

Employees' Insurance and Benefits Plans SB 98

Georgia State University Law Review

Follow this and additional works at: <https://readingroom.law.gsu.edu/gsulr>

 Part of the [Law Commons](#)

Recommended Citation

Georgia State University Law Review, *Employees' Insurance and Benefits Plans SB 98*, 31 GA. ST. U. L. REV. (2014).
Available at: <https://readingroom.law.gsu.edu/gsulr/vol31/iss1/12>

This Peach Sheet is brought to you for free and open access by the Publications at Reading Room. It has been accepted for inclusion in Georgia State University Law Review by an authorized editor of Reading Room. For more information, please contact mbutler@gsu.edu.

PUBLIC OFFICERS AND EMPLOYEES

Employees' Insurance and Benefits Plans: Amend Article 1 of Chapter 24 of Title 33 of the Official Code of Georgia Annotated, Relating to Insurance Generally, so as to Provide Definitions; Prohibit Coverage of Certain Abortions through Certain Qualified Health Plans; Provide for Certain Exceptions; Provide for a Right of Intervention in Certain Lawsuits; Amend Article 1 of Chapter 18 of Title 45 of the Official Code of Georgia Annotated, Relating to Public Employees' Insurance and Benefit Plans, so as to Change Certain Provisions Relating to Expenses Not to be Covered by the State Health Benefit Plan; Provide for Related Matters; Provide an Effective Date; Repeal Conflicting Laws; and for Other Purposes

CODE SECTIONS:	O.C.G.A. §§ 33-24-59.17 (new); 45-18-4 (amended).
BILL NUMBER:	SB 98
ACT NUMBER:	547
GEORGIA LAWS:	2014 Ga. Laws 349
SUMMARY:	This bill restricts government spending on certain abortions through insurance provided by the Georgia State Health Benefit Plan and through insurance offered under any regulation or exchange created by the federal Patient Protection and Affordable Care Act.
EFFECTIVE DATE:	April 21, 2014

History

As defined by Code section 31-9A-2 of the Official Code of Georgia Annotated, the term “abortion” means “the use or prescription of any instrument, medicine, drug, or any other substance or device with the intent to terminate the pregnancy of a female known to be pregnant.”¹ The term does not include “the use or prescription of any instrument, medicine, drug, or any other

1. O.C.G.A. § 31-9A-2 (Supp. 2014).

substance or device employed solely to increase the probability of a live birth, to preserve the life or health of the child after live birth, or to remove a dead unborn child who died as the result of a spontaneous abortion.”² Further, the term ‘abortion’ does “not include the prescription or use of contraceptives.”³

From 2002 to 2010, between 30,000 and 36,000 abortions took place each year in Georgia.⁴ In 2010, President Barack Obama signed an executive order outlawing the use of public money to pay for abortions under the Affordable Care Act (ACA).⁵ Instead of public money, insurance companies must use money from coverage premiums to cover any abortion procedures.⁶ Abortion insurance bans gained national attention in late 2013 when Michigan passed a law that opponents called “rape insurance,” because it bans all insurance coverage of abortions, including in cases of rape or incest, unless a woman purchases an additional insurance rider.⁷ Georgia’s ban put into place by Senate Bill (SB) 98 is understood to be “slightly less extreme” than Michigan’s, which is considered to be one of the most extreme laws in the nation.⁸ Similar to Michigan’s ban, Georgia’s SB 98, does not affect all private insurers, and it provides no exceptions for rape or incest.⁹ Unlike Michigan’s law, however, SB 98 provides a marginal health exception.¹⁰

Senator Judson Hill (R-32nd), the bill’s sponsor, stated that the main purpose of SB 98 was to control how taxpayer dollars are spent,

2. *Id.*

3. *Id.*

4. Karen Pazol, et al., *Abortion Surveillance—United States, 2010*, CENTERS FOR DISEASE CONTROL AND PREVENTION, (Nov. 29, 2013), <http://www.cdc.gov/mmwr/preview/mmwrhtml/ss6208a1.htm>.

