

REPEALING ESSENTIAL HEALTH BENEFITS HURTS AND HARMS WOMEN

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ABSTRACT

Health care reform is one of the most discussed, controversial, and little-understood topics of the last decade. The Affordable Care Act, also known as Obamacare, transformed the American health care system when it was enacted in 2010. Seven years later, a new Administration and a new Congress have repeatedly tried to weaken and undermine the mandates of the Affordable Care Act and have attempted to repeal and replace it altogether on multiple occasions. Though both efforts to limit the impact of the Affordable Care Act and efforts to repeal and replace it have gained significant media attention, the public conversation has missed a critical point: the potential repeal of Essential Health Benefits. This article draws attention to Essential Health Benefits with a specific focus on how women would be harmed by their repeal. The article begins with a focus on the Affordable Care Act and how it transformed women’s health care. It continues with an examination of why women need Essential Health Benefits and goes on to explain how Essential Health Benefits are under immediate threat. The article then discusses various repeal efforts, specifically focusing on the impact the American Health Care Act and the Better Care Reconciliation Act could have had on women. It proceeds by discussing the continued threat of repeal of the Affordable Care Act and the future of Essential Health Benefits. The article concludes with suggestions on how to move forward and urges lawmakers to ensure the future of Essential Health Benefits.

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I. INTRODUCTION

The Affordable Care Act (“ACA”), also known as Obamacare, was enacted with three goals in mind: 1) expand access to health insurance, 2) increase quality of health care, and 3) control costs.¹ The ACA sought to achieve these goals by requiring individuals to get health insurance or pay a fine (known as the individual mandate), expanding employer coverage, expanding Medicaid, improving Medicare, and creating subsidies to help people pay for health insurance.² While the ACA was intended to allow all Americans to have equal access to health insurance and health care, one subgroup of the population was particularly affected: women.³

The ACA changed women’s health care in four major ways: 1) Ending Gender Rating, 2) Prohibiting Discrimination Based on Pre-Existing Conditions, 3) Expanding Medicaid, and 4) Creating Essential Health Benefits (“EHBs”).⁴ The first three of these provisions helped make health care more affordable and accessible. The fourth provision, EHBs, changed the type of health care to which women have access. Together, these four provisions helped the ACA achieve its goals. Before the implementation of the ACA approximately 18% of women ages 18–64 in the United States were uninsured.⁵ In 2015, that percentage dropped to 11%.⁶ Indeed,

1. *Breaking Down the 10 Goals of the Affordable Care Act*, UNIV. OF PITTSBURGH MED. CTR. (Mar. 31, 2015), <http://share.upmc.com/2015/03/10-goals-affordable-care-act/> [<https://perma.cc/X5Y9-7B2M>].

2. *See What is Obamacare/What is the Affordable Care Act?*, OBAMACARE FACTS, <http://obamacarefacts.com/whatis-obamacare/> [<https://perma.cc/CJ4N-GABZ?type=image>] (last visited May 1, 2017).

3. “Women” in this article is used for simplicity. The issues discussed in the article, however, affect a wide variety of people, including, but not limited to, those who are biologically female, those who identify as female, and those who are gender nonconforming.

4. 42 U.S.C. § 300gg (2010); 42 U.S.C. § 300gg-3 (2010); 42 U.S.C. § 18022 (2010); Patient Protection and Affordable Care Act of 2010, Pub. L. 111-148, § 1201, 2001, 124 Stat. 271 [hereinafter “ACA”].

5. Alina Salganicoff, Usha Ranji, Adara Beamesderfer & Nisha Kurani, *Women and Health Care in the Early Years of the ACA: Key Findings from the 2013 Kaiser Women’s Health Survey*, KAISER FAMILY FOUND. 11 (2014), <https://kaiserfamilyfoundation.files.wordpress.com/2014/05/8590-women-and-health-care-in-the-early-years-of-the-affordable-care-act.pdf> [<https://perma.cc/4FH9-4K7Q>].

6. *Women’s Health Insurance Coverage*, KAISER FAMILY FOUND. 1, <http://files.kff.org/attachment/fact-sheet-womens-health-insurance-coverage> [<https://perma.cc/6F2L-5TUU>] (last visited Oct. 21, 2016).

approximately 9.5 million women who were previously uninsured gained health coverage through the ACA, and 55 million now have access to vital preventative care at no cost.⁷

This article will focus on one component of the ACA—EHBs—and examine how that one component has affected women. Specifically, this article will address how EHBs changed women’s healthcare for the better and explain why their maintenance is critical. The article will then address the reality of EHBs potentially being changed and/or completely repealed. The article will conclude with suggestions about moving forward, with an emphasis on ensuring that EHBs remain a part of health care in the United States.

II. HOW THE ACA CHANGED WOMEN’S HEALTH

The ACA allowed more women to gain access to health insurance and healthcare by ending gender rating, mandating coverage of individuals with pre-existing conditions, and expanding Medicaid. Before the ACA, insurance companies were able to practice “gender rating” and charge women significantly more than men for health insurance, “costing women approximately \$1 billion a year”.⁸ In addition to disproportionately charging women more for coverage, insurance companies were able to deny approximately 65 million women insurance coverage because of “pre-existing conditions” such as prior pregnancy, cesarean delivery, breast or cervical cancer, and domestic or sexual assault.⁹ In addition to ending both of these practices, the ACA expanded Medicaid coverage, which has significantly increased insurance coverage for poor women.¹⁰

The ACA also expanded the type of healthcare available to insured women by creating mandated EHBs. EHBs are a set of ten categories of services that must be covered by health insurance plans under the ACA.¹¹ The 10 categories of EHBs include 1) Ambulatory Patient Services; 2) Emergency Services; 3) Hospitalization; 4) Pregnancy, Maternity, and

7. Jamila Taylor, *How Women Would Be Hurt by ACA Repeal and Defunding of Planned Parenthood*, CTR. FOR AM. PROGRESS (Jan. 18, 2017, 9:23 AM), <https://www.americanprogress.org/issues/women/news/2017/01/18/296705/how-women-would-be-hurt-by-aca-repeal-and-defunding-of-planned-parenthood/> [https://perma.cc/26SR-JZCX].

8. *The Risk of Repeal: How ACA Repeal Will Hurt Women’s Health and Economic Security*, NAT’L WOMEN’S LAW CTR. 1 (Dec. 12, 2016), <https://nwlc.org/wp-content/uploads/2016/12/The-Risk-of-Repeal-FS-5.pdf> [https://perma.cc/P7LS-XFR7].

9. *Id.*

10. See *Women’s Health Insurance Coverage*, *supra* note 6, at 2.

11. See 42 U.S.C. § 18022 (2012); see also *Essential Health Benefits*, HEALTHCARE.GOV, <https://www.healthcare.gov/glossary/essential-health-benefits/> [https://perma.cc/7AUQ-JXTH] (last visited May 1, 2017).

