



May 17, 2020

Attn: Title X Rulemaking
Office of Population Affairs
Office of the Assistant Secretary for Health
U.S. Department of Health and Human Services
200 Independence Avenue SW
Washington, D.C. 20201

RE: Proposed Rule: Ensuring Access to Equitable, Affordable, Client-Centered Quality Family Planning Services

To Whom It May Concern,

The American Center for Law and Justice (ACLJ) submits the following comments, on behalf of itself and over 557,000 of its members¹ opposing the adoption of the proposed Rule (hereinafter “Rule”) issued by the Department of Health and Human Services (“HHS” or “The Department”) on April 15, 2021. That Rule revises the 2019 rules by readopting the 2000 regulations, with additional modifications, as reported in 86 FR 19812 of the Federal Register.

The ACLJ is an organization dedicated to the defense of constitutional liberties secured by law. ACLJ attorneys have argued before the Supreme Court of the United States in a number of significant cases involving the freedoms of speech and religion.²

The Rule should not be adopted because (a) the current regulations restored Title X to its proper function as the only domestic federal program designed solely to provide affordable family planning services to low income families *without* promoting abortion or allowing the misuse of funds to support abortion; and (b) the current regulations appropriately prevent referrals for abortion, whereas the proposed Rule *mandates* abortion referrals, in direct conflict with free speech and conscience protections.

¹ These comments are joined by over 557,000 ACLJ members who have signed our Petition Defund Millions from Planned Parenthood, available at <https://aclj.org/pro-life/defund-millions-from-planned-parenthood>.

² See *Sumnum v. Pleasant Grove*, 555 U.S. 460 (2009); *NOW v. Scheidler*, 547 U.S. 9 (2006); *McCormell v. FEC*, 540 U.S. 93 (2003); *Schenck v. Pro-Choice Network of Western New York*, 519 U.S. 357 (1997); *Lamb’s Chapel v. Center Moriches Sch. Dist.*, 508 U.S. 384 (1993); *Bray v. Alexandria Women’s Health Clinic*, 506 U.S. 263 (1993); *Bd. of Educ. v. Mergens*, 496 U.S. 226 (1990); *Bd. of Airport Comm’rs v. Jews for Jesus*, 482 U.S. 569 (1987).

I. BACKGROUND

Abortion, which the Supreme Court effectively legalized across the whole of the United States when it handed down its 1973 decision in *Roe v. Wade*, has consistently been at the center of contentious litigation. In fact, it is rare to find any point of consensus in this area of law. What is clear, is that it is hardly settled law, and abortion is a continued source of moral controversy for the American people.

Our nation was founded on the principle that human beings have God-given, inalienable rights. As stated in the Declaration of Independence:

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.³

Americans have always valued the right to life, and we should continue to do so. Although there is robust debate surrounding the issue of abortion in the United States, a recent poll revealed that a majority of Americans believe that abortion is a moral wrong.⁴ In addition, a large majority of Americans support restrictions on abortion, and “the finding that 70% of Americans either oppose abortion or favor limits on it rather than having it legal under any circumstances is echoed in the large majorities of Americans who have consistently said it should not be legal in the second (65%) and third (81%) trimesters.”⁵

Indeed, abortion is one of the gravest offenses against human life and natural right because it entails the deliberate killing of an innocent human being. It is a procedure that deliberately takes the life of a human being, ending the heartbeat of a living, unborn child. Such killing is the embodiment of disdain for human life, and is incompatible with our Declaration of Independence.

Title X of the Public Health Service Act, created by Congress in 1970, authorized taxpayer funds to assist “voluntary family planning projects.”⁶ The purpose of Title X is to promote the growth and strength of the American family. In keeping with the majority of Americans who view abortion as a moral wrong, Section 1008 of the Act, codified as 42 U.S.C. § 300(a)-6, was included to make it clear that “[n]one of the funds appropriated under this title shall be used in programs where abortion is a method of family planning.”⁷ Despite this clear prohibition, pro-abortion administrations have consistently interpreted the rule as allowing clinics which receive Title X funds to provide abortion counseling and referrals, or to perform abortions using non-Title X funds. As a result, organizations known almost exclusively for performing abortions, such as Planned Parenthood, have been granted Title X funds.

³ THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

⁴ Lydia Saad, *Where Do Americans Stand on Abortion?*, GALLUP (Sept. 29, 2020), <https://news.gallup.com/poll/321143/americans-stand-abortion.aspx>.

⁵ *Id.*

⁶ 42 U.S.C. § 300(a).

⁷ *Id.*

For instance, between 2013 and 2015, Planned Parenthood Federation of America (PPFA) received nearly \$90 million from HHS grants, averaging \$30 million per year, including taxpayer funded Title X grants.⁸ In the same time period, PPFA performed nearly 1 million abortions, averaging over 333,000 per year.⁹ Since that period, the grants received by PPFA have increased to \$60 million per year,¹⁰ and abortions have increased to nearly 355,00 per year.¹¹ As indicated above, no federal money is legally allowed to fund abortions. However, all money is fungible, if not simply transferable. Every dime given to PPFA for its shrinking women’s health program¹² is another it can spend on abortions and abortion-related services. Moreover, PPFA uses deceptive reporting¹³ to hide from scrutiny how these federal dollars directly support its abortion practice. Every abortion requires testing, screenings, and consultations.¹⁴ Yet, PPFA lists each of these services separately and reports them in other categories, such as “Other Women’s Health Services,”¹⁵ even if the ultimate goal of that pregnancy test was to terminate it.

In 2018, changes to Title X were proposed and then enacted in 2019 that included the Compliance With Statutory Program Integrity Requirements rule (“Protect Life Rule”).¹⁶ The Protect Life Rule created a high wall of separation, both physical and financial, between those

⁸ GAO-18-204R, 25–45.

⁹ In 2015, PPFA performed 328,384 abortions. See PLANNED PARENTHOOD (PPFA), 2015–2016 ANNUAL REPORT 25 (2017), available at https://www.plannedparenthood.org/uploads/filer_public/18/40/1840b04b-55d3-4c00-959d-11817023ffc8/20170526_annualreport_p02_singles.pdf. In 2014, PPFA performed 323,999 abortions. See PLANNED PARENTHOOD (PPFA), 2014–2015 ANNUAL REPORT 30 (2015), available at https://www.plannedparenthood.org/files/2114/5089/0863/2014-2015_PPFA_Annual_Report_.pdf. In 2013, PPFA performed 327,653 abortions. See PLANNED PARENTHOOD (PPFA), 2013–2014 ANNUAL REPORT 18 (2014), available at https://issuu.com/actionfund/docs/annual_report_final_proof_12.16.14_. Thus, in total, from 2013–2015, PPFA performed 980,036 abortions.

¹⁰ Valerie Richardson, *Planned Parenthood to Pass on Federal Funds Rather than Comply with Trump Abortion Rules*, THE WASHINGTON TIMES (July 17, 2019), <https://www.washingtontimes.com/news/2019/jul/17/planned-parenthood-forgo-title-x-federal-funds-ove/#:~:text=The%20%2460%20million%20in%20annual%20Title%20X%20grants,or%20in%20the%20cases%20of%20rape%20or%20incest>.

¹¹ PLANNED PARENTHOOD (PPFA), 2019–2020 ANNUAL REPORT 35 (2020), available at https://www.plannedparenthood.org/uploads/filer_public/67/30/67305ea1-8da2-4cee-9191-19228c1d6f70/210219-annual-report-2019-2020-web-final.pdf.

¹² For example, in 2016, PPFA performed over 100,000 fewer contraceptive services, over 5,000 fewer HPV treatments and vaccinations, 21% fewer prenatal services, and 57% fewer miscarriage care services than they did in 2015. Compare PPFA’s 2015–2016 Annual Report with their 2014–2015 Annual Report. The same trend can be seen when comparing PPFA’s 2014 and 2015 reporting. See *Taxpayer Funding, and Profits Soar; Prenatal Services and Cancer Screenings Plummet*, ACLJ.ORG (July 2016), <https://aclj.org/pro-life/shocking-planned-parenthood-annual-report-shows-abortions-taxpayer-funding-and-profits-soar-prenatal-services-and-cancer-screenings-plummet>; *A Balance Sheet of Death: Planned Parenthood’s Abortion Business Profits Continue to Soar as Prenatal and Miscarriage ‘Services’ Precipitously Dwindle*, ACLJ.ORG (Jan. 2018), <https://aclj.org/pro-life/a-balance-sheet-of-death-planned-parenthoods-abortion-business-profits-continue-to-soar-as-prenatal-and-miscarriage-services-precipitously-dwindle>.