5. Claire Simms, *Georgia Insurance Bill Bars Abortion Coverage*, GPB (Feb. 21, 2014), <http://www.gpb.org/news/2014/02/21/georgia-insurance-bill-bars-abortion-coverage>; Exec. Order No. 13,535, 3 C.F.R. § 13535 (2010).

6. Simms, *supra* note 5; Exec. Order No. 13,535, 3 C.F.R. § 13535 (2010) (“[I]t is necessary to establish an adequate enforcement mechanism to ensure that Federal funds are not used for abortion services . . .”).

7. Emily Crockett, *Proposed Abortion Ban Coverage Ban Moves Forward In Georgia*, RH REALITY CHECK (Feb. 25, 2014), <http://rhrealitycheck.org/article/2014/02/25/proposed-abortion-coverage-ban-moves-forward-georgia/>. The Michigan ban prohibits insurance companies from providing any access to abortion services unless customers purchase a separate abortion rider. Abortion Insurance Opt-Out Act, MICH. COMP. LAWS § 550.541–551 (West 2014).

8. Crockett, *supra* note 7.

9. *Id.*

10. *Id.*

not to regulate abortion.¹¹ After hearing from constituents regarding government money being spent on abortions, Senator Hill researched other states with similar abortion funding restrictions and determined that a comparable restriction would meet his constituents' concerns.¹² He says SB 98 is not an abortion bill, but a bill protecting taxpayers from paying for a procedure with which they do not agree.¹³ "It's nothing to do with whether or not you can have [an abortion]."¹⁴

SB 98 bars abortions from being covered by insurance policies offered through health care exchanges.¹⁵ "It is a prohibition of government spending on abortions."¹⁶ Further, SB 98's passing ratified Governor Nathan Deal's decision to eliminate abortion coverage from state employee health insurance policies.¹⁷ Senator Hill felt that codification of Governor Deal's decision was necessary so that the restriction could not be quickly removed via an executive order or overturned by a different Governor.¹⁸

Before the passage of SB 98, twenty-four other states banned insurance coverage of abortion on the health exchanges established under the ACA.¹⁹ It would also prevent Georgia's more than 600,000 state employees from accessing insurance coverage for abortion services.²⁰ More than 100,000 Georgians were enrolled in health insurance coverage under the ACA before the passing of SB 98.²¹ The bill bans those plans from covering abortions in the state.²²

11. Interview with Sen. Judson Hill (R-32nd) (Mar. 21, 2014) [hereinafter Hill Interview].

12. *Id.*

13. Simms, *supra* note 5.

14. *Id.*

15. Aaron Gould Sheinin & Kristina Torres, *What Bills Made the Cut in Georgia's 2014 Legislative Session?*, ATLANTA J.-CONST. (Mar. 22, 2014), <http://www.ajc.com/news/news/state-regional-govt-politics/what-bills-made-the-cut-in-georgias-2014-legislative/nfJKj/>.

16. Hill Interview, *supra* note 11.

17. Sheinin & Torres, *supra* note 15.

18. Video Recording of House Insurance Committee, March 11, 2014 at 11 min. 29 sec., (remarks by Sen. Judson Hill (R-32)) [hereinafter House Video, Mar. 11, 2014], <http://www.house.ga.gov/Committees/en-US/CommitteeArchives96.aspx>.

19. Crockett, *supra* note 7.

20. *Id.*

21. Simms, *supra* note 5.

22. *Id.*

*Bill Tracking of SB 98**Consideration and Passage by the Senate*

Senators Hill, Bill Heath (R-31st), Steve Gooch (R-51st), William T. Ligon, Jr. (R-3rd), Butch Miller (R-49th), and Barry Loudermilk (R-14th) sponsored SB 98.²³ The bill was first read on February 4, 2013 and subsequently assigned to the Senate Insurance and Labor Committee.²⁴ At the February 20, 2014 meeting of the Committee, Senator Hill offered several changes to the bill.²⁵ During the Committee meeting testimony was given in opposition and support of SB 98.²⁶ The Committee approved Senator Hill's changes and favorably reported a Committee substitute.²⁷

