March 8, 2024

Joshuah Marshall
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Indian Health Service
5600 Fishers Lane
Rockville, MD 20857

Submitted via regulations.gov

RE: Comments on Notice of Proposed Rulemaking, Removal of Outdated Regulations (RIN 0917-AA24)

Dear Mr. Marshall,

The undersigned organizations, scholars, and individuals respectfully submit the following comment in support of the Indian Health Service's ("IHS") Notice of Proposed Rulemaking ("NPRM" or "the proposed rule"), RIN 0917-AA24, Removal of Outdated Regulations, published in the Federal Register on January 8, 2024.[1]

I. The Hyde Amendment is discriminatory and has perpetuated systemic barriers to Native American and Alaskan Indian populations' health care access and exacerbated disparities in reproductive health outcomes that IHS must address.

American Indian and Alaska Native ("AI/AN") people experience disparate health outcomes, including lower life expectancy and a higher rate of mortality from diseases compared to other Americans.[2] The root cause of these disparities is the perpetuation of systemic racism and a continued history of genocide and colonialism, which now presents as a deep underinvestment and disenfranchisement by federal and state governments. These systemic failures result in gravely insufficient access to even the most basic necessities, such as clean water and electricity on Tribal lands, and lack of access to fully funded comprehensive, culturally competent health services.[3] For tribal communities located in rural areas, the concentration of resources outside, and often extremely far from, many AI/AN communities adds an additional layer of complexity to the challenges they face.

However, this complexity also exists for 76% of AI/AN living in urban areas that are served by underfunded IHS-funded urban Indian organizations, approximately a third of which are not able

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[1] Removal of Outdated Regulations, 89 Fed. Reg. 896 (proposed) (to be codified at 42 C.F.R. pt 136) *available at* https://www.federalregister.gov/documents/2024/01/08/2023-28948/removal-of-outdated-regulations.

[2] U.S. DEP'T OF HEALTH & HUM. SERVS., INDIAN HEALTH SERV., INDIAN HEALTH DISPARITIES (Oct. 2019) *available at* https://www.ihs.gov/sites/newsroom/themes/responsive2017/display_objects/documents/factsheets/Disparities.pdf [hereinafter "IHS FACT SHEET: DISPARITIES"].

[3] IHS FACT SHEET: DISPARITIES, *Id* at 1; Mary Smith, *Native Americans: A Crisis in Health Equity*, 43 A.B.A. HUM. RTS. MAG. 14-15 (2018) *available at* https://www.americanbar.org/content/dam/aba/administrative/crsj/human-rights-magazine/hr-v43n3.pdf; WILMERHALE, INFRASTRUCTURE SERIES: TRIBES AND INFRASTRUCTURE (2018) *available at* https://www.wilmerhale.com/insights/client-alerts/2018-04-26-infrastructure-series-tribes-and-infrastructure.

to provide primary care which would include reproductive services. Limited access to health care facilities and services, including reproductive health clinics, makes it difficult for individuals to seek timely and necessary care.[4] Limited access to culturally competent pregnancy-related care, in addition to these broader systemic barriers and discrimination at healthcare facilities, has created stark disparities in maternal mortality and morbidity among AI/AN women when compared to non-Hispanic White women.[5] By limiting the availability of abortion services, the Hyde Amendment exacerbates the disparate reproductive health outcomes of AI/AN women and birthing people and puts their health and lives in a perilous position.[6]

The Hyde Amendment bars the use of federal funds to cover most abortions, except in limited cases of reported rape, incest, or where the life of the pregnant person is at risk. The provisions of the Hyde Amendment disproportionately impact AI/AN communities because the Indian Health Service is entirely federally funded. The federal government provides healthcare to all American Indians and Alaska Natives via IHS, regardless of economic status, pursuant to its federal-trust responsibility based on the sovereign-to-sovereign relationship between the United States and Tribes.[7] Yet the Hyde Amendment fails to account for the federal statutory and trust obligations owed to Tribes. Consequently, IHS reproductive healthcare is definitionally incomplete. Practically, the Hyde Amendment makes abortion care entirely out of reach for low-income AI/AN individuals, especially when factoring in expenses for travel and childcare, and loss of income from taking time off work.

In addition to the facial limitations of the Hyde Amendment, the signaling of the Hyde Amendment has further compromised abortion care beyond its provisions. The Hyde Amendment provides for limited exceptions. Yet, the limited research into IHS reproductive care

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[4] *See,* Rebekah Sager, *How anti-abortion laws disproportionately impact Indigenous people*, AM. J NEWS (Apr. 10, 2023, 6:00am), https://americanjournalnews.com/abortion-indigenous-native-americans-alaska-hyde-amendment-colonization/; Noel Lyn Smith & Maddy Keyes, *Indigenous people united to navigate abortion access after Roe*, 19th News (Oct. 11, 2023), https://19thnews.org/2023/10/indigenous-people-abortion-access/; Janice C. Probst & Fozia Ajmal, *Findings Brief: Social Determinants of Health among Rural American Indian and Alaska Native Populations*, U. OF S.C. RURAL AND MINORITY RSCH. CTR., Jul. 2019 at 4-5, *available at* https://www.sc.edu/study/colleges_schools/public_health/research/research_centers/sc_rural_health_research_center/documents/socialdeterminantsofhealthamongruralamericanindianandalaskanativepopulations.pdf.

