



Office of the Assistant Secretary for Health
Office of Population Affairs
Attention: Family Planning
U.S. Department of Health and Human Services
Hubert H. Humphrey Building, Room 716G
200 Independence Avenue SW
Washington, DC 20201

RE: Proposed Title X Family Planning Program Rule from the Department of Health & Human Services

Dear Sir or Madam:

The American Center for Law and Justice (ACLJ) submits the following comments, on behalf of itself and more than 175,000 of its members,¹ supporting the adoption of the proposed rule issued by the Department of Health and Human Services (“HHS” or “the Department”) on June 1, 2018, regarding Title X of the Public Health Service Act as reported in 83 FR 25502 of the Federal Register (“Compliance With Statutory Program Integrity Requirements,” “Family Planning”) (hereafter, the “Rule”).²

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.³ In addition, the ACLJ represented 32 individuals and for-profit corporations in seven legal actions against the federal government’s contraceptive services mandate (“mandate”).⁴ The ACLJ submitted amicus briefs with the

¹ *Petition to Defund Planned Parenthood*, AMERICAN CENTER FOR LAW AND JUSTICE, <https://aclj.org/pro-life/defund-millions-from-planned-parenthood> (last visited July 27, 2018).

² Department of Health and Human Services; Compliance with Statutory Program Integrity Requirements, 83 Fed. Reg. 25502 (proposed June 1, 2018) (to be codified at 42 C.F.R. pt. 59), available at <https://www.federalregister.gov/documents/2018/06/01/2018-11673/compliance-with-statutory-program-integrity-requirements>

³ See, e.g., *Pleasant Grove v. Summum*, 555 U.S. 460 (2009) (holding that the government is not required to accept counter-monuments when it displays a war memorial or Ten Commandments monument); *McConnell v. FEC*, 540 U.S. 93 (2003) (holding that minors have First Amendment rights); *Lamb’s Chapel v. Center Moriches Sch. Dist.*, 508 U.S. 384 (1993) (holding that denying a church access to public school premises to show a film series violated the First Amendment); *Bd. of Educ. v. Mergens*, 496 U.S. 226 (1990) (holding that allowing a student Bible club to meet on a public school’s campus did not violate the Establishment Clause); *Bd. of Airport Comm’rs v. Jews for Jesus*, 482 U.S. 569 (1987) (striking down an airport’s ban on First Amendment activities).

⁴ *Gilardi v. U.S. Dep’t of Health & Human Servs.*, 733 F.3d 1208 (D.C. Cir. 2013); *Korte v. Sebelius*, 735 F.3d 654 (7th Cir. 2013); *O’Brien v. U.S. Dep’t of Health & Human Servs.*, 766 F.3d 862 (8th Cir. 2014); *Am. Pulverizer Co. v. U.S.*

Supreme Court in support of petitioners in both *Hobby Lobby v. Burwell*, 134 S. Ct. 2751 (2014), and *Zubik v. Burwell*, 136 S. Ct. 1557 (2016).

The Rule should be adopted in full because, (a) it restores Title X to its proper function as the only domestic federal program solely designed to provide affordable family planning services to low income families without promoting abortion or misusing funds to support abortion; (b) it increases the means by which women and their families can seek, and the manner in which Title X providers can offer, these services, including the use of natural family planning; and (c) it protects women and children by requiring Title X service providers to comply with state and local reporting and notification laws regarding rape, abuse, incest, and neglect.

I. HHS HAS RECENTLY MADE STRIDES TO PROTECT THE SANCTITY OF LIFE AND IT SHOULD CONTINUE TO DO SO.

In prior administrations, HHS implemented policies that demonstrated a disregard for the sanctity of human life, agnosticism toward its duty to uphold the law, and hostility toward states that wished to act in the best interests of their citizens on the issue of life. Notwithstanding its past acts, however, the ACLJ is greatly encouraged by strides made by the Department over the past year and a half to change course and correct these past mistakes, preferring to recognize the humanity of the unborn, respect the freedom of conscience, and uphold the law rather than play politics with human life.

First, after half a decade of litigation, HHS has finally issued interim rules that end the contraceptive mandate for religious objectors, securing not only the health and welfare of the American people, but also the constitutional rights and liberties of all Americans, including those with sincerely held religious beliefs. Second, for the first time in the history of the Department, HHS has released a Strategic Plan that recognizes the scientific fact that life begins at conception. Third, HHS has proposed vital safeguards and enforcement mechanisms that will help protect the right to conscience as required by federal law. Fourth, and finally, HHS has proposed rules that aim to end the discriminatory practices that exclude pro-life and faith-based organizations from federal funding, grants, and participatory projects.

It is our hope that these recent efforts are emblematic of a long-term commitment to righting the wrongs of the past. These laudatory steps must find root in the pragmatic implementation of existing law that protects the sanctity of human life and disentangles the American people from the business of abortion. The Rule creates a high wall of separation, both physical and financial, between those entities that perform abortions and those that provide sustainable and family-focused family planning services under the Title X Family Planning Grant Program. The purpose of Title X is to promote the growth and strength of the American family, and the Rule does just that. Moreover, the Rule demonstrates that women's health and religious liberty are not mutually exclusive but, rather, in unison promote a stronger, healthier family.