The Committee substitute contained four substantive changes. First, it extended the abortion coverage restriction to exchanges created under the federal Patient Protection and ACA.²⁸ Second, it removed the definition of abortion and instead defined it by referring to another Code section.²⁹ Third, it defined medical emergency by referring to another Code section.³⁰ Finally, it added an amendment to Code section 45-18-2 that banned abortion services under the state employees' health insurance plan.³¹

The bill was read a second time in the Senate on February 24, 2014, and a third time on March 3, 2014.³² Later on March 3, 2014, the bill was engrossed by a vote of 35 to 14.³³ The bill then passed the Senate by a vote of 35 to 18.³⁴

23. Georgia General Assembly, SB 98, Bill Tracking, <http://www.legis.ga.gov/legislation/en-US/Display/20132014/SB/98>.

24. State of Georgia Final Composite Status Sheet, SB 98, May 1, 2014.

25. *Hearing of SB 98 Before the S. Comm. on Ins. & Labor, 2014 Leg., 152nd Sess.* (Ga. Feb. 20, 2014).

26. *Id.*

27. State of Georgia Final Composite Status Sheet, SB 98, May 1, 2014.

28. SB 298 (SCS), § 1, p. 1, ln. 16–20, 2014 Ga. Gen. Assem.

29. *Id.* § 1, p. 1, ln. 21–22.

30. *Id.* § 1, p. 1, ln. 23–24.

31. *Id.* § 2, p. 2, ln. 29–47.

32. State of Georgia Final Composite Status Sheet, SB 98, May 1, 2014.

33. Georgia General Assembly, SB 98, Bill Tracking, <http://www.legis.ga.gov/legislation/en-US/Display/20132014/SB/98>.

34. *Id.*

Consideration and Passage by the House

Representative Darlene Taylor (R-173rd) sponsored SB 98 in the House.³⁵ The House read the bill for the first time on March 4, 2014 and for the second time on March 5, 2014.³⁶ Speaker of the House David Ralston (R-7th) assigned it to the House Committee on Insurance,³⁷ where several changes were offered to the bill.³⁸ The Committee approved these changes and favorably reported a Committee substitute on March 11, 2014.³⁹

The changes to Section One of the bill removed language that legislative counsel deemed confusing.⁴⁰ This change was intended to clarify that abortions would not be covered under state exchanges created under the ACA.⁴¹ The changes to Section Two of the bill removed the language banning abortion coverage under state health insurance plans and replaced it with a reference to the Department of Community Health (DCH) regulations as they existed on January 1, 2014;⁴² Legislative Counsel advised this change.⁴³ Senator Hill expressed his hesitation to the Section Two changes out of concern that they allowed DCH to make later changes to the insurance restriction.⁴⁴ Senator Hill later stated that he felt the changes made the bill less clear than the original Senate version, but accomplished the same task.⁴⁵ Though the rationale behind the changes was not discussed during the House Insurance Committee meeting, the substitute also removed Section Three, which provided a right of intervention for cases that challenged any portion of the act.⁴⁶

35. *Id.*

36. State of Georgia Final Composite Status Sheet, SB 98, May 1, 2014.

37. *Id.*

38. House Video, Mar. 11, 2014, *supra* note 18, at 53 sec., (remarks by Rep. Richard H. Smith (R-134th)).

39. State of Georgia Final Composite Status Sheet, SB 98, May 1, 2014.

40. House Video, Mar. 11, 2014, *supra* note 18, at 2 min., 30 sec., (remarks by Rep. Darlene K. Taylor (R-173rd)).

41. *Id.*

42. *Id.*

43. *Id.* at 5 min, 28 sec (remarks by Rep. Richard H. Smith (R-134th)).

44. *Id.* at 7 min, 13 sec (remarks by Sen. Judson Hill (R-32nd)).

