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Zika Funding and Partisan Politics

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THE HEALTH LAWYER

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ZIKA FUNDING AND PARTISAN POLITICS

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Introduction

In 2014, Congress responded effectively to the threat of an Ebola epidemic’s emergence within the United States.¹ A year-and-a-half later, it failed to respond similarly to the threat presented by the Zika virus.² In late 2014, Congress appropriated \$5.4 billion in emergency funding to combat Ebola.³ In contrast, congressional paralysis, grounded in partisan politics, precluded a similar legislative response to President Obama’s request in February 2016 for \$1.9 billion in emergency funds to combat Zika.⁴ In short, the congressional response to Ebola reflected a coalescence of concern that displaced partisan politics. Congress’s response to the risk posed by the Zika virus reflected broad ideological disagreements and a delay that could have proved, and may still prove, harmful to the health of the population.

This article summarizes the threat that Zika poses to public health. It reviews governmental action that

would likely limit that threat and then delineates Congress’s failure to appropriate funding to combat Zika in the months between the administration’s request for such funding and the summer of 2016.⁵ The article focuses on Congress’s readiness to stymie funding for a national response to Zika by displacing cooperation with sectarian politics. That such did not occur in 2014 – when Congress voted expeditiously to fund responses to Ebola – may reflect the extraordinary level of national concern evoked by media presentations of Ebola, as compared with those of Zika in 2016,⁶ a hardening of sectarian positions in the intervening two years, or both.

Zika: Uncertainties and “Facts”: the Risks of Zika to Public Health

Significant uncertainty surrounds the emergence and spread of the Zika virus.⁷ It has proven difficult to predict where the virus will likely appear over time.⁸ Further, individuals in areas with Zika-infected mosquitoes are sometimes infected but exhibit no symptoms. A small percentage of those infected with the virus develop serious conditions, including Guillian-Barre Syndrome.⁹ It is unclear who will be affected this way or why. There is uncertainty about the relation

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between the time of a pregnant woman's being infected with Zika and the consequences for her fetus.¹⁰ And it is not clear whether there are long-term consequences implicating brain development in children infected in utero. These uncertainties are compounded by the absence of a vaccine or an effective treatment.

The uncertainties that surround the condition have encouraged the development of myths and conspiracy theories.¹¹ Zika has been attributed falsely to the release of genetically-modified mosquitoes, to vaccinations given to pregnant women, and to bioterrorism.¹² Others have asserted that claims about Zika's dangers are a hoax, aimed at compelling people to "blindly obey the government."¹³

However, facts about Zika are emerging. Zika is a flavivirus, first isolated from a monkey in Uganda in 1947.¹⁴ Human infection was reported in Nigeria in 1954.¹⁵ More recently, the virus appeared in French Polynesia, Latin America (where it was first identified in Brazil), and the Caribbean. The Pan American Health Organization documented the first case in Brazil in May 2015.¹⁶ By the start of the summer of 2016, the mosquito responsible for Zika infections had spread to many Latin American countries and to some U.S. Territories.¹⁷ The Centers for Disease Control and Prevention ("CDC") estimated in June 2016 that Zika had appeared in more than 60 countries.¹⁸ Many of those countries are in the Caribbean or in Latin America.¹⁹

The *Aedes aegypti* mosquito is the primary vector for the spread of Zika; the virus is also spread by *Aedes albopictus* mosquitoes and through certain body fluids, including sperm, blood, and perhaps urine and saliva.²⁰ Although *Aedes* mosquitoes are the primary agent through which humans are infected with Zika virus disease,²¹

research in Brazil suggests that the *Culex* mosquito may also serve as a vector for Zika's spread.²² If that is the case, then the United States and Europe face a significantly greater risk that the virus will be transmitted locally.²³ Further, the *Culex* and *Aedes* mosquitoes have different feeding patterns and different breeding environments, a combination that could make containment efforts aimed at limiting or eradicating mosquitoes carrying Zika particularly complicated in areas with both sorts of mosquitoes.²⁴

The consequences of the virus in Africa – where Zika has not been terribly troublesome²⁵ – are quite different from those that became manifest in Latin America and the Caribbean in 2016, and that appeared in the South Pacific a few years earlier. In Africa, the virus appeared to cause no symptoms or only minor ones, including a rash and achiness.²⁶ But a different strain of the virus that seems first to have appeared in Yap in Micronesia in 2007²⁷ and then in the Western Hemisphere in 2015 has far more devastating consequences.²⁸ The new strain attacks nerve cells and can cause serious nerve damage.²⁹ The virus is especially dangerous to developing fetuses, causing miscarriage, microcephaly, other brain injuries, small size, and ocular defects³⁰ as well as conditions such as clubfoot and joint inflexibility.³¹ There is concern about the possibility of neurodegenerative disease and developmental problems in children exposed to Zika in utero.³² Researchers have suggested that the Zika virus may attack fetal brains by invading rapidly dividing brain stem cells, resulting in the death of some of the stem cells and the incapacity of others to continue to divide.³³ As a result, development of the fetal cortex is disrupted, and the brain can be left malformed and not fully developed.³⁴

That Zika attacks fetuses so brutally has made the consequences of a Zika epidemic terrifying to some, though not to all,³⁵ people.³⁶ One graduate student at Washington University in St. Louis doing research on Zika pinpointed the fear: "A bunch of scientists were like, 'you can kill millions of us, you can give us cancer.... But don't mess with our babies.'"³⁷

Yet, despite Zika's capacity to ravage fetal brains, the virus seems not to have seriously affected the majority of babies born to mothers infected during pregnancy.³⁸ Preliminary research estimated that between one percent and 13 percent of women infected with Zika during early pregnancy will have babies with serious defects at birth.³⁹ An early report on Zika-related birth defects in Colombia (involving patients showing symptoms of Zika between August 2015 and April 2016) suggests that infection during the third trimester of pregnancy may be far less likely to result in Zika-related defects than infection earlier in pregnancy.⁴⁰ The seriousness of Zika's consequences for fetuses is compounded by the absence of both a vaccine and of treatment beyond symptom relief.⁴¹

In February 2016, the Director-General of the World Health Organization ("WHO"), reflecting the conclusions of a WHO Emergency Committee on Zika, declared that the spread of the Zika virus constituted a Public Health Emergency of International Concern.⁴² The WHO report described the spread of Zika and its consequences for fetuses as an "extraordinary event" and a significant public health threat to the world.⁴³

Medicine and Epidemiology: The Spread of Zika

As of late July 2016, locally acquired cases of Zika had been

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confirmed only in one neighborhood in the continental United States – near downtown Miami.⁴⁴ However, a significant number of travel-related cases were reported.⁴⁵ Between the start of 2015 and August 3, 2016, about 1,800 travel-associated Zika cases had been reported in the United States, with others reported in the U.S. Territories (Puerto Rico and the U.S. Virgin Islands).⁴⁶ Over 5,400 additional cases of Zika virus, all locally acquired, were reported within the same time frame in Puerto Rico, 44 in American Samoa and in the U.S. Virgin Islands, and by mid-August over 10,000 cases were reported in Puerto Rico.⁴⁷ As of the end of March 2016, there were over 180,000 suspected cases of Zika infection in Latin America.⁴⁸

By mid-June 2016, the CDC reported that the Zika infection rate in Puerto Rico had risen faster than had been anticipated.⁴⁹ The June infection rate – computed on the basis of data from the screening of donor blood – raised fears that thousands of pregnant women could become infected during the summer months, leading to “dozens to hundreds” of babies born with microcephaly.⁵⁰ By July, Thomas Frieden, Director of the CDC, estimated that 50 pregnant women in Puerto Rico were being infected each day.⁵¹

Further, in mid-June, the CDC reported the births in the continental United States of three infants with birth defects related to infection of their mothers during pregnancy.⁵² Zika-linked defects were identified in three other fetuses, but these pregnancies did not result in live births.⁵³ Each of these six cases was travel-related.⁵⁴ From this information, it is not possible to discern what percent of births to women in the United States infected with Zika have resulted in birth defects.⁵⁵ Apparently, some of the babies with Zika-related

defects were gestated by women who had traveled to Zika-infected areas but had exhibited no symptoms of the disease.⁵⁶

The Zika virus remains in an infected person’s blood for a week and can be spread through mosquitoes which bite an infected person and then bite others to whom the virus is thus spread.⁵⁷ Thus, local transmission within the United States would likely begin after a local mosquito able to carry Zika bit someone with Zika who contracted the virus elsewhere.⁵⁸ In June, it was expected that were this to happen, it is most likely that Zika-infected mosquitoes would spread, at least initially, in the South during the summer months; the appearance of locally transmitted Zika was reported in Florida in late July 2016.⁵⁹ Urban areas⁶⁰ and other areas with dense populations are at greatest risk of Zika’s spreading, in part because most mosquitoes that carry Zika do not move more than a city block during their lives.⁶¹

The most common vector for Zika virus, the *Aedes Aegypti* mosquito (also referred to as the Yellow Fever mosquito),⁶² is most ubiquitous in the American South and Southwest but has been found in the Northeast.⁶³ The CDC has targeted a wide swath of states as being particularly at risk for local transmission, including some in the South but also Arizona, California, Hawaii, Louisiana and Texas. The focus of concern is on localities with high urban densities and the high likelihood of travelers from Zika-infested areas. Others suggest that Zika will not be as widespread within the United States as the CDC projections suggest.⁶⁴

States and localities are responsible for mosquito control, although federal funds can be used to implement local mosquito-control plans. In many states at particular risk for Zika,

however, efforts to control mosquitoes are inadequate.⁶⁵ Poor states without a robust tax base are most likely not to have adequate mosquito control.⁶⁶ Parts of North Carolina and Tennessee fall into this bailiwick.⁶⁷ Moreover, many states were not aware of the danger until recently and thus have only just begun efforts to control mosquito populations.⁶⁸ States at risk of Zika seem to be waiting for federal funding to respond with more adequate mosquito control efforts. Should a local outbreak develop, however, efforts at controlling mosquitoes will likely accelerate.⁶⁹

The project may prove daunting. In Brazil, where the infestation of Zika in the Western Hemisphere was first identified, there is a far more solidly institutionalized system for eradicating mosquitoes’ breeding spots than now exists in the United States.⁷⁰ In contrast, federal funding dedicated to the control of mosquitoes fell by more than 50 percent in the United States between 2004 and 2012 (from \$24 million to \$10 million).⁷¹

Responses to Zika in the United States

Effective responses to the spread of Zika depend on invoking a multiplicity of talents and on governmental support.⁷² Most felicitously, a vaccine⁷³ and treatment options will be developed. But before that happens control of mosquitoes carrying Zika infection is essential. This control depends on the use of pesticides in areas in which mosquitoes breed, on eliminating even small pockets of water,⁷⁴ and on screens and air conditioners that will facilitate the protection of home environments. Further, research is underway to release mosquitoes infected with bacteria that might limit mosquito populations,⁷⁵ and new techniques for monitoring the appearance and breeding grounds of Zika-infected

mosquitoes are being actively developed.⁷⁶ Other basic responses to the threat of Zika's spread include public education about the virus and the mosquitoes that carry it, available and affordable contraception, monitoring the disease, especially in pregnant women,⁷⁷ supporting research aimed at precluding Zika's consequences and at accurate testing, and, of course, development of treatments⁷⁸ and vaccine research.⁷⁹ The Food and Drug Administration has advised the nation's blood banks not to accept blood from people at risk for Zika, including those who have travelled to nations with Zika or who have had sex with a man who has travelled to one of those nations.⁸⁰

All of this work needs funding. A CDC deputy director has referred to the agency's efforts to respond to Zika as "the most difficult health response" that the agency has ever been asked to undertake.⁸¹

Funding Zika Responses and Politics

Congress reacted with a sustained display of factious politics to President Obama's request for almost \$1.9 billion in emergency supplemental appropriations to strengthen national and international responses to the Zika virus.⁸² By July 2016, the House and the Senate had not agreed on an appropriations package despite predictions, proved accurate by the end of the month, that Zika would likely spread to the continental United States during the summer months.