Dep't of Health & Human Servs., No. 6:12-cv-03459-MDH (W.D. Mo.); *Lindsay v. U.S. HHS*, No. 1:13-cv-01210 (N.D. Ill.); *Bick Holdings, Inc. v. U.S. Dep't of Health & Human Servs.*, No. 4:13-cv00462-AGF (E.D. Mo.); *Hartenbower v. U.S. Dep't of Health & Human Servs.*, No. 1:13-cv-2253 (N.D. Ill.).

The ACLJ urges the Department to build on these recent efforts and make it clear that HHS will no longer shirk its responsibility to equitably, consistently, and transparently enforce federal law that prohibits even a single penny of federal taxpayer money under Title X to be spent on abortion or “in programs where abortion[s]” are performed.⁵

II. THERE ARE BETTER ALTERNATIVES FOR WOMEN’S HEALTHCARE THAN TITLE X RECIPIENTS THAT PROVIDE ABORTIONS

In 2016, 120 House and Senate Members sent a letter to the Government Accountability Office (GAO).⁶ This letter requested an updated accounting of all federal taxpayer dollars allocated to and spent by Planned Parenthood Federation of America (PPFA), the International Planned Parenthood Federation (IPPF), and Marie Stopes International (MSI) from 2013–2015. The letter also requested statistics on Federally Qualified Health Centers (FQHC), which are community-based healthcare providers.

In response, the GAO performed an in-depth accounting of federal obligations and expenditures granted to these organizations. The facts are contained in this latest report.⁷ The report identifies which organizations received obligated federal funds, the federal programs with which those funds were associated, how much each organization spent in federal funds, and on which services and programs each organization used those funds. The report also specifies which Planned Parenthood affiliates received federal funds and how much each unit received.⁸

While this report reveals many troubling concerns, particularly regarding the state of abortion funding abroad, the key takeaway is that there is simply no reason to provide federal taxpayer dollars, from Title X or elsewhere, to Planned Parenthood and other abortion providers. FQHCs provide ten times more comprehensive health services in the U.S. than PPFA without performing a single abortion.⁹

⁵ 42 U.S.C. § 300a-6 (“None of the funds appropriate under this title shall be used in programs where abortion is a method of family planning.”).

⁶ See the letter here: <https://black.house.gov/sites/black.house.gov/files/03-042015%20Letter%20to%20Dodaro%20re%20federal%20funds%20for%20PP%26affiliates%20for%20FY%2020102012.pdf>.

⁷ U.S. Government Accountability Office, GAO-18-204R Federal Funds for Selected Organizations (March 6, 2018), <https://www.gao.gov/assets/700/690490.pdf>.

⁸ *Id.* at 4–7.

⁹ For analysis of the GAO Report *see* Kurtis Anderson, “Evidence From the 2018 GAO Report on Federal Funding for Select Organizations & Health Care Funding Supports Defunding Planned Parenthood,” *ACLJ* (March 26, 2018), <http://media.aclj.org/pdf/ACLJ-Report-on-Evidence-from-the-2018-GAO-Report-on-Federal-Funding-for-Planned-Parenthood.pdf>.

a. Currently, Federal Funding for Planned Parenthood Under HHS Grants, Including Title X, Frees Up Other Dollars for Abortions.

During the reporting period for the GAO study, 2013–2015, PPFA received almost \$1.3 billion in federal taxpayer dollars.¹⁰ The vast majority of these funds came from federal reimbursements.¹¹ However, nearly \$90 million in funds received by PPFA during the reporting period came from HHS grants, including the Title X program.¹² In the same time period, PPFA performed nearly 1 million abortions.¹³

While no federal money is legally allowed to fund abortions, all money is fungible, if not simply transferable. Every dime given to PPFA for its shrinking women’s health program¹⁴ is another it can spend on abortions and abortion-related services. Moreover, PPFA uses deceptive reporting¹⁵ to hide from scrutiny how these federal dollars directly support its abortion practice. Every abortion requires testing, screenings, and consultations.¹⁶ Yet, PPFA lists each of these services separately and reports them in other categories, such as “Other Women’s Health Services,”¹⁷ even if the ultimate goal of that pregnancy test was to terminate it.

¹⁰ *GAO-18-204R*, 5, 7.

¹¹ *Id.* at 56–59.

¹² *GAO-18-204R*, 25–45.

¹³ In 2015, PPFA performed 328,384 abortions. *See* Planned Parenthood (PPFA), *2015–2016 Annual Report*, https://www.plannedparenthood.org/uploads/filer_public/18/40/1840b04b-55d3-4c00-959d11817023ffc8/20170526_annualreport_p02_singles.pdf, 25. In 2014, PPFA performed 323,999 abortions. *See* Planned Parenthood (PPFA), *2014–2015 Annual Report*, https://www.plannedparenthood.org/files/2114/5089/0863/2014-2015_PPFA_Annual_Report_.pdf, 30. In 2013, PPFA performed 327,653 abortions. *See* Planned Parenthood (PPFA), *2013–2014 Annual Report*, https://www.plannedparenthood.org/files/6714/1996/2641/20132014_Annual_Report_FINAL_WEB_VERSION.pdf, 18. Thus, in total, from 2013–2015, PPFA performed 980,036 abortions.