45. Hill Interview, *supra* note 11.

46. See House Video, Mar. 11, 2014, *supra* note 18.

The House Rules Committee offered another amendment to the bill on March 18, 2014.⁴⁷ The amendment, to Section Two, clarified that abortion services would be permitted under the state health benefit plan approved by the board as of January 1, 2014.⁴⁸ This amendment passed the Rules Committee.⁴⁹

The House read the Insurance Committee substitute as amended on March 18, 2014.⁵⁰ Minority Whip Carolyn Hugley (D-136th) presented a minority report to the bill.⁵¹ The Insurance Committee substitute was subsequently withdrawn with no opposition.⁵² The House adopted the Setzler amendment by a vote of 98 to 67.⁵³ The Rules Committee substitute, as amended, passed the House by a vote of 105 to 64.⁵⁴

SB 98 was then transferred back to the Senate, who had to agree to the changes made by the House.⁵⁵ The Senate agreed to the House substitute on March 18, 2014, by a vote of 37 to 18.⁵⁶ The Senate then passed the substituted version of the bill later on that day, by a vote of 36 to 18.⁵⁷ The bill was sent to the Governor on March 25, 2014 and signed into law on April 21, 2014.⁵⁸

47. Video Recording of House Rules Committee Proceedings, Mar. 18, 2014 at 13 min., 18 sec. (remarks by Sen. Judson Hill (R-32nd)) [hereinafter Rules Video], <http://www.gpb.org/lawmakers/2014/day-39>.

48. *Id.* at 14 min., 30 sec. (remarks by Rep Ed Setzler (R-35th)). No discussion of the rationale behind the new amendment occurred. *Id.*

49. *Id.* at 14 min., 52 sec. (remarks by Rep. John Meadows (R-5th)).

50. State of Georgia Final Composite Status Sheet, SB 98, May 1, 2014; Video Recording of House Proceedings, Mar. 18, 2014 at 1 hr., 53 min., 56 sec. (remarks by Rep. Darlene K. Taylor (R-173rd)) [hereinafter House Video, Mar. 18, 2014], <http://www.gpb.org/lawmakers/2014/day-39>.

51. House Video, Mar. 18, 2014 at 2 hr., 1 min., 1 sec. (opposing the bill due to the lack of exceptions for rape and incest).

52. *Id.* at 2 hr., 7 min., 34 sec. (remarks by Rep. David Ralston (R-7th)).

53. Georgia General Assembly, SB 98, Bill Tracking, <http://www.legis.ga.gov/legislation/en-US/Display/20132014/SB/98>.

54. *Id.*

55. Video Recording of Senate Proceedings, Mar. 18, 2014 at 1 hr., 24 min., 30 sec., [hereinafter Senate Video, Mar. 18, 2014], <http://www.gpb.org/lawmakers/2014/day-39>. Sen. Nan Orrock (D-36th) argued that abortion restrictions were overreaching because of the lack of exceptions for rape and incest. *Id.* The Senator also felt that the bill was another step in the incremental erosion of the rights of women to get an abortion. *Id.*

56. Georgia General Assembly, SB 98, Bill Tracking, <http://www.legis.ga.gov/legislation/en-US/Display/20132014/SB/98>.

57. *Id.*

58. State of Georgia Final Composite Status Sheet, SB 98, May 1, 2014.

The Act

The Act amends Title 33 of the Official Code of Georgia Annotated, relating to insurance generally, for the purpose of prohibiting coverage of abortions through certain health plans.⁵⁹ The Act amends Title 45 of the Official Code of Georgia Annotated, relating to public employees' insurance and benefit plans that specify that abortion expenses will not be covered by the state health benefit plan.⁶⁰

Section One of the Act bans abortion coverage under any health plan created through a state or federal law, regulation, or exchange, except in the case of medical emergency.⁶¹ It amends Article 1 of Chapter 24 of Title 33 by creating a new Code section, 33-24-59.17.⁶² The new Code section defines both "abortion" and "medical emergency" by reference to Code section 31-9A-2.⁶³ The section also clarifies that it is not "creating or recognizing a right to an abortion" nor is it "mak[ing] lawful an abortion that is currently unlawful."⁶⁴

