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# THE ABORTION FUNDING ACT OF 2011

Model Legislation & Policy Guide  
*For the 2011 Legislative Year*



*Changing Law to Protect Human Life, State by State*

# INTRODUCTION

The new health care reform law signed by President Barack Obama on March 23, 2010 requires individual States to operate and maintain “health insurance exchanges.”

Health insurance plans offering abortion coverage **are** allowed to participate in a state’s exchanges and to receive federal subsidies unless the State legislature affirmatively opts-out of offering these plans. Individuals with income up to 400% of the federal poverty level receive tax credits to apply towards health insurance plans in the new exchanges. If one chooses a plan that covers abortion, his or her tax credit cannot be used to directly pay for abortions; however, the tax credit subsidizes the insurance plan which covers abortions.

Specific language in the new health care reform law (commonly referred to as the “Nelson-Reid compromise”) permits a state to opt-out of allowing insurance plans that cover abortions to participate in that state’s health insurance exchange.

Contrary to some perceptions, President Obama’s March 24, 2010 Executive Order does not make the new health care reform law conform to the longstanding principle of the Hyde Amendment – that the federal government will not pay for abortions or for insurance plans that cover abortions.

While the text of the Executive Order **addresses** the health insurance exchanges, it utterly fails to apply the language of the Hyde Amendment to them. Section 2 of the Order provides guidelines for “strict compliance” with the provisions in the new law that address how federal subsidies are handled in plans that cover abortions in the exchanges. However, these guidelines do nothing to **prevent** federal subsidies from going to plans that cover abortions, directly violating the long-standing principles embodied in the Hyde Amendment and other federal law.

Additionally, even if the Executive Order were sufficient to address pro-life concerns, it is not permanent law. The order can be easily repealed by the Obama Administration or a future administration.

Currently, five states<sup>1</sup> have laws, dating back as far as 1978, that prohibit private insurance plans operating within their states from covering elective abortions.<sup>2</sup> All five have an exception for when the mother's life is at risk and one state<sup>3</sup> also allows coverage when a pregnancy is the result of rape or incest. Notably, all five states allow elective abortion coverage through the purchase of an optional rider and payment of an additional premium.

However, under the new health care law, P.L. 111-148, states are *required* to affirmatively opt out of allowing abortion coverage by exchange-participating health plans through *new* legislation or a *new* amendment to an existing statute. This is required because of the Supremacy clause, Article VI, Clause 2 of the Constitution which causes federal law to trump existing state law.<sup>4</sup>

To assist state legislators in opting-out of providing health insurance plans with abortion coverage through their health insurance exchanges, and to also help state legislators limit health insurance coverage of elective abortions within their states, AUL has developed "The Abortion Funding Act of 2011." For more information and drafting assistance, please contact AUL's Legislative Coordinator at (202) 741-4907 or [Legislation@AUL.org](mailto:Legislation@AUL.org).

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<sup>1</sup> Idaho, Kentucky, Missouri, North Dakota, and Oklahoma.

<sup>2</sup> Importantly, in *Coe v. Melahn*,<sup>2</sup> the 8<sup>th</sup> Circuit Court of Appeals held that Missouri's ban on insurance coverage of elective abortion did not place an "undue burden" on a woman's ability to obtain an abortion and was, therefore, constitutionally permissible.

<sup>3</sup> Oklahoma.

<sup>4</sup> P.L. 111-148 speaks directly to the question of who can make the decision as to whether abortion will be covered in an exchange-participating plan (see Sec. 1301 of P.L. 111-148 in which *issuers* of the insurance plan offered through the exchange are the ones to decide whether or not abortion coverage will be offered), and thus, the federal law will trump any existing state law.

# The Abortion Funding Act of 2011

HOUSE/SENATE BILL NO. \_\_\_\_\_  
By Representatives/Senators \_\_\_\_\_

## Section 1. Title.

This Act may be known and cited as the “[*Insert Name of State*] Abortion Funding Act of 2011.”