[5] *See e.g.,* CTRS. FOR DISEASE CONTROL & PREVENTION, DISPARITIES AND RESILIENCE AMONG AMERICAN INDIAN AND ALASKA NATIVE PEOPLE WHO ARE PREGNANT OR POSTPARTUM (last reviewed Nov. 16, 2022), *available at* https://www.cdc.gov/hearher/ aian/disparities.html; Susanna Trost, MPH, et al., *Pregnancy-Related Deaths Among American Indian or Alaska Native Persons: Data from Maternal Mortality Review Committees in 36 US States, 2017–2019*, CTRS. FOR DISEASE CONTROL & PREVENTION (last reviewed Sept. 19, 2022), *available at* https://www.cdc.gov/reproductivehealth/ maternal-mortality/erase-mm/data-mmrc-aian.html; Katy B. Kozhimannil, et al., *Severe Maternal Morbidity and Mortality Among Indigenous Women in the United States*, 135 OBSTETRICS & GYNECOLOGY, 294-300 (2020) *available at* https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7012336/; Ctr. for Reprod. Rts. et al., Systematic Racism and Reproductive Injustice in the United States: A Report for the UN Committee on the Elimination of Racial Discrimination (2022), *available at* https://reproductiverights.org/wp-content/uploads/2022/08/2022-CERD-Report_Systemic-Racism-and-Reproductive-Injustice.pdf; Brief of Cecilia Fire Thunder, National Indigenous Women's Resource Center, The Native American Community Board, and Additional Advocacy Organizations and Individuals as Amici Curiae Supporting Respondents, *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022)(No. 19-1392), *available at* http://www.supremecourt.gov/DocketPDF/19/19-1392/192846/20210917173106773_NIWRC%20Main%20EFILE%20Sep%2017%2021.pdf.

[6] Rebekah Sager, *How anti-abortion laws disproportionately impact Indigenous people*, AM. J NEWS (Apr. 10, 2023, 6:00am), https://americanjournalnews.com/abortion-indigenous-native-americans-alaska-hyde-amendment-colonization/.

[7] Shaye Beverly Arnold, *Reproductive Rights Denied: The Hyde Amendment and Access to Abortion for Native American Women Using Indian Health Service Facilities*, 104 AM. J. PUBLIC HEALTH 1892–1893 (2014), *available at* https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4167108/.

reveals that IHS-funded facilities generally lack the capacity or competency to provide such care when the exceptions apply.[8] It is also unclear whether medication abortion, the most common form of abortion, is covered through Purchase-Referred Care (PRC), creating an additional barrier to timely abortion care.[9] Thus, even in cases where the exceptions criteria are met an individual must still travel to a non-IHS provider and could still be subject to the same economic and geographic barriers, as well as restrictive state laws. Secondly, the Hyde Amendment fuels misinformation about what reproductive care IHS-funded clinics are authorized to not only provide but to discuss, such that clinics are frequently reluctant to share information about reproductive healthcare or provide referrals to other reproductive healthcare facilities. Thirdly, and central to the ask of these comments, the IHS inappropriately interprets the provisions of the Hyde Amendment, which effectuates an inappropriate narrowing of the exceptions criteria and further exacerbates the Hyde Amendment's chilling effect.

II. IHS must engage AI/AN communities around their experiences with the provision of abortion care and referrals and make structural changes in order to improve the provision of abortion care under Hyde.

The Hyde Amendment exacerbates existing challenges faced by AI/AN birthing people when accessing the full spectrum of reproductive health care and limits the federal government's ability to meet its responsibility to tribes. As noted in the NPRM, IHS will continue to enforce the Hyde Amendment at IHS-funded facilities consistent with current Congressional guidelines governing HHS. Promulgating regulations on this matter are not necessary, and we recommend they be removed. We further recommend that IHS take the following steps in order to appropriately enforce exceptions to the Hyde Amendment and mitigate some of the existing harms caused by the policy:

- Take steps to educate administrators at IHS-funded facilities on appropriate compliance with the exceptions to the Hyde Amendment in order to eliminate any unnecessary denials of abortion care, or the denial or withholding of information of where AI/AN individuals may receive abortion care, whether from community-based organizations or healthcare providers. This includes making critical updates to the IHS Manual to accurately reflect the actual provisions of the Hyde Amendment and the eligible exception criteria.[10]

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[8] *See,* Kati Schindler, et al., *Indigenous Women's Reproductive Rights: The Indian Health Service and Its Inconsistent Application of the Hyde Amendment*, NATIVE AMERICAN WOMEN'S HEALTH EDUCATION RESOURCE CENTER, PROJECT OF THE NATIVE AMERICAN COMMUNITY BOARD, Oct. 2002, *available at* https://www.prochoice.org/pubs_research/publications/downloads/about_abortion/indigenous_women.pdf; Allison Herrera, Indigenous women face extra barriers when it comes to reproductive rights, HIGH COUNTRY NEWS (Feb. 14, 2020), *available at* https://www.hcn.org/issues/52-3/indigenous-affairs-public-health-indigenous-women-face-extra-barriers-when-it-comes-to-reproductive-rights/.