¹⁴ 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*. *See supra* fn. 13. The same trend can be seen when comparing PPFA’s 2014 and 2015 reporting. *See supra* fn. 13. *See also* ACLJ, “Taxpayer Funding, and Profits Soar; Prenatal Series and Cancer Screenings Plummet,” *ACLJ.org*, July 2016, <https://aclj.org/pro-life/shocking-planned-parenthood-annual-report-shows-abortion-taxpayer-funding-and-profits-soar-prenatal-services-and-cancer-screenings-plummet>; ACLJ, “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>.

¹⁵ *See* ACLJ, “Taxpayer Funding and Profits Soar;” ACLJ, “A Balance Sheet of Death.” *See also* ACLJ, “332,278 Lives Taken in 2009 at U.S. Government Expenses,” *ACLJ.org*, 2016, <https://aclj.org/planned-parenthood/332278lives-taken-2009-us-government-expense>.

¹⁶ *See, e.g.*, “What Happens During An In-Clinic Abortion?,” *PlannedParenthood.org*, Accessed March 20, 2018, <https://www.plannedparenthood.org/learn/abortion/in-clinic-abortion-procedures/what-happens-during-an-in-clinic-abortion>.

¹⁷ *See, e.g.*, PPFA, *2014–2015 Annual Report*, 30.

b. Federally Qualified Health Centers Provide an Alternative to Planned Parenthood and Abortion Providers for Title X Funds.

Women’s healthcare, including family planning, matters; but PPFA and abortion providers are not the only ones who can provide it. Ensuring a wall of separation between abortion services, on the one hand, and women’s healthcare and family planning services, on the other, will neither reduce access to, nor the quality of, women’s healthcare services. In fact, there are thousands of alternative community healthcare providers who service at-risk and minority communities with comprehensive healthcare, including family planning services, without performing a single abortion.

The same GAO report that details federal funding to PPFA and other abortion providers also accounts for the money given to these Federal Qualified Health Centers.¹⁸ FQHCs are a network of over 1,400 community-based healthcare providers with over 9,800 service delivery sites in the U.S., covering all 50 states.¹⁹ FQHCs provide comprehensive primary healthcare services to anyone, regardless of their ability to pay. Their services include diagnostic testing, disease treatment, and preventative care, including family planning, prenatal, postpartum, and other women’s healthcare services.²⁰

In 2015 alone, FQHCs provided nearly 100 million clinical visits, providing dental, medical, mental health, vision, and substance abuse services to over 25 million individuals, including 14.5 million women, most of whom self-identified as racial or ethnic minorities.²¹ In comparison, in that same year, FQHCs provided more than ten times the healthcare services to more than ten times the number of individuals and more than five times the number of women as PPFA.²² They even provided more *women’s* health services than PPFA.²³ For examples, FQHCs provided over 45% more mammograms²⁴ and seven times more pap tests than PPFA.²⁵ FQHCs also provided more than 5 million medical services to infants and children.²⁶

In short, FQHCs provided more healthcare services to more individuals, including women, than PPFA, and they did so without providing a single abortion. FQHCs are a *better* and more comprehensive healthcare safety net than Planned Parenthood and other abortion providers. These centers are where federal taxpayer dollars should be directed to help women and minorities in need.

¹⁸ *GAO-18-204R*, 15, 18, 24.

¹⁹ *Id.* at 4.

²⁰ *Id.*

²¹ *Id.* at 18–19, 24, 56. Of note, in 2015, FQHCs were allocated \$7.5 billion from HHS. In that same year, FQHCs received \$9.6 billion in Medicaid reimbursements and \$1.4 billion in Medicare reimbursements.

²² *Id.* at 20. In 2015, PPFA provided 9.5 million health services to 2.4 million individuals, predominantly women.

²³ *Id.* at 19–20.

²⁴ *Id.* In 2015, PPFA provided 321,700 “breast exams.” In contrast, FQHCs provided approximately 590,000 “mammograms.”

²⁵ *Id.* In 2015, PPFA provided 293,799 “pap tests.” In contrast, FQHCs provided approximately 2.06 million “pap tests.”

²⁶ *Id.*

The only organizations that could be negatively affected by the proposed rule are abortion providers who refuse to focus on the provision of comprehensive healthcare for women and instead choose to remain wedded to abortion. Thousands of local community health centers already serving women and minorities across this country will still receive funding. This reform promotes women's healthcare.

III. THE RULE SUPPORTS WOMEN'S HEALTHCARE, PROTECTS WOMEN, PROMOTES TRANSPARENCY, AND DEFENDS FREE SPEECH.

Title X is the "only discrete, domestic, Federal grant program solely focused on the provision of cost-effective family planning services."²⁷ The Rule restores this program to that singularly important function. For too long, Title X has been hijacked by abortion advocates as a conduit to advance their agenda. Yet, 42 U.S.C. § 300(a)-6 requires that "[n]one of the funds appropriated under this title [Title X] shall be used in programs where abortion is a method of family planning." The Rule restores compliance with this simple, straightforward statutory requirement. In so doing, it also promotes women's healthcare; enforces existing laws designed to protect women from rape, incest, and abuse; and ensures regulatory and physical transparency at all levels of the program.

a. The Rule Better Provides for Women's Healthcare and Protects Human Life by Reallocating Title X Funds to Organizations that Focus on Women's Healthcare and Family Planning Services, Not Abortions.

