No. 19-35394

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STATE OF WASHINGTON,

Plaintiff-Appellee,

v.

ALEX M. AZAR II, in his official capacity as Secretary of the United States Department of Health and Human Services; and UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Defendants-Appellants.

NATIONAL FAMILY PLANNING & REPRODUCTIVE HEALTH ASSOCIATION, et al.,

Plaintiffs-Appellees,

v.

ALEX M. AZAR II, in his official capacity as Secretary of the United States Department of Health and Human Services, et al.,

Defendants-Appellants.

On Appeal from the United States District Court
for the Eastern District of Washington

BRIEF *AMICUS CURIAE* OF AMERICANS UNITED FOR LIFE IN SUPPORT OF APPELLANTS AND REVERSAL

CATHERINE GLENN FOSTER
STEVEN H. ADEN
RACHEL N. MORRISON
Counsel of Record
AMERICANS UNITED FOR LIFE
1150 Connecticut Ave, NW, Suite 500
Washington, DC 20036
Rachel.Morrison@aul.org
(202) 741-4902

Counsel for Amicus Curiae

CORPORATE DISCLOSURE STATEMENT

Amicus Curiae Americans United for Life has no parent corporations or stock that a publicly held corporation can hold.

/s/ Rachel N. Morrison
RACHEL N. MORRISON
Counsel of Record
AMERICANS UNITED FOR LIFE
1150 Connecticut Ave, NW, Suite 500
Washington, DC 20036
Rachel.Morrison@aul.org
(202) 741-4902

Counsel for Amicus Curiae

June 7, 2019

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s):

Cases

Statutes

Other Authorities

STATEMENT OF INTEREST OF *AMICUS CURIAE*[1]

Amicus Americans United for Life (AUL) is the first and most active pro-life non-profit advocacy organization dedicated to advocating for comprehensive legal protections for human life from conception to natural death. Founded in 1971, before the Supreme Court's decision in *Roe v. Wade*, 410 U.S. 113 (1973), AUL has nearly 50 years of experience relating to abortion jurisprudence. 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 long-time 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

[1] No party's counsel authored any part of this brief. No person other than *Amicus Curiae* and its counsel contributed any money intended to fund the preparation or submission of this brief.

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.[2] 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. *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).

All parties consented to the timely filing of this *Amicus* Brief.

ARGUMENT

Plaintiffs' complaints that the Rule impedes access to abortion reveals that their real problem is with Title X's statutory prohibition against abortion as a method of family planning.

A. Title X statutorily excludes abortion from the scope of its projects and funding.

Congress enacted Title X of the Public Health Service Act in 1970 to provide financial support for healthcare organizations offering

[2] *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.

prepregnancy family planning services. *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."). 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 services, and services for adolescents)." *Id.* § 300(a). 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." *Id.* § 300a-6. 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." 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). 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.

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. *See* 500 U.S. at 187, 203. As such, it cannot be arbitrary and capricious 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." 84 Fed. Reg. 7714, 7715. Materially similar to the regulations upheld by the Supreme Court in *Rust*, 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 forabortion. *Id.* at 7715–17.[3]

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). *See id.* at 7788–89. 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.

B. Despite Title X's prohibition against abortion, Plaintiffs complain that the Rule impedes access to abortion.

Despite Title X's prohibition on abortion as a method of family planning within Title X projects and funding, Plaintiffs' motions for

[3] During non-directive counseling, Title X providers "may provide a list of licensed, qualified, comprehensive primary health care providers[,] . . . some (but not the majority) of which may provide abortion in addition to comprehensive primary care," and abortion referrals are permitted in cases of an "emergency," such as for an "ectopic pregnancy." *Id.* at 7716, 7789.

preliminary injunction are rife with concerns over the Rule's impact on access to abortion. For example, Plaintiffs make the following complaints.

- The Rule's referral requirements "impede[] timely access" to abortion care. State of Wash.'s Mot. for Prelim. Inj. at 23–24, *Washington v. Azar*, No. 19-3040 (E.D. Wash. Mar. 22, 2019), ECF No. 9 [hereinafter Wash. Prelim. Inj. Mot.].

- The Rule's counseling, physical separation, and referral requirements "will impede patients' ability to obtain the [abortion] care they want and need." *Id.* at 44.