Section Two of the Act amends Article 1 of Chapter 18 of Title 45 by codifying an existing regulation that banned abortion under the state health benefit plan.⁶⁵ Code section 45-15-4 allows expenses for abortion only "to the extent permitted under the state health benefit plan approved by the board as such plan existed on January 1, 2014."⁶⁶ Similar to the new Code section enacted by Section One of the Act, Section Two defines "abortion" by a reference to section 31-9A-2.⁶⁷ Section Three of the Act allows the General Assembly, by joint resolution, to intervene when any portion of the Act is challenged.⁶⁸

59. O.C.G.A. § 33-24-59.17 (Supp. 2014).

60. O.C.G.A. § 45-18-4 (Supp. 2014).

61. O.C.G.A. § 33-24-59.17 (Supp. 2014).

62. *Id.*

63. *Id.*

64. *Id.*

65. O.C.G.A. § 45-18-4 (Supp. 2014).

66. *Id.*

67. *Id.*

68. 2014 Ga. Laws 349.

*Analysis**History of Abortion Restrictions*

In *Roe v. Wade*, the Supreme Court recognized that the Constitution protected a woman's right to choose to terminate her pregnancy prior to viability.⁶⁹ However, the right to choose to terminate a pregnancy was not absolute, but was balanced against the state's interest in protecting "prenatal life."⁷⁰ The Court adopted a trimester framework where the government could not prohibit abortion and could only regulate it like a medical procedure during the first trimester.⁷¹ In the second trimester the government could regulate abortion "in ways that are reasonably related to maternal health."⁷² In the third trimester, the government had the authority to prohibit abortions as long as exceptions were made to preserve the health of the mother.⁷³

The trimester framework stood until the Court's decision in *Planned Parenthood of Se. Pa. v. Casey*.⁷⁴ The Court found government regulation of abortion—prior to viability—was allowed unless it placed an "undue burden" on access to abortion.⁷⁵ An undue burden is one that "place[s] a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability."⁷⁶

Abortion Restrictions in State Insurance Exchanges

Signed into law on March 23, 2010,⁷⁷ the ACA allowed a state to prohibit abortion coverage through state insurance exchanges.⁷⁸ On

69. *Roe v. Wade*, 410 U.S. 113, 153 (1973) (finding that the Constitution embodied a right to privacy that was "broad enough to encompass a woman's decision whether or not to terminate her pregnancy").

70. *Id.* at 155.

71. *Id.* at 163.

72. *Id.* at 164.

73. *Id.* at 164–65.

74. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992).

75. *Id.* at 874.

76. *Id.* at 878.

77. *H.R. 3590 (111th): Patient Protection and Affordable Care Act*, GOVTRACK.US, <https://www.govtrack.us/congress/bills/111/hr3590> (last visited June 24, 2014).

78. 42 U.S.C. § 18023(a)(1) (2012) ("A State may elect to prohibit abortion coverage in qualified health plans offered through an Exchange in such State if such State enacts a law to provide for such

March 24, 2010, President Barack Obama signed an executive order that reiterated long standing federal policy restricting federal funding for abortions.⁷⁹ Numerous states responded by drafting statutes that restricted abortion coverage in their state insurance exchanges.⁸⁰

Abortion Restrictions for State Employee Insurance

Restrictions on abortions in state employee insurance plans have been in place since 1981.⁸¹ Similar statutes have been challenged in court for various reasons including violations of Title VII,⁸² for exceeding the scope of *Roe v. Wade*,⁸³ and for creating an “undue burden” on access to abortion.⁸⁴ The restrictions included in the Act are likely to be challenged for similar reasons.

Does the Act Place an “Undue Burden” on Access to Abortion?