Newborn Care; 5) Mental Health and Substance Use Disorder Services; 6) Prescription Drugs; 7) Rehabilitative and Habilitative Services and Devices; 8) Laboratory Services; 9) Preventative and Wellness Services and Chronic Disease Management; and 10) Pediatric Services, including oral and vision care.¹² In addition, plans must offer birth control coverage¹³ and breastfeeding coverage (these mandates, however, are not technically EHBs).¹⁴ Due to the ACA mandate that plans in the individual and small group markets, excluding grandfathered plans, or plans purchased on or before March 23, 2010,¹⁵ cover EHBs,¹⁶ women gained guaranteed insurance coverage for prenatal and newborn care and preventative services.¹⁷

III. WHY WOMEN NEED ESSENTIAL HEALTH BENEFITS

If EHBs are changed or removed entirely, women will be hurt tremendously. The two EHBs that, if removed, will affect women most profoundly are 1) pregnancy, maternity, and newborn care; and 2) preventative and wellness services and chronic disease management. EHBs cover pregnancy, maternity and newborn “[c]are that women receive during pregnancy (prenatal care), throughout labor, delivery and post-delivery, and care for newborn babies.”¹⁸ The preventative services that are covered include well-woman visits;¹⁹ screening for gestational diabetes; human

12. 42 U.S.C. § 18022 (2012).

13. However, note that a new rule announced Friday, October 6, 2017, by the Trump administration will relax the ACA’s birth control requirement for employers, meaning fewer women in the workplace will have plans that cover birth control (due to more employers being able to obtain a religious exemption). See *ObamaCare Birth Control*, OBAMACARE FACTS, <https://obamacarefacts.com/obamacare-birth-control/> [<https://perma.cc/6RFS-HLUN>] (last visited Nov. 1, 2017).

14. The ACA contains a section on the coverage of preventative services. See ACA § 1001 (adding § 2713 to the Public Health Service Act) (codified as 42 U.S.C. § 300gg-13 (2012)). It also includes a separate section outlining EHBs, including preventative services. See 42 U.S.C. 18022 (2012).

15. See 42 U.S.C. § 18011 (2012); *Grandfathered Health Plans*, HEALTHCARE.GOV, <https://www.healthcare.gov/glossary/grandfathered-health-plan/> [<https://perma.cc/6MSK-B64E>] (last visited Nov. 1, 2017).

16. See 42 U.S.C. § 18022 (2012).

17. *Id.*; see also *Information on Essential Health Benefits (EHB) Benchmark Plans*, THE CTR. FOR CONSUMER INFO. & INS. OVERSIGHT, <https://www.cms.gov/cciiio/resources/data-resources/ehb.html> [<https://perma.cc/ZUU8-KYTP>] (last visited Nov. 1, 2017).

18. See *ObamaCare Essential Health Benefits*, OBAMACARE FACTS, <https://obamacarefacts.com/essential-health-benefits/> [<https://perma.cc/QV6R-H27S>] (last visited Nov. 1, 2017).

19. Well-woman visits vary depending on the woman’s health needs and age. Typically, they include gynecological, pelvic, and breast examinations. See *Well-Woman Visit*, PLANNED PARENTHOOD, <https://www.plannedparenthood.org/learn/health-and-wellness/well-woman-visit> [<https://perma.cc/QAT9-MW6F>] (last visited Nov. 1, 2017).

papillomavirus (HPV) testing; counseling for sexually transmitted infections (STIs); counseling and screening for human immune-deficiency virus (HIV); contraceptive methods²⁰ and counseling; breastfeeding support, supplies, and counseling; and screening and counseling for interpersonal and domestic violence.²¹ Included within these broader categories are vital services like anemia screening, folic acid supplements, gonorrhea screening, Hepatitis B screening, Rh Incompatibility screening, syphilis screening, expanded tobacco intervention and counseling for pregnant tobacco users, urinary tract or other infection screening, breast cancer genetic test counseling (BRCA), breast cancer mammography screenings, breast cancer chemoprevention counseling, cervical cancer screening, chlamydia infection screening, and osteoporosis screening.²²

The positive impact of EHBs on women's healthcare is easily demonstrable. In a 2007 study, 52% of women reported delaying needed medical care because of cost.²³ In the same study, 32% of women reported they were "unable to pay for basic necessities such as food, heat, or rent; had used up all their savings; had taken a mortgage or loan against their home; or had taken on credit card debt because of medical bills."²⁴ After the passage of the ACA, thanks to its inclusion of EHBs, women now have access to well-woman visits,²⁵ and other routine, recommended preventative care²⁶ with little to no out of pocket expenses.²⁷ Women also have better

20. 42 U.S.C. § 18022 (2012).

21. *Women's Preventive Services Guidelines*, HEALTH RES. & SERVS. ADMIN., <https://www.hrsa.gov/womensguidelines/> [<https://perma.cc/GY9B-FBPC>] (last visited Nov. 1, 2017); ACA § 1001 (adding § 2713 to the Public Health Service Act and giving HRSA the statutory authority to create these guidelines) (codified as 42 U.S.C. § 300gg-13 (2012)).

22. *Preventative Care Benefits for Women*, HEALTHCARE.GOV, <https://www.healthcare.gov/preventive-care-women/> [<https://perma.cc/PW8U-THP8>] (last visited Nov. 1, 2017).

23. Sheila D. Rustgi, Michelle M. Doty & Sara R. Collins, *Women at Risk: Why Many Women Are Foregoing Needed Health Care*, THE COMMONWEALTH FUND 3, 5 (May 2009), http://www.commonwealthfund.org/~media/Files/Publications/Issue%20Brief/2009/May/Women%20at%20Risk/PDF_1262_Rustgi_women_at_risk_issue_brief_Final.pdf [<https://perma.cc/4Q49-AMQX>].

24. *Id.*

25. See 42 U.S.C. § 18022(b)(1) (2012); see also *Information on Essential Health Benefits (EHB) Benchmark Plans*, *supra* note 17.

26. See 42 U.S.C. § 18022(b)(1) (2012).

27. *What Marketplace health insurance plans cover*, HEALTHCARE.GOV, <https://www.healthcare.gov/coverage/what-marketplace-plans-cover/> [<https://perma.cc/7FQD-N3QY>]; Elizabeth Renter, *How to Make the Most of Free Preventive Care Under the ACA*, U.S. NEWS & WORLD REP. (Jan. 12, 2015), <https://health.usnews.com/health-news/health-insurance/articles/2015/01/12/how-to-make-the-most-of-free-preventive-care-under-the-aca> [<https://perma.cc/8FYQ-TBCV>]. The ACA has also allowed women to save approximately \$1.4 billion per year on birth control. Amie Newman, *Millions of Women's Birth Control Depends Upon*

access to pregnancy-related services. Despite the “average total charges for [maternal and newborn] care with vaginal and cesarean births [being] \$32,093 and \$51,125, respectively,”²⁸ prior to the implementation of the ACA, only 12% of individual market plans covered maternity services.²⁹ Even those plans that did offer maternity coverage often charged extra for the coverage and required waiting periods of at least a year, if not longer.³⁰ Other plans offered optional riders, usually costing around \$1,000 a month.³¹ Moreover, maternity coverage had to be purchased before a woman became pregnant in order to avoid the treatment of the pregnancy as a pre-existing condition.³² Although all women have benefitted from EHBs, pregnant women perhaps embody the best example of why having access to affordable health care is important, since not having access to prenatal care makes it three times more likely that their babies will be born with a low birth weight and five times more likely that their babies will die.³³

IV. ESSENTIAL HEALTH BENEFITS ARE UNDER IMMEDIATE THREAT

Due to the structure of the ACA, EHBs are under immediate threat. The ACA defines the ten categories of EHBs insurance plans must cover, but does little else.³⁴ Rather, it is up to the states to choose the level at which EHBs will be offered.³⁵ In essence, states pick from a range of

the ACA, OUR BODIES OURSELVES (Jan. 19, 2017), <http://www.ourbodiesourselves.org/2017/01/millions-of-womens-birth-control-depends-upon-aca/> [https://perma.cc/9A3W-2B78].