First and foremost, the Rule would eliminate the influence of the abortion lobby in Title X, allowing the program to better provide for comprehensive women's healthcare and family planning needs. These changes are in line with the law and the purpose of the program to care for women and families. The Rule accomplishes this goal by actually defining "family planning" services, expanding and clarifying service requirements for all Title X projects, and excising abortion and its infrastructure from the program.

First, and perhaps most fundamentally, the Rule actually defines "family planning," arguably the most important term for the program, which is not currently defined anywhere in the existing regulations.²⁸ The proposed definition is a simple one: "[f]amily planning means the voluntary process of identifying goals and developing a plan for the number and spacing of children and the means by which those goals may be achieved."²⁹ While this definition at first seems rather expansive, the remainder of the section clarifies that the scope of family planning services are

²⁷ See Proposed Rule, *supra* n.2 at 25521.

²⁸ Currently, there is no definition of "family planning" in Title X regulations. While the 1988 Regulations defined "family planning," those regulations and their definition were eventually replaced and are no longer in the code. This definition is a restoration and an expansion of those 1988 Regulations. *See id.* at 25513.

²⁹ *Id.* at 25529. *See* proposed 42 C.F.R. § 59.2.

strictly “preconceptional.”³⁰ It explicitly states that “[f]amily planning does not include postconception care,” including specifically “abortion as a method of family planning.”³¹

In clarifying the meaning of “preconceptional” family planning services, the definition provides a list of examples that represent the expansive provision of women’s health services envisioned by the proposed rule. The list of permissible types of family planning services included in the definition of “preconceptional” “family planning”:

may range from choosing not to have sex to the use of other family planning methods and services to limit or enhance the likelihood of conception (including contraceptive methods and natural family planning or other fertility awareness-based methods) and the management of infertility (including adoption). Family planning services [also] include preconceptional counseling, education, and general reproductive and fertility health care to improve maternal and infant outcomes, and the health of women, men, and adolescents who seek family planning services, and the prevention, diagnosis, and treatment of infections and diseases which may threaten childbearing capability or the health of the individual, sexual partners, and potential future children[.].³²

This broad definition of “preconceptional” “family planning” empowers HHS and Title X grant recipients to provide comprehensive services to women, men, children, and families involved in planning for their future families and/or preserving the nature of their existing families.

Importantly, the definition of “family planning” clarifies that Title X funds, as a bedrock definitional matter, *cannot* be used to fund or support abortions. It does so in two ways. First, the definition practically precludes abortion as a family planning service by defining family planning services as “preconceptional” services rather than “postconception” services. Abortion procedures, including the prescription of abortifacients, are only possible postconception, placing them beyond the scope of the Rule’s definition of “family planning” and thus beyond the scope of Title X. Second, out of an abundance of caution and clarity, the definition of “family planning” expressly excludes abortion.

This definition is a major step in the direction of reorienting Title X toward its intended purpose. Without a proper definition of the core purpose of the program, it is impossible to create meaningful requirements, let alone ensure compliance with them. This has been the unfortunate state of Title X regulations for over two decades. Now, this definition allows HHS to work with Title X grantees to provide a wide range of comprehensive family planning services to women and families while ensuring that not a single dollar goes to support an abortion. This definition will be the foundation upon which HHS can work to reallocate currently misused grant funds back to where they belong: helping women plan for their futures and their families.

³⁰ *Id.* at 25529.

³¹ *Id.*

³² *Id.*

Also, of note, the Rule makes another definitional change that further promotes women’s healthcare. Now included in the definition of “low income family” is anyone who has health insurance coverage through a company that will not provide contraceptives “because it has a sincerely held religious or moral objection to providing such coverage.”³³ Now, women who need contraceptive coverage from their objecting employer can receive it through the Title X program. This provision is laudable for its protection of those with religious and moral objections to the provision of contraceptives. It is proof that protecting religious liberty and promoting women’s health are not mutually exclusive endeavors.

Second, on top of this critical definition, the Rule mandates a broad range of women’s healthcare and family planning services, which Title X projects must provide, ensuring there are ready alternatives to abortion and that Title X recipients actually follow through on the program’s goal to provide for women’s healthcare and family planning needs. The Rule continues the requirement that Title X projects “[p]rovide a broad range of acceptable and effective family planning services.”³⁴ Among the services that must be included within this “broad range” of services is “natural family planning, infertility services, and services for adolescents.”³⁵ Further, all Title X participants must provide for “medical services related to family planning,” which includes, among other things, “physicians consultation,” “prescription,” “continuing supervision,” and “laboratory examination.”³⁶

Unlike current regulations, the Rule makes it explicitly clear that providing a “broad range” of services does not mean providing “every acceptable” service. Instead, the Rule states that so long as the entire project provides a “broad range” of services, individual participating entities “may offer only a single method or a limited number of methods of family planning. . . .”³⁷ Moreover, unlike previous regulations, the Rule also explicitly prohibits any Title X resources from being used in the provision, promotion, referral, or support of “abortion as a method of family planning.”³⁸

Taken together, the Rule expands not only the range of family planning services available to women, but also the flexibility with which they can be provided. As such, individual project participants can coordinate to form one comprehensive Title X project that addresses the specific needs of different communities, cultural or religious groups, and geographic areas, while working together to keep costs down and reach the greatest number of people possible. Instead of spending any money in support of abortion activities, directly or indirectly, Title X participants must focus their efforts on the provision of actual women’s health services. Furthermore, Title X service projects must now provide methods of natural family planning, allowing those who are morally or religiously opposed to contraception to plan for their future consistent with their faith. Once more,

³³ *Id.* at 25529–30.