¹³ See *Taxpayer Funding and Profits Soar; A Balance Sheet of Death*. See also, Nathanael Bennett, *332,278 Lives Taken in 2009 at U.S. Government Expenses*, ACLJ.ORG (Jan. 12, 2012), <https://aclj.org/planned-parenthood/332278-lives-taken-2009-us-government-expense>.

¹⁴ See, e.g., *What Happens During An In-Clinic Abortion?*, PLANNEDPARENTHOOD.ORG, <https://www.plannedparenthood.org/learn/abortion/in-clinic-abortion-procedures/what-happens-during-an-in-clinic-abortion> (last visited May 12, 2021).

¹⁵ See, e.g., PPFA, 2014–2015 ANNUAL REPORT, *supra* note 9.

¹⁶ Compliance with Statutory Program Integrity Requirements, A Rule by the Health & Human Services Department (Mar. 4, 2019), <https://www.federalregister.gov/documents/2019/03/04/2019-03461/compliance-with-statutory-program-integrity-requirements>.

entities that perform abortions and those that provide sustainable and family-focused family planning services. Thus, Title X grant recipients are no longer allowed to be co-located within the same facility as an entity that provides abortion.¹⁷

Furthermore, the 2019 rule states that:

In addition to prohibiting abortion, the Rule also prohibits support for, promotion of, or referral for abortion:

A Title X project may not perform, promote, refer for, or support, abortion as method of family planning, nor take any other affirmative action to assist a patient to secure such an abortion.¹⁸

The proposed Rule seeks to eliminate those requirements, and reinstate a mandatory abortion referral. For the following reasons, the ACLJ opposes the proposed Rule and urges HHS to fully preserve the current 2019 regulations.

II. LEGAL ANALYSIS

As the Department correctly noted in its preamble to the proposed Rule, Title X has frequently been amended, has had additional requirements imposed, and has been the subject of litigation.¹⁹ Also noted is the most recent litigation centered on the 2019 Rule, which the Supreme Court was set to decide in the consolidated cases of *California v. Azar*, 950 F.3d 1067 (9th Cir. 2020) and *Mayor of Baltimore v. Azar*, 973 F.3d 258 (4th Cir. 2020).²⁰ Notably, the 2019 regulations and current rule were upheld by the Ninth Circuit Court of Appeals. But, on March 12, 2021, the Biden Administration and the other parties involved stipulated to dismiss the cases.²¹

The 2019 rule closely mirrors a 1988 version of the Title X regulations that the Supreme Court upheld in *Rust v. Sullivan*, 500 U.S. 173 (1991). The regulations at issue in *Rust* were “designed to provide ‘clear and operational guidance’ to grantees about how to preserve the distinction between Title X programs and abortion as a method of family planning.” *Rust*, 500 U.S. at 179 (quoting 53 Fed. Reg. 2923-2924 (1988)). The 1988 regulations did so by “specify[ing] that a ‘Title X project may not provide counseling concerning the use of abortion as a method of family planning or provide referral for abortion as a method of family planning.’” *Id.* (quoting 42 CFR § 59.8(a)(1) (1989)). Moreover, the regulations clarified that “[t]he Title X project [was] expressly prohibited from referring a pregnant woman to an abortion provider, even upon specific request.” *Id.* at 180 (quoting § 59.8(b)(5)). In addition, “the regulations broadly prohibit a Title X project from engaging in activities that ‘encourage, promote or advocate abortion as a method of family planning.’” *Id.* (quoting § 59.10(a)).

¹⁷ *Id.*

¹⁸ 42 C.F.R. § 59.14.

