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Hearing of the House Subcommittee on Oversight and Investigations,
Committee on Energy and Commerce
"Protecting Title X and Safeguarding Quality Family Planning Care."

June 19, 2019, 10:00 a.m.
John D. Dingell Room, 2123 Rayburn House Office Building

June 19, 2019

Dear Chairwoman DeGette, Ranking Member Guthrie, and Members of the Committee:

I am deeply privileged to testify before this Committee on Title X and the Department of Health and Human Services rule regarding eligibility and use of Title X funding. I serve as President & CEO of Americans United for Life (AUL), America's original and most active pro-life legal advocacy organization. Founded in 1971, two years before the Supreme Court's decision in *Roe v. Wade*, AUL has dedicated nearly 50 years to advocating for comprehensive legal protections for human life from conception to natural death. AUL attorneys are highly-regarded experts on the Constitution and legal issues touching on abortion and are often consulted on various bills, amendments, and ongoing litigation across the country.

It is AUL's longstanding policy position that public funds appropriated or controlled by federal and state governments should not be allocated to providers of elective abortions, but instead should be allocated towards comprehensive and preventive women's health care providers. In furtherance of its mission, AUL seeks to maintain the constitutionality of laws restricting public funds from subsidizing abortion businesses and advocate against the creation of new precedents that would undermine the permissible policy choices of federal and state governments. To that end, AUL filed a Comment in support of the Rule during the public notice and comment period.[1] AUL has also filed amicus briefs in every Supreme Court case involving the rights of states and the federal government not to use public funds and resources to subsidize elective abortions or abortion providers.[2]

Congress acted intentionally when it excluded abortion from Title X.

Congress enacted Title X of the Public Health Service Act in 1970 to provide financial support for healthcare organizations offering prepregnancy family planning services.[3] Title X funds are allocated specifically to projects that "offer a broad range of acceptable and effective family planning methods and services (including natural family planning methods, infertility

[1] *See* Comment from Rachel N. Busick, Staff Counsel, Ams. United for Life, to Alex M. Azar, Secretary, U.S. Dep't Health & Human Servs., on Proposed Rule to Ensure Compliance with Statutory Program Integrity Requirements in Title X of the Public Health Service Act (July 31, 2018), https://aul.org/wp-content/uploads/2018/07/AUL-Comment-on-Title-X-Proposed-Rule-re-Program-Integrity.pdf.

[2] *See, e.g.*, *Rust v. Sullivan*, 500 U.S. 173 (1991); *Webster v. Reprod. Health Servs*., 492 U.S. 490 (1989); *Harris v. McRae*, 448 U.S. 297 (1980); *Maher v. Roe*, 432 U.S. 464 (1977).

[3] *See* 42 U.S.C § 201 et seq.; *Rust v. Sullivan*, 500 U.S. 173, 190 (1991) ("It is undisputed that Title X was intended to provide primarily prepregnancy preventive services.").

services, and services for adolescents)."[4] Section 1008 of the Act (also enacted in 1970) explicitly excludes abortion from the scope of "family planning" and states that "[n]one of the funds appropriated under this title shall be used in programs where abortion is a method of family planning."[5] Likewise, the 2019 Continuing Appropriations Act also explicitly conditioned the allocation of Title X funds to family planning projects provided that the funds "shall not be expended for abortions" and "that all pregnancy counseling shall be nondirective."[6] Thus, Congress has statutorily excluded abortion from the scope of Title X projects and Title X funding, and any discussion of abortion must be nondirective.[7]

In *Rust v. Sullivan*, the Supreme Court held that Section 1008 was ambiguous enough to allow for multiple permissible interpretations, including the regulations at issue in *Rust*, which, similar to the Rule at issue here, required the physical and financial separation between Title X projects and abortion-related activities and prohibited referrals for abortion.[8] As such, it cannot be unreasonable, let alone arbitrary and capricious as claimed in the lawsuits filed against the Rule, for the U.S. Department of Health and Human Services (HHS), under a new administration with different priorities and goals, to disagree with a prior administration's interpretation of an "ambiguous" section with multiple permissible interpretations.