In its request for funding to combat Zika, the administration asked Congress to appropriate funds, specifically for the operating division of the Department of Health and Human Services ("HHS") (somewhat more than \$1.5 billion), the U.S. Agency for International Development (\$335 million), and the Department of State (\$41 million).⁸³ In May, the Senate and House proposed different responses to the need defined by the President. The Senate bill,⁸⁴

appropriating funds for other purposes as well, provided for \$1.1 billion in Zika funds.⁸⁵ The House bill ("The Zika Response Appropriations Act"), in contrast, provided \$622 million, significantly short of the \$1.9 billion requested by the President.⁸⁶ Both bills and the administration sought funding for a similar list of federal agencies.⁸⁷ But broad differences distinguished the approach of the Senate from that of the House.⁸⁸ Republican lawmakers in the House argued adamantly that any funds allocated for the nation's Zika response had to be offset with funds already allocated for some other purpose.⁸⁹ In contrast, the Senate characterized its proposed appropriation as emergency funding⁹⁰ and did not offset Zika appropriations with funds originally allocated for other purposes.⁹¹ Furthermore, the House bill included a variety of reporting, notification, and oversight provisions and provided funding for three months only.⁹² President Obama threatened to veto the House bill.⁹³

That the House insisted on offsetting Zika funds with funds allocated for other purposes was a point of some contention. Some of the offset was to come from money appropriated to combat Ebola.⁹⁴ In 2014, Congress had approved the allocation of \$5.4 billion in emergency funding to respond to Ebola.⁹⁵ Although Ebola had largely disappeared from news reports by 2016, it had not been eradicated and could re-appear in epidemic form.⁹⁶ HHS Secretary Sylvia Burwell described the continuing imperative to prevent another major Ebola epidemic.⁹⁷ Speaking before world health leaders, Burwell asserted:

We have to finish the job on Ebola, even as we act now to slow the spread of Zika. We continue to see Ebola flare-ups in West Africa – seven clusters since the initial outbreak in 2014, resulting in 33 confirmed cases and the monitoring of more than 3,600 people.

We can't sacrifice one urgent health priority in the name of another.⁹⁸

Yet, in light of the congressional deadlock on Zika spending several months after the Obama administration's request for emergency funding, the administration itself re-appropriated \$589 million, most of which had originally been allocated for the nation's response to Ebola.⁹⁹ The administration intended to facilitate implementation of responses to Zika before the summer months arrived.¹⁰⁰ The bulk of the transferred funding was devoted to CDC efforts to work on vaccine and treatment development and for mosquito control.¹⁰¹ Three months had passed since the administration had requested emergency Zika funding. At that time, CDC Director Thomas Frieden defined three months as an "eternity" in the effort to control the Zika infection.¹⁰² There is, Frieden explained, "a narrow window of opportunity here and it's closing."¹⁰³

By mid-June, having failed to agree on the terms for funding a national response to Zika, the House and the Senate entered into Conference negotiations to resolve their differences.¹⁰⁴ Unsurprisingly, negotiations did not bring agreement.¹⁰⁵ Then, immediately before the House adjourned for the July Fourth recess, it passed a bill¹⁰⁶ based on a Committee Report that reflected Republican voices on the Committee.¹⁰⁷ The bill provided the same level of funding proposed by the Senate's May bill (\$1.1 billion), but it included a set of provisions that virtually guaranteed failure in the Senate.¹⁰⁸ The White House deputy press secretary immediately told reporters that the President would veto the bill were it approved in the Senate.¹⁰⁹ The President objected expressly to the bill's offsetting Zika funding¹¹⁰ with funding from "critically important public health priorities."¹¹¹ But the President's veto proved unnecessary. Senate Democrats did not support

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the bill.¹¹² Less than a week after the House vote, the Senate blocked passage of the bill by a vote of 52 to 48.¹¹³

Senate Democrats found several provisions in the House bill especially problematic. The first of these limited funding for Planned Parenthood.¹¹⁴ Senate Harry Reid (D-Nev.), the Senate Minority leader, referred to this provision in particular in explaining Democrats' refusing to support the House bill:

A narrowly partisan proposal that cuts off women's access to birth control, shortchanges veterans and rescinds Obamacare funds to cover the cost is not a serious response to the threat from the Zika virus...In short, [conservative lawmakers] are trying to turn an attempt to protect women's health into an attack on women's health.¹¹⁵

Second, as noted, the bill offset Zika funding with funds previously appropriated to meet other public health needs. Third, it included provisions allowing states and localities to loosen regulations developed by the Environmental Protection Agency ("EPA") pursuant to the Clean Water Act.¹¹⁶ A bill focused on loosening the same environmental protections had been introduced in the House a year earlier, before Zika emerged as a threat in the United States.¹¹⁷ Fourth, the House provisions for Zika funding deleted language from the larger bill that included the Zika-funding provisions – a bill that also provided funding for military construction and the Veterans Administration. The deleted language precluded the use of federal funds at veterans' cemeteries that displayed the Confederate flag.¹¹⁸

Criticism from all sides followed. Republicans blamed Democrats for failing to support a bill that echoed

the funding allocation that the Senate originally suggested.¹¹⁹ Democrats countered that the House bill was not serious. Senator Reid called it "nothing more than a goodie bag for the fringes of the Republican Party"¹²⁰ and a "disgrace" – "a mockery of how Congress should treat an emergency."¹²¹ Senator Charles Schumer (D-NY) declared that the bill contained "poison pills" that made it impossible for Democrats in the Senate to support its passage. Schumer was referring in particular to the provision to limit funding for Planned Parenthood.¹²² The American Public Health Association called the bill "both late and inadequate," and President Obama criticized Congress for recessing for the July 4 holiday before providing funding to combat Zika.¹²³

Disagreements between Democrats and Republicans about Zika funding reflected underlying ideological disagreements. These disagreements presented such a serious stumbling block that Congress recessed for seven weeks in mid-July 2016 – just the time of highest risk for Zika-infected mosquitoes' appearing in the continental United States – without having agreed on a Zika-funding package.¹²⁴ The polarized atmosphere that characterized congressional debate on Zika funding slowed the nation's response to a disease that posed a significant threat to the continental United States, especially to states in the South during the summer months.

Comparison to Congress's Response to Ebola

Congress's response to the administration's request for Zika funding in 2016 contrasted with its response to the President's much larger request for Ebola funding in 2014. In November 2014, the Administration sought \$6.18 billion in emergency funding for Ebola responses.¹²⁵ Congress complied, in large part,¹²⁶ and in December 2014 President Obama signed a bill that

allocated \$5.4 billion in emergency funding for Ebola.¹²⁷

There are a number of possible explanations for the contrast in Congress's responses to funding requests for Ebola in 2014 and for Zika in 2016. Several pertinent differences between the appearance of Ebola in 2014 and that of Zika in 2016 may also be relevant. Zika appeared during the start of the 2016 presidential election, a period of angry and divisive politicking that reflected and inflamed deep ideological tensions within the nation. Perhaps partisan rivalries in Congress had simply intensified in the period between Congress's response to Ebola and its failure to respond to Zika.

In addition, and probably of equal importance, Zika and Ebola are distinct in their mode of transmission, the sort of harm they can cause, the sub-populations they are most likely to affect, and the public's consequent image of and response to each.

Ebola is a hemorrhagic fever that presents with frightening symptoms. These can include profound bleeding and uncontrolled waste elimination.¹²⁸ The United States dealt with only nine cases of Ebola. The first involved Dr. Kent Brantly, a physician who had contracted Ebola while working in Liberia. Brantly, transported to the United States after diagnosis, was treated in 2014 at Emory Hospital in Atlanta.¹²⁹ Eight of the nine Ebola patients treated in the United States in 2014 (including Dr. Brantly) survived.¹³⁰ However, the majority of Ebola patients during the 2014 epidemic in African nations died.¹³¹

Unlike Ebola, Zika has few consequences for most infected adults but, as noted above, has serious consequences for some adults and devastating consequences for fetuses carried by women infected during pregnancy.¹³² Dr. Anthony Fauci,

director of the National Institute of Allergy and Infectious Diseases, described Zika as “not scary at all” for most people but “overwhelmingly catastrophic for pregnant women and their fetuses.”¹³³ Differences in Congress’s responses to Ebola and Zika may in part reflect a difference in the intensity of concern about a condition that can harm anyone and a condition that is devastating, but, as a general matter, mainly for women and babies. In news media photos, Zika was presented, in sharp contrast with images of Ebola, as a serious disability affecting newborn babies, not a terrifying disease.

