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Re: Memorandum: H.R. 5, the Equality Act, and Implications on the Hyde Amendment

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H.R. 5, the Equality Act, contains language that could be construed to create a right to demand abortion from health care providers, and likely would place at risk the authority of the government to prohibit taxpayer-funded abortions.

Historically, when Congress has addressed discrimination based on sex, rules of construction have been added to prevent requiring funding of abortion or nullifying conscience laws. No such rule of construction is contained in H.R. 5.

Section 9 of the Equality Act would amend the Civil Rights Act of 1964 (CRA) by defining “sex” to include “pregnancy, childbirth, or a related medical condition.” It is well established that abortion is regarded as a “related medical condition.” *See* 29 C.F.R. pt. 1604 App. (1986) and *Doe v. CARS Protection Plus, Inc.*, 527 F.3d 358 (3d Cir. 2008).

With abortion regarded as a pregnancy-related medical condition, H.R. 5 goes on to state that “pregnancy, childbirth, or a related medical condition **shall not receive less favorable treatment than other physical conditions.**”

While the CRA had previously prohibited discrimination in certain places of “public accommodation,” such as hotels, restaurants, and places of entertainment, H.R. 5 amends the CRA definition of “public accommodations” to include any “establishment that provides health care.” The bill states that the term establishment “shall be construed to include an individual whose operations affect commerce and who is a provider of a good, service, or program.” This provision would apply to individual health care providers who object to abortion, including those with religious objections (indeed, the bill explicitly overrides the protections contained in existing federal law under the Religious Freedom Restoration Act, 42 U.S.C. 2000bb et seq.).

Further, there is an additional provision that goes on to state that health care providers “**shall not be construed to be limited to a physical facility or place.**”

So to the extent that non-physical entities, including States administering Medicaid, could be considered an “establishment that provides health care,” funding restrictions, including the Hyde Amendment, will be put in jeopardy.

In late 2018, Executive Director Mara Keisling of the National Center for Transgender Equality said in an interview, “The worry is that extending sex-based protections to government programs could create a backdoor legal challenge to abortion restrictions like the Hyde amendment, which could potentially threaten whatever conservative support the bill may have.”<sup>i</sup>

From 1973, when abortion first became legal, until 1980, when the Hyde amendment first took effect, the joint federal-state Medicaid program was paying for roughly 300,000 abortions annually.

In *Harris v. McRae*, 448 U.S. 297 (1980), the Court upheld the Hyde Amendment, which restricted federal funding of abortion to cases here the mother's life was endangered (rape and incest exceptions were later added). While the Court insisted that a woman had a right to an abortion, the state was not required to fund the exercise of that right.

Currently, 17 states fund Medicaid coverage of abortion voluntarily or have laws in place requiring funding (of these, 13 are due to court decisions). Twenty-seven (27) states and the District of Columbia have laws that limit funding to cases of life endangerment, rape, and incest; six states limit abortion funding to a lesser extent.

Even if, under H.R. 5, the federal Hyde amendment was still applied to block federal funds for Medicaid abortions, States currently not funding abortion, under Title VI as federal funding recipients, could now face challenges to require them to use their own state or local funds for Medicaid abortions. Further, the CRA Sec. 201(d) and Sec. 202 explicitly supersede state laws for purposes of "public accommodations" law.

For example, in New Mexico, which adopted a state Equal Right Amendment (ERA), the state affiliates of Planned Parenthood and NARAL relied on this state ERA in a legal attack on the state version of the Hyde Amendment, prohibiting Medicaid funding of elective abortions. The case was *NM Right to Choose / NARAL v. Johnson*, No. 1999-NMSC-005. In its 1998 ruling, every justice on the New Mexico Supreme Court agreed that the state ERA required the state to fund abortions performed by medical professionals, since procedures sought by men (e.g., prostate surgery) are funded. If enacted, H.R. 5 would open the door for widespread similar litigation wherein any attempt to restrict the funding of abortion would constitute discrimination.

Enactment of H. R. 5 would open the door to legal challenges that will amount to this: pregnancy-related medical conditions (including abortion) **could not be treated less favorably than other physical conditions**, so any "public accommodation" that treats abortion differently from procedures than other procedures constitute discrimination.

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<sup>1</sup> December 5, 2018: <https://rewire.news/article/2018/12/05/new-congress-opens-door-lgbtq-equality-act/>