- The Rule's referral requirements "create[] 'unreasonable barriers' and 'impede[] timely access' to abortion care." Nat'l Family Planning & Reprod. Health Ass'n Pls.' Mot. for Prelim. Inj. at 16, *Washington*, No. 19-3040 (Mar. 22, 2019), ECF No. 18 [hereinafter NFPRHA Prelim. Inj. Mot.].

- The Rule "'creates . . . unreasonable barriers . . . to obtain[ing]' abortion care and 'impedes timely access' to abortion 'health care services.'" *Id.* at 28.

- The Rule "prohibits any 'assist[ance]' for women seeking abortions or actions to make abortion accessible." *Id.* (alteration in original).

- The Rule's separation requirements "prevent the availability 'in any fashion' of written materials regarding abortion." *Id.* at 29.

- The Rule's referral requirements "will cause dignitary injury and 'forestall or foreclose' patients' access to [abortion] care . . . and without referrals and information through the program, many patients will have no practical means of accessing [abortion] care." *Id.* at 43; *id.* at 19 (explaining that Title X patients may not know "that abortion is legally available").

Plaintiffs' concerns are echoed in the Washington district court's 19-page nation-wide preliminary injunction order: the Rule is "designed to exclude and eliminate health care providers who provide abortion care and referral—*which by extension will impede patients' access to abortion*—even when Title X funds are not used to provide abortion care, counseling or referral." Order Granting Pls.' Mots. for Prelim. Inj. at 3, *Washington*, No. 19-3040 (Apr. 25, 2019), ECF No. 54 [hereinafter Wash. Prelim. Inj. Order] (emphasis added).

Plaintiffs' concerns about access to abortion reveal that the heart of Plaintiffs' legal challenge is 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.

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.[4] 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." *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 507 (1989); *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."). This includes abortion. "There is a basic difference between direct state interference with a protected activity and state

[4] While none of the Title X legal challenges in Washington, Oregon, and California currently before this Court raise an undue burden claim, Plaintiffs in the Maine Title X legal challenge did. AUL filed an *amicus* brief in the Maine district court, explaining that since the right to abortion does not include a right to provide abortion or a right to government funding for either abortion or non-abortion related services, it certainly does not include a right to Title X funding. *See* 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), ECF No. 54, https://aul.org/wp-content/uploads/2019/04/AUL-Amicus-Brief.pdf.

encouragement of an alternative activity consonant with legislative policy." *Maher v. Roe*, 432 U.S. 464, 475 (1977). 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," *Rust*, 500 U.S. at 192–93 (quoting *Maher*, 432 U.S. at 474). Both Title X and the Rule implement Congress' "value judgment favoring childbirth over abortion."

C. If Plaintiffs leave Title X, it is because they are choosing abortion over Title X services.

Plaintiffs' preliminary injunction motions and the lower court's preliminary injunction order make the bold claim that the Rule will force or drive out Plaintiffs and other Title X grantees from Title X. *See, e.g.*, Wash. Prelim. Inj. Mot. at 2 (The Rule "will force out the Title X clinics comprising 89% of Washington's statewide network, leaving low-income patients without access to services."); *id.* at 34–35 (The Rule "will force out the subrecipients and clinics comprising the vast majority of Washington's Title X network."); NFPRHA Prelim. Inj. Mot. at 18 ("[C]urrent providers serving more than 40% of Title X's patients would be forced from the program[,] . . . leaving massive gaps."); *id.* at 25

("[C]urrent providers . . . may be forced to leave Title X."); Wash. Prelim. Inj. Order at 16 ("[T]he Final Rule may or likely will . . . drive many Title X providers from the system."); *id* at 17 ("[M]any NFPRHA members will leave the network once the Final Rule becomes effective, thereby leaving low-income individuals without Title X providers.").

First of all, underlying Plaintiffs' claim is the assumption that Plaintiffs and other Title X grantees will dogmatically choose abortion over their Title X services, despite the agreement by all parties that Title X provides vital services to communities. This outcome is far from certain. Moreover, HHS has made the determination that even if Plaintiffs do choose to leave Title X, other grantees will likely fill their place. *See* 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).

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 Rules 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 and not the fault of the Rule.

Third, Plaintiffs are attempting to coerce HHS into changing its regulations by leveraging their Title X services. *See, e.g.*, Wash. Prelim. Inj. Mot. at 36 ("Lack of access to Title X services will worsen public health outcomes . . . ."); NFPRHA Prelim. Inj. Mot. at 6 (The Rule "would make it much more difficult for long-standing Title X providers to stay in the network and destabilize Title X's broad reach."); *id.* at 39–40 (The Rule "decimat[es] the provider network and caus[es] public health harms to low-income patients—directly undermin[ing[the very purpose of Title X."). 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. *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.").