Further, the mode through which the two conditions are transmitted differs, which has probably shaped public attitudes. News reports about Ebola in 2014 led the public to fear it as highly contagious.¹³⁴ That is not the case. The Ebola virus is not airborne and does not threaten to infect someone in the house or room with an Ebola patient unless that person comes in contact with the patient’s body fluids.¹³⁵ However, Ebola is highly infectious. Those who come in contact with the body fluids (blood, urine, feces, semen, and saliva) of an Ebola patient with symptoms¹³⁶ of the disease are at significant risk of contracting Ebola.¹³⁷ Zika, by comparison, is less easily transmitted from person to person¹³⁸ since the primary mode for Zika’s transmission¹³⁹ is a mosquito bite.¹⁴⁰ Media photos of babies born with microcephaly, however disturbing, did not threaten people with the terror of an epidemic’s developing through person-to-person contact.¹⁴¹

Many Americans feared Ebola in 2014 and favored federal funding to control or eradicate the illness. By comparison, by the start of the summer of 2016, only about one-third of the American public was seriously concerned about Zika.¹⁴² In 2014, after Ebola had reached epidemic proportions in Africa and a few cases of Ebola had been treated in the United States, 43 percent of the American

public expressed significant concern about Ebola.¹⁴³ That concern waned as the threat of an immediate Ebola epidemic affecting the United States appeared to dim,¹⁴⁴ even though Ebola cases continued to appear in several African countries.¹⁴⁵

The dramatic contrast in media images of the two conditions may prove to have been the most important factor that shaped divergent public attitudes toward Ebola and Zika, respectively. Media photos of responses to Ebola in the United States in 2014 resembled war scenes. Emergency workers, clad in hazmat suits, transported terribly ill people out of their homes on stretchers.¹⁴⁶ Images from Africa further depicted very ill people, lying unattended on the ground, sometimes surrounded by healthcare workers in body suits, sometimes lying alone outdoors.¹⁴⁷ Images of Zika featured mothers lovingly holding newborn babies with small heads.¹⁴⁸ Ebola’s images were far more frightening. Images of Zika were sad but suggested compassion and love. The impact of each set of images, taken as a whole, differs markedly from that of the other. Moreover, it is possible that some part of the difference in Congress and the public’s responses to Ebola and to Zika, respectively, reflect the fact that Ebola can strike and seriously sicken or even kill anyone, but Zika is particularly horrendous for a sub-population of women and their children.

It is reasonable to suggest that differences in the nation’s political responses generally between 2014 and 2016 as well as differences between the public’s perception of Ebola and its perception of Zika explain the dramatic difference in congressional responses to the administration’s request for Ebola funding in 2014 and for Zika funding in 2016. Whatever the explanations, however, the difference in response was undeniable.¹⁴⁹ Congress funded efforts to combat Ebola quickly and generously.¹⁵⁰ In contrast, by July of 2016, Congress

had replaced any serious effort to fund Zika responses with factional disagreements.¹⁵¹

Responses from Physicians, Federal Agencies, and States

In April 2016, over 75 medical, research, pharmaceutical, public health and health advocacy groups signed a letter to congressional leaders in both Houses of Congress encouraging lawmakers to appropriate “emergency supplemental funding to prepare for and respond to the Zika virus here in the United States.”¹⁵² The letter explained:

If we take immediate action, we may be able to dramatically slow the spread of Zika, giving scientists time to develop and test a vaccine. Without action, however, we fear the number of newborns born with debilitating birth defects will only continue to rise. In addition to the human toll on children and families, the CDC estimates that the average lifetime cost of caring for each child born with microcephaly will likely be millions of dollars per child....¹⁵³

Two months later, in June 2016, the American Medical Association (“AMA”), anxious that Congress appropriate funding for Zika before the advent of local transmission¹⁵⁴ but concerned about re-directing funding originally dedicated to other public health efforts, suggested creation of a public health fund for HHS to rely on for responses to a variety of public health emergencies.¹⁵⁵

By the start of the summer of 2016, several federal agencies filled some part of the gap left by Congress’s failure to appropriate Zika funds. The CDC allocated \$85 million to Zika control efforts¹⁵⁶ and issued a Zika “Interim Response Plan.”¹⁵⁷ The agency proposed sending CDC Emergency Response Teams to states that requested help combatting locally-transmitted Zika should the mosquito arrive in the continental United

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States.¹⁵⁸ In addition, reflecting a Food and Drug Administration policy (presented in early 2016), the CDC recommended that blood donations not come from areas with active Zika transmission and that those who traveled to areas with Zika not donate blood.¹⁵⁹

In late May 2016, the Centers for Medicare & Medicaid Services (“CMS”) provided for state Medicaid programs to cover specific services related to preventing or responding to Zika.¹⁶⁰ This included Medicaid reimbursement for certain mosquito repellents “when prescribed by an authorized health professional.”¹⁶¹ CMS has also stressed the importance of “family planning counseling” and contraception, including “barrier method contraceptives” that may prevent sexual transmission of the virus, as well as contraception to avoid pregnancy for those exposed, or likely to be exposed, to Zika.¹⁶² Additionally, CMS provided for states’ Medicaid programs to cover testing for Zika infection and treatment for those with the condition.¹⁶³ It also required states to “cover all medically necessary diagnostic services” to detect infection with the virus “including diagnosis of microcephaly and other birth defects without limit” to those under 21 years of age.¹⁶⁴

These responses are important. However, without more, they are inadequate.

By the early summer, states at particular risk for local transmission of the virus during the summer months also began to respond to the threat with state funding. Local public health officials in many states worked to educate their populations about Zika.¹⁶⁵ However, resources dedicated to Zika control varied significantly from state to state and from locality to locality.¹⁶⁶ Florida, for instance, able to provide funding at a

level that could make a significant difference, implemented a mosquito control program.¹⁶⁷ Florida’s Governor, Rick Scott, relied on the Governor’s emergency powers to allocate over \$26 million for mosquito control, the purchase and distribution of kits to prevent Zika infection, and other efforts.¹⁶⁸ At the time, 40 pregnant women in Florida (none infected by local mosquitoes) had tested positive for the Zika virus. New York City similarly implemented a program aimed at mosquito control.¹⁶⁹

Texas dedicated state funds to increase the capacity of laboratories that test for the virus, to control the mosquito population, for surveillance of cases, and to educate the public.¹⁷⁰ The state feared that if the CDC did not allocate additional funds to the state’s efforts, efforts to combat Zika in Texas would wither.¹⁷¹ This was especially troubling since Texas is among the states at highest risk for local transmission of the virus.¹⁷²

In other states with more limited resources, local authorities distributed coloring books that informed people about the risks posed by mosquitoes and offered advice on how best to limit mosquito exposure.¹⁷³ Such efforts – recommendations, for instance, that people use mosquito repellent and wear long sleeves¹⁷⁴ – are important but are unlikely to provide an adequate response should Zika-infected mosquitoes spread in the United States.

Specific Populations and Additional Concerns About Zika: Immigrants, Low-Income Women of Child-Bearing Age, and Reproduction

Zika’s spread in the continental United States could raise particularly difficult funding challenges for patients without health insurance, especially undocumented immigrants and some adults in states that have

not expanded their Medicaid programs. Moreover, in many states, documented immigrants must wait for five years before becoming eligible for Medicaid coverage.¹⁷⁵ These issues raise significant implications for health and frame the importance of Congress’s displacing polarizing politics in order to reach an accord on Zika funding.

It is essential that all people, including the uninsured population, have access to Zika screening, vaccination and treatments, if and when they are developed, and to monitoring of pregnant women and fetuses as well as infants who were affected by the virus in utero. Furthermore, the risk of Zika exposure may increase for low-income families who may not be able to afford air-conditioning or even house screens.¹⁷⁶ Without funding, these needs, as well as many others created by the Zika threat, cannot be met.

Public health professionals and physicians in New York City have expressed particular concern about immigrants from Latin American and Caribbean nations who spend time in their home countries and then return to the United States.¹⁷⁷ Public hospitals and clinics in New York City have few extra resources; significant bureaucracy attends every call for a Zika test in the city, and physicians often do not recommend Zika testing, even for pregnant women.¹⁷⁸ That will likely change if and when the Zika mosquito spreads more widely in the continental United States.¹⁷⁹

More particularly, low-income women and women who oppose the use of contraception (usually for religious reasons) will face especially difficult issues should Zika mosquitoes appear more widely in the continental United States. Until a vaccine or treatment for Zika becomes available, mosquito control and avoidance of reproduction are central components

of the nation's response to the virus. In other nations, this has raised very difficult questions, especially in places in which the Catholic Church continues to play a significant role in national life and, more particularly, in a population's individual reproductive decisions.¹⁸⁰

Broadly, the reproductive implications of Zika raise questions about access to reproductive care, privacy, and other reproductive rights. The experience in Latin America provides a provocative illustration that warrants attention in the United States, despite significant differences. Abortion is banned or limited in the vast majority of Latin American nations.¹⁸¹ Yet after international organizations and some nations in Latin America began to alert people to the dangers that Zika poses to fetuses, online purchases of medications that induce abortion rose significantly.¹⁸² Researchers found an increase in online requests to Women on Web for abortifacients of between 36 and 108 percent over baseline request numbers¹⁸³ in Latin American nations with local Zika transmission from mosquitoes, restrictions on abortion, and national advisories about the risks to pregnant women and their fetuses of Zika exposure.¹⁸⁴ This research did not identify, and thus did not account for, abortions performed illegally through other methods, which are almost always less safe.¹⁸⁵ Similar patterns could appear in the United States, especially in states that make it difficult to get abortions should Zika-carrying mosquitoes spread here.

Providing easily affordable contraception for everyone in the United States, even those without healthcare coverage, may become a basic component of Zika control should Zika-carrying mosquitoes spread in the continental United States. In the spring of 2016, the CDC recommended that women with symptoms of Zika infection try not to get pregnant for eight weeks after symptoms first appear; those who have travelled to areas with Zika-infected mosquitoes

or women who have sexual relations with men who traveled to such places should also postpone pregnancy for eight weeks.¹⁸⁶ Further, the CDC has recommended that couples in which the man has had a Zika infection postpone pregnancy for "at least 6 months."¹⁸⁷ The situation for those living in areas with Zika-infected mosquitoes is far more worrisome and CDC guidance is less certain.¹⁸⁸ The agency suggested that those in Zika-infected areas talk with healthcare professionals and has described individual decisions about how best to respond as "very complex [and] deeply personal."¹⁸⁹

In the United States, the use of contraception is a constitutional right.¹⁹⁰ However, exercising that right depends on contraceptive medications and devices being available and affordable.¹⁹¹ For the most part, that is the case in the United States, but misperceptions about access to contraceptive care may limit its use, especially by poor women.¹⁹² Such misperceptions may have followed the publicity that attended two Supreme Court cases involving the contraceptive mandate in the Patient Protection and Affordable Care Act ("PPACA"), both decided between 2014 and 2016.¹⁹³

Among the states most likely to experience the spread of Zika-infected mosquitoes, neither Florida nor Texas has expanded its Medicaid program under PPACA.¹⁹⁴ This is especially problematic for women seeking coverage for medical, including reproductive, services and who are above the income level for Medicaid but below that needed to apply for subsidies offsetting the cost of participation in a state exchange.¹⁹⁵ Although there are some healthcare options for such women, including health department clinics, those facilities may not have adequate resources to respond to women seeking contraception should Zika-infected mosquitoes appear in the state.¹⁹⁶