¹⁹ ENSURING ACCESS TO EQUITABLE, AFFORDABLE, CLIENT-CENTERED QUALITY FAMILY PLANNING SERVICES, A PROPOSED RULE BY THE HEALTH & HUMAN SERVICES DEPARTMENT, Sec. II (Apr. 15, 2021), *available at* <https://www.federalregister.gov/documents/2021/04/15/2021-07762/ensuring-access-to-equitable-affordable-client-centered-quality-family-planning-services#footnote-42-p19819>.

²⁰ *Id.*

²¹ *Id.*

Finally,

the regulations require[d] that Title X projects be organized so that they [were] ‘physically and financially separate’ from prohibited abortion activities. § 59.9. To be deemed physically and financially separate, ‘a Title X project must have an objective integrity and independence from prohibited activities. Mere bookkeeping separation of Title X funds from other monies [was] not sufficient.’

Id.

The Department correctly noted that the 1988 regulations were upheld by the Supreme Court “against constitutional attack under the Fifth and First Amendments.”²² Thus, the current regulations are just as constitutional now as they were when the Supreme Court decided *Rust*, and there is no reason for HHS or the Biden Administration to be concerned about their constitutionality. As such, the proposed Rule should be rejected, and the current rule allowed to stand.

A. Former Title X Grantees That Withdrew from the Program after the 2019 Rule Did So Because Abortion, Which Cannot Be Funded by Federal Grants, is Their Main Priority.

Though HHS has indicated that “there was no evidence” the 1988 bright line rule “would—or could—work in practice,” the fact that the 2019 rule was effective in separating approved Title X family planning services from abortion, without adverse effect to public health, is demonstrated below.

Abortion providers who previously participated in the Title X program proved both the fungible nature of money and that abortion is their priority when, because of the 2019 rule’s bright line rule, 18 out of 100 grantees refused to abide by the new Title X requirements and “discontinued [their] participation in the Title X program.”²³ The remaining grantees were fully able comply with the 2019 rule and continue their participation in the program. Now, HHS is threatening to undo the 2019 bright line rule and once again allow abortion providers to receive Title X funds, despite, 1) the telling demonstration on behalf of a minority of providers that they cannot separate abortion from their alleged family planning services, and 2) the clear demonstration by the majority of grant recipients that participation in the Title X program under the 2019 rule is wholly possible.

To date, PPFA is the largest single abortion provider in the United States.²⁴ After the current rule was adopted and enforced in 2019, abortion providers like PPFA voluntarily withdrew from the

²²*Id.* (citing *Rust v. Sullivan*).

²³ FAMILY PLANNING ANNUAL REPORT: 2019 NATIONAL SUMMARY, OFFICE OF POPULATION AFFAIRS, HEALTH & HUMAN SERVICES ES-2 (Sept. 2020), available at <https://opa.hhs.gov/sites/default/files/2020-09/title-x-fpar-2019-national-summary.pdf>.

²⁴ According to PPFA’s reports, it committed 345,672 abortions in 2018, accounting for 56% of the 619,691 abortions reported to the CDC in 2018. See Katherine Kortsmitt, et al., *Abortion Surveillance - United States, 2018*, CENTERS FOR DISEASE CONTROL AND PREVENTION (Nov. 27, 2020), <https://www.cdc.gov/mmwr/volumes/69/ss/ss6907a1.htm>; PLANNED PARENTHOOD (PPFA), 2019–2020 ANNUAL

Title X program. The withdrawal from the program had nothing to do with being unable to continue providing contraception and other family planning information, but everything to do with not being able to perform or promote abortion.

Again, the current rule does not prevent any health provider participating in the Title X program from providing contraception or information on any other means of *preventive* family planning. The only thing it does not allow a Title X grantee to do is promote, counsel or refer for abortion. In a statement released after withdrawing from the Title X program, PPFA made it clear that 1) it was going to continue its work without Title X funding, and 2) the reason for withdrawing from the program was solely because it could no longer promote or perform abortion while receiving Title X funds:

Planned Parenthood is still open. Our doors are open today, and our doors will be open tomorrow. . . . [we] will do everything we can to make sure our patients don't lose care.

The Title X program is designed to help bring access to birth control, cancer screenings, STD testing and more to those who otherwise can't afford it.

