



Center for Reproductive Rights
Supplemental Testimony

Before the Subcommittee on Select Revenue Measures
Committee on Ways and Means
United States House of Representatives

March 30, 2011

The Center for Reproductive Rights (CRR) submits the supplemental testimony below in response to issues raised at the hearing before the Subcommittee on Select Revenue Measures by the testimony of the Joint Committee on Taxation and questions raised by Committee Members.

CRR uses the law to advance reproductive freedom as a fundamental human right that all governments are legally obligated to protect, respect, and fulfill. We envision a world where every woman is free to decide whether and when to have children; where every woman has access to the best reproductive healthcare available; where every woman can exercise her choices without coercion or discrimination. More simply put, we envision a world in which every woman participates with full dignity as an equal member of society.

Restrictions on abortion coverage – such as H.R. 3 – impose real and high costs on women. Current restrictions on insurance coverage for federal employees forced one woman, D.J., to pay thousands of dollars after confronting incredibly difficult circumstances. After terminating a wanted pregnancy because she learned that the fetus had no brain and no chance of survival, she discovered that her federal insurance was barred from covering the procedure. In the midst of her grief, she was handed a \$9,000 bill.¹ H.R. 3 would inflict that pain on many more women.

H.R. 3 provides no clear theory of “federal funding,” and in fact contorts the concept beyond recognition.² H.R. 3 picks and chooses where to impose its strictures along utterly arbitrary – indeed, indiscernible – lines. A tax credit for outsourced workers to assist with medical expenses is thankfully no longer captured by the bill, but a tax credit to allow small businesses to provide workers with health insurance coverage remains in its sights. Similarly, expenses related to the COBRA program, which extends health benefits for workers, are now excluded from the bill’s reach, but health flexible spending arrangements (FSAs) which involve pre-tax dollars from workers’ pockets, are unaccountably still subject to its harsh rules.

Below, we make two key points about the harms of H.R. 3 that came to light at the hearing.

1) H.R. 3 misuses the tax code for social engineering, and thus would force tax auditors and employers to intrude into the most personal, private aspects of women’s lives.

As the hearing before the Subcommittee on Select Revenue Measures earlier this month made clear, the bill injects ideological principles into the tax code, using the tax mechanism to shame and punish women who seek to use medical insurance coverage for a legal choice.

H.R. 3 has far-reaching and potentially limitless implications. It creates a narrow “exception” for pregnancies that are the result of rape or incest, or where the woman’s life is endangered. The public reacted rightly with outrage when an earlier version of this bill attempted to redefine rape. The current version now gives that same power to the Internal Revenue Service (IRS).

H.R. 3 calls on the IRS to conduct rape audits.³ As Thomas A. Barthold, Chief of Staff of the Joint Committee on Taxation, testified, the burden of proof regarding whether or not an abortion occurred within the narrow confines of one of those exceptions will fall on the taxpayer.⁴ This means that women will be required to keep records, and to open up those records – and their highly personal traumatic experiences – to the probing investigations of IRS agents. According to a former longtime IRS official, “on audit [she] would have to demonstrate or prove, ideally by contemporaneous written documentation, that it was incest, or rape, or [her] life was in danger . . . [i]t would be fairly intrusive for the woman.”⁵

The case of incest is even more difficult. H.R. 3 could require the taxpayer (which could include an abusive father) to substantiate that the abortion was the result of abuse, creating an untenable and volatile situation for a family already in difficult and painful circumstances. To make matters worse, in addition to policing rape and incest, H.R. 3 would turn IRS officials into amateur physicians, requiring them to determine which dangerous conditions should qualify as life endangering under the bill.

Needless to say, such determinations – for practical, medical and emotional reasons – are far beyond the expertise and training of the typical IRS auditor. Indeed, they so poorly suit the role of the IRS auditor that this alone constitutes substantial evidence that H.R. 3 works a serious abuse of the tax code in the service of ideology.

In addition to inviting the IRS into the most personal aspects of women’s lives, H.R. 3 (as amended by H.R. 1232), could require that women report their abortions to their employers. H.R. 3/1232 provides that abortion services must be excluded from health flexible spending arrangements (“health FSAs”), which otherwise allow individuals to reduce their cash

compensation and set aside funds for medical expenses. Under H.R. 3/1232, according to the Joint Committee on Taxation, it is likely that the IRS will require that any amount paid for abortion services “be reported on the employee’s Form W-2 . . . as wages.”⁶ That is, H.R. 3/1232 creates a big brother regime in which women’s private medical decisions are forced to become public events, exposed to an endless stream of parties who could use that information to the woman’s detriment.

Given the bill’s misleading title, the slim reed on which the opposition’s argument rests is the equation of tax credits with direct federal funding. The hypocrisy of this suggestion would be laughable if it were not so threatening in this instance, as small-government conservatives would be surprised to learn that money now in the pocket of individuals due to the operation of a tax credit is in fact considered federal dollars. This political point aside, the government has long recognized a critical distinction between direct federal funding and tax “expenditures” or credits. Indeed, this distinction is essential to the reasoning that allows religious institutions and non-profits to remain tax exempt without that status working a violation of the Constitution’s Establishment Clause.