Consistent with *Rust* and in accordance with Title X's statutory mandates, HHS issued the Rule, in part, to "ensure compliance with the statutory requirement that Title X funding not support programs where abortion is a method of family planning."[9] The Rule requires "clear physical and financial separation between a Title X program and any activities that fall outside the program's scope," such as programs or facilities where abortion is a method of family planning, and prohibits directive pregnancy counseling and referrals for abortion.[10]

While Congress has permitted (but not required) nondirective counseling for pregnant women within a Title X project, generally speaking, Title X is focused on prepregnancy family planning services and does not cover post-conception care (outside emergency situations).[11] Regardless of whether a woman is receiving prepregnancy services, nondirective pregnancy counseling, or referrals for care outside the scope of Title X, Title X funds are statutorily prohibited from being used for abortion or in programs where abortion is a method of family planning.

Challenges to the Rule are rooted in the desire to use Title X funding for abortion-related services.

The organizations challenging the Rule in the courts and in the court of public opinion show their hand. Their concerns about abortion reveal that the heart of their legal challenge is

[4] 42 U.S.C § 300(a).
[5] *Id*. § 300a-6.
[6] Department of Defense and Labor, Health and Human Services, and Education Appropriations Act, 2019 and Continuing Appropriations Act, 2019, Pub. L. No. 115–245, div. B, tit. II, 132 Stat. 2981, 3970–71 (2018).
[7] 65 Federal Register 41273. ("Grantees may provide as much factual, neutral information about any option, including abortion, as they consider warranted by the circumstances, but may not steer or direct clients toward selecting any option, including abortion, in providing options counseling").
[8] *See* 500 U.S. at 187, 203.
[9] 84 Fed. Reg. 7714, 7715.
[10] *Id*. at 7715–17.
[11] *See id*. at 7788–89.

really about access to abortion and coercing HHS to permit abortion services within Title X projects, despite and contrary to Congress' statutory prohibition. The remedy Plaintiffs seek is an injunction against the Rule so they can continue to receive Title X funds (which are prohibited from going to abortion) while still providing abortions in the same physical location as their Title X services and direct abortion referrals within their Title X projects.[12]

But any consideration of access to abortion should carry no legal weight since Title X explicitly excludes abortion from the scope of its projects and funding and Plaintiffs did not raise a legal challenge based on an undue burden to a woman's abortion choice. The latter is unsurprising considering that a woman's "right" to abortion neither includes a right to public funding for it, nor a third party's right to provide it. It is well established that "the Due Process Clauses generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual."[13] This includes abortion. "There is a basic difference between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy."[14] That is why the Supreme Court has consistently upheld the power of federal and state governments to "make a value judgment favoring childbirth over abortion, and . . . implement that judgment by the allocation of public funds."[15] Both Title X and the Rule implement Congress' "value judgment favoring childbirth over abortion."

Challengers claim the Rule will force grantees out from Title X.

Challengers to the Rule claim the rule will force or drive out Title X grantees from Title X, harming those who use the program as a health resource.[16] First of all, underlying this claim is