28. *The Cost of Having a Baby in the United States*, TRUVEN HEALTH ANALYTICS MARKETSCAN STUD. (Jan. 2013), <http://transform.childbirthconnection.org/wp-content/uploads/2013/01/Cost-of-Having-a-Baby1.pdf> [https://perma.cc/J8EE-6DDQ].

29. *The Risk of Repeal*, *supra* note 8.

30. Michelle Andrews, *Health Law's 10 Essential Benefits: A Look at What's at Risk in GOP Overhaul*, KAISER HEALTH NEWS (Feb. 21, 2017), <http://khn.org/news/health-laws-10-essential-benefits-a-look-at-whats-at-risk-in-gop-overhaul/> [https://perma.cc/SQ4Z-UC2Z].

31. Julie Rovner, *Families to Pay Price if Maternity Care Coverage Is Cut by GOP*, KAISER HEALTH NEWS (Mar. 14, 2017), <http://khn.org/news/families-to-pay-price-if-maternity-care-coverage-meets-gop-knife/> [https://perma.cc/RM79-TQYE].

32. *Id.*

33. *Late or No Prenatal Care: Indicators of Child and Youth Well-Being*, CHILD TRENDS 2 (Dec. 12, 2015), https://www.childtrends.org/wp-content/uploads/2015/12/25_Prenatal_Care.pdf [https://perma.cc/4HNE-MLXB].

34. See 42 U.S.C. § 18022 (2012).

35. 45 CFR § 156.100 (2012); *Health Policy Brief: Essential Health Benefits*, HEALTH AFF. BLOG (May 2, 2013),

<http://www.healthaffairs.org/doi/10.1377/hpb20130502.454771/full/> [https://perma.cc/6YW8-A2WN].

existing health insurance plans to serve as the EHB benchmark plan.³⁶ If an EHB benchmark plan does not include all of the ACA's required benefit categories, then states have to identify supplemental coverage to ensure such coverage.³⁷ Although states technically control which EHBs are offered in insurance plans sold on the exchanges in their state, the Department of Health and Human Services ("HHS") must approve each benchmark plan.³⁸ In theory then, HHS and its various agencies may make attempts to approve less-than-ideal benchmark plans. In addition, and of particular importance, is the fact that the Health Resources and Services Administration, an agency of HHS, sets certain guidelines for the types of services insurance plans must cover.³⁹ It is therefore possible that even without an ACA repeal, the administration can cause implementation changes that lead to less comprehensive coverage.⁴⁰

The threat of changes to EHBs is current and ongoing. HHS has had a particularly anti-women's health stance since the beginning of President Donald Trump's administration. President Trump appointed Tom Price to be the head of HHS shortly after his election win, calling Mr. Price "exceptionally qualified to shepherd our commitment to repeal and replace Obamacare and bring affordable and accessible health care to every American."⁴¹ In reality, President Trump appointed a man who, as a Representative of Georgia, repeatedly yelled "I object!" as the Democratic Women's Caucus attempted to make arguments about how the ACA would benefit women.⁴² This is the same man who, after the passage of the ACA, when asked about what would happen to low-income women if the contraceptive coverage mandate were repealed, responded, "Bring me one

36. *Quick Take: Essential Health Benefits: What Have States Decided for Their Benchmark?*, KAISER FAMILY FOUND. (Dec. 7, 2012), <http://kff.org/health-reform/fact-sheet/quick-take-essential-health-benefits-what-have-states-decided-for-their-benchmark/> [<https://perma.cc/HQ5M-HRB4>].

37. *Id.*

38. See 42 U.S.C. § 18022(d)(3) (2012); Michael Petruzzelli, *CMS Finalizes Essential Health Benefits Benchmark for 2017*, NATIONAL COUNSEL FOR BEHAVIORAL HEALTH (Nov. 12, 2015), <https://www.thenationalcouncil.org/capitol-connector/2015/11/cms-finalizes-essential-health-benefits-benchmark-2017/> [<https://perma.cc/LE8N-PTUL>].

39. 45 CFR § 156.110(b)-(c) (2012); See *Information on Essential Health Benefits (EHB) Benchmark Plans*, *supra* note 17.

40. *Cf.* 42 U.S.C. § 18022 (2012).

41. Amy Goldstein & Philip Rucker, *Trump Names Rep. Tom Price as Next HHS Secretary*, WASH. POST (Nov. 29, 2016), https://www.washingtonpost.com/news/powerpost/wp/2016/11/28/trump-to-name-rep-tom-price-as-next-hhs-secretary/?utm_term=.baa9a24eaf67 [<https://perma.cc/J9KJ-VUNR>].

42. Lila Shapiro, *"I Object": Tom Price Tries to Shut Down Democratic Congresswomen*, HUFFPOST (May 25, 2011), http://www.huffingtonpost.com/2009/11/07/i-object-tom-price-tries_n_349587.html [<https://perma.cc/HBM7-S332>].

woman who has been left behind. Bring me one. There's not one."⁴³ During his short-lived tenure as Secretary of HHS, Mr. Price vowed to destabilize the ACA, telling House of Representatives members that he planned to weaken the ACA by changing the regulations governing it.⁴⁴ In addition to promising to roll-back the contraceptive mandate,⁴⁵ Mr. Price suggested that maternity care should not be a benefit covered under federal law.⁴⁶

Though Mr. Price resigned after receiving public scrutiny for using at least \$400,000 of taxpayer money to take chartered flights,⁴⁷ his anti-woman vision of HHS is very much alive. Mere days after his resignation, HHS issued two rules aimed at rolling back the contraceptive mandate the ACA put in place.⁴⁸ In particular, the rules exempt employers from covering contraceptive services on the basis of "sincerely held religious beliefs" or "moral conviction which is not based in any particular religious belief."⁴⁹

43. Melissa Cruz, *These Tom Price Quotes on Women's Reproductive Rights Suggest Hard Times Ahead*, BUSTLE.COM (Nov. 29, 2016), <https://www.bustle.com/articles/197478-these-tom-price-quotes-on-womens-reproductive-rights-suggest-hard-times-ahead> [<https://perma.cc/YL7Q-9MXR>].

44. Tami Luhby, *Essential Health Benefits and Why They Matter*, CNN (Mar. 24, 2017, 9:59 AM), <http://www.cnn.com/2017/03/22/politics/essential-health-benefits-obamacare-freedom-caucus/> [<https://perma.cc/32RN-Y6TW>].

45. Laurel Raymond, *Tom Price 'Welcomes' the Chance to Roll Back Birth Control Coverage*, THINK PROGRESS (May 4, 2017, 8:51 PM), <https://thinkprogress.org/tom-price-birth-control-coverage-a87009b7b418/> [<https://perma.cc/76BV-9TYJ>].

46. Juliet Eilperin & Mike Debonis, *Price: Trump Administration Plans to Undue Parts of the Affordable Care Act*, CHI. TRIB. (Mar. 29, 2017, 10:21 PM), <http://www.chicagotribune.com/news/nationworld/politics/ct-price-trump-health-care-law-20170329-story.html> [<https://perma.cc/J3FY-PTZP>].

