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### **LD 494 An Act to Conform State Funding to the Federal Hyde Amendment, Limiting Funding for Some Abortion Services**

Good morning, Senator Carney, Representative Moonen and distinguished members of the Joint Standing Committee on Judiciary. I am Kathy Javner, I represent the Maine citizens of the beautiful Katahdin Region. I am here today to present to you LD 494 An Act to Conform State Funding to the Federal Hyde Amendment, Limiting Funding for Some Abortion Services.

This bill is simple. It realigns Maine's funding source of abortions with the Federal Hyde Amendment.

You will hear today that the Hyde Amendment is a racist, classist, sexist piece of archaic policy.

Let's talk about the racist piece. According to the Charlotte Lozier Institute:

White women obtained the vast majority of abortions reported in Maine in 2021, accounting for 84 percent of the total. Nine percent of the abortions were on black women, two percent on Native American women, two percent on women of other races, and three percent on women whose race was not reported. Four Hawaiian or Pacific Islander women also were reported to have had abortions in 2021. CLI estimates that Maine's black abortion rate in 2021 was 31.4 abortions per 1,000 women ages 15 to 44, over four times higher than the white abortion rate of 7.2 abortions per 1,000 women.

That means that the abortion rate for Maine's black population was almost four times the rate of abortions than that of Maine's white population. Doesn't sound like there is an access issue there.

Now, onto the classism piece. According to the Collins Dictionary, Classism is the belief that people from some social classes are better than people from others.

The Hyde Amendment levels the fiduciary playing field. With the Hyde Amendment, one social class is not given preference over another when it comes to abortion access. That is true equity, allocating the same resources and opportunities needed to reach an equal outcome.

Furthermore, you will hear that the Hyde Amendment is out of step with Maine's values.

The Maine I know values family  
The Maine I know values hard work  
The Maine I know values respect  
The Maine I know values community  
The Maine I know values LIFE

Only four days ago, this committee heard from over 600 Maine Citizens concerning their values I guarantee that they would concur that Maine's Funding for abortions should align with the Hyde Amendment As a matter of fact, according to a survey performed in 2019, over 60% of Maine voters disagree with funding abortions with their hard earned tax dollars

We, as policy makers, are tasked with a great responsibility We decide, on a daily basis, where these tax dollars are invested Yes, INVESTED

I say, and the majority of Maine says with me, "Let's invest in LIFE "

I urge you to listen to the people of Maine and pass LD 494



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## The Hyde Amendment: An Overview

The Hyde Amendment, named after its original congressional sponsor, Representative Henry J. Hyde, refers to annual funding restrictions that Congress has regularly included in the annual appropriations acts for the Departments of Labor, Health and Human Services, and Education, and related agencies (“L-HHS-Ed”)

The most recently enacted version of the Hyde Amendment (P.L. 117-103 Div. H, §§ 506–507), applicable for fiscal year (FY) 2022, prohibits covered funds to be expended for any abortion or to provide health benefits coverage that includes abortion. This restriction, however, does not apply to abortions of pregnancies that are the result of rape or incest (“rape or incest exception”), or where a woman would be in danger of death if an abortion is not performed (“life-saving exception”). As a statutory provision included in annual appropriations acts, Congress can modify, and has modified, the Hyde Amendment’s scope over the years, both as to the types of abortions and the sources of funding subject to this restriction.

### Covered Abortions

All versions of the Hyde Amendment have included, at a minimum, the life-saving exception. The original FY1977 version of the Amendment (P.L. 94-439, § 209) included only the life-saving exception. The FY1979 version (P.L. 95-480, § 210) included three exceptions: (1) the life-saving exception, (2) a rape or incest exception, but only if the rape or incest had been reported promptly to a law enforcement agency or public health service, and (3) an exception for instances in which severe and long-lasting physical health damage to the mother would result if the pregnancy were carried to term, as determined by two physicians.

Like the original version, between FY1981 and FY1993, the Amendment again generally included only the life-saving exception. For FY1994, the rape or incest exception, without a reporting requirement, was reintroduced to the Amendment. The scope of abortions subject to the Amendment has generally included these two exceptions since FY1994.

### Covered Funds

As originally enacted for FY1977, the Hyde Amendment applied only to funds appropriated in the same act where the Hyde Amendment is found, i.e., the annual L-HHS-Ed appropriations act. Beginning in FY1999, the Hyde Amendment language has also included coverage of trust funds that receive a transfer from the annual L-HHS-Ed appropriations act.

Where Congress has enacted an L-HHS-Ed appropriations act as a single division of a larger omnibus appropriations

act, questions may arise regarding whether the Hyde Amendment’s reference to “funds appropriated in this Act” includes funds appropriated in other divisions of the larger omnibus. Historically, such omnibus appropriations acts have included a prefatory provision specifying that “any reference to ‘this Act’ contained in any division of this Act shall be treated as referring only to the provisions of that division.” See, e.g., P.L. 117-103, § 3. Where such language is included with a version of the Hyde Amendment in an omnibus appropriations act, it will likely constrain the application of the Hyde Amendment to funds appropriated, or transferred, in the L-HHS-Ed division of the omnibus

### Effect of the Hyde Amendment

A significant effect of the Hyde Amendment is that it restricts federally funded abortions under major federal health care programs, such as Medicaid, a cooperative federal-state program that provides medical benefits assistance to low-income individuals, and Medicare, which provides health coverage not only for certain elderly individuals, but also certain disabled individuals under 65. Medicaid is covered by the Hyde Amendment because it is funded through appropriations made in the annual L-HHS-Ed appropriations act. Medicare is covered because it is financed from various trust funds that receive transfers from the same appropriations act. The Hyde Amendment also restricts abortion funding under other health programs funded through the L-HHS-Ed appropriations act, including certain community health centers that provide primary health services in underserved areas.