³⁴ *Id.* at 25530.

³⁵ *Id.* at 25516. *See also* 42 U.S.C. § 300(a).

³⁶ *Id.* at 25530.

³⁷ *Id.*

³⁸ *Id.*

the Rule expands access to women’s health services without the need to resort to abortion and while making allowances for people of diverse religious beliefs.

Third, the Rule is unambiguous in its excision of abortion, including any attempt to promote abortion, from the program. In doing so, the Rules makes it clear that abortion has no place in family planning under Title X and that these limited funds will be spent solely on the provision of women’s healthcare. The Rule accomplishes this in two specific ways:

- (1) 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.³⁹

The only exception to this rule is if the woman, without prompting from a doctor, explicitly states her decision to obtain an abortion, at which point a Title X participant may simply provide a list of doctors who provide “comprehensive health service[s],” only some of whom perform an abortion, and the list cannot label which ones will perform the procedure.⁴⁰

- (2) The Rule also prohibits all forms of promotion of abortion for family planning purposes:

A Title X project may not encourage, promote or advocate abortion as a method of family planning. This restriction prohibits action to assist women to obtain abortions or to increase the availability or accessibility of abortion for family planning purposes.⁴¹

The expansive list of prohibitions includes “[l]obbying” for expanded abortion, providing “speakers or educators” who use Title X funds to “promote the use of abortion,” attending “events or conferences” during which the Title X recipient lobbies for abortion, “paying dues to any group” that “advocates [for] abortion,” taking “legal action” to support abortion, and creating or distributing “materials” “advocating abortion” or even “promoting a favorable attitude toward” it.⁴²

Combined, these two additional prohibitions on abortion in Title X programs work to fully excise abortion from the program. In so doing, the Rule liberates the program from abortion advocates and reorients Title X toward what it was designed to do: provide low cost and effective healthcare and family planning services to women and their families. Moreover, the Rule does this while expanding the scope of provided services, increasing the flexibility of providers to meet the needs of women and communities where they are, and to make provision for people of faith. In

³⁹ *Id.* at 25531.

⁴⁰ *Id.*.

⁴¹ *Id.* at 25532.

⁴² *Id.*

short, the Rule will give the American people a more efficient, expansive, and conscientious Title X than ever before.

b. The Rule Protects Women by Requiring Title X Recipients to Report Instances of Suspected Rape, Incest, and Sexual Abuse in Compliance with State Reporting Laws.

Currently, Title X regulations contain sufficient ambiguity to allow service providers to hide behind confidentiality and claim exemptions from state and local laws requiring them to notify authorities of suspected cases of “child abuse, child molestation, sexual abuse, rape, incest, and the like.”⁴³ This is simply unacceptable. This sustained lack of clarity puts women and young girls at risk; it allows perpetrators to utilize Title X to pay for and cover up their abuse, thereby permitting them to continue the abuse. The Rule ends this harmful and unlawful practice of willfully neglecting to report to the proper authorities instances of suspected rape, incest, and sexual abuse of women and young girls who use Title X services.

The Rule ends this practice in two ways. First, it clarifies that confidentiality, while of the utmost importance, is never an excuse for failing to comply with these reporting laws:

[C]oncern with respect to the confidentiality of information, however, may not be used as a rationale for noncompliance with laws requiring notification or reporting of child abuse, child molestation, sexual abuse, rape, incest, intimate partner violence, human trafficking, or similar reporting laws. . . .⁴⁴

Second, the Rule puts in place strict requirements for those receiving Title X funds to establish verifiable reporting procedures for such cases. It requires that any Title X project have in place a plan to comply with state notification laws. This plan must include, “at a minimum,” a “summary of obligations” of all participants under the law, including the obligation to “inquire or determine the age of a minor client” and their “sexual partner(s),” a “[t]imely and adequate annual training” program for all involved individuals in compliance with the law, protocols to counsel children on how to resist coercive sexual advances, and a commitment to “conduct preliminary screenings” of any minor who “presents” with an STD.⁴⁵ Additionally, the project must maintain records on the ages of minor clients, their sexual partners, and each time participant organizations notify the authorities.⁴⁶ Failure to comply with these requirements renders the organization ineligible for Title X funds.⁴⁷

In sum, the Rule clarifies the obligation of Title X projects and service providers to protect the women and children who come to them for care. No longer can these groups hide behind ambiguity—an ambiguity that only protects abusers, harming the very women and families the

⁴³ *Id.* at 25517.

⁴⁴ *Id.* at 25531.

⁴⁵ *Id.* at 25532–33.

⁴⁶ *Id.* at 25533.

