

(Slip Opinion)

Application of the Hyde Amendment to the Provision of Transportation for Women Seeking Abortions

The Hyde Amendment’s prohibition barring the Department of Health and Human Services from expending covered funds for any abortion does not bar HHS from expending covered funds to provide transportation for women seeking abortions in circumstances in which HHS has the requisite statutory authority and appropriations to provide such transportation.

September 27, 2022

MEMORANDUM OPINION FOR THE GENERAL COUNSEL DEPARTMENT OF HEALTH AND HUMAN SERVICES

You have asked whether the Hyde Amendment would permit appropriated funds to be used for providing transportation for women seeking abortions in circumstances in which the Department of Health and Human Services (“HHS”) has the requisite statutory authority and appropriations to provide transportation, but those appropriations are subject to the Hyde Amendment. HHS’s view is that the Hyde Amendment would permit covered funds to be used in those circumstances, including with respect to abortions not excepted from the Hyde Amendment’s coverage. We agree. The Hyde Amendment would not pose an obstacle in those circumstances. The legality of any specific policy proposal would depend, however, on all of its particulars, including with respect to statutory authority and appropriations.

“For over forty years, Congress has included a provision in the annual appropriations legislation for the Departments of Labor, Health and Human Services, and Education restricting the use of federal funds for certain abortions.” *Application of the Hyde Amendment to Federal Student-Aid Programs*, 45 Op. O.L.C. __, at *1 (Jan. 16, 2021). Known as the Hyde Amendment, in its current form this restriction provides that no covered funds “shall be expended for any abortion” or “for health benefits coverage that includes coverage of abortion,” except “if the pregnancy is the result of an act of rape or incest; or . . . in the case where a woman suffers from a physical disorder, physical injury, or physical illness, including a life-endangering physical condition caused by or arising from the pregnancy itself, that would, as certified by a physician, place the woman in danger of death unless an abortion is performed.” Consolidated

Appropriations Act, 2022, Pub. L. No. 117-103, div. H, §§ 506–07, 136 Stat. 49, 496 (“CAA 2022”). The general question here is whether, in providing that no funds “shall be expended for any abortion,” the prohibition is limited to funds directly expended for abortion procedures or also sweeps in indirect expenses, such as transportation intended to facilitate an abortion. We conclude that the Hyde Amendment is best interpreted as not prohibiting indirect expenditures.

Starting with the Hyde Amendment’s text, the term “‘expend’ [is a] term of art that generally describe[s] the . . . payment of funds.” *Effect of Spending Prohibition on HUD’s Satisfaction of Contractual Obligations to ACORN*, 33 Op. O.L.C. 339, 340 (2009). In this context, the term “for” is best read “‘to indicate the object, aim, or purpose of an action or activity.’” *Jennings v. Rodriguez*, 138 S. Ct. 830, 845 (2018) (quoting *American Heritage Dictionary of the English Language* 709 (3d ed. 1992)). And the term “abortion” refers to a discrete medical procedure or a discrete category of medical procedures. *See* Abortion, *Black’s Law Dictionary* (11th ed. 2019). Taking these definitions together, funds “expended for any abortion,” CAA 2022, div. H, § 506(a), are funds paid with the object, aim, or purpose of paying for the discrete medical procedure of abortion. The Hyde Amendment is therefore best read to prohibit only direct expenses for the procedure itself and not indirect expenses, such as those for transportation to and from the medical facility where the procedure is performed.

Alternative interpretations of the Hyde Amendment’s terms are less persuasive. Emphasizing that “for” refers to the actor’s intent, or alternatively understanding “for” as connoting causation, *see, e.g., In re Lunsford*, 848 F.3d 963, 968 (11th Cir. 2017), one could claim that when federal funds are spent for transportation to obtain an abortion, the payer sufficiently intends or causes the abortion to occur so as to have expended funds “for” it. But understanding “for” in terms of intent does not resolve *what* must be intended. Here, the Hyde Amendment’s text resolves that question, referring to the medical procedure of “abortion” and not more, as discussed below. Moreover, reading the Hyde Amendment to reach any expenditure that could be said to cause an abortion would have the potential to sweep in activities that have never been understood to violate the Amendment or analogous restrictions, such as non-directive counseling and referrals, *see* 42 C.F.R. § 59.5(a)(ii); 86 Fed. Reg. 56,144, 56,150

(Oct. 7, 2021), or even participation by the Department of Justice (“DOJ”) in abortion cases, *see* CAA 2022, div. B, § 202 (restricting DOJ from using federal funds “to pay for an abortion” (emphasis added)). Finally, although the term “any” commonly has an “expansive meaning,” which “can broaden to the maximum,” the term is not “transformative,” and it can “never change in the least[] the clear meaning of the phrase selected by Congress.” *Freeman v. Quicken Loans, Inc.*, 566 U.S. 624, 635 (2012); *see BP Am. Prod. Co. v. Burton*, 549 U.S. 84, 93 (2006) (“[T]he broad terms ‘every’ and ‘any’ . . . do not broaden the ordinary meaning of the key term ‘action.’”).