The most common argument against statutes that restrict public funding of abortion is that they pose an undue burden to a woman’s right to receive an abortion.⁸⁵ This test was articulated by the Supreme Court in *Casey*.⁸⁶ The plurality opinion stated that “the essential holding of *Roe v. Wade* should be retained and once again reaffirmed.”⁸⁷ Because

prohibition.”).

79. Exec. Order No. 13,535, 75 Fed. Reg. 15,599 (Mar. 24, 2010).

80. *State Bans on Insurance Coverage of Abortion Endanger Women’s Health and Take Health Benefits Away from Women*, NATIONAL WOMEN’S LAW CENTER (May 2014), http://www.nwlc.org/sites/default/files/pdfs/state_bans_on_abortion_covg_factsheet_5.5.14.pdf.

81. *E.g.*, NEB. REV. STAT. ANN. § 44-1615.01 (2013) (enacted in 1981); R.I. GEN. LAWS § 36-12-2.1 (2013) (enacted in 1981).

82. Nat’l Educ. Ass’n of R.I. v. Garrahy, 598 F. Supp. 1374, 1380 (D.R.I. 1984) (finding that Title VII imposes no federal limit on a state government’s right to restrict benefits paid to public employees), *aff’d*, 779 F.2d 790 (1st Cir. 1986).

83. *Id.* (finding that Rhode Island’s restriction on municipal government’s providing abortion coverage through their insurance plans was unconstitutional because the restriction flatly banned abortion with no exceptions).

84. *Coe v. Melahn*, 958 F.2d 223, 227 (8th Cir. 1992) (reversing lower court’s ruling that MO. REV. STAT. § 376.805 created an undue burden on access to abortion).

85. *Jackson Women’s Health Org., Inc. v. Amy*, 330 F. Supp. 2d 820 (S.D. Miss. 2004) (granting preliminary injunction against MISS. CODE ANN. § 41-41-91 since public funding restriction would create an undue burden on a woman’s right to an abortion).

86. *See Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992).

87. *Id.* at 846.

[a]bortion is a unique act . . . fraught with consequences for others . . . it does not follow that the State is entitled to proscribe it in all instances. That is because the liberty of the woman is at stake in a sense unique to the human condition and so unique to the law. The mother who carries a child to full term is subject to anxieties, to physical constraints, to pain that only she must bear. . . . Her suffering is too intimate and personal for the State to insist . . . upon its own vision of the woman's role”⁸⁸

The opinion identified three essential holdings from *Roe*: (1) a woman has a right to get an abortion before fetal viability without undue interference from the state, (2) the State may restrict abortion after fetal viability, and (3) the State has a legitimate interest in protecting the health of the woman and the life of the fetus.⁸⁹

The Court reiterated its “obligation to follow precedent” and that it only overturns a prior holding in limited circumstances.⁹⁰ Rejecting the trimester framework from *Roe v. Wade*, the Court established “the undue burden standard [a]s the appropriate means of reconciling the State's interest with the woman's constitutionally protected liberty.”⁹¹ However, the State was authorized to “take measures to ensure that the woman's choice is informed, and measures designed to advance this interest will *not be invalidated as long as their purpose is to persuade the woman to choose childbirth over abortion*. These measures must not be an undue burden on the right.”⁹²

In *Harris v. McRae*, the Court examined whether a restriction on federal funding for abortion violated the First or Fifth Amendments to the United States Constitution.⁹³ The Court found that the law was “rationally related to the legitimate governmental objective of protecting potential life” because it “encourage[ed] childbirth except

88. *Id.* at 852.

89. *Id.* at 846.

90. *Id.* at 854.

91. *Id.* at 876 (stating that “an undue burden is a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus.”).

92. *Casey*, 505 U.S. at 878 (emphasis added).

