THE AMERICAN CIVIL LIBERTIES UNION

WRITTEN STATEMENT FOR A HEARING ON

H.R. 7, the No Taxpayer Funding for Abortion Act

TO THE

Subcommittee on the Constitution and Civil Justice
The Committee on the Judiciary, U.S. House of Representatives

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Laura W. Murphy, Director
ACLU Washington Legislative Office

Sarah Lipton-Lubet, Policy Counsel
ACLU Washington Legislative Office

On behalf of the American Civil Liberties Union (ACLU), a nonpartisan public interest organization dedicated to protecting the principles of freedom and equality set forth in the Constitution and in our nation's civil rights laws, over a half million members, countless additional activists and supporters, and 53 affiliates nationwide, we would like to thank Chairman Franks, Ranking Member Nadler, and members of the Judiciary Committee's Subcommittee on the Constitution and Civil Justice for the opportunity to submit a statement for a hearing on H.R. 7, the so-called No Taxpayer Funding for Abortion Act.

The ACLU opposes H.R. 7 because it further entrenches discriminatory laws that deny abortion care to women who rely on the government for their health care. The bill also extends these unjust prohibitions into the new health care exchanges in an unprecedented attempt to greatly undermine, if not eliminate, the insurance market for abortion, and rewrites the tax code to penalize abortion care. Abortion is basic health care for women and a right protected by the United States Constitution. Congressional interference in women's private decision-making, as embodied in this bill, is wrong, harmful and discriminatory.

1. H.R. 7 Makes Permanent Discriminatory Restrictions on Abortion

The bill currently before the Subcommittee provides that "no funds authorized or appropriated by federal law, and none of the funds in any trust fund to which funds are authorized or appropriated by federal law, shall be expended for any abortion." This language is intended to codify current abortion restrictions on appropriations bills and would do away with Congress' need to consider each year riders that harm women by singling out and excluding abortion from a host of programs that fulfill the government's obligation to provide health care to certain populations. In so doing, the bill would permanently deny millions of women, including Native Americans, Peace Corps volunteers, women eligible for Medicaid, and women in federal prisons, access to abortion care except in very limited circumstances.

The inequity caused by these restrictions is almost as old as the constitutional right to abortion itself and was opposed by the ACLU from the onset. Although Medicaid originally, and appropriately, covered medically necessary abortions, access came under attack in 1976 with the adoption of the Hyde Amendment, which was blocked for nearly a year by an injunction obtained by the ACLU, Planned Parenthood, and the Center for Constitutional Rights, who challenged the law on behalf of a pregnant Medicaid recipient and health care providers in *McRae v Mathews*.[1] Although the Supreme Court would later uphold the Hyde restriction, the

[1] *See* 421 F. Supp. 533 (E.D.N.Y. 1976). The United States Supreme Court vacated the injunction in August 1977 after issuing two decisions that upheld state limitations on the use of public funds for abortion. Three years later, the Court would uphold the constitutionality of the Hyde Amendment. *See* Harris v. McRae, 448 U.S. 297 (1980). The ACLU has also initiated and supported legal battles in state courts to ensure abortion access for low-income women affected by these funding restrictions. *See Access Denied: Origins of the Hyde Amendment and Other Restrictions*

devastating and detrimental impact it has had on low-income women's exercise of a fundamental right cannot be denied. As a result of Hyde and its progeny, women who rely on the government for their health care do not have access to a health care service readily available to women of means. A woman who does not have independent financial resources must scramble to raise the necessary funds, delay receiving abortion care (which can increase the medical risks and costs) and can be left with no choice but to carry to term in circumstances where she is physically, emotionally, mentally and financially unprepared to care for a child.

The Hyde Amendment and similar bans should be repealed—not made into permanent law—because they are discriminatory and harm women's health. If a woman chooses to carry to term, Medicaid (and other federal insurance programs) offers her assistance for the necessary medical care. But if the same woman needs to end her pregnancy, Medicaid (and other federal insurance programs) will not provide coverage for her abortion, even if continuing the pregnancy will harm her health. The government should not discriminate in this way. It should not use its power of the purse to intrude on a woman's decision whether to carry to term or to terminate her pregnancy and selectively withhold benefits because she seeks to exercise her right of reproductive choice in a manner the government disfavors.