47. Peter Baker, Glenn Thrush & Maggie Haberman, *Health Secretary Tom Price Resigns After Drawing Ire for Chartered Flights*, N.Y. TIMES (Sept. 29, 2017), <https://www.nytimes.com/2017/09/29/us/politics/tom-price-trump-hhs.html> [<https://perma.cc/J3FY-PTZP?type=image>].

48. Robert Pear, Rebecca R. Ruiz & Laurie Goodstein, *Trump Administration Rolls Back Birth Control Mandate*, N.Y. TIMES (Oct. 6, 2017), <https://www.nytimes.com/2017/10/06/us/politics/trump-contraception-birth-control.html> [<https://nyti.ms/2xZX1y8>].

49. *Trump Administration Issues Ruling Protecting the Conscience Rights of All Americans*, DEPARTMENT OF HEALTH AND HUMAN SERVICES, <https://www.hhs.gov/about/news/2017/10/06/trump-administration-issues-rules-protecting-the-conscience-rights-of-all-americans.html>

[<https://perma.cc/87VX-XS24>] (last visited Nov. 1, 2017). On the same day as HHS announced these new rules, Attorney General Jeff Sessions issued a memorandum to aid administrative agencies and executive departments in "interpreting religious liberty protections in federal law." The memorandum specifically notes: "Nor may the Department of Health and Human Services second-guess the determination of a religious employer that providing contraceptive coverage to its employees would make the employer complicit in wrongdoing in violation of the organization's religious precepts." Attorney General Jeff Sessions, *Memorandum for All Executive Departments and Agencies*, <https://www.justice.gov/opa/press-release/file/1001891/download> [<https://perma.cc/9LBT-K8Q6>] (Oct. 6, 2017).

These new rules are just the beginning. HHS’s draft 2018-22 strategic plan states: “HHS accomplishes its mission through programs and initiatives that cover a wide spectrum of activities, serving and protecting Americans at every stage of life, *beginning at conception*.”⁵⁰ In other words, the plan intended to clarify the administration’s focus contains language that is specifically aimed at limiting women’s access to health care—namely, abortion and contraception. As alarmingly, the Centers for Medicare and Medicaid Services (“CMS”), which is a part of HHS, has proposed a rule directly targeting EHBs.⁵¹ In particular, the CMS proposed rule is aimed at giving states more flexibility in determining which services insurers have to cover.⁵² In other words, should this rule be instituted, states could stop requiring insurers to cover EHBs.

Though neither HHS’s draft plan nor CMS’s EHBs rule has been implemented yet, it is very clear that HHS will continue to target provisions which help women gain access to health care, and lower costs of such care. If Mr. Price was any indication, it is almost guaranteed that his successor will continue to take positions that ultimately harm women and limit their access to affordable health care (or health care at all).⁵³ Even if a successor for Mr. Price is not confirmed in the immediate future, President Trump has ensured that an anti-women’s health agenda will continue to thrive by filling HHS with officials who have documented anti-women’s health stances, including Seema Verma, Valerie Huber, Charmaine Yoest, Teresa

50. HHS Strategic Plan 2018–2022, U.S. DEP’T OF HEALTH AND HUMAN RES. 4 (proposed Sept. 2017) (emphasis added), <https://web.archive.org/web/20170930061658/https://www.hhs.gov/sites/default/files/hhs-draft-strategic-plan-fy2018-2022.pdf>; see also Jessie Hellmann, *Trump’s HHS Defines Life as Beginning at Conception*, THE HILL (Oct. 11, 2017, 10:59 AM), <http://thehill.com/policy/healthcare/355104-health-department-defines-life-as-beginning-at-conception> [<https://perma.cc/U85J-5W3E>] (emphasis added).

51. HHS Notice of Benefit and Payment Parameters for 2019, 82 Fed. Reg. 51052-51148 (proposed Nov. 2, 2017) (to be codified at 45 C.F.R. pts. 147, 153, 154, 155, 156, 157, 158), <https://www.gpo.gov/fdsys/pkg/FR-2017-11-02/pdf/2017-23599.pdf> [<https://perma.cc/J9W6-TAVJ>].

52. *Id.* at 51053 (“We propose to provide States with additional flexibility in the definition of essential health benefits (EHBs). . . .”); See also Kathryn Watson, *Trump Administration Proposes Rule to Give States Flexibility on “Essential Health Benefits”*, CBS NEWS (Oct. 28, 2017, 10:47 AM), <https://www.cbsnews.com/news/trump-administration-proposes-rule-to-let-states-decide-essential-health-benefits/> [<https://perma.cc/4UCX-6J7K>].

53. At the time of publishing, Alex Azar had been nominated by President Trump to become the new head of HHS. See Paige Winfield Cunningham, *The Health 202: Who is Alex Azar, Trump’s Pick to Lead HHS?*, WASH. POST (Nov. 14, 2017), https://www.washingtonpost.com/news/powerpost/paloma/the-health-202/2017/11/14/the-health-202-who-is-alex-azar-trump-s-pick-to-lead-hhs/5a09d17b30fb045a2e002fcf/?utm_term=.034ffd4199ce [<https://perma.cc/W9S9-T29N>].

Manning, and Katy Talento.⁵⁴ Though abortion and contraceptives are not EHBs, and EHBs have so far been left untouched, it is clear that HHS has the will and the power to upend regulations that benefit women and aid them in receiving health care. Indeed, HHS can change regulations and can do so immediately.

V. THE POTENTIAL REPEAL OF THE ACA AND THE IMPACT OF REPEAL ON WOMEN

In addition to any rollbacks that HHS or CMS may implement, President Trump is determined do away with the entire ACA. During the 2016 election cycle, President Trump promised to repeal and replace “the disaster known as Obamacare” and to do so on day one of his administration.⁵⁵ Despite promising to repeal the ACA no less than 68 times,⁵⁶ President Trump has never fully articulated why he believes the ACA needs to be repealed. He has repeatedly asserted that the ACA is “imploding” and that premiums are increasing, but has been vague on the details of his claims.⁵⁷ The main concern for him and those that want to repeal the ACA, however, seems to be saving money. On February 9, 2016 President Trump tweeted “we will save \$’s and have much better healthcare!”⁵⁸ The conservative think-tank The Heritage Foundation echoed this sentiment when it focused three of its top five reasons for repealing the ACA on its expense.⁵⁹ It is also worth noting that an ACA repeal would cause there to be a \$346 billion tax cut for taxpayers that earn over \$200,000 (\$200,500 for couples).⁶⁰

54. For more information on these individuals see Liz Galst, *8 Anti-Women’s Health White House Officials Whose Job Is to Protect Your Health*, PLANNED PARENTHOOD ACTION FUND (June 13, 2017, 10:33 AM), <https://www.plannedparenthoodaction.org/blog/anti-womens-health-white-house-officials-whose-job-is-to-protect-your-health> [<https://perma.cc/TA5T-2RRG>].

55. See Lauren Carroll, *Repeal Obamacare*, POLITIFACT (Jan. 16, 2017, 12:46 PM), <http://www.politifact.com/truth-o-meter/promises/trumpometer/promise/1388/repeal-obamacare/> [<https://perma.cc/X8UP-6HQJ>].

56. Ryan Koronowski, *68 Times Trump Promised to Repeal Obamacare*, THINKPROGRESS (Mar. 24, 2017, 8:28 PM), <https://thinkprogress.org/trump-promised-to-repeal-obamacare-many-times-ab9500dad31e> [<https://perma.cc/H45U-L2SQ>].