We will not be bullied into withholding abortion information from our patients.²⁵

PPFA's own statement is at odds with itself, and with its acknowledged understanding of the purpose of Title X funding. Title X funding is indeed intended to provide access to preventive family planning. Notably absent from the list of items PPFA says that the Title X program was designed to provide is information on abortion. Yet, PPFA then makes it abundantly clear that the bright line rule against abortion being promoted as a method of family planning is *the only reason* that PPFA withdrew from the program.

PPFA then tries to argue that because of the bright line rule and PPFA's withdrawal from the program, many clients seeking access to "birth control will not be able to access methods like the pill, an IUD, and emergency contraception."²⁶ Except, Title X does not prevent provision of birth control, and Planned Parenthood stated that it is remaining open and continuing those very services.

Although PPFA is used here as an example, as it is, again, the largest abortion provider in the United States, the current regulations do not target PPFA. The current regulations are uniformly applied to all Title X grant recipients. Thus, PPFA has the same option as all other Title X grantees to comply with the 2019 regulations.

It is evident that the proposed Rule, by erasing the bright line rule, would cater to the demands of PPFA and other pro-abortion advocates, and once again allow them to flout the clear intent,

REPORT (2020), available at https://www.plannedparenthood.org/uploads/filer_public/7a/9a/7a9a6bc4-490d-47f9-b0c5-84bb87f431b4/ppnorcal_annual_report_2019-2020.pdf.

²⁵ Press Release, Planned Parenthood, Remarks by Alexis McGill Johnson, Acting President and CEO of Planned Parenthood Federations of American on Title X (Aug. 19, 2019), available at <https://www.plannedparenthood.org/about-us/newsroom/press-releases/trump-administration-gag-rule-forces-planned-parenthood-out-of-title-x-national-program-for-birth-control>.

²⁶ *Id.*

language, and purpose of Title X by receiving federal monies while still promoting and performing abortion.

B. The Department’s Justification for Changing the Current Regulations Rests on a Flawed Premise.

In justifying its reasoning for the proposed changes to the current Title X regulations, HHS states that “while section 1008 may be ambiguous, the public health consequences of the previous Administration’s interpretation of the statute are not.”²⁷ HHS goes on to “outline[] the effects of the 2019 rule,” citing a decline in the number of family planning grantees, and a “dramatic” decrease in provision of family planning and related preventive health services.²⁸

However, a brief review of HHS’s Family Planning Annual Reports for the last ten years, demonstrates that this “decrease” in Title X grantees and provision of Title X services cannot honestly be credited to the current regulations. In fact, in 2009, during the Obama Administration, there were 89 Title X grant recipients, and over 5.1 million family planning users.²⁹ In 2016, the last full year of the Obama Administration, there were 91 Title X grant recipients, but only “4.0 million family planning users.”³⁰ Thus, in those five years of the Obama Administration with no bright line rule in place, Title X grant recipients increased by only two, and family planning users dropped by 1.1 million. In the two years prior to the 2019 regulations, the number of family planning users dropped to 3.9 million, but Title X grant recipients increased to 99.³¹

Moreover, HHS suggests that “[t]he realization of a greater pool of grantees, as predicted by the 2019 rule, has not transpired over the course of two grant cycles.” Yet, according to HHS reports, the total number of Title X grantees increased from 89³² in 2017 to 99 in 2018,³³ and then to 100³⁴ in 2019.³⁵ Under the Trump Administration, the number of Title X grantees increased by 9 from 2016,³⁶ the last year of the Obama Administration.

²⁷ ENSURING ACCESS TO EQUITABLE, AFFORDABLE, CLIENT-CENTERED QUALITY FAMILY PLANNING SERVICES, A PROPOSED RULE BY THE HEALTH & HUMAN SERVICES DEPARTMENT, Sec. III (Apr. 15, 2021), *available at* <https://www.federalregister.gov/documents/2021/04/15/2021-07762/ensuring-access-to-equitable-affordable-client-centered-quality-family-planning-services#footnote-42-p19819>

²⁸ *Id.*

²⁹ FAMILY PLANNING ANNUAL REPORT: 2009 NATIONAL SUMMARY, OFFICE OF POPULATION AFFAIRS, HEALTH & HUMAN SERVICES 7-8 (Dec. 2010, revised Jan 2011), *available at* <https://opa.hhs.gov/sites/default/files/2020-07/fpar-2009-national-summary.pdf>.