Of course, it is possible to avoid pregnancy without contraception if sexual relations are avoided. However, that is a harsh option that many couples are likely not to follow. Thus contraception becomes essential for those accepting the CDC's advice on pregnancy postponement. Puerto Rico, which had seen more than 10,000 cases of Zika infection among its population by mid-August 2016, is illustrative.¹⁹⁷ The CDC reports that about 66 percent of pregnancies in Puerto Rico are not intended.¹⁹⁸ Noting that about 138,000 women living in Puerto Rico who do not wish to become pregnant are not using contraception, the CDC recommended broadened educational programs about Zika and about effective contraception.¹⁹⁹

Efforts by states to limit access to abortion present another arena of factious politics that may have a significant impact on the nation's ability to confront Zika's threat to pregnant women and fetuses. For instance, as of spring 2016, 10 states had passed laws that limit coverage for abortion, even in private plans, including plans presented on the states' health insurance exchanges.²⁰⁰ More generally, almost one-third of the laws limiting abortion promulgated since the U.S. Supreme Court granted a limited right to abortion in *Roe v. Wade*²⁰¹ were passed within the last half-dozen years.²⁰²

The spread of Zika also creates challenges regarding the protection of privacy. The possibility of mandated testing or screening of fetuses and infants and of testing pregnant women and fetal tissue raises troubling privacy questions. Should such testing and screening not be performed, however, the risk to pregnant women and fetuses could increase significantly. Failure to test and screen could even create liability should infants be born with disabilities, including microcephaly.²⁰³

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Conclusion

Over time, the threat of Zika may dim – as the Ebola threat has, at least for the moment. But that has not yet occurred. In fact, as noted above, by late July 2016, the threat had increased with the appearance of Zika-infected mosquitoes in an area close to downtown Miami.²⁰⁴ The CDC issued an unprecedented travel advisory in recommending that pregnant women not travel to an area within the continental United States.²⁰⁵ At present, the geographic area of concern is narrow, but that could change quickly.²⁰⁶ In any event, that Zika can pose significant risks is apparent. Congress's readiness to displace emergency preparedness with political gamesmanship and displays of partisan politics reflects serious dysfunction with potentially untoward consequences for millions of people, especially those who are infected in utero and their families.

The immediate risks are significant. Without federal funding, the challenge of responding to Zika cannot adequately be met. In early August 2016, HHS Secretary Burwell announced that work on a promising Zika vaccine will be halted if funding is not soon made available.²⁰⁷ As important, Congress's responses suggest a deeply troubling precedent of permitting sectarian politics to preclude action necessary to protect the nation's health and welfare. Zika will not be the last novel and serious health threat to face the nation. The capacity of the government to respond quickly and competently to such threats is essential to population health.

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Endnotes

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- 2 See *infra* "Comparison to Congress's Responses to Ebola" Section.
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- 71 *Id.* Possibly new technology developed by Microsoft Research will be of significant assistance in knowing where mosquitoes that might carry the Zika virus breed. Microsoft has created mosquito traps with the promise of being able to identify particular mosquito breeds entering the trap and will be able to transmit relevant data to local public health facilities. Matt McFarland, Microsoft is Testing a New Mosquito Trap to Fight Zika, CNN, June 21, 2016, available at http://money.cnn.com/2016/06/21/technology/microsoft-mosquito-zika/index.html?utm_campaign=KHN%3A+Daily+Health+Policy+Report&utm_source=hs_email&utm_medium=email&utm_content=30879285&hsenc=p2ANqtz-8d7_GF45SwYhReRD061Jlkkyd9OI_r91s0ZMFNDBt9f0w5GuCHGfaSZrxW1h84E5M1fK6eQsfmQ-mahzh1XPcuBzjmjQ&_hsmi=30879285.
- 72 Shefali Luthra, Kaiser Health News (KHN), A Primer: How the Fight Against Zika Might be Funded, May 17, 2016, available at <http://khn.org/news/a-primer-how-the-fight-against-zika-might-be-funded>.
- 73 Researchers have already had promising results with potential treatment modalities and vaccine development. In particular, preliminary research results on a medical response to Zika from work at the Washington University School of Medicine in St. Louis offer hope that a treatment for Zika might be developed. Researchers relying on CRISPR, the gene editing technology, identified 9 genes (out of 19,000 examined) that seem crucial to Zika infection. Rong Zhang et al., A CRISPR Screen Defines a Signal Peptide Processing Pathway Required by Flaviviruses, *Nature*, June 17, 2016; Julia Evangelou Strait, Potential Drug Target Identified for Zika, Similar Viruses, Wash. U. School of Med. in St. Louis News Release, June 17, 2016, available at <https://medicine.wustl.edu/news/potential-drug-target-identified-zika-similar-viruses>. Disabling one of these genes (SPCS1) would limit infection by flaviviruses (including Zika, dengue, yellow fever and others). *Id.* This work could lead to development of a drug that would preclude or limit Zika infection. *Id.* Researchers elsewhere have had some success with the development of two vaccines that have bestowed almost complete immunity on mice infected with the virus. Melissa Healy, Two New Vaccines Can Protect Against Zika After a Single Shot, *L.A. Times*, June 28, 2016, available at http://latimes.com/science/sciencenow/la-sci-sn-zika-vaccine-20160628-snap-story.html?utm_campaign=KHN%3A+Daily+Health+Policy+Report&utm_source=hs_email&utm_medium=email&utm_content=31133755&hsenc=p2ANqtz-_P_KumGojm5kt1OIAxhIeDSkh61kPR2jz-XQrnD66r3_ScY48QZUZGjVdZMHU5QmhPe8ht4FK1_gfHRpiASN7aacw4w&_hsmi=31133755. Another group of scientists at Inovio Pharmaceuticals Inc. and GeneOne Life Science Inc. announced work on vaccine development, resulting in approval from the Food and Drug Administration to commence Phase I trials. Inovio Pharmaceuticals and GeneOne Life Science Receive Approval for First-in-Man Zika Vaccine Clinical Trial, June 20, 2016, available at <http://ir.inovio.com/news/news-releases/news-releases-details/2016/Inovio-Pharmaceuticals-and>

GeneOne-Life-Science-Receive-Approval-for-First-in-Man-Zika-Vaccine-Clinical-Trial/default.aspx?_ga=1.258365193.2054467900.1467074045. See also *infra* note 207 and accompanying text (noting vaccine trials).