57. Linda Qiu, *Fact Check: Trump’s Misleading Claims on the Health Bill Failure*, N.Y. TIMES (Mar. 24, 2017), https://www.nytimes.com/2017/03/24/us/politics/fact-check-trumps-misleading-claims-in-health-bill-failure.html?_r=0 [<https://nyti.ms/2nOIUu9>].

58. Donald J. Trump (@realDonaldTrump), TWITTER (Feb. 9, 2016, 2:15 PM), <https://twitter.com/realdonaldtrump/status/697182075045179392?lang=en> [<https://perma.cc/6E76-9G82>].

59. Alyene Senger, *Five Reasons to Repeal Obamacare*, THE HERITAGE FOUND. (Jan. 21, 2015), <http://www.heritage.org/health-care-reform/commentary/five-reasons-repeal-obamacare> [<https://perma.cc/6TWZ-W52N>].

60. Matt O’Brien, *Why Do Republicans Want to Repeal Obamacare So Much? Because It Would Be a Big Tax Cut For the Rich*, WASH. POST (Dec. 16, 2016),

While those that want to repeal the ACA are concerned about saving costs, they seem less concerned about how women—50.8% of the population⁶¹—will be affected as a result. Although Congressional attempts at repealing and replacing the ACA have so far failed,⁶² the proposed House bill, the American Health Care Act (AHCA), and the proposed Senate bill, the Better Care Reconciliation Act (BCRA), give insight into the priorities of those who want to repeal the ACA. In its final form, the AHCA retained the ACA's prohibitions of gender rating and discrimination based on pre-existing conditions,⁶³ but included provisions to end Medicaid expansion and defund Planned Parenthood.⁶⁴ Similarly, the BCRA included provisions to end Medicaid expansion and defund Planned Parenthood for at least one year.⁶⁵ Had either of these bills become law, the negative effects on women's health care would have been enormous.

Under both bills, Medicaid expansion would have been terminated and Medicaid would have been cut back significantly.⁶⁶ Indeed, these bills would have completely reworked the Medicaid system, cut future spending for Medicaid growth, and shifted the burden of care from the federal government to the states.⁶⁷ Such cuts would have drastically reduced, if not eliminated, Medicaid for nearly 74 million Americans—approximately 20%

https://www.washingtonpost.com/news/wonk/wp/2016/12/16/why-do-republicans-want-to-repeal-obamacare-so-much-because-it-would-be-a-big-tax-cut-for-the-rich/?utm_term=.5e9ca97a3783 [<https://perma.cc/UN3J-CRT5>].

61. *Age and Sex Composition: 2010*, U.S. CENSUS BUREAU 2 (May 2011), <https://www.census.gov/prod/cen2010/briefs/c2010br-03.pdf> [<https://perma.cc/8FCF-6XGM>].

62. Rachel Roubein, *TIMELINE: The GOP's Failed Effort to Repeal Obamacare*, THE HILL (Sept. 26, 2017, 8:02 PM), <http://thehill.com/policy/healthcare/other/352587-timeline-the-gop-effort-to-repeal-and-replace-obamacare> [<https://perma.cc/PSG8-32TN>].

63. *See Summary of the American Health Care Act*, KAISER FAMILY FOUND. (May 2017), <http://files.kff.org/attachment/Proposals-to-Replace-the-Affordable-Care-Act-Summary-of-the-American-Health-Care-Act> [<https://perma.cc/D5HM-QUVA>].

64. *See* H.R. Res. 1628, 115th Cong. § 103(b)(1)(A) (as passed by House, May 4, 2017) (hereinafter "ACHA") (prohibiting organizations that perform abortions from receiving Medicaid reimbursements); ACHA §§ 111, 112 (ending Medicaid expansion on December 31, 2019).

65. *See* S. Cong. Res. 1628, 115th Cong. § 124 (last draft of BCRA by Senate, June 26, 2017) (hereinafter "BCRA") (prohibiting organizations that perform abortions from receiving Medicaid reimbursements); BCRA §§ 125, 126 (ending Medicaid expansion on December 31, 2019).

66. *See* ACHA §§ 111, 112; BCRA § 126; *See also* Sara Kliff, *The American Health Care Act: The Obamacare Repeal Bill the House Just Passed, Explained*, VOX (May 4, 2017 2:44 PM), <https://www.vox.com/policy-and-politics/2017/5/3/15531494/american-health-care-act-explained> [<https://perma.cc/Z4PQ-EKHK>]; Peter Sullivan, *Senate GOP Releases Obamacare Repeal Bill with Deep Cuts to Medicaid*, THEHILL (June 22, 2017, 10:46 AM), <http://thehill.com/policy/healthcare/338947-senate-gop-releases-obamacare-repeal-bill-with-deep-cuts-to-medicare> [<https://perma.cc/YK9A-SE25>].

67. Harrison Jacobs & Bob Bryan, *The Republican Healthcare Plan Would Bring Big Changes for the 69 Million Americans on Medicaid—Here's How the Program Works*, BUS. INSIDER (July 5, 2017, 9:59 AM), <http://www.businessinsider.com/what-is-medicare-medicare-ahca-trumpcare-bcra-healthcare-news-2017-6>.

of the population—who rely on Medicaid in whole or in part.⁶⁸ Of the 19.4 million women ages 15 and older who receive full Medicaid benefits, 70% are of reproductive age.⁶⁹ Indeed, “[t]hree-quarters of all public dollars for family planning come from Medicaid”⁷⁰ and “half of all births [in the United States] are covered by Medicaid, including two-thirds of unplanned births.”⁷¹ In addition to cutting Medicaid, both bills would have completely defunded Planned Parenthood because it provides abortion services⁷² (even though the Hyde Amendment has prohibited federal funding for abortion services since 1976).⁷³ The effect of defunding Planned Parenthood, however, extends far beyond abortion coverage. Abortions are only a small part of the services Planned Parenthood provides, accounting for only 3.4% of all services provided in the year ending in September 2014.⁷⁴ On average, Planned Parenthood provides health care services—including contraceptive services, breast examinations, pap smears, and sexually transmitted disease and sexual transmitted infection tests—to 2.4 million women and men in the United States each year.⁷⁵ In 2015, “[o]ne-quarter of

68. *Id.*

69. Usha Ranji, Yali Balir & Alina Salganicoff, *Medicaid and Family Planning: Background and Implications of the ACA*, KAISER FAMILY FOUND. (Feb. 3, 2016), <https://www.kff.org/womens-health-policy/issue-brief/medicaid-and-family-planning-background-and-implications-of-the-aca/> [<https://perma.cc/E7XG-MJFJ>].

70. *Id.*

71. *Id.*

72. In March 2017, President Trump offered to let Planned Parenthood keep its funding if it stopped performing abortions, but Planned Parenthood declined. In addition to defunding Planned Parenthood, the AHCA and BCRA also banned abortion coverage through insurance plans offered to people receiving tax credits or subsidies. *See* ACHA §§ 202(a)(1)(B)(ii), 202(a)(3), 203(b); BCRA §§ 102(d), 103(b); *see also* Maggie Haberman, *Trump Tells Planned Parenthood Its Funding Can Stay if Abortion Goes*, N.Y. TIMES (Mar. 6, 2017), <https://www.nytimes.com/2017/03/06/us/politics/planned-parenthood.html> [<https://nyti.ms/2n7BEnP>]; Julia Belluz, *Once Again, 13 Men Wrote a Bill That’s Bad for Women’s Health*, VOX (Jun. 23, 2017, 9:29 AM), <https://www.vox.com/2017/6/22/15845832/republican-senate-healthcare-bill-planned-parenthood-better-care-reconciliation-act> [<https://perma.cc/G9GS-FMBN>].