⁴⁷ *Id.* at 25532.

program is designed to protect and serve. As with so many areas of Title X, bright lines are required, and the Rule finally establishes them: notify or no money.

c. The Rule Promotes Transparency in the Use of Title X Funds by, Among Other Things, Requiring a High Wall of Separation, both Physical and Financial, Between Title X-Funded Services and Abortion.

As discussed above, the Rule firmly establishes that abortion has no place in the Title X program.⁴⁸ In addition to the definitions,⁴⁹ reporting requirements,⁵⁰ and explicit statements prohibiting abortions or abortion advocacy⁵¹ in these programs, the Rule erects a firm and high wall of physical and financial separation between Title X family planning services and abortion.

First, the Rule requires a clear financial separation between Title X funds, programs, and services, and those which a Title X participant may use for an abortion. Under the flexibility of current regulations, Title X funds may be interchanged with other existing assets to build infrastructure such as, for example, physical space, technology systems, supplies, and staff training for non-Title X purposes, including abortion.⁵² The Rule fixes this flexibility.

Under the Rule, Title X funds “shall not be used to build infrastructure for purposes prohibited with these funds, such as support for the abortion business of a Title X grantee or subrecipient.”⁵³ Further, these funds “shall only be used for the purposes, and in direct implementation of the funded project.”⁵⁴ Even in the direct implementation of the project, the “majority of grant funds” must go to “provide direct services to clients.”⁵⁵ Moreover, any major changes must be reported to HHS before they are undertaken, and all grantees must give a “detailed accounting” of the used funds in their annual reporting and applications for funding.⁵⁶

While all money is fungible and sophisticated accounting will always be a problem, this is the clearest, most comprehensive, and accountable way to ensure that Title X funds remain financially separated from non-Title X projects and services, including abortion. This deficiency in financial separation, however, would still pose a major problem without the physical separation also called for by the Rule.

Second, the Rule also requires a clear physical separation between the Title X project and other non-Title X projects and services. Under current rules, Title X projects can be conducted using the same facilities and with the same staff as non-Title X projects. This effectively blurs the line between the specific aims of Title X and other services, whether health-related, abortion-

⁴⁸ See, *supra*, pp. 5–8.

⁴⁹ See, *supra*, pp. 5–6.

⁵⁰ See 42 CFR § 59.5.

⁵¹ See 42 CFR § 59.14.

⁵² Proposed Rule, *supra* n.2 at 25521.

⁵³ *Id.* at 25533.

⁵⁴ *Id.* at 25533.

⁵⁵ *Id.*

⁵⁶ *Id.*

related, or otherwise. It also incentivizes using Title X funds in a fungible manner. One nurse could be trained using Title X funds and then transferred to performing other services, including abortions. The same consultation room built with Title X funds could also be later used to consult for an abortion.

Under the Rule, that abusive flexibility ends. Recipients of Title X funds must physically separate such funds and their function from the rest of their practice. The Rule requires that a Title X project must have an “objective integrity and independence from prohibited activities.” To determine whether this standard has been met, HHS will evaluate a variety of factors, including separate accounting records, the “degree of separation of facilities,” the “existence of separate personnel,” record keeping, and “workstations,” and the “extent to which signs and other forms of identification of the Title X project are present” in relation to “material referencing or promoting abortion.”⁵⁷

In this way, the Rule undertakes the important task of ending the current farce of fungible flexibly and instead enforces bright line regulations. Such physical separation and oversight should greatly reduce the use of Title X funds in furtherance of non-Title X projects, programs, and services. The ACLJ fully endorses these measures as they are by far the most comprehensive effort to address the issues of comingling funds and a lack of compliance with the prohibition against the use of Title X funds for abortion services.

Yet, because money is still fungible, and every Title X dollar used to fund preconception services still frees up another dollar for postconception services, including abortion, the answer to HHS’s question of whether these Title X regulations should go further,⁵⁸ is yes. The ACLJ believes it would be even more effective for the Department to require different operational names and organizational separation between a Title X project and other aspects of a grantee’s services that exceed the scope of Title X.

While at the end of the day very little can stop concerted disingenuous accounting practices, such additional measures would do three things, (1) they would further remove the perception that Title X supports non-Title X services, including abortion; (2) they would clarify for patients what services they can expect to receive from a given organization; (3) they would put yet another financial barrier between Title X and non-Title X services, as it is more difficult to move money from one organization to another than it is to do so internally. Further, given the increased reporting requirements and oversight already included in the Rule, these additional measures would make it that much more difficult, financially speaking, for Title X fund recipients to hide the ball.

Thus, such additional measures would only further advance the goals stated in and pursued by the Rule. The ACLJ therefore encourages HHS to seriously consider implementing these additional measures.

⁵⁷ *Id.* at 25532.

⁵⁸ *Id.* at 25519.

d. The Rule Protects Free Speech Rights and Does Not Create a So-Called “Domestic Gag Rule.”

One major critique of the Rule is that it creates a ban on abortion-related speech in Title X projects. Critics claim they are identical to the gag rule included in the 1988 regulations put in place by President Ronald Reagan. That is simply not the case; these proposed rules are not a “domestic gag rule.” It is not a “gag” on speech for the government to specify how its own funds are to be spent. As such, this condition on federal funding is by no means a “domestic gag rule.”