- 74 Aedes mosquitoes, unlike others, need very little water to breed. Steven Ross Johnson, *Years of Budget Cuts Have Left Some Cities and States Ill-prepared to Stop Zika Spread*, *Modern Healthcare*, July 3, 2016, available at http://modernhealthcare.com/article/20160703/NEWS/160629878/years-of-budget-cuts-have-left-some-cities-and-states-ill-prepared?utm_campaign=KHN:%20Daily%20Health%20Policy%20Report&utm_source=hs_email&utm_medium=email&utm_content=31295284&_hsenc=p2ANqtz-93LESpGA9tHljc75-4SGbqODxC07ppQ2SS8p390SHA0V_1xA3d4Oer58Xn3pm9n1iYIE1FjCpTJ5hDKgul1Vbs-WebCw&_hsmi=31344233. <http://nytimes.com/2016/06/11/health/zika-virus-outbreak-united-states.html>.
- 75 In June 2016, Senators Angus King (I-Maine), Bill Nelson (D-Fla.), and Richard Burr (R-N.C.) introduced the Strengthening Mosquito Abatement for Safety and Health (SMASH) Act. The bill aims to aid states and local governments in controlling mosquitoes. King, Nelson, Burr Introduce Bill to Fight Spread of Zika Virus, http://king.senate.gov/newsroom/press-releases/king-nelson-burr-introduce-bill-to-fight-spread-of-the-zika-virus?elq_cid=1276219&x_id=, June 9, 2016 (last visited June 20, 2016); see also Luthra, *supra* note 72; Tavernise, *supra* note 55. The bill, S.3039, was introduced in June 2016 and was referred to the Committee on Health, Education, Labor and Pensions. S.3039 – SMASH ACT (114th Cong. 2015-2016), <https://congress.gov/bill/114th-congress/senate-bill/3039>.
- 76 McFarland, *supra* note 71 (describing development by Microsoft Research of “smart” mosquito traps).
- 77 Marc Santora, *As Zika Threat Grows in U.S., Testing Lags for a Vulnerable Group*, *N.Y. Times*, June 17, 2016, available at <http://nytimes.com/2016/06/18/nyregion/zika-testing-lags-in-a-vulnerable-new-york-population.html?action=click&contentCollection=health&module=NextInCollection®ion=Footer&pgtype=article&version=newsevent&rref=collection%2Fnews-event%2Fzika-virus>. Many women in New York City who should be screened for Zika because they have visited countries affected by the virus-carrying mosquito have not been screened. In particular, low-income women seem less likely to be screened than women in higher income groups. *Id.*
- 78 Brian Broderick, *Obama Signs Zika Treatment, Rx Drug Safety Bills*, *Bloomberg BNA.com* (noting President’s signature in April 2016 of S. 2512). That law adds Zika to the conditions that bestow eligibility to sponsors of specific drugs and biologic agents that treat or prevent certain tropical diseases for receipt of a voucher offering priority review of a subsequent drug presented by the sponsor to the Food and Drug Administration).
- 79 Luthra, *supra* note 72; Sabrina Tavernise, *Officials Preparing for Zika Virus to Spread in the U.S.*, *N.Y. Times*, June 10, 2016, available at [http://khn.org/news/unintended-consequence-](http://khn.org/news/unintended-consequence-blood-banks-could-feel-the-squeeze-from-zika-advisories/?utm_campaign=KHN%3A+Daily+Health+Policy+Report&utm_source=hs_email&utm_medium=email&utm_content=31344233&_hsenc=p2ANqtz-93LESpGA9tHljc75-4SGbqODxC07ppQ2SS8p390SHA0V_1xA3d4Oer58Xn3pm9n1iYIE1FjCpTJ5hDKgul1Vbs-WebCw&_hsmi=31344233)
- blood-banks-could-feel-the-squeeze-from-zika-advisories/?utm_campaign=KHN%3A+Daily+Health+Policy+Report&utm_source=hs_email&utm_medium=email&utm_content=31344233&_hsenc=p2ANqtz-93LESpGA9tHljc75-4SGbqODxC07ppQ2SS8p390SHA0V_1xA3d4Oer58Xn3pm9n1iYIE1FjCpTJ5hDKgul1Vbs-WebCw&_hsmi=31344233.
- 80 Shefali Luthra, *Unintended consequence: Blood Banks Could Feel the Squeeze from Zika Advisories*, *Kaiser Health News*, July 6, 2016, available at <http://khn.org>. The advisory, though important, could significantly decrease the nation’s supply of blood. *Id.* After discovery of a case of Zika in a male in New York City, contracted through intercourse with a female partner, the guidance may change to include warnings about intercourse with a person of either gender who has traveled to areas with Zika mosquitoes. Sun, *Spread Through Female-to-Male Sex*, *supra* note 21.
- 81 Beck, *supra* note 8. (quoting Anne Schuchat, Principal Deputy Director of the CDC).
- 82 Letter, President Barack Obama, Feb. 22, 2016 (to the Hon. Paul D. Ryan, Speaker of the House of Representatives), available at https://whitehouse.gov/sites/default/files/omb/assets/budget_amendments/emergency_supplemental_2-22-16_zika.pdf. The President’s letter referred Congress to a letter of the same date as his own, authored by the Director of the Office of Management and Budget; that letter provides details as to the February funding request. Letter, Shaun Donovan, Director Office of Management and Budget, Feb. 22, 2016 (to President Barack Obama), available at https://whitehouse.gov/sites/default/files/omb/assets/budget_amendments/emergency_supplemental_2-22-16_zika.pdf (hereinafter Letter, Donovan).
- 83 Letter, Donovan, *supra* note 82.
- 84 S.Amdt.3900 to S.Amdt.3896 (114th Cong. 2015-2016); and H.R. 5243 (Zika Response Appropriations Act, 2016) (114th Cong. 2015-2016).
- 85 S.Amdt.3900 to S.Amdt.3896 (114th Cong. 2015-2016). The Senate funding proposal added provisions to the Military Construction and Veterans Affairs and Related Agencies Appropriations Act (H.R. 2577). Nathaniel Weixel, *Difficult Negotiations Loom on Zika Funding*, *Bloomberg BNA*, June 10, 2016, <http://0-lawrc.bna.com>.
- 86 H.R. 5243 (Zika Response Appropriations Act, 2016) (114th Cong. 2015-2016).
- 87 The bills would have appropriated funds to several agencies within the Department of Health and Human Services (“HHS”) (including, for instance, to the CDC to “prevent, prepare for, and respond to Zika virus” and to the National Institutes of Health (“NIH”) for research on vaccine development) as well as to the State Department and a number of other agencies and organizations. S.Amdt. 3900 to S.Amdt.3896 (114th Cong. 2015-2016); H.R. 5243 (114th Cong. 2015-2016). Specifics of the appropriations differed between the Senate and House bills, with the Senate’s bill more closely echoing the President’s request. Susan B. Epstein & Sarah
- A. Lister, *Zika Response Funding: Request and Congressional Action*, *Congressional Research Service* (7-5700, R44460), May 20, 2016, www.crs.gov.
- 88 Epstein & Lister, *supra* note 87, at 4-6.
- 89 John T. Bennett, *As Zika Risk Escalates, Congress Heads Out*, *Roll Call*, May 26, 2016, available at <http://rollcall.com/news/politics/congress-leaves-memorial-day-zika-2-million-women-at-risk> (last visited June 17, 2016).
- 90 Epstein & Lister, *supra* note 87.
- 91 Weixel, *supra* note 85.
- 92 H.R. 5243 (Zika Response Appropriations Act, 2016) (114th Cong. 2015-2016); American Health Line (AHL), *Senate, House to negotiate funding Amount for Zika Response Efforts*, June 9, 2016, available at <http://americanhealthline.com/todays-news/2016/06/09/zika-house-senate-negotiations>. The Senate measure, unlike the President’s request, did not provide funding for Medicaid in Puerto Rico (a “hot spot” for the Zika virus) and did not provide for repayment of funds originally allocated to respond to Ebola. *Id.* Roll Call Staff, *Zika Deal in the Works as CDC Reports Virus-Linked Birth Defects*, June 16, 2016, available at http://rollcall.com/news/zika-agreement-works-cdc-reports-virus-linked-birth-defects?utm_name=newsletters&utm_source=rollcallnewsalerts&utm_medium=email (last visited June 17, 2016); Epstein & Lister, *supra* note 87, at 4-7; Nathaniel Weixel, *Senate Passes Spending Bill with Zika Funds Attached*, *Bloomberg BNA (Health Law Resource Center)*, May 20, 2016, <http://0-healthlawrc.bna.com>.
- 93 Sarah Ferris, *House Approves \$522M Zika Funding Bill*, *The Hill*, May 18, 2016, available at <http://thehill.com/policy/health-care/280459-house-approves-zika-funding-bill-over-white-house-veto-threat>.
- 94 Also in June 2016, the House of Delegates of the American Medical Association (“AMA”) urged Congress to appropriate funds “commensurate with the public health emergency” but not at the expense of “other essential health initiatives.” Roll Call Staff, *Zika Deal in the Works as CDC Reports Virus-Linked Birth Defects*, *Roll Call*, June 16, 2016, available at http://rollcall.com/news/zika-agreement-works-cdc-reports-virus-linked-birth-defects?utm_name=newsletters&utm_source=rollcallnewsalerts&utm_medium=email (last visited June 17, 2016); Michael J. Bologna, *AMA Demands Swift Action to Head Off Zika Threat*, June 16, 2016, <http://0-www.bna.com>. At the same time, the AMA’s House of Delegates proposed creation of a “fully-funded public health emergency fund” that would provide funds to respond to future public health crises without having to wait for congressional action. *Id.*
- 95 Sylvia Burwell, *Congress Must Fully Fund Battle Against Zika and Ebola*, *Miami Herald*, June 20, 2016, available at <http://miamiherald.com/opinion/op-ed/article84960247.html>.
- 96 *Id.*
- 97 *Id.*
- 98 *Id.*

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- ⁹⁹ The funds transferred were to have expired at the end of the fiscal year 2016. Over \$1.5 billion allocated for Ebola still remain with the CDC and other federal agencies. Courtney Carson, President Will Redirect Ebola Funds for Zika, but Where is the Money From and Where Will It Go?, Breakthroughs Blog, Apr. 8, 2016, available at <http://ghtcoalition.org/blog/president-will-redirect-ebola-funds-for-zika-but-where-is-the-money-from-and-where-will-it-go>.
- ¹⁰⁰ Andrew Taylor, White House to Transfer \$589 M of Ebola Funds to Combat Zika Virus, PBS Newshour, Apr. 6, 2016, available at <http://pbs.org/newshour/rundown/white-house-to-transfer-ebola-funds-to-combat-zika-virus/>; Maggie Fox, Zika Virus Fight: White House Shifts Ebola Cash, Blames Congress, NBC News, Apr. 6, 2016, available at <http://nbcnews.com/storyline/zika-virus-outbreak/white-house-shift-ebola-funds-zika-fight-n551631>.
- ¹⁰¹ Some did question the planned allocation of the transferred funds. Carson, *supra* note 99. Others noted that the re-allocation of funds was a disservice to the effort to combat Ebola. See, e.g., Joyce Frieden & Molly Walker, Robbing Peter to Pay Paul? White House Redirects Ebola \$\$ to Zika: Officials Frustrated with Congressional Inaction, Med Page Today, Apr. 6, 2016, available at <http://medpagetoday.com/infectiousdisease/generalinfectiousdisease/57220>.
- ¹⁰² President Obama asked Congress to appropriate funds for Zika control in February. David M. Herszenhorn, Political Battles Color Congressional Feud Over Zika Funding, N.Y. Times, May 24, 2016, http://nytimes.com/2016/05/25/us/politics/political-battles-color-congressional-feud-over-zika-funding.html?_r=1.
- ¹⁰³ *Id.*
- ¹⁰⁴ American Health Line (AHL), Senate, House to Negotiate Funding Amount for Zika Response Efforts, June 9, 2016, available at <http://americanhealthline.com/todays-news/2016/06/09/zika-house-senate-negotiations>.
- ¹⁰⁵ Nathaniel Weixel, Zika Conference Committee Shows Sides Still Far Apart, Bloomberg BNA (Health Law Resource Center), June 16, 2016, <http://0-healthlawrc.bna.com>.
- Rep. Anita Lowey (D-N.Y.) announced that House Democrats on the Appropriations Committee filed a discharge petition in a last-minute effort to have funding for the nation's response to Zika approved at the level that President Obama had requested before Congress departed for the July Fourth recess. Nathaniel Weixel, House Democrats Will Try to Force Vote on Zika Funding, NVA's Health Care Daily Report, June 21, 2016; Sarah Ferris, Democrats File Discharge Petition on Zika Funding Bill, The Hill, June 21, 2016, available at http://thehill.com/policy/healthcare/284298-democrats-file-discharge-petition-on-zika-funding-bill?utm_campaign=KHN%3A+Daily+Health+Policy+Report&utm_source=hs_email&utm_medium=email&utm_content=30879285&hsenc=p2ANqtz-8x07iTFIzifE4CjO
- 4brVqfvrD07qiPWJwqPxOCLgsq970tnEio1Lzuf_avHTpvBZuwGLOGDhUKHY2peHilsZBaA_YOmg&_hsmi=30879285. To become effective, the petition required 218 votes. In Lowey's view, the bill, if presented to the House, would have passed. Mary Ellen McIntire, Top Democrats Filing Discharge Petition for Full Zika Funding, Morning Consult, June 21, 2016, available at <https://morningconsult.com/alert/top-democrats-filing-discharge-petition-full-zika-funding/>. See also Ferris, *supra*. The discharge plan would need significant Republican support to pass and thus bring the issue to the House floor absent a report from the Committee. Mary Ellen McIntire, Top Democrats Filing Discharge Petition for Full Zika Funding, Morning Consult, June 21, 2016, available at https://morningconsult.com/alert/top-democrats-filing-discharge-petition-full-zika-funding/?utm_campaign=KHN%3A+Daily+Health+Policy+Report&utm_source=hs_email&utm_medium=email&utm_content=30879285&hsenc=p2ANqtz-8Rr8Rg2O5nbk_4P8sEN4hn0MH1loFeEGu97vNUT6UeIxX7c70JTXzcnL-T-x1JleHllzClWj-HIqym6HxRq84z2DCvFg&_hsmi=30879285.
- ¹⁰⁶ H.R. 2677 (114th Cong. 2015-2016).
- ¹⁰⁷ The vote occurred before dawn, in a chaotic setting. On the previous date, and continuing on the date of the vote about Zika appropriations, House Democrats staged a sit-in to protest Republicans' failure to vote on gun control issues; the provision would have precluded people suspected of terrorist affiliations from buying guns and would have increased the scope of background checks for those purchasing them. Kristina Peterson & Natalie Andrews, Democrats Stage Sit-In Over Gun Bills, Wall Street Journal, June 23, 2016, at p. A3.
- ¹⁰⁸ The House bill (based on the Conference Committee report, shaped by Republicans on the Committee) provided for \$750 million that were offset with redirected funds from other programs. H.R. 2577 (House spending package to combat Zika) (114th Cong. 2015-2016). Weixel, *supra* note 105. The House passed the bill pursuant to a conference report (H. Rept. No. 114-540 on H.R. 2577). *Id.* H.R. 2577 would appropriate \$82.5 million to a variety of measures, most related to services for the military and veterans. The vote in the House was 239 to 171. American Health Line (AHL), Senate to Vote on House-approved Zika Funding Bill Next Week, June 24, 2016, available at [http://americanhealthline.com/todays-news/2016/06/24/senate-to-hereinafter-AHL, Senate to Vote\) \(last visited June 24, 2016\); Sarah Ferris, House GOP Pushes \\$4.1 Billion Zika Bill Through Dem Sit-in, The Hill, June 23, 2016, available at <http://thehill.com/policy/healthcare/284566-house-gop-pushes-11-billion-zika-bill-through-dem-sit-in>.](http://americanhealthline.com/todays-news/2016/06/24/senate-to-hereinafter-AHL, Senate to Vote) (last visited June 24, 2016); Sarah Ferris, House GOP Pushes $4.1 Billion Zika Bill Through Dem Sit-in, The Hill, June 23, 2016, available at http://thehill.com/policy/healthcare/284566-house-gop-pushes-11-billion-zika-bill-through-dem-sit-in)
- ¹⁰⁹ Weixel, *supra* note 105.
- ¹¹⁰ The bill offset Zika funding with funds appropriated to respond to Ebola (\$107 million), HHS administrative funding (\$100 million), and funds allocated to support the development of Obamacare exchanges in U.S. territories (\$543 million). House Appropriations Committee, Conference Report Summary: Funding for Zika Prevention and Response, available at http://appropriations.house.gov/uploadedfiles/06.22.16_zika_conference_report_-_summary.pdf.
- ¹¹¹ Weixel, *supra* note 105 (quoting Eric Schultz, White House deputy press secretary).
- ¹¹² Weixel, *supra* note 105; Roberta Rampton & Susan Cornwell, White House Threatens to Veto Republicans' Zika Funding Plan, Reuters, June 23, 2015, available at http://reuters.com/article/us-health-zika-usa-whitehouse-idUSKCN0Z92E2?feedType=RSS&feedName=healthNews&elq_cid=1276219&x_id=.
- ¹¹³ David M. Herszenhorn, Zika Bill Blocked by Senate Democrats Upset Over Provisions, N.Y. Times, June 28, 2016, <http://nytimes.com/2016/06/29/us/politics/congress-zika-funding.html> (hereinafter Herszenhorn, Zika Bill Blocked). The bill needed 60 positive votes to avoid a filibuster from Democrats in the Senate. *Id.* Only two of the Democrats in the Senate voted for the bill. Two Republicans (James Lankford (R-Oka.) and Mike Lee (R-Utah) voted "no." A third Republican, Mitch McConnell, the Senate Majority Leader, also voted "no," but that was apparently done to provide him with the opportunity to present the bill for another vote in the future. Russell Berman, Why the U.S. Senate Blocked Funding to Combat Zika, The Atlantic, June 28, 2016, available at <http://theatlantic.com/politics/archive/2016/06/the-senate-blocks-funding-to-combat-zika/489161>.
- ¹¹⁴ AHL, Senate to Vote, *supra* note 108.
- ¹¹⁵ David M. Herszenhorn, Zika Deal in Congress Likely to Be Delayed Until After Recess, N.Y. Times, June 23, 2016, available at <http://nytimes.com/2016/06/23/us/politics/zika-congress-emergency-funding.html>; American Health Line (AHL), House Advances \$1.1B Zika Funding Measure, Draws Opposition from Lawmakers, White House, June 23, 2016, available at <http://americanhealthline.com/todays-news/2016/06/23/zika-news>; Reuters, U.S. Senate Democratic Leader Dismisses Republicans' Zika Funding Proposal, N.Y. Times, June 22, 2016, available at http://nytimes.com/reuters/2016/06/22/us/politics/22reuters-health-zika-usa-reid.html?_r=0.
- ¹¹⁶ In May 2016, Republicans presented a bill aimed similarly at loosening environmental protections. That bill, the "Zika Vector Control Act," precluded the need for an EPA permit when spraying pesticides into bodies of water. The bill was not passed. Cristina Marcos, EPA Pesticide Bill Rebranded for Zika Fails to Pass the House, The Hill, May 17, 2016, available at <http://thehill.com/blogs/floor-action/house/280210-epa-pesticide-bill-rebranded-for-zika-fails-to-pass-house> (last visited June 21, 2016).
- ¹¹⁷ The bill then was named "Reducing Regulatory Burdens Act." *Id.* The Zika Vector Control Act was defeated in the House.
- ¹¹⁸ Jennifer Shutt, Confederate Flag Ban