The Hyde Amendment’s legislative history further confirms our interpretation of its text. When Congress has wanted to restrict expenditures beyond those for the procedure itself, Congress has revised the Hyde Amendment to do so. Specifically, in 1997 Congress added that covered funds cannot be expended “for health benefits coverage that includes coverage of abortion.” Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act, 1998, Pub. L. No. 105-78, § 509(b), 111 Stat. 1467, 1516 (1997); *see* H.R. Rep. No. 105-390, at 119 (1997) (Conf. Rep.); *see also* 143 Cong. Rec. 17,448 (1997) (statement of Sen. Ashcroft). If the phrase “for any abortion” already covered activities as removed from the direct provision of abortion as transportation to or from an appointment for the procedure, then the additional statutory language would have been unnecessary. Payment for health insurance that covers abortions is more closely connected to the actual expenditure for or provision of abortions than transportation to and from the procedure: In the context of health insurance, the funds are paid out to reimburse the provider or the insured for, and thus effectively pay for, the abortion procedure itself. To be sure, some of the legislative history suggests that the 1997 revision simply “clarified” what the Hyde Amendment already prohibited. 143 Cong. Rec. 18,493 (1997) (statement of Rep. Hyde). At the very least, however, this debate and the amendment itself indicate that the earlier version of the Hyde Amendment did not—and the operative text here does not—clearly sweep beyond the direct provision of abortions. The fact that Congress revised the Hyde Amendment to make explicit that it applies to payments for health benefits coverage supports the view that the prohibition on expending funds “for any

abortion” is limited to the direct provision of abortions and would not apply to indirect expenses such as those for transportation.

Before 1993, the Hyde Amendment stated that no federal funds “shall be *used to perform* abortions,” except in limited circumstances. *E.g.*, Departments of Labor and Health, Education, and Welfare Appropriations Act, 1977, Pub. L. No. 94-439, § 209, 90 Stat. 1418, 1434 (1976) (emphasis added). Congress then revised the provision to its current form, stating that no federal funds “shall be *expended for* any abortion,” except in limited circumstances. *E.g.*, Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act, 1994, Pub. L. No. 103-112, § 509, 107 Stat. 1082, 1113 (1993) (emphasis added). We do not read the phrase “used to perform abortions” as meaningfully different from the phrase “expended for any abortion.” Notably, when the Department of Health, Education, and Welfare—HHS’s predecessor agency—issued regulations in the late 1970s interpreting the earlier version of the Hyde Amendment, it used phrases like “performance of abortion” and “expenditures for an abortion” interchangeably throughout the preamble and even in the regulatory text itself. *Compare, e.g.*, 43 Fed. Reg. 4832, 4832 (Feb. 3, 1978), *with id.* at 4843. Moreover, we have not found any indication that Congress intended the 1993 revision to the Hyde Amendment to prohibit *more* conduct. To the contrary, the major issues that came up during the debates on the revision were whether to eliminate the Hyde Amendment entirely or at least dramatically reduce its scope, *see, e.g.*, 139 Cong. Rec. 14,848 (1993) (statement of Rep. Porter), and whether to include additional exceptions to the Hyde Amendment for rape and incest, *see, e.g., id.* at 22,638 (statement of Sen. Hatfield). Given the extensive and contentious debates over the Hyde Amendment, we would expect Congress to have spoken more clearly in the statutory text, and members more clearly in the legislative debates, if Congress had intended to expand the scope of the Hyde Amendment’s prohibition. *See Chisom v. Roemer*, 501 U.S. 380, 396 & n.23 (1991) (drawing an analogy to the “dog that did not bark” in Sherlock Holmes).

Comparing the Hyde Amendment to a similar limitation Congress has attached to DOJ funds reinforces that the Hyde Amendment should not be read to reach indirect expenses. The DOJ restriction includes:

- a general prohibition against using covered funds “to pay for an abortion,” CAA 2022, div. B, § 202 (“section 202”), which is nearly identical to that in the Hyde Amendment, *see id.*, div. H, § 506(a) (prohibiting funds from being “expended for any abortion”);
- a general prohibition against using covered funds “to require any person to perform, or facilitate in any way the performance of, any abortion,” *id.*, div. B., § 203 (“section 203”); and
- a clarification that the general prohibition in section 203 does not “remove the obligation of the Director of the Bureau of Prisons to provide escort services necessary for a female inmate” to obtain an abortion “outside the Federal facility,” *id.*, div. B, § 204 (“section 204”).