³⁰ FAMILY PLANNING ANNUAL REPORT: 2016 NATIONAL SUMMARY, OFFICE OF POPULATION AFFAIRS, HEALTH & HUMAN SERVICES ES-1 (Aug. 2017), *available at* <https://opa.hhs.gov/sites/default/files/2020-07/title-x-fpar-2016-national.pdf>.

³¹ FAMILY PLANNING ANNUAL REPORT: 2018 NATIONAL SUMMARY, OFFICE OF POPULATION AFFAIRS, HEALTH & HUMAN SERVICES ES-1 (Aug. 2019), *available at* <https://opa.hhs.gov/sites/default/files/2020-07/title-x-fpar-2018-national-summary.pdf>.

³² FAMILY PLANNING ANNUAL REPORT: 2017 NATIONAL SUMMARY, OFFICE OF POPULATION AFFAIRS, HEALTH & HUMAN SERVICES ES-1 (Aug. 2018), *available at* <https://opa.hhs.gov/sites/default/files/2020-07/title-x-fpar-2017-national-summary.pdf>

³³ FAMILY PLANNING ANNUAL REPORT: 2018 NATIONAL SUMMARY, *supra* note 31.

³⁴ The ACLJ notes that 18 grantees did discontinue their participation in the program in 2019, dropping the number to 82 grantees. However, the fact remains that 100 grantees were originally selected for grants.

The Department's own data belies the reasoning put forth by HHS to justify the proposed changes to the current Title X regulations.

C. The Proposed Rule Contains Mandatory Abortion Referrals in Violation of Federal Law.

Contrary to what critics of the current rules may argue, the current regulations are not a “gag” on speech, but protect free speech and align with federal law to protect the rights of healthcare providers. On the other hand, the Department's proposed Rule would reinstate mandatory abortion referrals in direct conflict with federal law.

It is true that the current regulations do prohibit referrals for abortion and promotion of abortion using Title X funds,³⁷ but that is simply a function of what the law already requires.³⁸ Further, these prohibitions do not gag speech. They do not compel Title X service providers to refer patients for abortion as required under the proposed Rule and previous regulations, and they do not stop providers from counseling about abortion when done appropriately and consistently with the laws governing Title X.

Because Title X funding is for preconception services only, all services beyond its scope – including abortions – must be referred out of the program in a neutral and helpful manner.³⁹ Furthermore, while the current regulations prohibit the encouragement, promotion, or advocacy of abortion by Title X projects, they in no way stop participating organizations from using non-Title X funds to lobby for or promote abortion. Likewise, the current regulations do not prevent private individuals who work on Title X projects from doing the same on their own time and with their own funds. Rather, the current regulations actually protect the free speech rights of Title X providers. They do so by ending the requirement that Title X service providers refer and counsel patients about abortion.

Under the proposed Rule, and previous regulations, Title X providers are required to affirmatively counsel on and refer patients for abortion even when not directed to or asked by the patient:

- (a) Each project supported under this part must:
 - (5) Not provide abortion as a method of family planning. A project must:
 - (i) Offer pregnant clients the opportunity to be provided information and counseling regarding each of the following options:
 - (C) Pregnancy termination.

³⁵ FAMILY PLANNING ANNUAL REPORT: 2019 NATIONAL SUMMARY, OFFICE OF POPULATION AFFAIRS, HEALTH & HUMAN SERVICES ES-1 (Sept. 2020), *available at* <https://opa.hhs.gov/sites/default/files/2020-09/title-x-fpar-2019-national-summary.pdf>.

³⁶ FAMILY PLANNING ANNUAL REPORT: 2016 NATIONAL SUMMARY, *supra* note 30.

³⁷ 42 C.F.R. § 59.5(a)(5).

³⁸ 42 U.S.C. § 300(a).

³⁹ 42 C.F.R. § 59.14(a) and (b).