Moreover, Plaintiffs' claim that they will have to shut down programs and clinics is revealing. *See, e.g.*, Wash Prelim. Inj. Mot. at 14 ("Rural clinics are more likely to close *entirely* absent federal funding, exacerbating public health disparities among already underserved patients." (emphasis added)); *id.* at 39 ("[A]n abrupt loss of [Title X] funding will force at least some current Title X clinics to close or reduce their services."); NFPRHA Prelim. Inj. Mot. at 44 (The Rule will force providers "to reduce services or even shutter."). It makes sense that if Plaintiffs choose to no longer receive Title X funds, they would have to stop providing Title X-funded services. What does not make sense is why Plaintiffs 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.[5] Any claims of program and clinic closures that include services

---

[5] For instance, plaintiffs in the Maine Title X legal challenge explicitly admitted in their preliminary injunction memorandum that regardless of whether or not Maine Family Planning (MFP) accepts Title X funds, 50% to 85% of the clinics providing abortion services in Maine will be forced to stop providing abortion. Mem. in Supp. of Mot. for Prelim. Inj. at 32, *Family Planning Ass'n of Me.*, No. 19-100 (Mar. 25, 2019), ECF No. 17; *see also id.* at 1–2 ("[I]f MFP is forced to leave the Title X program, it will have to close more than half of its clinics entirely, causing thousands of women in Maine to lose access to *both* family planning services and abortion services."); *id.* at 35 (indicating that if MFP does not implement the Rule, 11 to 15 rural clinics will close, and "eliminate both *abortion and* family planning services in those locations" (first emphasis added)). Assuming that MFP refuses to comply with the Rule and voluntarily foregoes Title X funding, their clinics offering abortion services would not have to close unless MFP uses Title X funds in some way to support their abortion services. Thus, by stating that its clinics will close without Title X funding, MFP voluntarily admits that—in blatant disregard of Title X's statutory prohibition—it uses Title X funds to directly support its abortion services.

Of note, the Maine plaintiffs withdrew their preliminary injunction motion after oral argument when the Washington district court issued its nationwide injunction order. *See* Notice of Withdrawal of Mot. for Prelim.

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 and are in no way arbitrary or capricious.

In sum, the Rule does not force Plaintiffs out of Title X; if Plaintiffs do leave it is a result of their choice to favor abortion over Title X services.

CONCLUSION

The Court should reverse the preliminary injunction below.

Respectfully submitted,

CATHERINE GLENN FOSTER
STEVEN H. ADEN
RACHEL N. MORRISON
Counsel of Record
AMERICANS UNITED FOR LIFE
1150 Connecticut Ave, NW, Suite 500
Washington, DC 20036
Rachel.Morrison@aul.org
(202) 741-4902

Counsel for Amicus Curiae

June 7, 2019

Inj., *Family Planning Ass'n of Me.*, No. 19-100 (Apr. 26, 2019), ECF No. 65. Considering that the Washington district court order did not stop plaintiffs in any of the other Title X legal challenges from continuing with their motions for preliminary injunction, presumably the Maine plaintiffs were not confident that their preliminary injunction motion would also be successful, likely because of their blatant admission and weak arguments.

CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDURE 32(A)

I hereby certify, pursuant to Federal Rule of Appellate Procedure 32(a)(5) and (6) because it has been prepared in 14-point Century Schoolbook, a proportionally spaced font.

I further certify that this brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) and Ninth Circuit Rule 32-1 because it contains 3,069 words, according to the count of Microsoft Word.

/s/ Rachel N. Morrison
RACHEL N. MORRISON
Counsel of Record
AMERICANS UNITED FOR LIFE
1150 Connecticut Ave, NW, Suite 500
Washington, DC 20036
Rachel.Morrison@aul.org
(202) 741-4902

Counsel for Amicus Curiae

June 7, 2019

CERTIFICATE OF SERVICE

I hereby certify that on June 7, 2019, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit through the CM/ECF system, which shall send notification of such filing to any CM/ECF participants.

/s/ Rachel N. Morrison
RACHEL N. MORRISON
Counsel of Record
AMERICANS UNITED FOR LIFE
1150 Connecticut Ave, NW, Suite 500
Washington, DC 20036
Rachel.Morrison@aul.org
(202) 741-4902

Counsel for Amicus Curiae