## Section 2. Legislative Findings and Purposes.

- (a) The Legislature of the State of [*Insert Name of State*] finds that:
- (1) Under the *Patient Protection and Affordable Care Act* (P.L. 111-148), federal tax dollars, via affordability credits (subsidies provided to individuals up to 400% of the federal poverty level), are routed to Exchange-participating health insurance plans, including plans that provide coverage for abortions.
  - (2) Federal funding of insurance plans that provide abortions is an unprecedented change in federal abortion funding policy. The Hyde Amendment, as passed each year in the Labor Health and Human Services Appropriations bill, and the Federal Employee Health Benefits Program (FEHBP) prohibit federal funds from subsidizing health insurance plans that provide abortion. Under this new law, however, Exchange-participating health insurance plans that provide abortions can receive federal funds.
  - (3) The provision of federal funding for health insurance plans that provide abortion coverage is nothing short of taxpayer-funded and government-endorsed abortion.
  - (4) However, P.L. 111-148, Section 1303(a) allows a State to “opt out” of permitting health insurance plans that cover abortions to participate in the Exchanges within that State, and thereby prohibit taxpayer money from subsidizing plans that cover abortions within that State.

- (5) It is the long-standing policy of the State of *[Insert name of State]* that taxpayer dollars should not be used to fund abortion. Specifically, *[Insert specific information from existing state abortion funding laws]*.
- (6) The decision not to fund abortion places no governmental obstacle in the path of a woman who chooses to terminate her pregnancy. *Rust v. Sullivan*, 500 U.S. 173, 201 (1991).
- (7) Moreover, it is permissible for a State to engage in unequal subsidization of abortion and other medical services to encourage alternative activity deemed in the public interest. *Rust v. Sullivan*, 500 U.S. 173, 198 (1991).
- (8) Citizens of the State of *[Insert name of State]*, like other Americans, oppose the use of public funds – both federal and state – to pay for abortions. For example, a January 2010 Quinnipiac poll showed that 7 in 10 Americans were opposed to provisions in federal health care reform that use federal funds to pay for abortions and abortion coverage.
- (9) The Guttmacher Institute which advocates for unfettered and taxpayer-funded access to abortion confirms that more women have abortions when they are covered by public programs.<sup>5</sup>
- (10) It is an accepted principle of economics and public policy, that when you subsidize or pay for a service or product, you increase demand for that service or product. Moreover, it is reasonable to conclude that this principle applies to the delivery of medical care in general and to the provision of abortion in particular.
- (11) Given that more women have abortions when they are covered by public programs, and public *or* private insurance coverage of a procedure generally leads to increased usage of that procedure, the State of *[Insert name of State]* concludes that

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<sup>5</sup> See Heather D. Boonstra, *The Heart of the Matter: Public Funding of Abortion for Poor Women in the United States*, Guttmacher Policy Review, Winter 2007, Vol. 10, No. 1, available at <http://www.guttmacher.org/pubs/gpr/10/1/gpr100112.html>.

the incidence of abortion would increase with the subsidization of private insurance plans that cover abortion.

(12) Private insurance contracts, plans, and policies often offer optional abortion coverage through the purchase of a separate rider.

(b) Based on the findings in subsection (a) of this Section, it is the purpose of this Act to affirmatively opt out of allowing qualified health plans that cover abortions to participate in Exchanges within the State of [*Insert name of State*].

(c) Further, it is also the purpose of this Act to limit the coverage of abortion in all health insurance contracts, plans, or policies delivered or issued for delivery in the State of [*Insert name of State*].

### **Section 3. Federal Abortion-Mandate Opt-Out.**

(a) No abortion coverage may be provided by a qualified health plan offered through an Exchange created pursuant to PL 111-148 within the State of [*Insert name of State*].

(b) This limitation shall not apply to an abortion performed when the life of the mother is endangered by a physical disorder, physical illness, or physical injury, including a life-endangering physical condition caused by or arising from the pregnancy itself [, *or when the pregnancy is the result of an act of rape or incest*].

### **Section 4. Abortion Coverage Prohibition.**

(a) No health insurance contracts, plans, or policies delivered or issued for delivery in the State of [*Insert name of State*] shall provide coverage for elective abortions except by an optional rider for which there must be paid an additional premium. For purposes of this Section, an "**elective abortion**" means "an abortion for any reason other than a spontaneous abortion or to prevent the death of the female upon whom the abortion is performed."

(b) Subsection (a) of this Section shall be applicable to all contracts, plans or policies of:<sup>6</sup>

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<sup>6</sup> This list should be tailored according to the laws of the State.