- (ii) If requested to provide such information and counseling, provide neutral, factual information and nondirective counseling on each of the options, and referral upon request, except with respect to any option(s) about which the pregnant client indicates they do not wish to receive such information and counseling.⁴⁰

While HHS claims in the explanation of the proposed Rule that “individuals and grantees with conscience objections will not be required to follow the proposed rule’s requirements regarding abortion counseling and referral,”⁴¹ that language is not repeated in the proposed Rule itself. Instead, the proposed Rule *mandates* abortion counseling and referral, without exception – other than if the pregnant woman specifically declines such information.⁴² In the preamble to the proposed Rule, HHS discusses the concerns and reasoning behind the 2019 regulations, and the conscience protections that were put in place.⁴³ It is therefore difficult to understand why the Rule does not itself contain clear and unambiguous language regarding those conscience protections. This is especially true in light of Supreme Court precedent, including *National Institute of Family Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018), where the Court rejected California’s efforts to compel the speech of pro-life pregnancy resource centers in the form of abortion referrals and written notice requirements. The Court held that the challengers to the California law were likely to succeed on the merits of their claim that the law was unconstitutional.⁴⁴

As HHS is fully aware,⁴⁵ the abortion counseling and referral mandate also directly conflicts with numerous federal laws, including the Weldon Amendment. The Weldon Amendment prohibits “a Federal agency or program, or . . . a State or local government” from subjecting “any institutional or individual health care entity to discrimination on the basis that the health care entity does not provide, pay for, provide coverage of, or refer for abortions.”⁴⁶

Further, this counseling has to be done in such a way as to make abortion as valid as any other option.⁴⁷ The proposed Rule’s mandatory abortion referral actively discourages program applicants who object to abortion as a method of family planning from participating in the program, even though their view of abortion directly aligns with Title X. Moreover, the proposed Rule reinstates government coercion of private speech in favor of abortion and limits the abilities of those who wish to help women and families plan for their future in accordance with their faith to freely serve their communities. This is an unlawful government restriction of free speech

⁴⁰ ENSURING ACCESS TO EQUITABLE, AFFORDABLE, CLIENT-CENTERED QUALITY FAMILY PLANNING SERVICES, *supra* note 19, at Subpart A –Project Grants for Family Planning Services, proposed changes to § 59.5(a)(5)(i)(C) and (ii).

⁴¹ *Id.* at IV. Proposed Rules.

⁴² *Id.* at Subpart A –Project Grants for Family Planning Services, proposed changes to § 59.5(a)(5)(ii).

⁴³ *Id.*

⁴⁴ *National Institute of Family Life Advocates v. Becerra*, 138 S. Ct. 2361, 2378 (2018).

⁴⁵ See ENSURING ACCESS TO EQUITABLE, AFFORDABLE, CLIENT-CENTERED QUALITY FAMILY PLANNING SERVICES, *supra* note 19.

⁴⁶ Weldon Amendment, Consolidated Appropriations Act, 2009, Pub. L. No. 111-117, 123 Stat. 3034, *available at* https://www.hhs.gov/sites/default/files/ocr/civilrights/understanding/ConscienceProtect/publaw111_117_123_stat_3034.pdf.

⁴⁷ ENSURING ACCESS TO EQUITABLE, AFFORDABLE, CLIENT-CENTERED QUALITY FAMILY PLANNING SERVICES, *supra* note 19, at Subpart A –Project Grants for Family Planning Services, proposed changes to § 59.5(a)(5)(ii).

rights that once again fails to recognize that the provision of women's healthcare does not have to be hostile to people of faith. In sum, it is the proposed Rule that violates private free speech rights, compelling conscientious objectors to speak a message that favors abortion and abortion activists.

III. CONCLUSION

The ACLJ and its members oppose the proposed Rule and urge HHS to keep the current regulations in whole and without amendment. The proposed Rule is inconsistent with federal law, including Title X itself and the First Amendment to the Constitution, and would allow unconstitutional discrimination that discourages otherwise qualified health care providers from participating in the Title X program. All program participants deserve to have a clear understanding of both their obligations and protections under the law. Moreover, it is incumbent upon the federal government to use taxpayer-sourced funds in ways that are consistent with federal law. The proposed Rule does away with bright line rules that ensure taxpayer dollars are not used to promote or perform abortions.

Finally, the ACLJ encourages the Department to reject the proposed Rule to ensure equal treatment under the law for all Title X program participants.

Thank you for the opportunity to provide comment on this critical matter.



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