Because the Hyde Amendment is a limitation on particular sources of funds, it does not apply to other sources of funds that may be available to a federal program. Some states have opted to cover abortions beyond the Hyde restrictions under their Medicaid programs using exclusively state funds. Similarly, the Office of Legal Counsel in the Department of Justice has concluded that the Hyde Amendment applied to those portions of student aid programs under Title IV of the Higher Education Act (HEA) funded through the annual L-HHS-Ed appropriations act. However, it concluded that the Amendment did not limit the use of mandatory appropriations for such programs provided in the HEA itself. 45 Op. O.L.C.—(Jan. 16, 2021).

### Other Hyde-like Provisions

Although the Hyde Amendment does not generally apply to funding provided outside of the L-HHS-Ed appropriations act, programs with such funding may still be subject to Hyde-like restrictions on abortion. For example, the Hyde Amendment has been incorporated by statutory cross-reference to apply to the Indian Health Service, which provides health services to American Indians and Alaska

Natives and is funded through the Department of the Interior, Environment, and Related Agencies Appropriations Act Similarly, the Children's Health Insurance Program (CHIP), which generally provides health coverage to children in families that earn too much to qualify for Medicaid but not enough to buy private insurance, is funded through mandatory appropriations provided in Title XXI of the Social Security Act CHIP is therefore not covered by the Hyde Amendment However, the CHIP statute includes its own independent limitations on abortion coverage at 42 U S C § 1397ee(c)(1) and (7)

Other examples of Hyde-like provisions that Congress has regularly included in other annual appropriations acts or permanently codified include

- Department of State, Foreign Operations, and Related Programs Appropriations Act, P L 117-103, Div K, Title III (restricting funds for global health programs and the Peace Corps), Title VII, §§ 7018 and 7057,
- Financial Services and General Government Appropriations Act, P L 117-103, Div E, §§ 613, 810,
- Department of Justice Appropriations Act, P L 117-103, Div B, Title II, § 202,
- 10 U S C § 1093 (placing restrictions on funds available to the Department of Defense)

For more detailed information on these provisions, see CRS Report RL33467, *Abortion Judicial History and Legislative Response*, by Jon O Shimabukuro

### Litigation History

Upon enactment, the original Hyde Amendment was immediately challenged on the grounds that it violated the Medicaid Act and the Fifth and First Amendments of the Constitution In *Harris v McRae*, 448 U S 297(1980), the Supreme Court upheld the Hyde Amendment

The Court rejected the plaintiffs' statutory argument that the Medicaid Act imposed an obligation on states to continue funding those medically necessary abortions for which federal reimbursements became unavailable under the Hyde Amendment The Medicaid program, according to the Court, "was designed as a cooperative program of shared financial responsibility, not as a device for the Federal Government to compel a State to provide services that Congress itself is unwilling to fund "

As to the constitutional challenge, the Court held that the Hyde Amendment did not violate the liberty interests protected by the Fifth Amendment's Due Process Clause because the Amendment "places no governmental obstacle in the path of a woman who chooses to terminate her pregnancy " Rather, the Court reasoned, the Amendment merely provides unequal subsidization of abortion relative to other medical services to encourage alternative activity deemed by Congress to be in the public interest

The Court further held that the Hyde Amendment, which principally impacts the indigent who receive health care coverage through Medicaid, was not predicated on a

constitutionally suspect classification that raised equal protection concerns under the Fifth Amendment The Court also ruled that the funding restriction did not violate the First Amendment's Establishment Clause merely because it may coincide with the religious tenets of the Roman Catholic Church

After 1993, when the rape or incest exception was included in the Hyde Amendment, several appellate courts considered the interplay between this version of the Amendment and more restrictive state requirements that limited abortion coverage to only instances where the mother's life was in danger These courts uniformly concluded that the states' narrower funding restriction impermissibly conflicted with the Medicaid Act's requirements and enjoined those restrictions See *Planned Parenthood Affiliates of Michigan v Engler*, 73 F 3d 634, 638 (6<sup>th</sup> Cir 1996) (collecting cases)

According to these courts, the Medicaid Act and its implementing regulations require participating states to cover certain categories of health services and prohibit states from arbitrarily denying or reducing the scope of such mandatory, medically necessary services solely because of the diagnosis or condition of the recipient In these courts' view, abortions fall within several mandatory categories of care, including family planning services The Hyde Amendment, according to the courts, effectively defined the range of medically necessary abortions covered by Medicaid by carving out particular abortion services that states are not obligated to cover Because the states' narrower restrictions would deny a medical service in all cases except those where a patient's life is at risk, the courts reasoned that such restrictions impermissibly discriminated in the coverage of medically necessary abortions on the basis of a patient's medical condition

### Open Questions Related to the Hyde Amendment

Following the Supreme Court's decision in *Dobbs v Jackson Women's Health Organization*, No 19-1392 (U S June 24, 2022), which overruled *Roe v Wade*, 410 U S 113 (1973), and held that there is no constitutional right to abortion, many states are expected to enact or begin enforcing state laws that restrict abortion access See CRS Legal Sidebar LSB10779, *State Laws Restricting or Prohibiting Abortion*, by Laura Deal Many of these laws permit abortions in narrower circumstances than the current version of the Hyde Amendment, such as by including only a life-saving exception to the restrictions they impose If the current version of the Hyde Amendment were reenacted, its prior litigation history suggests that the interplay between these state laws and the Amendment in the context of the Medicaid program may be relitigated There may also be additional interpretive questions regarding the current Hyde Amendment's scope, such as whether its restrictions apply beyond the payment or coverage of abortion services to, for instance, activities like travel that may facilitate abortion access

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