It is true that the Rule does prohibit referrals for abortion and promotion of abortion using Title X funds,⁵⁹ but that is simply a function of what the law already requires.⁶⁰ Further, these prohibitions do not gag speech. They do not compel Title X service providers to refer patients for abortion as required under present regulations, and they do not stop providers from counseling about abortion when done appropriately and consistent with the laws governing Title X.

First, the Rule prohibits referrals for abortions, providing that:

A Title X project may not perform, promote, refer for, or support abortion as a method of family planning, nor take any other affirmative action to assist a patient to secure such an abortion.⁶¹

Nonetheless, the Rule allows the service provider to furnish the patient with “a list of licensed, qualified, comprehensive health service providers” of which “some, but not all” may “provide abortions, in addition to comprehensive prenatal care.”⁶² This list can only be provided once the woman has been “medically verified as pregnant” and has affirmatively made such a request “of her own accord.”⁶³ This list cannot “identify the providers who perform abortion[s].”⁶⁴

While some might argue that this prohibition “gags” the speech of the service provider, that is a misreading of the Rule. The law requires⁶⁵ that Title X funds not support abortion. As such, these regulations ensure not only that Title X funds are not used to provide abortions directly, but also that they are not used as a vehicle for federally funded abortion referrals. The Rule attempts to close loopholes by which some providers may abuse the system.⁶⁶ Additionally, because Title X 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.⁶⁷ Finally, the ban

⁵⁹ *Id.* at 25531–32.

⁶⁰ *See* 42 U.S.C. § 300(a)-6 (“None of the funds appropriated under this title shall be used in programs where abortion is a method of family planning.”).

⁶¹ 83 Fed. Reg. at 25531.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *See supra* n. 60.

⁶⁶ 83 Fed. Reg. at 25531.

⁶⁷ Proposed 42 CFR § 59.14(a) and (b).

on referrals for abortion does not in any way interfere with the medical determinations of the service provider.⁶⁸ Thus, this prohibition does not “gag” a medical doctor from making the appropriate determination that a pregnant woman may need additional services outside the scope of the Title X program and providing her a list of comprehensive care doctors, some of whom may perform an abortion.

Second, the Rule prohibits the encouragement, promotion, or advocacy of abortion by Title X projects.⁶⁹ However, the Rule in no way stops participating organizations from using non-Title X funds to lobby for or promote abortion.⁷⁰ Likewise, the Rule does not prevent private individuals who work on Title X projects from doing the same on their own time and with their own funds.⁷¹

In fact, the Rule actually protects the free speech rights of Title X providers. It does so by ending the requirement that Title X service providers refer and counsel patients about abortion. Under current 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.⁷² Further, this counseling has to be done in such a way as to make abortion as valid as any other option.⁷³ The Rule excises these coerced speech requirements from the program entirely. Instead, even in emergency situations, Title X providers would merely be compelled to immediately refer the client to “an appropriate provider of emergency medical services” generally.⁷⁴

In so doing, the Rule ends the government coercion of private speech in favor of abortion and enables those who wish to help women and families plan for their future in accordance with their faith to freely serve their communities. This is a meaningful restoration of free speech rights and once again recognizes that the provision of women’s healthcare does not have to be hostile to people of faith.

In sum, the Rule advances private free speech rights rather than gag them in the name of any special interests. It ensures that women who seek family planning services will receive those services without feeling pressured to seek an abortion. Likewise, those who believe in the importance of abortion will not be silenced by the Rule—they will just not be allowed to hide behind a government program and use government funds to advance their cause. Instead, they will be required to adhere strictly to the requirements of the law, which prohibit the use of Title X funds to support abortion and limit their abortion advocacy to their own time and money. As such, the Rule is in line with free speech rights and government speech doctrines, and provides important protections for religious liberty. They do not constitute a “domestic gag rule.”

⁶⁸ *Id.* at § 50.14(c), (d), (e)(1–6).

⁶⁹ Proposed rule, *supra* n.2 at 25532.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.* at 25504. *See also* 65 Fed. Reg. at 41271.

⁷³ Proposed Rule, *supra* n.2 at 25504. *See also* 53 Fed. Reg. at 2923.

⁷⁴ Proposed Rule, *supra* n.2 at 25531.

IV. THE RULE CLOSELY MIRRORS THE REAGAN-ERA RULE AND IS CONSTITUTIONALLY SOUND.

Except as discussed above, the Rule closely tracks the 1988 regulations put in place under President Ronald Reagan. Those regulations were upheld on both statutory and constitutional grounds by the United States Supreme Court in *Rust v. Sullivan*.⁷⁵ The Rule is likewise legitimate as a matter of statutory interpretation and constitutional law.

As in *Rust*, courts will have to give the administrative agency, HHS, “substantial deference” in “the interpretation of the authorizing statute” used by the agency to propose the new Rule.⁷⁶ They will have to likewise conclude that while 42 U.S.C. §300(a)-6 does not explicitly prohibit counseling, promotion, and referral for abortion or matters of “program integrity,” the “broad language of Title X plainly allows” the “construction of the statute” as set forth in the Rule.⁷⁷ As the Court held concerning the 1988 regulations, courts will likewise be “unable to say” that this Rule is “impermissible.”⁷⁸

When and if the Rule is challenged in court, that challenge will fail. The Court in *Rust* explained that an “agency is not required to ‘establish rules of conduct to last forever’” and is authorized to adopt “rules and policies to the demands of changing circumstances.”⁷⁹ As the background to the Rule explains, the program’s purpose and integrity, not to mention federal law, requires a change in administration of Title X and the relationship and oversight of its projects.⁸⁰ There is no reason why the Court would alter its prior decision on these statutory issues or find the evidence any less compelling now than it did in 1991.