- (1) All health insurers subject to [*Insert appropriate State code section(s)*];
- (2) All nonprofit hospital, medical, surgical, dental, and health service corporations subject to [*Insert appropriate State code section(s)*];
- (3) All group and blanket health insurers subject to [*Insert appropriate State code section(s)*];
- (4) All health maintenance organizations subject to [*Insert appropriate State code section(s)*];
- (5) Any provision of medical, hospital, surgical, and funeral benefits and of coverage against accidental death or injury, when such benefits or coverage are incidental to or part of other insurance described in [*Insert appropriate State code section(s)*] ; and
- (6) All employers who provide health insurance for employees on a self-insured basis.

**Section 5. Construction.**

- (a) Nothing in this Act shall be construed as creating or recognizing a right to abortion.
- (b) It is not the intention of this Act to make lawful an abortion that is currently unlawful.

**Section 6. Right of Intervention.**

The [*Legislature*], by joint resolution, may appoint one or more of its members, who sponsored or cosponsored this Act in his or her official capacity, to intervene as a matter of right in any case in which the constitutionality of this Act or any portion thereof is challenged.

**Section 7. Severability.**

Any provision of this Act held to be invalid or unenforceable by its terms, or as applied to any person or circumstance, shall be construed so as give it the maximum effect permitted by law, unless such holding shall be one of utter invalidity or unenforceability, in which event such provision shall be deemed severable here from and shall not affect the remainder hereof or the

application of such provision to other persons not similarly situated or to other, dissimilar circumstances.

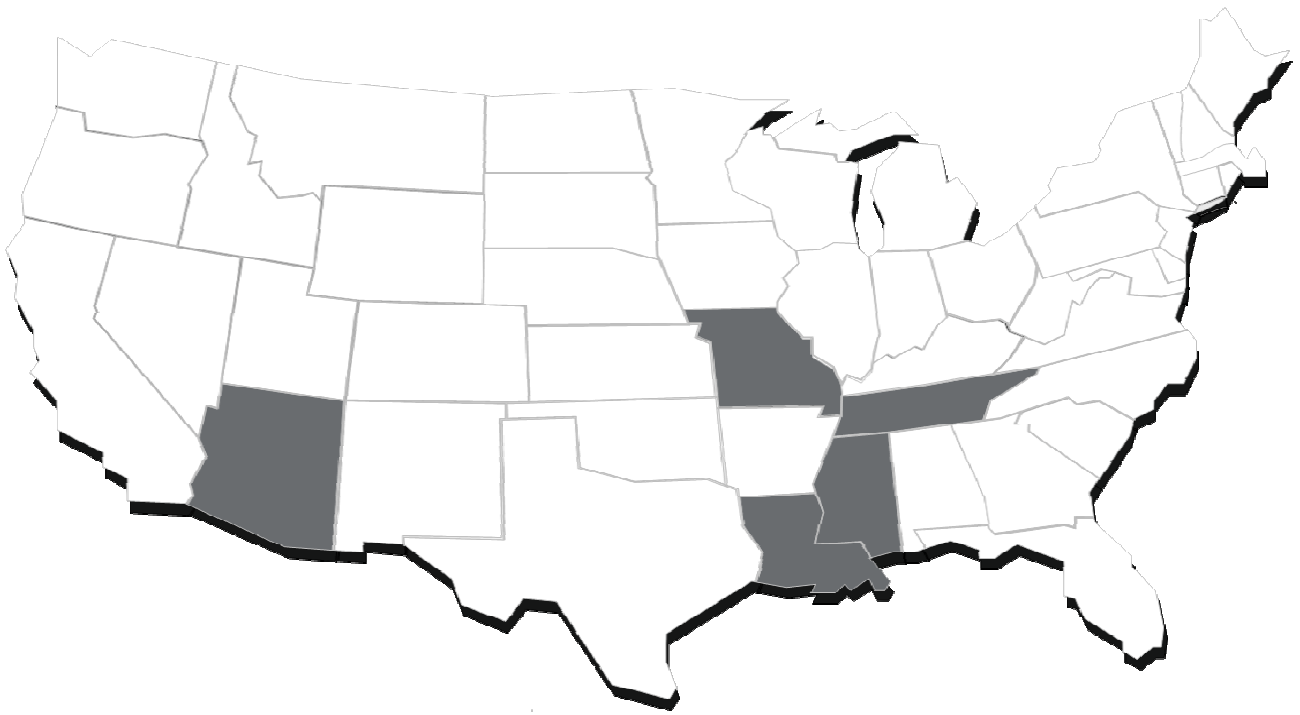
**Section 8. Effective Date.**

This Act takes effect on [*Insert date*].