- Vanishes During Democrats' Sit-in, Roll Call, June 24, 2016, available at <http://rollcall.com/news/confederate-flag-ban-vanishes-spending-bill>; see also Stephanie Akin, House Votes to Lower Confederate Flag at Cemetery, May 19, 2016, available at <http://rollcall.com/news/confederate-flag-debate-rises-again-over-congress> (noting vote in May to include the Confederate flag provision).
- ¹¹⁹ Herszenhorn, Zika Bill Blocked, *supra* note 113.
- ¹²⁰ Delphine D'Amorajun, Congress Once Again Fails to Fund the Fight Against Zika, Mother Jones, June 28, 2016, available at <http://motherjones.com/politics/2016/06/congress-still-hasnt-managed-fund-fight-against-zika>.
- ¹²¹ Jordain Carney, Senate Sets Up Zika Vote, The Hill, June 23, 2016, available at http://thehill.com/blogs/floor-action/senate/284676-senate-heads-towards-zika-fight?elq_cid=1276219&x_id=. Senator Reid appeared to be referring to several provisions in the bill that would almost certainly prove unacceptable to Senate Democrats, as was the case, in fact. See *infra* notes 113-117 and accompanying text.
- ¹²² AHL, Senate to Vote, *supra* note 108.
- ¹²³ D'Amorajun, *supra* note 120.
- ¹²⁴ See *supra* note 122 and accompanying text. In fact, Zika mosquitoes did appear in Florida during Congress's seven-week summer recess. See Alvarez & Belluck, *supra* note 19.
- ¹²⁵ The White House, Fact Sheet: Emergency Funding Request to Enhance the U.S. Government's Response to Ebola at Home and Abroad, Nov. 5, 2014, available at <https://whitehouse.gov/the-press-office/2014/11/05/fact-sheet-emergency-funding-request-enhance-us-government-s-response-eb>.
- ¹²⁶ Andrew Taylor, White House to Transfer \$589M of Ebola Funds to Combat Zika Virus, PBS Newshour, Apr. 6, 2016, available at <http://pbs.org/newshour/rundown/white-house-to-transfer-ebola-funds-to-combat-zika-virus>.
- ¹²⁷ Jennifer L. Plitsch, President Signs Act Authorizing \$5.4 Billion in Emergency Funding to Combat Ebola, The Nat'l L. Rev., Jan. 4, 2015, available at <http://natlawreview.com/article/president-signs-act-authorizing-54-billion-emergency-funding-to-combat-ebola>.
- ¹²⁸ Amanda L. Chan, What Actually Happens When a Person Is Infected with the Ebola Virus, Huffington Post, Aug. 7, 2014, available at http://huffingtonpost.com/2014/08/02/ebola-symptoms-infection-virus_n_5639456.html.
- ¹²⁹ Jane E. Jordan et al., Legal, Operational, and Practical Considerations for Hospitals and Health Care Providers in Responding to Communicable Diseases Following the 2014 Ebola Outbreak, 23 U. Miami Bus. L. Rev. 341, 343 (2014-2015). Emory was one of the few hospitals in the United States with a facility appropriate to the treatment of Ebola. *Id.*
- ¹³⁰ Carl Bialik, Real Ebola Mortality Rate in the U.S., FiveThirtyEight, Nov. 13, 2014, available at <http://fivethirtyeight.com/datalab/why-we-dont-know-the-real-ebola-mortality-rate-in-the-u-s/> (last visited July 5, 2016). In the same year, almost three-quarters of Ebola patients in Africa died. *Id.*
- ¹³¹ As of April of 2016, the CDC reported 28,616 possible Ebola cases in three African nations (Guinea, Sierra Leone, and Liberia). Out of that number, 15,227 were confirmed to have been Ebola. Of those Ebola patients, 11,310 died. CDC, 2014 Ebola Outbreak in West Africa – Case Counts, as of April 13, 2016, available at <http://cdc.gov/vhf/ebola/outbreaks/2014-west-africa/case-counts.html>.
- ¹³² One person commenting on an article in *The Atlantic* suggested that Zika is far from the most serious of diseases carried by mosquitoes. This commenter explained that “[m]ost people get infected with Zika and the virus is so insignificant they never know they’ve been infected. Apart from the the [sic] danger to pregnant women, it would be a non issue [sic].” Comment (Ken), Beck, *supra* note 8, comments can be found at http://theatlantic.com/health/archive/2016/06/zika-is-the-most-difficult-emergency-health-response-ever-says-cdc-official/488579/?utm_campaign=KHN%3A+Daily+Health+Policy+Report&utm_source=hs_email&utm_medium=email&utm_content=31183950&_hsenc=p2ANqtz-8kt1deko41cWB6mzLtpBDe01ZQAOG5ZgniYs-bAEPdFGRh8hMev3N2RvKATM7SXT7R08JUnKQ8ZsKWuyk7MdGNIKMsA&_hsmi=31183950#article-comments. Another commenter (Ken Evell Snoats) on the same article wrote about a Zika “media frenzy and it’s [sic] ability to whip us up into a state of panic with very little connection to reality. The Zika scare is good for business.” *Id.*
- ¹³³ Beck, *supra* note 8.
- ¹³⁴ Dr. Anthony Fauci referred to public response to Ebola in the United States in 2014 as “an epidemic of fear.” At the same time, he called the epidemic in Africa “a catastrophic health crisis.” Kathy Gilsinan, ‘An Epidemic of Fear’: Ebola in the United States, *The Atlantic*, Oct. 30, 2014, available at <http://theatlantic.com/international/archive/2014/10/an-epidemic-of-fear-ebola-in-the-united-states/382158/> (last visited July 5, 2016).
- ¹³⁵ World Health Organization (WHO), Emergencies Preparedness, Response: Frequently Asked Questions on Ebola Virus Disease, updated January 2016, available at <http://who.int/csr/disease/ebola/faq-ebola/en/> (hereinafter WHO, Response) (last visited July 5, 2016); Baylor College of Medicine, Ebola Virus, available at <https://bcm.edu/departments/molecular-virology-and-microbiology/emerging-infections-and-biodefense/ebola-virus> (hereinafter Baylor) (last visited July 5, 2016).
- ¹³⁶ However, Ebola is carried for at least several months in the semen of a patient who has recovered from Ebola and is without symptoms. Baylor, *supra* note 135.
- ¹³⁷ WHO, Response, *supra* note 135.
- ¹³⁸ The exception involves transmission through sexual intercourse. At first it was thought that sexual transmission was only from men to women. See Donald G. McNeil, Jr., Sex May Spread Zika Virus More Often Than Researchers Suspected, *N.Y. Times*, July 2, 2016, available at <http://nytimes.com/2016/07/05/health/zika-virus-sex-spread.html>. However, in mid-July 2016, a case of Zika was diagnosed in a male in New York City who had contracted the illness through intercourse with his female partner. Sun, Spread Through Female-to-Male Sex in NYC, *supra* note 18.
- ¹³⁹ In early July 2016, preliminary studies of Zika patients in Brazil suggested that sexual relations could be a more important route for Zika’s transmission to women than had been thought. McNeil, Jr., *supra* note 138.
- ¹⁴⁰ See *supra* notes 20-23 and accompanying text.
- ¹⁴¹ See *supra* “Funding Zika Responses and Politics” Section.
- ¹⁴² Brady Dennis, Lena Sun & Scott Clement, Americans Were More Worried About Ebola Than They Are About Zika, *The Washington Post*, June 30, 2016, available at https://washingtonpost.com/news/to-your-health/wp/2016/06/30/americans-were-more-worried-about-ebola-than-they-are-about-zika/?_hsmc=p2ANqtz--c2K4KXHjB47DDj5UShc2KRgwTIZ-J1Mg3LUAjZP4eXeSryv1ZxaW0shEa3VT8yFhG76jFBCDXIzRfVu6yJiwzzZk7A&_hsmi=31230310&utm_campaign=KHN%3A%20Daily%20Health%20Policy%20Report&utm_content=31230310&utm_medium=email&utm_source=hs_email (relying on *The Washington Post*–ABC News poll. At that time, no cases of Zika in the United States were attributable to local mosquitoes). A poll taken by the Kaiser Family Foundation found that 10 percent of whites were “very worried” about Zika as compared with 62 percent of Hispanics and 36 percent of African Americans. Ashley Kirzinger, Elise Sugarman & Mollyann Brodie, Kaiser Health Tracking Poll: June 2016, Kaiser Family Foundation, June 2016, available at <http://kff.org/global-health-policy/poll-finding/kaiser-health-tracking-poll-june-2016/> (last visited July 1, 2016).
- ¹⁴³ Dennis, Sun, & Clement *supra* note 142.
- ¹⁴⁴ See *supra* note 96.
- ¹⁴⁵ Frieden & Walker, *supra* note 101.
- ¹⁴⁶ See, e.g., Dan Diamond, Ebola’s Incredibly Infectious. Ebola’s Also Hard to Catch. Confused? Here’s How to Understand, *Forbes*, Oct. 16, 2014, available at <http://forbes.com/sites/dandiamond/2014/10/16/ebolas-very-contagious-ebolas-also-hard-to-catch-confused-heres-how-to-understand/#704b03c27aaf> (noting plethora of photos with health-care workers in full-body gear).
- ¹⁴⁷ See Google Images search for “Ebola Africa,” https://google.com/search?q=ebola+africa+images&biw=1242&bih=585&tbm=isch&tbo=u&source=univ&sa=X&ved=0ahUKewj4g9eSyd_NAhUKVz4KHU5UDPUQsAQIGw (last visited July 6, 2016).
- ¹⁴⁸ Of course, other images appeared as well, but none showed terrifyingly ill people. See Google Images search for Zika, Latin America, available at https://google.com/search?q=zika+latin+america&biw=1242&bih=585&source=lnms&tbm=isch&sa=X&ved=0ahUKewj2_Ocvt_NAhVJNj4KHSqFBeYQ_AUIBygC (last visited July 6, 2016).
- ¹⁴⁹ See, e.g., Lorraine Mullings Campos, Christopher L. Risetto & Robert Helland, FY 2015 Ebola Federal Funding: Congressional Increases and Program Support, *Global Regulatory Enforcement Law Blog*, Dec. 15, 2014, available at <https://globalregulatoryenforcementlawblog.com/2014/12/articles/government-contracts/fy-2015-ebola-federal-funding-congressional-increases-and-program-support/>. The authors describe the extent of