As a matter of constitutionality, the proposed rule is just as constitutional now as it was then. In *Rust*, the Court held that § 300(a)-6 was constitutional under Congress’s authority to allocate public funds.⁸¹ The Court likewise held that bans on referrals and counseling were consistent with the First Amendment, explaining “[t]his is not a case of the Government ‘suppressing a dangerous idea,’ but of a prohibition on a project grantee or its employees from engaging in activities outside of the project’s scope.”⁸² Even the financial and physical separation requirements were consistent with the First Amendment for similar reasons. The Court explained that “Congress has merely refused to fund such activities out of the public fisc, and the Secretary has simply required a certain degree of separation from the Title X project in order to ensure the integrity of the federally funded program.”⁸³

⁷⁵ See *Rust v. Sullivan*, 500 U.S. 173 (1991).

⁷⁶ *Id.* at 184.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.* at 186–87.

⁸⁰ 83 Fed. Reg. at 25503.

⁸¹ *Rust*, 500 U.S. at 192.

⁸² *Id.* at 194.

⁸³ *Id.* at 198.

Many other cases have affirmed the principle that the government is not obligated to fund or facilitate abortion.⁸⁴ There is no reason to doubt that the Rule is as constitutional and statutorily authorized as the 1988 regulations of the Reagan Administration. The Department should not allow threats of litigation by abortion advocates to derail the adoption and implementation of the Rule.

V. CONCLUSION

The ACLJ urges HHS to adopt the Rule in its entirety. It restores Title X to its proper and vital function as the only domestic federal program designed to provide low cost and efficient family planning services to low income families. Without the distraction of abortion in the form of referrals, promotion, and advocacy, and without the misuse of funds to support an abortion infrastructure, the Rule frees up resources to better aid women and families in deciding how to best plan for their futures.

Furthermore, the Rule multiplies the means by which women and their families can seek, and the manner in which Title X providers can offer, these invaluable services, including the use of natural family planning. Finally, for the first time in decades, women will no longer have to choose between planning their family's future and living in accordance with their sincerely held beliefs. The Rule is proof that religious liberty and women's healthcare do not have to stand in opposition to one another, but can actually work together to better the lives of American women and families.

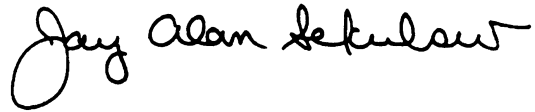
Moreover, the Rule protects women and children from abuse, rape, incest, and neglect by requiring Title X service providers to comply with state and local reporting and notification laws. No longer will certain abortion providers be allowed to hide behind confidentiality or turn a blind eye to the abuse that sits before them. It is horrifying that this situation has not been addressed sooner, but the ACLJ is pleased to see this step being taken now.

Finally, while the ACLJ fully endorses the Rule, we urge HHS to go further. Specifically, the ACLJ encourages the Department to require not only financial, but also organizational separation between Title X-funded projects and those outside the program's scope. Such a provision would serve as an essential roadblock in the way of entities that would seek to use Title X money as a fungible tool to support services, no matter how well meaning, outside the scope of Title X, including the promotion and performance of abortion. While the Rule is an excellent first step, we encourage HHS to remain ever vigilant, to continue to find new ways to protect the integrity of this vital program, and to better promote the health and welfare of the American family.

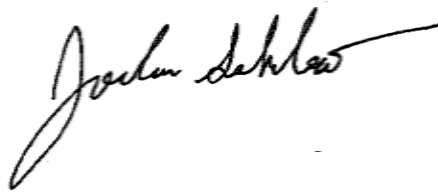
⁸⁴ See, e.g., *Webster v. Reproductive Health Servs.*, 492 U.S. 490, 511 (1989) (noting that the government "need not commit any resources to facilitating abortions"); *Harris v. McRae*, 448 U.S. 297 (1980) (upholding the Hyde Amendment to the Medicaid Act, which denied public funding for most abortions, including some characterized as medically necessary); *Maher v. Roe*, 432 U.S. 464, 474 (1977) (holding that the government may "make a value judgment favoring childbirth over abortion, and . . . implement that judgment by the allocation of public funds"); *Poelker v. Doe*, 432 U.S. 519, 521 (1977) (upholding a city's choice "to provide publicly financed hospital services for childbirth without providing corresponding services for nontherapeutic abortions").

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

Sincerely,

A handwritten signature in black ink that reads "Jay Alan Sekulow". The signature is written in a cursive style with a large initial "J".

Jay Alan Sekulow
Chief Counsel
AMERICAN CENTER FOR LAW & JUSTICE

A handwritten signature in black ink that reads "Jordan Sekulow". The signature is written in a cursive style with a large initial "J".

Jordan Sekulow
Executive Director
AMERICAN CENTER FOR LAW & JUSTICE