93. *Harris v. McRae*, 448 U.S. 297, 301 (1980) (examining “whether the Hyde Amendment, by denying public funding for certain medically necessary abortions, contravenes the liberty or equal protection guarantees of the Due Process Clause of the Fifth Amendment, or either of the Religion Clauses of the First Amendment.”).

in the most urgent circumstances.”⁹⁴ Under the implicit Due Process Clause limitations on governmental power, there was no affirmative duty to subsidize abortion in every situation.⁹⁵ Nor was it unreasonable for the State to insist its funds were only being spent for medically necessary procedures.⁹⁶ A State only had to demonstrate that there was a “reasonable basis” for its decision of where to expend funds.⁹⁷ The Court deferred to the legislature’s fiduciary decision because “the state interest in encouraging normal childbirth exceed[ed] this minimal level” of interest.⁹⁸

Similar to the statute at issue in *Harris*, SB 98 removes government subsidization of abortion and encourages childbirth.⁹⁹ However, in a dissent to *Harris*, Justice Brennan cautioned the State from “wielding its enormous power and influence in a manner that might burden the pregnant woman’s freedom to choose whether to have an abortion.”¹⁰⁰ The Court in *Casey* made clear that an undue burden analysis is fact specific.¹⁰¹ Thus, any challenge to SB 98 will have to factually demonstrate how a woman’s access to abortion is unduly burdened.¹⁰²

Restrictions in Other States

Twenty-five states have enacted laws similar to this Act prohibiting insurance coverage of abortion through any state exchange.¹⁰³ Additionally, eighteen states restrict abortion coverage for public employees through their respective state health benefit

94. *Id.* at 325.

95. *Id.* at 317–318 (“Although the liberty protected by the Due Process Clause affords protection against unwarranted government interference with freedom of choice in the context of certain personal decisions, it does not confer an entitlement to such funds as may be necessary to realize all the advantages of that freedom. . . . To translate the limitation on governmental power implicit in the Due Process Clause into an affirmative funding obligation would require Congress to subsidize the medically necessary abortion of an indigent woman even if Congress had not enacted a Medicaid program to subsidize other medically necessary services.”).

96. *Maier v. Roe*, 432 U.S. 464, 480 (1977).

97. *Id.* at 479.

98. *Id.*

99. O.C.G.A. § 33-24-59.17 (Supp. 2014); O.C.G.A. § 45-18-4 (Supp. 2014).

100. *Harris*, 448 U.S. at 330 (Brennan, J., dissenting).

101. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 901 (1992). (“While at some point increased cost could become a substantial obstacle, there is no such showing on the record before us.”).

102. *See id.*

103. *See* NATIONAL WOMEN’S LAW CENTER, *supra* note 80.

plans.¹⁰⁴ Some states fall into both categories by restricting abortions through state exchanges and for public employees.¹⁰⁵ Unlike SB 98, ten of these states ban abortion coverage through any insurance plan even if it is not in a state exchange.¹⁰⁶ Some of these restrictions have already begun to face court challenges, and this Act is likely to fare no differently.¹⁰⁷

In 2011, the American Civil Liberties Union challenged the Kansas Act.¹⁰⁸ The suit claimed the restrictions violated a woman's "rights to privacy and liberty, as protected by the U.S. Constitution's Due Process Clause."¹⁰⁹ The Plaintiff argued that the Kansas legislature passed its Act "simply to impede access to abortion care, not to serve legitimate state interests."¹¹⁰ On cross motions for summary judgment, the court found that the restriction did not impose an "undue burden" on abortion rights.¹¹¹ The court analyzed the Kansas Act under a two-part test, "with the first part focused on the law's purpose and the second part focused on the law's actual effect."¹¹² Under the first part of the test, the court found that the plaintiff had not produced "evidence suggesting an unlawful motive" and therefore the legitimacy of the State's interests did not need to be addressed.¹¹³ Nonetheless, the court went on to find that at least

104. *State Restriction of Health Insurance Coverage of Abortion*, KAISER FAMILY FOUNDATION, <http://kff.org/womens-health-policy/state-indicator/abortion-restriction/> (last visited June 24, 2014).

105. *See id.*; e.g., KAN. STAT. ANN. § 40-2,190 (2013); MO. REV. STAT. § 376.805 (2012).