73. *Hyde Amendment*, PLANNED PARENTHOOD, <https://www.plannedparenthoodaction.org/issues/abortion/hyde-amendment> [<https://perma.cc/6KZC-LRNW>] (last visited Sept. 17, 2017).

74. Danielle Kurtzleben, *Here’s What GOP Bill Would (and Wouldn’t) Change for Women’s Health Care*, NPR (Mar. 10, 2017, 2:38 PM), <http://www.npr.org/2017/03/10/519461271/heres-what-the-gop-bill-would-and-wouldnt-change-for-womens-healthcare>.

75. *Planned Parenthood at a Glance: Who We Are*, PLANNED PARENTHOOD, <https://www.plannedparenthood.org/about-us/who-we-are/planned-parenthood-at-a-glance> [<https://perma.cc/7VVD-VB25>] (last visited May 1, 2017).

all women in need of publicly funded contraceptive services lived in [238 counties served by Planned Parenthood].”⁷⁶

VI. THE POTENTIAL REPEAL OF THE ACA AND THE FUTURE OF ESSENTIAL HEALTH BENEFITS

The AHCA did not originally include a provision to repeal EHBs primarily because Congress was trying to pass the bill through budget reconciliation, which limited the legislation to changes affecting spending, revenues, and the federal debt limit.⁷⁷ Because of those limits, the bill’s proponents in the House feared that the Senate Parliamentarian⁷⁸ would rule the AHCA as outside of the scope of reconciliation if it included EHBs, meaning that the Senate would have needed a 60 vote threshold instead of a simple majority to pass the bill.⁷⁹ However, after the House Freedom Caucus, a group of over 30 hardline conservatives,⁸⁰ threatened to block the AHCA’s passage,⁸¹ lawmakers amended the bill to permit states to establish their own standards for EHBs and waive the federal requirements.⁸²

76. Kinsey Hasstedt, *Understanding Planned Parenthood’s Critical Role in the Nation’s Family Planning Safety Net*, GUTTMACHER INST. (Jan. 12, 2017), <https://www.guttmacher.org/gpr/2017/01/understanding-planned-parenthoods-critical-role-nations-family-planning-safety-net> [https://perma.cc/9EK8-JYDW].

77. See David Reich & Richard Kogan, *Introduction to Budget “Reconciliation”*, CTR. ON BUDGET & POLICY PRIORITIES (Nov. 9, 2016), <http://www.cbpp.org/research/federal-budget/introduction-to-budget-reconciliation> [https://perma.cc/M3T9-BG2T].

78. The Parliamentarian is a Senate staffer that serves as the Senate’s advisor on the interpretation of Senate rules and procedures. *Glossary*, UNITED STATES SENATE, https://www.senate.gov/reference/glossary_term/parliamentarian.htm [https://perma.cc/HRQ7-HBHT]. [https://perma.cc/HRQ7HBHT]. For information on the Parliamentarian’s nonpartisan role in the ACA repeal debate, see Paige Winfield Cunningham, *This Senate Staffer Could Change the Course of the Health Care Debate*, WASH. POST (May 29, 2017), https://www.washingtonpost.com/powerpost/this-senate-staffer-could-change-the-course-of-the-health-care-debate/2017/05/29/16e16ef2-425d-11e7-9869-bac8b446820a_story.html?utm_term=.a962bcb9f4d3.

79. Mike DeBonis, *What the Freedom Caucus Wants in the GOP HealthCare Bill, and Why It’s Not Getting It*, WASH. POST (Mar. 22, 2017), https://www.washingtonpost.com/news/powerpost/wp/2017/03/22/what-the-freedom-caucus-wants-in-the-gop-health-bill-and-why-they-arent-getting-it/?utm_term=.c7d0d56f0cb0.

80. Eliza Collins, *What is the House Freedom Caucus and Why is Trump Attacking Its Members?*, USA TODAY (Mar. 30, 2017, 3:22 PM), <https://www.usatoday.com/story/news/politics/onpolitics/2017/03/30/what-is-the-house-freedom-caucus/99831230/> [https://perma.cc/U3G9-VSMV].

81. Bob Bryan, *“No Deal”: Hardline Conservatives Threaten to Sink “Trumpcare”*, BUS. INSIDER (Mar. 23, 2017, 1:39 PM), <http://www.businessinsider.com/trumpcare-ahca-obamacare-house-vote-trump-paul-ryan-freedom-caucus-2017-3>.

82. Compare H.R. Res. 1628, 115th Cong. (AHCA as drafted, Mar. 6, 2017) (not including a waiver of EHBs), with ACHA § 136(b); see also Haeyoun Park, Margot Sanger-Katz & Jasmine C. Lee, *What Republicans Changed in Their Health Care Bill to Try to Get More Votes*, N.Y. TIMES (May 3,

Following the House's lead, the Senate's bill included a provision that would allow states to opt-out of covering EHBs.⁸³ As predicted by the House originally, the Senate Parliamentarian ruled that this provision violated the rules of budget reconciliation; thus the BCRA needed a 60 vote majority to pass in the Senate.⁸⁴ After the Parliamentarian's ruling, the Senate abandoned the BCRA and tried instead to pass a "skinny repeal" bill.⁸⁵ Three Republicans prevented the Senate from passing this legislation and momentarily ended Congressional Republicans' attempts to repeal and replace the ACA with a dramatic 51-49 vote.⁸⁶ However, attempts to repeal and replace the ACA appear to be far from over. Mere weeks after the failure of the "skinny repeal" bill, two new, polar-opposite health care bills were introduced. One bill, introduced by Senators Lindsay Graham and Bill Cassidy, followed in the same mold as previous repeal and replace bills and was aimed at limiting federal control of health care.⁸⁷ The other bill, introduced by Senator Bernie Sanders, was aimed at increasing governmental control of health care by creating a single-payer "Medicare

2017), https://www.nytimes.com/interactive/2017/05/03/us/what-republicans-changed-in-their-health-care-bill.html?smid=fb-nytimes&smtyp=cur&_r=0 [https://nyti.ms/2pyGzCz].

83. BCRA § 207; *see also* Kliff, *supra* note 66.

84. It should be noted that the Senate Parliamentarian also ruled that the provisions defunding Planned Parenthood and restricting the purchase of health plans that cover abortion with tax credits fell outside of the scope of budget reconciliation and would also need a 60 vote majority to pass. *See* Julia Rovner, *Senate Parliamentarian Upends GOP Hopes for Health Bill*, KAISER HEALTH NEWS (July 21, 2017), <http://khn.org/news/ruling-by-senate-parliamentarian-upends-gop-hopes-for-health-care-bill/> [https://perma.cc/3YY8-JL52]; Eric Levitz, *Conservatives Just Lost Their Favorite Part of Trumpcare*, N.Y. MAG. (July 27, 2017, 2:48 PM), <http://nymag.com/daily/intelligencer/2017/07/conservatives-just-lost-their-favorite-part-of-trumpcare.html> [https://perma.cc/V6PV-ZZ59].