In testimony, Barthold referred to a case on the distinction between direct government expenditures and tax-subsidized private choices currently before the Supreme Court. The case, *Arizona Christian School Tuition Organization v. Winn*, includes consideration, among other issues, of the distinction between direct government expenditures and tax credits. The case was argued in November 2010, and a decision is expected later this term.

As indicated, in *Winn*, the Court is considering the constitutionality of an Arizona statute permitting taxpayers to receive a tax credit of up to \$500 for contributions made to “student tuition organizations” – private organizations that fund private-school scholarships for children, including scholarships to parochial schools. Under the Court’s precedents, while direct government expenditures for religious purposes are an unconstitutional violation of the First Amendment’s Establishment Clause; tax-subsidized private, non-governmental choices do not implicate the First Amendment.

A panel of the Ninth Circuit Court of Appeals ruled the statute at issue in *Winn* unconstitutional,⁷ and a slim majority of the full court denied review.⁸ The dissent in the decision denying review emphasized that “[m]ultiple layers of private, individual choice separate the state from any religious entanglement.”⁹ In other words, according to the dissent, by “‘delegating’ the choice to taxpayers, the government already broke the circuit [between government and religion]” – that is, the private taxpayer choice attenuates any link to government action.¹⁰

The Arizona Christian School Tuition Organization appealed the decision to the U.S. Supreme Court, which agreed to hear the case. During oral argument, a number of the Justices objected to the respondent's argument that appeared to conflate direct government spending with tax credits based on the theory that a reduction in taxes is a governmental expenditure.

For example, Justice Scalia stated, "That's a great leap to say that it's government funds, that any money the government doesn't take from me, because it gives me a deduction, is government money... This money has never been in the government's coffers. The government has declined to take this money."¹¹ Justice Alito similarly indicated his skepticism of Winn's argument that tax credits for private donations are imputable to the government, asking respondent Winn's attorney, "You think that all the money belongs to the government – except to the extent that it deigns to allow private people to keep some of it[?]"¹²

Most importantly, Justice Kennedy, widely regarded as the crucial swing vote on the Court, expressed tremendous skepticism about the respondent's argument eliding government expenditures and tax credits, noting, "But I must say, I have some difficulty that any money that the government doesn't take from me is still the government's money."¹³ Justice Kennedy continued:

JUSTICE KENNEDY: Let me ask you. If – if you reach a certain age, you can get a – a card and go to certain restaurants, and they give you a 10 percent credit. I think it would be rather offensive for the cashier to say, "and be careful how you spend my money."
(Laughter.)

JUSTICE KENNEDY: But that's the whole theory of your case.¹⁴

In light of the Court's earlier decisions distinguishing between direct government expenditures and tax-subsidized private choices, as well as the skepticism of Justice Kennedy and others, the Supreme Court is likely to reverse the Ninth Circuit's decision and reaffirm that tax breaks do not transform a private choice into a governmental decision.

2) H.R. 3 is an egregious attack on America's small businesses.

The economic challenges facing small businesses in this economy are serious; without attention from Congress, any economic recovery remains in doubt. A crucial step is to address escalating health care costs, and the loss of workers due to preventable illness that could have been avoided by proper care covered by health insurance. After a long period of neglect, the Affordable Care Act's (ACA's) tax breaks for small businesses at last offers hope to small businesses that they will be able to afford health insurance coverage for their workers. The ACA's tax credits are critical to stemming the escalation in health care costs, and making health care coverage affordable for American entrepreneurs and their businesses.

If there is to be an economic recovery, small businesses will be the engine for that growth. But instead of rewarding them, this bill would punish them in ever more innovative ways. The attack on small business healthcare tax credits in H.R. 3 would greatly complicate and confuse this community's ability to provide insurance coverage. Small business might respond to these burdens in several ways, each of which undermines employees' access to health insurance, and the goal of the ACA. They could reduce coverage, as Barthold testified, or they could decide not to provide coverage at all.

Even without taking full account of the impacts on coverage by small businesses, the paperwork burdens and costs imposed by this new and unwarranted mandate are steep. First, the provision would require every small business eligible for a tax credit – numbering some 4 million¹⁵ – to closely examine its healthcare plan to ascertain whether the plan includes coverage for abortion.

While some of these small businesses may not have offered health insurance coverage prior to the ACA, that program of tax credits has already begun, and many have likely signed up for coverage. Whether a healthcare plan does cover abortion care is far from simple to figure out, as coverage could occur in many categories, from prescription drugs to outpatient surgery to maternity care that includes unforeseen complications.

Indeed, most plan managers do not likely know whether this service is covered, and will have to waste precious time on the phone with insurers to figure it out. A 2010 Kaiser Family Foundation study revealed that a stunning 71% of employers replied “don't know” when asked whether their insurance plans provided coverage for abortion services.¹⁶ Yet surveys by both the Kaiser Family Foundation and the Guttmacher Institute indicate that a majority of healthcare insurance plans offered today provide coverage for abortion.¹⁷

Second, a majority of small businesses that today do provide abortion coverage – or approximately 2.4 million businesses – will have to switch insurance plans or pay the penalty of the loss of tax credits made available to them in the Affordable Care Act.¹⁸ But this, as it turns out, is a catch-22.