106. NATIONAL WOMEN'S LAW CENTER, *supra* note 74.

107. *See, e.g.*, *ACLU v. Praeger*, 917 F. Supp. 2d 1179, 1180 (D. Kan. 2013) (claiming abortion restriction in the Kansas statute had the effect of imposing a substantial obstacle on a woman's right to an abortion); *See e.g.*, *Jackson Women's Health Org., Inc. v. Amy*, 330 F. Supp. 2d 820, 827 (S.D. Miss. 2004) (granting preliminary injunction against the enforcement of Mississippi's statute since public funding restriction would create an undue burden on a woman's right to an abortion); *Coe v. Melahn*, 958 F.2d 223, 224 (8th Cir. 1992) (reversing grant of summary judgment in favor of plaintiff where plaintiff had argued that Missouri's statute placed obstacles on her access to abortions); *Fischer v. Dep't of Pub. Welfare*, 502 A.2d 114, 125-26 (Pa. 1985) (finding restriction of abortion funding to life endangering situations did not violate the state constitution).

108. *ACLU Challenges Kansas Ban on Insurance Coverage for Abortions*, ACLU (Aug. 16, 2011), <https://www.aclu.org/reproductive-freedom/aclu-challenges-kansas-ban-insurance-coverage-abortions>; *ACLU*, 815 F. Supp. 2d at 1217 (denying motion for preliminary injunction of HB 2075, later codified as KAN. STAT. ANN. § 40-2,190 (2013)).

109. *ACLU*, 917 F. Supp. 2d at 1180. Kansas' version of the restriction on elective abortion coverage in the state's exchange included an exception that allowed abortion when needed to save the life of the mother. KAN. STAT. ANN. § 40-2,190 (2013).

110. *ACLU*, 917 F. Supp. 2d at 1180.

111. *Id.* at 1187.

112. *Id.* at 1184.

113. *Id.* at 1185.

three of the four claimed interests were legitimate.¹¹⁴ Under the second part of the test, the law's actual effect, the court found that there was a genuine issue of material fact that would have to be explored at trial.¹¹⁵

SB 98 does not remove a woman's access to an abortion, but it certainly increases the cost by no longer subsidizing the procedure.¹¹⁶ With the amplified cost of getting an abortion, women of any income would be increasingly burdened by the Act.¹¹⁷ But since restrictions that ban funding for abortion, but don't ban abortions themselves, have been upheld by the Supreme Court, it is unlikely that the Act will be found to place an "undue burden" on access to abortion.¹¹⁸ The State is not under any obligation to provide abortion coverage¹¹⁹ and thus, the Act will likely withstand an "undue burden" challenge.

Farhaan Merchant & Saba Danenshvar

114. *Id.* at 1186 ("First, The Act still allows Kansas citizens who object to paying insurance premiums that are calculated to include the costs of elective abortions to avoid paying those premiums, whether they are covered as individuals or as part of a group plan. Even though the premiums are pooled, the cost of abortion services is not factored into the premium paid by those in plans that do not cover abortions. Second, although, as Plaintiff indicates, the Act does not significantly lower insurance rates for individuals, the Act will likely lower insurance costs in the aggregate, particularly for businesses employing large numbers of people. And third, the Act could make individuals seeking abortions more aware of the actual cost of abortion, at least for those individuals who previously would have paid for an abortion with insurance. All three of these interests are legitimate state interests, and the Court finds no evidence they are merely pretextual.")

115. *Id.* at 1189.

116. Senate Video, Mar. 18, 2014, *supra* note 55, at 1 hr., 37 min., 30 sec. (remarks by Sen. Nan Orrock (D-36th)).

117. *Id.*

118. *See Harris v. McRae*, 448 U.S. 297 (1980); *Maher v. Roe*, 432 U.S. 464 (1977).

119. *Rust v. Sullivan*, 500 U.S. 173, 201 (1991) (quoting *Webster v. Reprod. Health Servs.*, 492 U.S. 490 (1989)) (holding that "the Due Process Clauses . . . generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual.").