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[12] *California v. Azar*, No. 19-1184 (N.D. Cal. Apr. 26, 2019); *Essential Access Health, Inc. v. Azar*, No. 19-1195 (N.D. Cal. Mar. 21, 2019); *Oregon v. Azar*, No. 19-317 (D. Or. Mar. 29, 2019); *Washington v. Azar,* No. 19-3040 (E.D. Wash. Apr. 25, 2019); Brief Amicus Curiae of Ams. United for Life in Support of Appellants and Reversal, *California v. Azar*, Nos. 19-15974 (9th Cir. June 7, 2019) https://aul.org/wp-content/uploads/2019/06/AUL-CA-Title-X-Amicus-Brief.pdf; Brief Amicus Curiae of Ams. United for Life in Support of Appellants and Reversal, *Essential Access Health, Inc. v. Azar*, & 19-15979 (9th Cir. June 7, 2019) https://aul.org/wp-content/uploads/2019/06/AUL-CA-Title-X-Amicus-Brief.pdf; *Oregon v. Azar*, No. 19-35386(L) (9th Cir. June 7, 2019) https://aul.org/wp-content/uploads/2019/06/AUL-OR-Title-X-Amicus-Brief.pdf; Brief Amicus Curiae of Ams. United for Life in Support of Appellants and Reversal, *Washington v. Azar*, No. 19-35394 (9th Cir. June 7, 2019) https://aul.org/wp-content/uploads/2019/06/AUL-WA-Title-X-Amicus-Brief.pdf; Brief Amicus Curiae of Ams. United for Life in Support of Defendants and in Opposition to Plaintiffs' Motion for Preliminary Injunction, *Family Planning Ass'n of Me. v. U.S. Dep't of Health & Hum. Servs.*, No. 19-100 (D. Me. Apr. 17, 2019), https://aul.org/wpcontent/uploads/2019/04/AUL-Amicus-Brief.pdf.

[13] *Webster*, 492 U.S. at 507; *see also Regan v. Taxation with Representation of Wash.,* 461 U.S. 540, 549 (1983) ("[A] legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right.").

[14] *Maher*, 432 U.S. at 475.

[15] *Rust*, 500 U.S. at 192–93 (quoting *Maher*, 432 U.S. at 474).

[16] *See, e.g.*, Cal.'s Notice of Mot. & Mot. For Prelim. Inj., with Mem. of Points & Auths., *California v. Azar*, No. 19-1184 (N.D. Cal. Mar. 21, 2019) ECF No. 26 at 1 [hereinafter Cal. Prelim. Inj. Mot.] ("The Final Rule will push out many well- qualified providers . . . ."); Pl.'s Notice of Mot. & Mot. for Prelim. Inj., *Essential Access Health, Inc. v. Azar*, No. 19-1195 (N.D. Cal. Mar. 21, 2019) ECF No. 25 at 2 [hereinafter EAH Prelim. Inj. Mot.] ("[P]roviders will be forced out of the program."); *id*. at 18 ("Title X providers nationally would feel compelled to leave the Title X program . . . ."); *id*. at 27 (The Rule will "forc[e] [many subrecipients] out of the network."); Order Granting in Part & Denying in Part Pls.' Mots. for Prelim. Inj., *California v. Azar*, No. 19-1184 (N.D. Cal. Apr. 26, 2019), ECF No. 103 at 16 [hereinafter Cal. Prelim. Inj. Order] ("[T]he Final Rule threatens to drastically reduce access to the wide array of services provided by Title X projects by driving large numbers of providers out of the program."); *id*.

the assumption that Title X grantees will dogmatically choose abortion over their Title X services. This outcome is far from certain. All grantees have the ability to physically and financially separate services, something they should have already been doing. Moreover, HHS has made the determination that even if some grantees choose to leave Title X, others will likely fill their place.[17] HHS listed as goals for the program under the new Rule: "reaching more unserved or underserved areas, increasing innovation within the program, [and] expanding diversity of grantees and partners."[18] The Rule does not require every grantee to provide all Title X services, as long as the overall Title X project offers a broad range of services. This increases the pool of applicants and allows the government to choose the best-qualified applicants for specific services instead of settling for a single sub-par applicant who happens to provide more services. This also allows for participation by organizations who have a conscience objection to certain Title X services, but provide excellent service in other Title X areas. This more inclusive approach creates opportunity for greater access to Title X services generally. Through this Rule, HHS is taking steps to ensure that any grantees who choose to withdraw from participation are replaced by qualified providers.