One instructive comparison is between, on the one hand, the Hyde Amendment (and the nearly identical general prohibition in section 202 of the DOJ restriction) and, on the other, the general prohibition in section 203 of the DOJ restriction. Section 203 shows that when Congress has wanted to ensure that a prohibition reaches facilitation of abortion, Congress has been explicit, stating that no covered funds “shall be used to require any person to perform, or facilitate in any way the performance of, any abortion.” *Id.*, div. B, § 203 (emphasis added). Notably, the Hyde Amendment does not include a similar elaboration, *see id.*, div. H, § 506(a), a strong indication that it should not be read to encompass indirect funding, *see Digital Realty Tr., Inc. v. Somers*, 138 S. Ct. 767, 777 (2018) (“[W]hen Congress includes particular language in one section of a statute but omits it in another[,] . . . this Court presumes that Congress intended a difference in meaning.” (quoting *Loughrin v. United States*, 573 U.S. 351, 358 (2014))). Relatedly, Congress elsewhere has referred separately to “coverage of abortion” and “abortion-related services,” CAA 2022, div. E, § 726(d), suggesting again that the term “abortion” does not itself cover more than the medical procedure.

A second instructive comparison is between the prohibition in section 202 of the DOJ restriction and the clarification in section 204. In section 202, Congress has prohibited DOJ funds from being used “to pay for an abortion,” *id.*, div. B, § 202, but in section 204, Congress has acknowledged “the obligation of the Director of the Bureau of Prisons to provide escort services necessary for a female inmate to receive [an abortion]

outside the Federal facility,” *id.*, div. B, § 204. Notably, section 204 does not create an exception to the funding restriction in section 202—the Hyde Amendment analogue—but rather clarifies that nothing in section 203—concerning conscience rights—“remove[s] the obligation” of the Bureau of Prisons (“BOP”) to provide transportation services. *Id.* In this way, section 204 presupposes that BOP has some existing “obligation” to provide such services to inmates and indicates that nothing in section 202 affects BOP’s ability to meet that obligation. Consistent with this text, BOP has long provided transportation to inmates for abortions. *See, e.g.*, BOP, *Program Statement 5200.07, Female Offender Manual* at 17 (May 12, 2021); Compl. ¶ 62, *United States v. Texas*, No. 21-cv-796 (W.D. Tex. Sept. 9, 2021). To be sure, BOP’s custodial role may raise special issues, but this comparison nonetheless indicates that when Congress prohibits funds from being used or expended for abortion, as in section 202—and in the nearly identical Hyde Amendment—Congress does not intend for that prohibition to reach transportation expenses.

Further confirming our reading of the Hyde Amendment, the Peace Corps has long paid to transport volunteers to obtain abortions, *see* Peace Corps, *MS 262 Peace Corps Medical Services Program 9.1–2* (Mar. 24, 2022), even though its appropriations are subject to a restriction worded very similarly to the Hyde Amendment that prevents the agency from paying for the procedure itself, *see* CAA 2022, div. K, 136 Stat. at 580 (“none of the funds appropriated under this heading shall be used to pay for abortions”). In 1981, OLC concluded that the Peace Corps’ policy of paying for transportation expenses (and per diems) for volunteers to get an abortion was consistent with its Hyde-type restriction. *See Peace Corps Employment Policies for Pregnant Volunteers*, 5 Op. O.L.C. 350, 357 (1981).*

* At the time of our opinion, the restriction on the Peace Corps’ funds had a different wording, prohibiting the Peace Corps from using funds “to perform abortions” (absent limited exceptions). *Peace Corps Employment Policies for Pregnant Volunteers*, 5 Op. O.L.C. at 357. Congress has typically phrased the Peace Corps’ funding restriction as prohibiting “pay[ing] for abortions,” including in appropriations measures enacted both before and after 1981. *E.g.*, Foreign Assistance and Related Programs Appropriations Act of 1979, Pub. L. No. 95-481, tit. III, 92 Stat. 1591, 1597 (1978); Foreign Assistance and Related Programs Appropriations Act of 1982, Pub. L. No. 97-121, tit. II, 95 Stat. 1647, 1652 (1981). We have not found any indication in the legislative history that Congress intended the difference in language to change the scope of the prohibition.

Hyde Amendment Application to the Provision of Transportation for Abortions

For these reasons, the Hyde Amendment is best read to permit expenditures to fund transportation for women seeking abortions where HHS otherwise possesses the requisite authority and appropriations.

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