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- testimony to Congress on the need for Ebola funding from HHS, the Department of Defense, and the Department of Homeland Security. They concluded: "It appears that Congress listened and delivered big." *Id.*
- ¹⁵⁰ See *supra* notes 125-126 and accompanying text.
- ¹⁵¹ See *supra* "Funding Zika Responses and Politics" Section.
- ¹⁵² Letter to The Honorable Paul Ryan et al., April 5, 2016 (signed by the Academic Pediatric Association et al.), available as a link in Frieden & Walker, *supra* note 101.
- ¹⁵³ Letter to The Honorable Paul Ryan et al., *supra* note 152. The Congressional Record notes the insertion of the letter into the Record on May 26, 2016. 162 Cong. Rec. H3270 (daily ed. May 26, 2016) (statement of Rep. Deutch). The author has been unable to find additional evidence that Congress responded to the letter.
- ¹⁵⁴ Tom Howell Jr., Medical Groups Press Congress to Move Faster on Zika Funding, *The Washington Times*, June 14, 2016, available at <http://washingtontimes.com/news/2016/jun/14/medical-groups-press-congress-move-faster-zika-fun>.
- ¹⁵⁵ American Health Line ("AHL"), CDC Unveils Emergency Zika Response Plan, June 15, 2016, available at <http://americanhealthline.com/todays-news/2016/06/15/obama-admin>. The medical groups included internists, pediatricians and obstetrician-gynecologists. They expressed concern about the apparent inability of Congress to pass a bill appropriating funds for a national Zika response. *Id.*
- ¹⁵⁶ AHL, Senate to Vote, *supra* note 108.
- ¹⁵⁷ Centers for Disease Control and Prevention, Interim CDC Zika Response Plan (CONUS and Hawaii): Initial Response to Zika Virus (Atlanta, Georgia), June 2016, available at http://cdc.gov/zika/pdfs/zika-draft-interim-conus-plan.pdf?elq_cid=1276219&x_id=&elq_TrackId=b6abe2fa961d42e0a36c209aa4d19f6&elq=e0535547ee204e8faa0cb27309164d49&elqaid=54357&elqat=1&elqCampaignId=24201 (hereinafter Zika, CDC Interim Response Plan).
- ¹⁵⁸ Zika, CDC Interim Response Plan, *supra* note 157, at p. 3. The teams will "prove on-the-ground technical and epidemiological assistance, risk communication, vector control, and logistical support." *Id.*
- ¹⁵⁹ Recommendations for Donor Screening, Deferral, and Product Management to Reduce the Risk of Transfusion-Transmission of Zika Virus, U.S. Dep't H. and Hum. Services, FDA, Cent. for Biologics Evaluation and Research, Feb. 2016, available at <http://fda.gov/downloads/BiologicsBloodVaccines/GuidanceComplianceRegulatoryInformation/Guidances/Blood/UCM486360.pdf>.
- ¹⁶⁰ Centers for Medicare & Medicaid Services ("CMS"), CMCS Informational Bulletin (from Vikki Wachino, Director Center for Medicaid and CHIP Services), Medicaid Benefits Available for the Prevention, Detection and Response to the Zika Virus, June 1, 2016, available at <https://medicaid.gov/federal-policy-guidance/downloads/cib060116.pdf> (hereinafter CMCS Bulletin, Medicaid Benefits). The Bulletin provides that family planning benefits (including supplies benefits) "may prevent the transmission of the Zika virus by providing access to barrier method contraceptives." Further, the Bulletin asserts that family planning benefits and mosquito repellents are eligible for federal financial participation. *Id.*
- ¹⁶¹ CMCS Bulletin, Medicaid Benefits, *supra* note 160, at p. 2.
- ¹⁶² *Id.* at pp. 2-3.
- ¹⁶³ *Id.* at pp. 3-4.
- ¹⁶⁴ *Id.* p. 3.
- ¹⁶⁵ Javonte Anderson, Health Officials Monitor Zika and West Nile Viruses, Chicago Tribune, June 24, 2016, available at http://chicago.tribune.com/suburbs/post-tribune/news/ct-ptb-mosquito-borne-viruses-st-0623-20160624-story.html?utm_campaign=KHN%3A+Daily+Health+Policy+Report&utm_source=hs_email&utm_medium=email&utm_content=31025728&_hsenc=p2ANqtz-cM_SGK9DnWn1DHSig7njFRjUq-dLrm6w9Q1_xHA4sSc2m-oWbvmKPLaPbl-EZ6KK2Tpx20oHKm4hcyyiwNNump5zMWgQ&_hsmi=31025728.
- ¹⁶⁶ Dennis, Sun, & Clement, *supra* note 142.
- ¹⁶⁷ *Id.* (noting that Lee County in Florida has more funding to control mosquitoes than any other county in the country).
- ¹⁶⁸ AP, Scott Orders State to Spend \$26 Million on Zika Fight, Health News Florida, June 24, 2016, available at http://health.wusf.usf.edu/post/scott-orders-state-spend-26-million-zika-fight?utm_campaign=KHN%3A+Daily+Health+Policy+Report&utm_source=hs_email&utm_medium=email&utm_content=31025728&_hsenc=p2ANqtz-8qqxJlPnrEvHRD9bZNhNErWQqFwxLj1ezocZ9HgUXeGedmv8nAHv7FCavtc-4X17YQwAgxgBB3bgK4m_1pbrGZUfNA&_hsmi=31025728&stream/0. Since that time, Zika-infected mosquitoes appeared in one neighborhood of Florida, near downtown Miami. LaMotte, *supra* note 44.
- ¹⁶⁹ Dennis, Sun, & Clement, *supra* note 142.
- ¹⁷⁰ Sabriya Rice, Texas 'Ready as Possible' for Zika, but Funding Would Help, The Dallas Morning News, June 27, 2016, available at <http://dallasnews.com/business/health-care/20160627-texas-ready-as-possible-for-zika-but-funding-would-help.ece>. The Texas Health and Human Services Commission also requested that the state provide mosquito repellent to all women and girls of childbearing age. Robert T. Garrett, Alarmed Over Zika, Texas official Seeks Nearly \$30M for Mosquito Repellent for Poor Women, The Dallas Morning News, July 1, 2016, available at http://dallasnews.com/news/politics/headlines/20160701-alarmed-over-zika-texas-official-seeks-nearly-30m-for-mosquito-repellent-for-poor-women.ece?utm_campaign=KHN%3A+Daily+Health+Policy+Report&
- utm_source=hs_email&utm_medium=email&utm_content=31295284&_hsenc=p2ANqtz--4CdAO4iwRdZ_yBLzn-H3W1aCKJNcooND1XneY3V-FJBw5vup7zRS9NNu32MghXdw9dS6Rmb5oPAiZjrKzcVmo7b4w&_hsmi=31295284. If approved, the request will be fulfilled through Medicaid, the Children's Health Insurance Program, and some health programs that provide care for women. *Id.*
- ¹⁷¹ Texas Governor Greg Abbott asked the CDC for help in funding a Zika response plan. Rice, *supra* note 170.
- ¹⁷² Rice, *supra* note 170.
- ¹⁷³ Dennis, Sun, & Clement, *supra* note 142. See also Anderson, *supra* note 165; Nancy Daly & Anne Skaer, NKY Reports First Case of Zika Virus, (reporting case of Zika contracted through sex with a man who had travelled to a Zika-infested area), available at http://cincinnati.com/story/news/local/boone-county/2016/06/24/nky-reports-first-case-zika-virus/86330570/?utm_campaign=KHN%3A+Daily+Health+Policy+Report&utm_source=hs_email&utm_medium=email&utm_content=31025728&_hsenc=p2ANqtz-URehx7CJTK9wiQZpLqr9TI-Uvmyln7exyEvraUYXyymxPdU5F6jJaQe21lgs84rPyBQR7iy4MKUj8qJ0sUIlbiVtA&_hsmi=31025728.
- ¹⁷⁴ Anderson, *supra* note 165.
- ¹⁷⁵ American Health Line (AHL), States Can Use Medicaid Funds to Combat Zika; WHO Updates Guidance on Virus, June 3, 2016, <http://americanhealthline.com/todays-news/2016/06/03/states-can>.
- ¹⁷⁶ American Health Line (AHL), Fla., Texas Launch Zika Response Efforts, June 16, 2016, available at <http://americanhealthline.com/todays-news/2016/06/16/fla-texas> (last visited June 27, 2016) (hereinafter AHL, Fla., Texas).
- ¹⁷⁷ Marc Santora, Zika Testing Lags for a Group Both Vulnerable and Hard to Track, N.Y. Times, June 18, 2016, p. 1, available at <http://nytimes.com/2016/06/18/nyregion/zika-testing-lags-in-a-vulnerable-new-york-population.html> (hereinafter Santora, Zika Testing Lags).
- ¹⁷⁸ *Id.* Among those who have been tested for Zika, New York State has reported the highest number of positives in the country; three-quarters of those positive test results come from New York City. *Id.*
- ¹⁷⁹ Ramanathan Raju, President of New York City's Health and Hospitals Corporation recently told his staff to comply with CDC guidelines on Zika testing "when appropriate." Santora, Zika Funding Lags, *supra* note 177.
- ¹⁸⁰ Brazil has provided inexpensive birth control for a number of years. Stan Lehman, Brazil to Subsidize Birth Control Pills, *The Washington Post*, May 28, 2007, available at <http://washingtonpost.com/wp-dyn/content/article/2007/05/28/AR2007052800637.html>. But local attitudes are often shaped by statements from Church officials. The Vatican did not speak on the issue when the Zika virus appeared. Thus, official Church statements about the use of contraception following Zika's appearance in