Second, the Rule does not force Plaintiffs out of Title X projects. Title X grantees who provide abortion services are not automatically excluded or eliminated from Title X. Rather, grantees simply must adhere to Title X project regulations, which under the Rule requires grantees to provide any abortion services physically and financially separate from their Title X projects and not give any directive abortion counseling or abortion referrals within their Title X programs. If Plaintiffs choose not to comply with the Rule's separation, counseling, and referrals requirements because they want to prioritize their abortion services over their Title X services, that is Plaintiffs' independent business decision, irrespective of the Rule.

Third, Plaintiffs are attempting to coerce HHS into changing its regulations by leveraging their Title X services.[19] But threats to leave a federal program cannot be a basis to enjoin the Rule. Otherwise, a subset of grantees in a federal program could coerce an agency by threatening to leave until the agency changes its regulations to suit the grantees' preferences. If grantees do not want to comply with the regulations, they are free to forego participation in government funded programs.[20]

Moreover, the claim that grantees will have to shut down programs and clinics is revealing.[21] It makes sense that if grantees choose to no longer receive Title X funds, they would

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at 59 ("[L]arge numbers of Title X providers would be forced to leave the program."); *id*. at 20 ("Planned Parenthood has stated unequivocally that its whole network of health centers 'would be forced to discontinue their participation in Title X if the Proposed Rule takes effect.'").

[17] 84 Fed. Reg. at 7780; cf. *Obria Grp., Inc. v. U.S. Dep't of Health & Hum. Servs*., No. 19-905 (C.D. Cal.) (suit by new grantee network of family planning service providers to enjoin prior Title X regulations requiring abortion referrals so that it will be able to participate in Title X grant programs).

[18] https://www.hhs.gov/about/news/2019/02/22/fact-sheet-final-title-x-rule-detailing-family-planning-grant-program.html

[19] *See, e.g*., Cal. Prelim. Inj. Order at 16 ("The net effect of so many providers leaving Title X will be a significant reduction in the availability of important medical services.").

[20] *See Rust*, 500 U.S. at 199 n.5 (Title X grantees are "in no way compelled to operate a Title X project; to avoid the force of the regulations, [they] can simply decline the subsidy.").

[21] *See, e.g*., Cal. Prelim. Inj. Mot. at 20 ("Loss of Title X funding will cause clinics to reduce hours of operation, eliminate transportation or off-site locations currently offering services at times and places convenient to certain patients, and undermine the long-term financial stability of some family planning clinics, especially in rural

have to stop providing Title X-funded services. What does not make sense is why they would have to stop receiving Title X funding in the first place. If their Title X projects or clinics do not provide prohibited abortion services, then they would not need to forego Title X funds. But if their Title X projects or clinics do provide prohibited abortion services, then to admit that they would have to shut down the entirety of those projects or clinics is to admit that Title X funds are used to support their abortion services. Otherwise, even if abortion services are offered in conjunction with Title X services, but not within a Title X project, there should be no need to stop the abortion services or close the clinic if they choose to leave Title X, unless the Title X funds are being used to support their abortion services. Any claims of program and clinic closures that include services beyond Title X support HHS's rationale behind the Rule's separation, counseling, and referral requirements, and demonstrate why the Rule's regulations are necessary and beneficial.

Vocal opposition to the Rule, including legal challenges, suggests that some grantees may not have always complied with the separation requirement. Congress was clear when it enacted the Title X program in 1970 and has not deviated; the intent was clearly to exclude abortion. The Rule adds accountability and transparency to the Title X program. It is my legal opinion that the Rule is sound public policy that can withstand constitutional scrutiny. Thank you.

Sincerely,

Catherine Glenn Foster
President and CEO
Americans United for Life

communities."); EAH Prelim. Inj. Mot. at 27 ("Without Title X funds, health centers vital to their communities will reduce services, decrease clinic hours, eliminate staff positions, cut staff training and continuing education, and close satellite sites."); Cal. Prelim. Inj. Order at 16 ("Some [Title X recipients] would have to shut down core services and programs entirely," citing a slew of declarations by various health programs in the state that indicated that the loss of Title X funds would hurt their programs and services.).