[9] Rachel K. Jones, et al., *Medication Abortion Now Accounts for More Than Half of All US Abortions*, GUTTMACHER INST., Feb. 24, 2022 (last updated Dec. 1, 2022), *available at* https://www.guttmacher.org/article/2022/02/medication-abortion-now-accounts-more-half-all-us-abortions; ELAYNE J. HEISLER & TAYLOR R. WYATT, CONG. RSCH. SERV., R46785, FEDERAL SUPPORT FOR REPRODUCTIVE HEALTH SERVICES: FREQUENTLY ASKED QUESTIONS (2022) *available at* https://crsreports.congress.gov/product/pdf/R/R46785/11.

[10] For example, the Indian Health Manual, Special General Memorandum 96-01 authorizes abortion care in the context of rape and incent, but only if there is signed documentation from a law enforcement agency and a report is filed by the victim within

- Education is also recommended to ensure that administrators understand relevant state abortion laws and do not deny patients access to information about other health care providers and organizations that provide abortion care.
- We recommend that IHS engage with AI/AN communities to better understand the impact of the Hyde Amendment, especially in light of the U.S. Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization* to overrule *Roe v. Wade*. We urge IHS to be inclusive of the full I/T/U system of care in these engagements, as it is essential to include the tribes and urban Indian organizations providing the care. We encourage IHS officials to examine longstanding barriers to abortion access and to engage with community members to discuss the impact of state-level abortion bans and restrictions that went into effect after the *Dobbs* decision. [11]

By engaging Tribal leaders and community stakeholders, including abortion providers, birth workers, midwives, doulas, and other community health workers, IHS can position itself to address many of the issues raised and advocate for increased funding for those needs.

Removing unnecessary and harmful regulations, educating administrators at IHS-funded facilities, and engaging meaningfully with AI/AN communities regarding their sexual and reproductive health needs will bring the U.S. closer to meeting its international human rights obligations. United Nations ("UN") Treaty Monitoring Bodies and UN human rights experts have made numerous observations and recommendations to the U.S. aimed at ensuring that Indigenous peoples have access to quality healthcare that respects their cultural practices and supports their sexual and reproductive health.[12] We recommend that IHS review these recommendations and integrate supportive policies into the IHS healthcare delivery framework, in consultation with Tribes and Tribal organizations.

III. Conclusion

We support the proposed rule and appreciate the opportunity to comment on this NPRM. If you require any additional information about the issues raised in this letter, please contact Vandana Ranjan (vranjan@reprorights.org) and Abigail Echo-Hawk (abigaile@uihi.org).

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60 days of the incident. The Hyde Amendment does not require such documentation, and instead just another unnecessary barrier. Indian Health Serv., *Special General Memorandum 96-01,* Indian Health Manual (Aug. 12, 1996). *Also see* Lauren van Schilfgaarde, Aila Hoss, Ann E. Tweedy, Sarah Deer, and Stacy Leeds*,* Tribal Nations and Abortion Access: A Path Forward, 46 HARV. J. L & GENDER 1, 22-23 (2023).

[11] Erik Ortiz, *How Texas abortion law is undermining Native American women's reproductive justice*, NBC NEWS (SEP. 4, 2021, 9:51 AM), https://www.nbcnews.com/health/womens-health/how-texas-abortion-law-undermining-native-american-women-s-reproductive-n1278494; Noel Lyn Smith & Maddy Keyes, *Indigenous people united to navigate abortion access after Roe*, 19TH NEWS (Oct. 11, 2023), https://19thnews.org/2023/10/indigenous-people-abortion-access/; Emily Hofstaedter*, Abortion Was Already Inaccessible on Reservation Land. Dobbs Made Things Worse*, MOTHER JONES (Aug. 12, 2022) https://www.motherjones.com/politics/2022/08/abortion-dobbs-tribal-land/.

[12] U.N. Special Rapporteur on the rights of indigenous peoples on her mission to the United States of America – Note by the Secretariat, ¶12, ¶55, U.N. Doc. A/HRC/36/46/Add.1 (2017); Human Rts. Comm., Concluding observations on the fifth periodic report of the United States of America, CCPR/C/USA/CO/5, ¶24-29e, ¶66-67d (2023); Comm. on the Elimination of Racial Discrimination, Concluding observations on the combined tenth to twelfth reports of the United States of American, ¶34-36, U.N. Doc. CERD/C/USA/CO/10-12 (2022).

Sincerely,

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National Council of Jewish Women
National Family Planning & Reproductive Health Association
National Health Law Program
National Partnership for Women & Families
National Women's Law Center
Physicians for Reproductive Health
Reproductive Freedom for All (formerly NARAL Pro-Choice America)