Justice Brennan's words about the Hyde Amendment apply equally to the bill currently before the Subcommittee:

> "the Hyde Amendment is a transparent attempt by the Legislative Branch to impose the political majority's judgment of the morally acceptable and socially desirable preference on a sensitive and intimate decision that the Constitution entrusts to the individual. Worse yet, the Hyde Amendment does not foist that majoritarian viewpoint with equal measure upon everyone in our Nation, rich and poor alike; rather, it imposes that viewpoint only upon that segment of our society which, because of its position of political powerlessness, is least able to defend its privacy rights from the encroachments of state-mandated morality."[2]

Indeed, Rep. Henry Hyde was clear about his intent, explaining that "[he] certainly would like to prevent, if [he] could legally, anybody having an abortion, a rich woman, a middle-class woman, or a poor woman. Unfortunately, the only vehicle available is the…Medicaid bill."[3] With H.R. 7, abortion opponents are pursuing a new, sweeping vehicle.

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on Public Funding for Abortion, AM. CIVIL LIBERTIES UNION (Dec. 1, 1994), https://www.aclu.org/reproductive-freedom/access-denied-origins-hyde-amendment-and-other-restrictions-public-funding-abor

[2] *Harris v McRae*, 448 U.S at 331 (Brennan, J., dissenting).

[3] Heather D. Boonstra, *The Heart of the Matter: Public Funding of Abortion for Poor Women in the United States*, 10 GUTTMACHER POL'Y REV. 12, 12 (2007), *available at* http://www.guttmacher.org/pubs/gpr/10/1/gpr100112.pdf.

2. H.R. 7 Makes Permanent the District of Columbia Abortion Ban, Disenfranchises and Marginalizes D.C. Residents and Denies Women of Color Access to Basic Health Care

Although under current law federal funds may not be used to cover most abortions, states are free to include coverage for abortion in their medical assistance programs if they pay for it themselves. This is true under H.R. 7 as well. The only exception is the District of Columbia.

H.R. 7 makes permanent a provision—lifted by Congress in 2009 but reinstated in 2011—that violates the District's autonomy and forbids it from choosing for itself whether to use its own locally raised non-federal dollars to provide coverage for abortion for its low-income residents.

In 1980, the Supreme Court held that the Hyde Amendment's restriction on federal Medicaid funding of abortions was constitutional despite its devastating impact on low-income women. But at the same time the Court also ruled that state and local governments were still free to pay for abortion for low-income women with their own funds. The Court stated that "a participating state is free, if it so chooses, to include in its Medicaid plan those medically necessary abortions for which federal reimbursement is unavailable."

In recognizing the limited federal role in establishing local health policy, the Supreme Court placed the primary fiscal responsibility for funding abortions with the state legislatures and, in the special case of the District of Columbia, with the District government. In fact, numerous states currently use their own, non-federal funds, to provide medically necessary abortions. Congress does not order New York, California or Arizona not to spend local tax dollars on abortion and it should not do so with the District.

In 1973, Senators and Representatives holding widely divergent political views, also recognized that the citizens of the District of Columbia had been denied the most basic privilege enjoyed by all other Americans – the right to elect those men and women who will control their local governments. They enacted the Home Rule Act to "grant to the inhabitants of the District of Columbia powers of local self-government…and relieve Congress of the burden of legislating upon essentially local District matters."[4] The Home Rule Act was viewed by many as a key civil rights victory for the predominantly African American residents of the District.

With the enactment of home rule, Congress clearly recognized the importance of allowing the District's leadership and residents to exercise control over their municipal affairs. While the scope of the local legislative prerogative has never been precisely defined, the Supreme Court

[4] District of Columbia Self-Government and Governmental Reorganization Act, Pub. L. No. 93-198, 87 Stat. 774, 777 (1973).

has held that our system of limited federalism reserves certain subject areas, including fire prevention, police protection, sanitation, public health, and parks and recreation for state and local decision-making. The provision of services to pregnant women—including abortion care—is clearly a matter of local public health policy intended to be left to the District of Columbia under home rule. Congress should respect the democratic process in the District and respect the choices its residents and leaders make.