# STATE OF THE STATES: WHERE ARE WE NOW?

## FEDERAL ABORTION MANDATE OPT-OUT

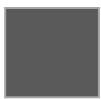
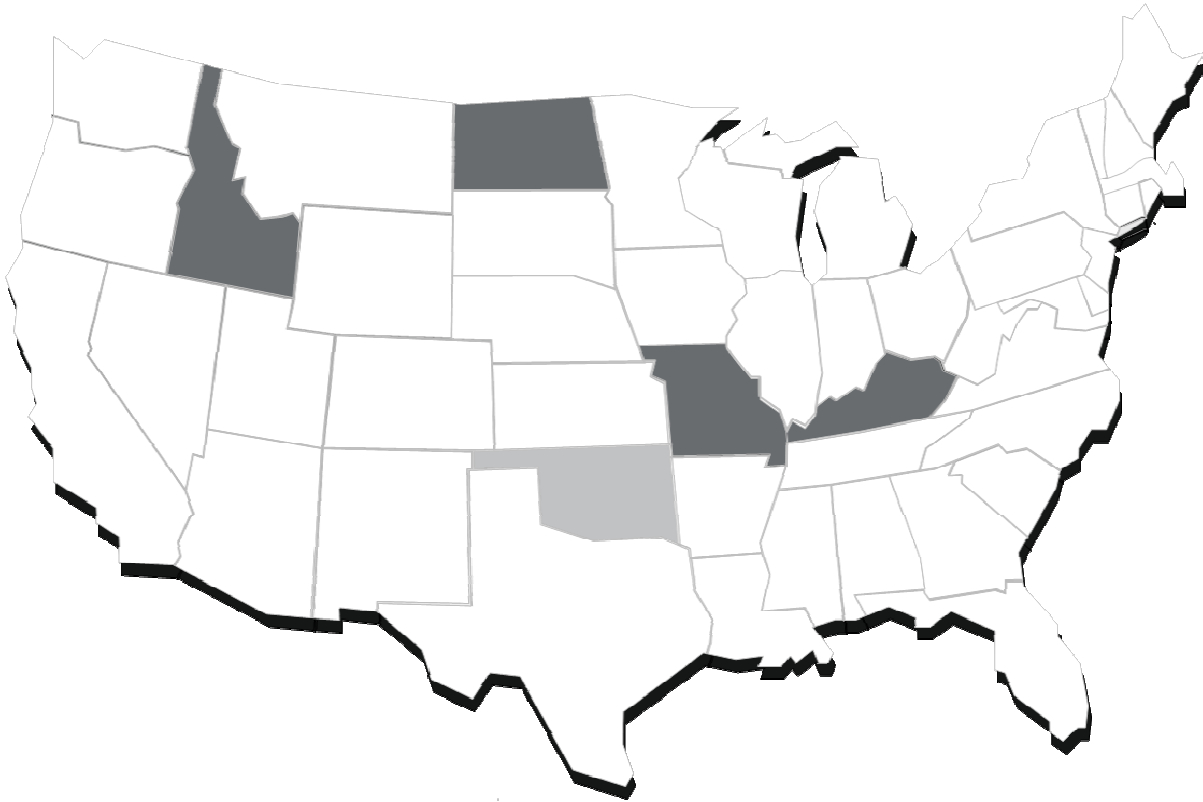
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Five states have opted out of the federal abortion-mandate: AZ, LA, MS, MO and TN.

# ABORTION COVERAGE LAWS

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Four states prohibit private insurance plans operating within their states from covering elective abortions (except for cases of life endangerment): ID, KY, MO, and ND.



One state prohibits private insurance plans operating within the state from covering elective abortions (except for cases of rape, incest, or life endangerment): OK.

More detailed information about pro-life legislative efforts can be found in AUL's annual publication *Defending Life 2010: A State by State Legal Guide to Abortion, Bioethics, and the End of Life*.

*Defending Life 2010* is available online at [AUL.org](http://AUL.org) or for purchase at [Amazon.com](http://Amazon.com).

For further information regarding this or other AUL policy guides, please contact:

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