- Brazil came from local bishops who did not always approve of the use of birth control, even in the context of Zika. For instance, in Olinda and Recife, places in which many have been infected with Zika, a spokesperson for the Archdiocese explained that efforts to avoid Zika infection during pregnancy do not justify reliance on contraception. Ollie Gillman, ‘Nothing Justifies an Abortion’: Brazilian Catholic Archdiocese Says Women Should Not Use Any Method of Birth Control to Combat Spread of Zika Virus, *Dailymail.com*, Feb. 3, 2016, available at <http://dailymail.co.uk/health/article-3431101/Nothing-justifies-abortion-Brazilian-Catholic-archdiocese-says-women-not-use-method-birth-control-combat-spread-zika-virus.html>. Further, abortion is rarely allowed in Latin American nations in which mosquitoes are infected with Zika, and contraception is often hard to obtain. Charlotte Alter, Why Latin American Women Can’t Follow the Zika Advice to Avoid Pregnancy, *Time*, Jan. 28, 2016, available at <http://time.com/4197318/zika-virus-latin-america-avoid-pregnancy>.
- ¹⁸¹ Fact Sheet, Abortion in Latin America and the Caribbean, the Guttmacher Institute (2015), available at https://guttmacher.org/pubs/IB_AWW-Latin-America.pdf. Abigail R.A. Aiken et al., Supplementary Appendix, Correspondence, Requests for Abortion in Latin America Related to Concern About Zika Virus Exposure, *N. Eng. J. Med.*, June 22, 2016, available at <http://nejm.org/doi/full/10.1056/NEJMc1605389?query=TOC> (hereinafter Aiken, Supplementary Appendix). The authors include Mexico and the Caribbean as well as South America and Central America in the term “Latin America.” *Id.* Abortion is not permitted for any reason in the Dominican Republic, El Salvador, and Nicaragua. Jonathan M. Katz, The Dilemma of Zika: Pregnancy Warnings Rise in a Region Lacking Contraception, *STAT*, Feb. 1, 2016, available at <https://statnews.com/2016/02/01/zika-pregnancy-warnings-latin-america/>. In Brazil and Colombia, abortion is permitted rarely, and only in individual cases. *Id.*
- ¹⁸² The drugs, including mifepristone and misoprostol, can be obtained through Women on Web, described as a “non-governmental, non-profit organization that provides medical abortion outside the formal healthcare setting through online telemedicine in areas where safe abortion is not available.” Aiken, Supplementary Appendix, *supra* note 181.
- ¹⁸³ Aiken, Supplementary Appendix, *supra* note 181. The authors identified the “before-Zika” period to run from Jan. 1, 2010 through Nov. 16, 2015 and the “after-Zika” period to begin on Nov. 17, 2015. Nov. 17, 2015 was the date on which the Pan American Health Organization issued its first advisory to the public, noting that Zika infection during pregnancy creates a risk of giving birth to a baby with microcephaly. *Id.* at p. 3.
- ¹⁸⁴ Aiken et al., Correspondence, Requests for Abortion in Latin America Related to Concern About Zika Virus Exposure, *N. Eng. J. Med.*, June 22, 2016, available at <http://nejm.org/doi/full/10.1056/NEJMc1605389?query=TOC>.
- ¹⁸⁵ Aiken, *supra* note 184; also see Supplementary Appendix, Aiken et al., *supra* note 183.
- ¹⁸⁶ CDC, CDC Issues Updated Zika Recommendations, Mar. 25, 2016, available at <http://cdc.gov/media/releases/2016/s0325-zika-virus-recommendations.html> (last visited June 17, 2016) (hereinafter CDC Issues Updated Zika Recommendations); see also CDC, Zika Virus: Women & Their Partners Who Are Thinking About Pregnancy, <http://cdc.gov/zika/pregnancy/thinking-about-pregnancy.html>.
- ¹⁸⁷ CDC Issues Updated Zika Recommendations, *supra* note 186.
- ¹⁸⁸ *Id.*
- ¹⁸⁹ *Id.*
- ¹⁹⁰ *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (defining right to distribute contraception to unmarried people); *Griswold v. Connecticut*, 381 US 479 (1965) (identifying right to contraceptive use for married couples).
- ¹⁹¹ A number of states have passed laws that require health insurers to include coverage for contraception. Guttmacher Institute, State Policies in Brief: Insurance Coverage of contraceptives, Mar. 1, 2016, available at https://guttmacher.org/sites/default/files/pdfs/spibs/spib_RICA.pdf. Of the ten states that limit coverage for abortion, eight provide an exception only for life endangerment. *Id.*
- ¹⁹² *Roe v. Wade*, 410 U.S. 113 (1973).
- ¹⁹³ Policy Analysis: Laws Affecting Reproductive Health and Rights: State Trends at Midyear, 2016, Guttmacher Institute, July 2016, available at <https://guttmacher.org/article/2016/07/laws-affecting-reproductive-health-and-rights-state-trends-midyear-2016>.
- The House’s cutting funding for Planned Parenthood in the bill it passed shortly before Congress left for the summer recess is troubling in that services offered by Planned Parenthood could prove particularly crucial in light of Zika to pregnant women and women contemplating becoming pregnant. See *supra* notes 114-115 and accompanying text.
- ¹⁹⁴ Hodge, Primer, *supra* note 20, at p. 2.
- ¹⁹⁵ Lena H. Sun & Brady Dennis, CDC Issues a Travel Advisory to Florida, Which Has 10 New Cases of Zika, *The Washington Post*, Aug. 1, 2016, <https://washingtonpost.com/news/to-your-health/wp/2016/08/01/florida-announces-10-new-zika-cases-a-travel-advisory-is-expected>.
- ¹⁹⁶ LaMotte, *supra* note 44.
- ¹⁹⁷ Lena Sun, Why the Zika Travel Warning in Florida Is So Narrow: And What It Means for Rest of U.S., *The Washington Post*, Aug. 8, 2016, available at <https://washingtonpost.com/news/to-your-health/wp/2016/08/08/why-the-zika-travel-warning-in-florida-is-so-narrow-and-what-it-means-for-rest-of-u-s/>.
- ¹⁹⁸ Sarah Ferris, HHS Warns: Zika Vaccine Funding Runs Dry, *The Hill*, Aug. 4, 2016, available at http://thehill.com/policy/healthcare/290389-hhs-zika-vaccine-funding-running-dry?elq_cid=1276219&x_id=
- In order to provide continuing funds for the development of an anti-Zika vaccine, the administration announced that it would divert \$81 million from funds previously allocated to pay for “biomedical research and antipoverty and health care programs.” Julie Hirschfeld Davis, With Congress Deadlocked, White House Diverts Funds to Fight Zika, *N.Y. Times*, Aug. 11, 2016, available at <http://nytimes.com/2016/08/12/us/politics/with-congress-deadlocked-white-house-diverts-funds-to-fight-zika.html?smprod=nytcore-iphone&smid=nytcore-iphone-share>.
- ¹⁹⁹ *contra* contraceptive mandate and asking circuit courts to shape an acceptable compromise). *Id.*