85. *See* S. Cong. Res. 1628, 115th Cong. (the Health Care Freedom Act by Senate, July 27, 2017). The so-called "skinny repeal" bill, the Health Care Freedom Act, largely left the ACA in place. It would have involved a repeal both the individual and employee mandates for health insurance and included provisions to restrict Planned Parenthood funding. The bill was viewed as a procedural vehicle to continue the healthcare debate—since it could be passed through reconciliation and open a conference committee negotiations with the House—and not the end of the road for the repeal and replace process. *See also* Vann R. Newkirk III, *The Health Care Freedom Act Hits the Senate Floor*, THE ATLANTIC (July 27, 2017), <https://www.theatlantic.com/politics/archive/2017/07/the-health-care-freedom-act-hits-the-senate-floor/535194/> [https://perma.cc/XH8P-47CP]; Alana Abramson, *Senate Republicans Just Unveiled the 'Skinny Repeal Bill.' Here's What It Would Do*, TIME (July 27, 2017, 11:45 PM), <http://time.com/4876315/obamacare-senate-skinny-repeal/> [https://perma.cc/25DY-7TCZ].

86. Robert Pear & Thomas Kaplan, *Senate Rejects Slimmed-Down Obamacare Repeal as McCain Votes No*, N.Y. TIMES (July 27, 2017), <https://www.nytimes.com/2017/07/27/us/politics/obamacare-partial-repeal-senate-republicans-revolt.html> [https://nyti.ms/2h7vxSA].

87. Jennifer Haberkorn, *Graham, Cassidy Unveil Last-Ditch Obamacare Repeal Bill*, POLITICO (Sept. 13, 2017, 2:20 PM), <http://www.politico.com/story/2017/09/13/obamacare-repeal-bill-senate-242665> [https://perma.cc/V6FQ-AHNW].

for All” system.⁸⁸ While both bills failed to muster enough support to pass the Senate,⁸⁹ they underscored the ongoing, divisive debate surrounding healthcare reform and proved that the issue of repeal and replace is far from settled.

Since the most recent fiscal year ended on September 30, 2017,⁹⁰ the Parliamentarian’s ruling has temporarily saved EHBs. As Congress has passed the 2017–18 budget with a focus on tax reform,⁹¹ it is likely that Congress will not attempt to repeal the ACA through budget reconciliation until they set the 2018-19 budget.⁹² Even so, Congress has already moved to undermine EHBs through tax reform. By including a repeal of the ACA’s individual mandate in its tax bill, the Senate voted to increase insurance premiums and allow millions of Americans to lose coverage.⁹³ Though

88. See S. Cong. Res., 115th Cong. §1804 (2017); see also Daniel Marans & Jonathan Cohn, *Bernie Sanders Announces Single-Payer Bill With Major Support in Senate*, HUFFPOST (Sept. 13, 2017, 8:00 AM), http://www.huffingtonpost.com/entry/bernie-sanders-single-payer-bill-major-support-senate_us_59b87dc1e4b02da0e13d465f [https://perma.cc/H7RS-RM88]; Matthew Yglesias, *Medicare-for-All is Nothing like “Repeal and Replace”*, VOX (Sept. 14, 2017, 8:00 AM), <https://www.vox.com/policy-and-politics/2017/9/14/16302744/medicare-repeal-and-replace> [https://perma.cc/P3Z4-5QKE].

89. Haeyoun Park & Wilson Andrews, *One-Third of Democratic Senators Support Bernie Sanders’s Single-Payer Plan*, N.Y. TIMES (Sept. 13, 2017), <https://www.nytimes.com/interactive/2017/09/13/us/sanders-medicare-for-all-plan-support.html> [https://nyti.ms/2eWw5a0]; Sean Sullivan, Juliet Eilperin & Kelsey Snell, *Senate GOP Effort to Unwind the ACA Collapses Monday*, WASH. POST (Sept. 25, 2017), https://www.washingtonpost.com/powerpost/new-version-of-health-care-bill-will-help-alaska-and-maine--home-of-two-holdout-senators/2017/09/25/24697f62-a188-11e7-b14f-f41773cd5a14_story.html?utm_term=.80126824e05b.

90. Ed Kilgore, *How Republicans Could Nuke the Rules to Pass Trumpcare*, N. Y. MAG. (Mar. 17, 2017, 11:16 AM), <http://nymag.com/daily/intelligencer/2017/03/how-republicans-could-nuke-the-rules-to-pass-trumpcare.html> [https://perma.cc/4MWQ-2CVY]; Peter Sullivan, *Senate Rulemaker: Fast-Track For ObamaCare Repeal Ends This Month*, THE HILL (Sept. 1, 2017, 2:06 PM), <http://thehill.com/policy/healthcare/348891-senate-rulemaker-fast-track-for-obamacare-repeal-ends-this-month> [https://perma.cc/3QNW-WF3X].

91. Ted Barrett and Phil Mattingly, *Senate Approves Budget Kick-Starting GOP Tax Reform Effort*, CNN (Oct. 20, 2017, 6:51 AM), <http://www.cnn.com/2017/10/19/politics/vote-a-rama-gop-tax-reform/index.html> [https://perma.cc/QQ36-3HYP].

92. Andrew Prokop, *How Republicans Could Still Revive Obamacare Repeal After Their September 30th Deadline*, VOX (Sept. 26, 2017, 2:50 PM), <https://www.vox.com/policy-and-politics/2017/9/26/16361250/obamacare-repeal-deadline-september-30> [https://perma.cc/D4SU-7NLP].

93. Tax Cuts and Jobs Act, H.R. 1, 115th Cong. § 11081 (1st Sess. 2017). The individual mandate repeal was added to the original House bill via an amendment introduced by Senator Orrin Hatch. S. Amdt. 1855, 115th Congress (1st Sess. 2017), available at <https://www.congress.gov/amendment/115th-congress/senate-amendment/1855/text/2186508?> [https://perma.cc/HHS9-B7WW]; see also Yasmeen Abutaleb, *U.S. Senate Tax Bill Accomplishes Major Obamacare Repeal Goal*, REUTERS (Dec. 2, 2017, 2:35 AM),

insurers would still be required to cover essential health benefits under the tax bill, having less insured healthy people to offset the cost of insured sick people would make it more expensive for insurers to cover these and other services.⁹⁴ In addition to potentially having insurers drop out of insurance marketplaces,⁹⁵ individuals who face high premiums may be priced out.⁹⁶ Should the Senate's tax bill become law once it is reconciled with the House's tax bill, which does not include a repeal of the individual mandate,⁹⁷ women would likely be less able to take advantage of EHBs.

It seems clear that the continued existence of EHBs will remain in jeopardy for as long as repeal and replace remains an option. Although the Parliamentarian has determined that the Senate would need to pass a future repeal bill allowing states to opt out of covering EHBs with a 60-vote majority, some members of Congress have argued that Vice President Pence can overrule this decision.⁹⁸ While overruling the Parliamentarian would reverse years of precedent, given that opponents of the ACA have promised to repeal it since the day former President Barack Obama signed it into law seven years ago,⁹⁹ this option is not infeasible. Even if Congress decides to respect the Parliamentarian's decision, it is likely that they will come up with another way to directly limit EHBs, one which the Parliamentarian might find amendable to budget reconciliation. Indeed, the Graham-Cassidy bill, proposed as a last-ditch repeal effort,¹⁰⁰ included a new type of provision that would allow states to waive EHB requirements under certain conditions.¹⁰¹

<https://www.reuters.com/article/us-usa-tax-healthcare/u-s-senate-tax-bill-accomplishes-major-obamacare-repeal-goal-idUSKBN1DW07T> [<https://perma.cc/Z2N7-QUYY>].