If a small business does decide to switch plans, their new healthcare insurance plan must meet requirements for non-grandfathered plans.¹⁹ This transformation of the marketplace was thoughtfully designed through the ACA and its implementing regulations to be gradual, as plans move from being grandfathered to needing a new health insurance contract. Yet H.R. 3 would inject a sudden interruption in this plan that will impact a majority of small businesses in the country.

More importantly, even a cursory look at the administrative costs required for small businesses to meet this one mandate in H.R. 3 shows that they are staggering. This kind of evaluation of a healthcare insurance plan and legal requirements requires the attention of the most valuable or second-most valuable employee at a typical small business. If we estimate that the time of that person is worth \$300/hour, if it takes 5 hours for every one of the 4 million small businesses eligible for the small business tax credit²⁰ to evaluate whether or not its coverage includes abortion (which is a conservative estimate), the cost for this assessment alone is a staggering \$6 billion.

If a majority of plans (estimated at 60 percent) – or 2.4 million businesses – then must switch plans in order to maintain eligibility for the tax credit, they must shop for a new plan, weigh options and costs, and address requirements for non-grandfathered plans. Again, a conservative figure for the time likely to be spent on this useless additional project is 30 hours. Using the same figures, the cost for this portion of the rule as a tax on small businesses is a stunning \$21.6 billion.

In total, this aspect of H.R. 3 imposes a tax on small businesses of more than \$27 billion in paperwork costs alone. Any way you slice this, small business owners will pay because some in Congress have decided to rewrite a reasonable and much-needed law to suit their own narrow ideological goals – goals that have nothing to do with the ordinary functioning and day-to-day life of the average small business. That Congress would support this penalty on small businesses at a moment of such dire economic hardships for America's most hard-working sector defies all logic and reason. That Congress would do so to penalize women in particular – when women are faring far worse, with 90% of the jobs created in the last year going to men²¹ – is simply shameful.

Congress should emphatically reject this extreme proposal.

Endnotes

¹ Statement of DJ Feldman on Harmful Impact of Abortion Coverage Restrictions, Nov. 16, 2009 at <http://reproductiverights.org/en/feature/no-abortion-banstatement-by-dj>.

² On March 30, 2011, the Committee on Ways and Means released H.R. 1232 “To amend the Internal Revenue Code of 1986 to eliminate certain tax benefits relating to abortion.” H.R. 1232 rewrites and refines section 303 of H.R. 3. Nothing in H.R. 1232 changes the egregious harms inflicted by the bill.

³ See Nick Baumann, “GOP Bill Would Force IRS to Conduct Abortion Audits,” *Mother Jones*, Mar. 18, 2011.

⁴ See *id.*

⁵ See *id.*

⁶ Joint Committee on Taxation, *Description of H.R. ____*, (JCX-21-11), 12-13, March 29, 2011.

⁷ *Winn v. Ariz. Chr. Sch. Tuition Org.*, 562 F.3d 1002 (9th Cir. 2009).

⁸ *Winn v. Ariz. Chr. Sch. Tuition Org.*, 586 F.3d 649 (9th Cir. 2009).

⁹ *Id.* at 662 (O’Scannlain, J., dissenting).

¹⁰ *Id.* at 667 (O’Scannlain, J., dissenting).

¹¹ *Ariz. Chr. Sch. Tuition Org. v. Winn*, No. 09-987, (Nov. 3, 2010), at 30-31.

¹² *Id.* at 35.

¹³ *Id.* at 31.

¹⁴ *Id.* at 31.

¹⁵ Small Business Majority, *A Helping Hand for Small Businesses: Health Insurance Tax Credits*, at 2 (2010).

¹⁶ See Kaiser Family Foundation & Health Research and Education Trust, *Employer Health Benefits 2010 Annual Survey*, 186, available at <http://ehbs.kff.org/pdf/2010/8085.pdf>.

¹⁷ Most Americans with employer-based insurance currently have coverage for abortion. See Guttmacher Institute, *Memo on Private Insurance Coverage of Abortion* (Jan. 2010), available at <http://www.guttmacher.org/media/inthenews/2011/01/19/index.html>.

¹⁸ *Id.*

¹⁹ See Amendment to the Interim Final Rules for Group Health Plans and Health Insurance Coverage Relating to Status as a Grandfathered Health Plan Under the Patient Protection and Affordable Care Act, 75 FR 70114 (2010).

²⁰ Small Business Majority, *A Helping Hand for Small Businesses: Health Insurance Tax Credits*, at 2 (2010).

²¹ Bradley Blackburn, “Women Lag Behind Men in Economic Recovery: New Government Numbers Show 90 Percent of Newly-Created Jobs Go to Men,” ABC News (Mar. 21, 2011).