As one member of Congress noted, "the government of the District of Columbia representing the wishes of its citizenry must…be able to choose how to spend its revenues collected through property and income taxes and other sources."[5]

The D.C. abortion ban is antithetical to the spirit of the Home Rule Act. Measures such as the abortion ban serve only to disenfranchise and marginalize the District's leaders and residents. Through this provision, non-resident Members of Congress impose their own ideology upon the District's residents and utterly disregard the needs or wishes of the broader community or those directly impacted. Most egregiously, those who seek to negate the will of the District's residents or leaders are not accountable to the people of the District. That which they could not do in their own home districts, they do with impunity against the residents of the District. Measures such as the abortion ban erode and undermine such progress and accentuate the voicelessness of those residing in the District.

3. H.R. 7 Imposes an Abortion Coverage Ban in the New Insurance Exchanges

The Patient Protection and Affordable Care Act (ACA) created new state-based market places called exchanges for individuals and small businesses to buy health insurance. H.R. 7 would revive the so-called Stupak Amendment, rejected by the 111th Congress, which would bar anyone receiving a federal premium assistance credit from buying a private insurance policy that includes abortion coverage on those exchanges.

The Stupak Amendment was—and remains—deeply troubling and alarming for a variety of reasons. It effectively bans abortion coverage on the exchanges. Because the majority of individuals in the exchanges will receive some premium assistance, this provision would mean that no policy sold in these exchanges would include abortion. What is more, a ban on insurance coverage of abortion in the exchanges would have a ripple effect on plans outside the exchanges. This would jeopardize abortion coverage for millions of women.

H.R. 7 is a direct attack on a woman's ability to make personal, private medical decisions and it endangers women's health**.** The bill makes no exception for women to get the coverage they need even in cases when a woman faces severe and permanent health risks.

[5] *See* 132 Cong. Rec. H4872 (daily ed. July 24, 1986) (statement of Rep. Theodore Weiss (NY)).

4. H.R. 7 Rewrites Tax Law and Policies to Penalize Women in Need of Abortion Care

H.R. 7 rewrites long-standing tax laws to penalize a single, legal, medical procedure: abortion. In particular, it penalizes small businesses and middle-class families, taking away coverage that women already have. It would deny small businesses tax credits designed to make health insurance affordable to all Americans if the insurance they provide includes abortion coverage. According to the Joint Committee on Taxation, that would lead employers to exclude abortion from their plans.[6] H.R. 7 also imposes a tax increase on women who need abortion care by excluding it from health savings accounts, medical savings accounts, and flexible spending arrangements. In addition, individuals could no longer claim the itemized deduction for unreimbursed medical expenses if the medical expense is related to abortion care. That would mean that a woman with serious medical complications who needs an abortion that costs thousands of dollars would not be able to deduct the cost of her abortion; she would have to pay higher taxes than someone with a comparably expensive medical condition, simply because her care required an abortion.

5. Conclusion

Abortion is a legal, medical procedure protected by the United States Constitution. It is also basic health care for women. Yet H.R. 7 attacks women's fundamental right and access to abortion. It first targets women—many of whom are low-income and women of color—who rely on the government for their health care and seeks to permanently deny them coverage for abortion. Then, under the guise of "safeguarding" taxpayer dollars, H.R. 7 advances an aggressive campaign to destabilize the insurance market for abortion coverage. In sum, H.R. 7 intrudes in a woman's private medical decisions and plays politics with women's health. The ACLU opposes this bill.

[6] *No Taxpayer Funding for Abortion Act: Hearing on the Tax-Related Provision of H.R. 3 Before the Subcomm. on Select Revenue Measures of the H. Comm. on Ways and Means*, 112th Cong. (2011) (testimony of Thomas A. Barthold, Chief of Staff, Joint Comm. on Taxation).