94. Julie Rovner, *Congress Isn't Really Done With Health Care—Just Look At What's In The Tax Bills*, KAISER HEALTH NEWS (Dec. 1, 2017), <https://khn.org/news/congress-isnt-really-done-with-health-care-just-look-at-whats-in-the-tax-bills/> [<https://perma.cc/7G4X-8BEW>].

95. *Id.*

96. Elizabeth O'Brien, *The Senate's Tax Bill Eliminates the Individual Mandate for Health Insurance. Here's What You Need to Know*, TIME (Dec. 2, 2017), <http://time.com/money/5043622/gop-tax-reform-bill-individual-mandate/> [<https://perma.cc/NN55-ZK4D>].

97. Jeff Stein, Kim Soffen, Reuben Fischer-Baum & Kevin Uhrmacher, *Here Are 7 Differences Republicans Must Resolve Between Their Tax Bills*, WASH. POST (Dec. 2, 2017), https://www.washingtonpost.com/graphics/2017/business/tax-bill-differences-reconciliation/?utm_term=.873c8d83c12f.

98. Alexander Bolton, *Cruz: Let's Overrule Senate Officer to Expand ObamaCare Bill*, THE HILL (Mar. 9, 2017, 4:58 PM), <http://thehill.com/homenews/senate/323272-cruz-lets-overrule-senate-officer-to-expand-obamacare-bill> [<https://perma.cc/TDF9-TU94>].

99. Kevin Glass, *Republicans Have Made Too Many Promises to Repeal ObamaCare Easily*, THE HILL (Aug. 3, 2017, 7:20 AM), <http://thehill.com/blogs/pundits-blog/healthcare/345099-republicans-have-made-too-many-promises-to-repeal-obamacare> [<https://perma.cc/7GRC-HWHW>].

100. BCRA § 207; *see also* Kliff, *supra* note 66.

101. *See* S. Cong. Res. 1628, 115th Cong. § 106 (Graham-Cassidy bill final draft); *see also* Sara Rosenbaum, *Graham-Cassidy: A Closer Look at the Medicaid Provisions*, HEALTH AFF. BLOG (Sept.

While the efforts of repeal and replace have demonstrated that provisions repealing EHBs have been both a key to passing legislation and an Achilles heel, it seems clear that some sort of repeal, waiver, or other limitation of EHBs is necessary for getting a repeal bill passed. This was made clear when adding a repeal of EHBs turned out to be a decisive move that ultimately allowed the House to pass its AHCA repeal bill.¹⁰² Moreover, each proposed repeal and replace bill—with the exception of Senator Sanders’ bill—has included provisions to limit the ACA’s EHBs mandate.¹⁰³ While it is unknown how Congress will proceed in its repeal and replace efforts, the risk that lawmakers will attempt to do away with EHBs in the future remains very real. As such, the future of women’s access to health care remains very much at risk.

VII. MOVING FORWARD

The current conversation about EHBs is an “all or nothing” conversation: either the ACA repeal and replace plan keeps EHBs intact or it does not. However, I propose that there may be a middle ground approach. Currently, the ACA’s deferral to states regarding EHB benchmark plans¹⁰⁴ leave women in some states with less comprehensive plans than women in others.¹⁰⁵ In Alabama, for example, breast cancer screening and mammography are the only women’s services listed as required benefits in the state’s 2017 EHB benchmark plan.¹⁰⁶ By contrast, Massachusetts requires a more generous list of benefits, including infertility treatment, prenatal and postnatal care, maternity health care, mammography, cytologic screening,¹⁰⁷ preventative care for children up to age six, lead poisoning screening, hearing screening for newborns, and contraceptive services as state required benefits, among others.¹⁰⁸ Perhaps Congress can find a middle ground by comparing the effects and health care outcomes in states with expansive benchmark plans to the effects and health care outcomes in states with minimal benchmark plans. For example,

14, 2017), <http://healthaffairs.org/blog/2017/09/14/graham-cassidy-a-closer-look-at-the-medicaid-provisions/> [<https://perma.cc/9EV3-7BEJ>].

102. See Park, *supra* note 82.

103. ACHA § 136(b); BCRA § 207; H.R. Res.1628 § (i)(1)(b); S. Cong. Res., 115th Cong. §1804 (2017).

104. See Rovner, *supra*, note 31.

105. See generally *Information on Essential Health Benefits (EHB) Benchmark Plans*, *supra* note 17.

106. *Alabama—State Required Benefits*, CTRS FOR MEDICARE & MEDICAID SERVS., https://downloads.cms.gov/cciio/State%20Required%20Benefits_AL.PDF [<https://perma.cc/BG5D-U7Q4>] (last visited May 1, 2017).

107. A screening used to detect early signs of cancer and other diseases.

108. *Massachusetts—State Required Benefits*, CTRS FOR MEDICARE & MEDICAID SERVS., https://downloads.cms.gov/cciio/State%20Required%20Benefits_MA.PDF [<https://perma.cc/VSL9-HJHU>] (last visited May 1, 2017).

studying the types and combinations of services used, along with their costs and effectiveness, could reveal a strategy for cutting costs without unduly cutting or impacting women's health care coverage.

No matter what happens in Congress, HHS, or CMS, one thing is clear: women have better access to health care than they did before the ACA, including those women in states with the least comprehensive benchmark plans. As House Minority Speaker Nancy Pelosi observed following the ACA's enactment, "being a woman is no longer a pre-existing medical condition."¹⁰⁹ Indeed, the broad and beneficial impact of the ACA on women's health care is indisputable. Ending gender rating, prohibiting discrimination based on pre-existing conditions, expanding Medicaid, and creating EHBs transformed women's health care and allowed millions of women to gain access to necessary care they had not had access to before.¹¹⁰ Due to the push to repeal the ACA, and the push to administratively dismantle it through HHS and CMS until repeal is achieved, it is unclear how long women will continue to enjoy the expanded access to health care the ACA currently provides. What is known, however, is that dropping required coverage of EHBs from future federal health care legislation will be an intolerable reversal and major step backwards for women's health care coverage in the United States. Such a move would revert the United States back to a time where only a select group of women had access to comprehensive health care. Without EHBs, all American women will suffer.

109. Nancy Pelosi: 'Being a Woman is No Longer a Pre-Existing Medical Condition', CNSNEWS.COM (Apr. 14, 2016, 3:18 PM), <http://www.cnsnews.com/news/article/cnsnewscom-staff/nancy-pelosi-being-woman-no-longer-pre-existing-medical-condition> [<https://perma.cc/F2DB-FYLW>].

110. Munira Z. Gunja, Sara R. Collins, Michelle M. Doty & Sophie Beutel, *How the Affordable Care Act Has Helped Women Gain Insurance and Approved Their Ability to Get Health Care*, COMMONWEALTH FUND (Aug. 2017), http://www.commonwealthfund.org/~media/files/publications/issue-brief/2017/aug/gunja_women_hlt_coverage_care_biennial.pdf [<https://perma.cc/YSE4-WFBM>].