July 31, 2018

Submitted Electronically

Secretary Alex M. Azar II
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 Rule to Ensure Compliance with Statutory Program Integrity Requirements in Title X of the Public Health Service Act, RIN 0937-ZA00

Dear Secretary Azar:

On behalf of Americans United for Life, I write in strong support of the proposed rule revising Title X regulations to ensure compliance with statutory program integrity requirements, specifically the requirement that none of the funds appropriated for Title X may be used in programs where abortion is a method of family planning.

Americans United for Life (AUL) is the oldest and most active pro-life nonprofit advocacy organization in the country. Founded in 1971, before the Supreme Court's decision in *Roe v. Wade*,[1] AUL has dedicated nearly 50 years to advocating for comprehensive legal protections for human life from conception to natural death.

It is AUL's long-time policy position that funds appropriated or controlled by the federal and state governments should be allocated away from the subsidization of elective abortion providers and toward comprehensive and preventive women's health care. To this end, AUL has created comprehensive model legislation,[2] works

[1] 410 U.S. 113 (1973).
[2] AMS. UNITED FOR LIFE, DEFENDING LIFE 460–61 (2018 ed.) (AUL state policy guide providing model bills that defund abortion providers).

extensively with state legislators to enact constitutional pro-life laws,[3] and files briefs in key cases, including in *Rust v. Sullivan*, in which the U.S. Supreme Court upheld similar HHS regulations.[4]

I have thoroughly reviewed the proposed rule and it is my legal opinion that the proposed regulations are both constitutional and sound public policy.

I. The proposed regulations create a bright-line reflecting that abortion is explicitly excluded from the scope of Title X projects.

In a time when allegations are made of abuse and misuse of government funds, it is important for the government to maintain transparency, accountability, and integrity to ensure the legal and ethical usage of taxpayer dollars. This proposed rule does just that by clarifying ambiguity inherent in Title X and taking steps to ensure compliance and accountability with Title X's statutory purpose and goals.

Congress enacted Title X of the Public Health Service Act[5] in 1970 to provide financial support for healthcare organizations offering family planning services. Title X projects "shall offer a broad range of acceptable and effective family planning methods and services (including natural family planning methods,

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[3] For example, in the wake of the Affordable Care Act (ACA), AUL supported legislation that would modify the ACA to protect conscience rights by comprehensively prohibiting both funding for abortion and insurance for abortion through the ACA. *See, e.g.*, Memorandum from Ams. United for Life on The Respect for Rights of Conscience Act & Its Application to the Affordable Care Act (June 25, 2012), http://www.realhealthcarerespectslife.com/wp-content/uploads/2012/06/AUL-Respect-for-Rights-of-Conscience-Act-memo-June-2012.pdf; Memorandum from Ams. United for Life on The Protect Life Act & Its Application to the Affordable Care Act (June 25, 2012), http://www.realhealthcarerespectslife.com/wp-content/uploads/2012/06/AUL-Protect-Life-Act-memo-June-2012.pdf.

[4] *See* Brief of the Association of American Physicians and Surgeons as *Amicus Curiae* in Support of Respondent, *Rust v. Sullivan*, 500 U.S. 173 (1991), http://www.aul.org/wp-content/uploads/2018/07/1990-Rust-v.-Sullivan.pdf (arguing that Congress and the administration may properly decide to promote childbirth and not abortion in federally funded programs); *see also* Brief of Intervening Defendants-Appellees James L. Buckley, Jesse A. Helms, Henry J. Hyde, and Isabella Pernicone in Support of Appellant Harris, *Harris v. McRae*, 448 U.S. 297 (1980), http://www.aul.org/wp-content/uploads/2018/08/1980-Harris-v.-McRae.compressed.pdf (arguing that the Hyde Amendment is constitutional because there is no due process right to government subsidized abortion). More recently, AUL filed *amicus* briefs supporting the states' right to defund abortion providers from their state Medicaid Programs. *See* Brief of 90 Members of Congress as *Amici Curiae* in Support of Petitioner, *Gee v. Planned Parenthood of Gulf Coast, Inc.*, No. 17-1492 (U.S. May 31, 2018), http://www.aul.org/wp-content/uploads/2018/08/17-1492-Amicus-Brief-of-90-Members-of-Congress.pdf; Brief *Amicus Curiae* of Americans United for Life in Support of Petitioners, *Andersen v. Planned Parenthood of Kansas and Mid-Missouri*, No. 17-1340 (U.S. April 23, 2018), https://www.supremecourt.gov/DocketPDF/17/17-1340/44260/20180423103023537_17-1340%20Amicus%20Brief%20of%20American%20United%20for%20Life.pdf.

[5] 42 U.S.C § 201 *et seq.*

infertility services, and services for adolescents)."[6] 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." Thus, abortion is explicitly excluded from the scope of Title X projects and Title X funds.

To reflect this reality, AUL supports the bright-line regulations created by this proposed rule. I highlight several of the benefits of the proposed regulations below.

Stopping Title X funds from subsidizing abortion. The reporting, accounting, and documentation requirements created by the proposed rule, as well as the bright-line rule requiring physical and financial separation between Title X services and the provision and promotion of abortion, are necessary to ensure that Title X funds are not being used to create infrastructure that supports abortion. By requiring reporting of subrecipients, partnerships, and oversight plans, Title X recipients will no longer be able to funnel money to subrecipients who would otherwise be ineligible to receive Title X funds or ignore the misuse of those funds by those with whom they work.

Expanding the pool of potential applicants. AUL supports the regulation that not every grantee or subrecipient should be required to provide *all* Title X services, so long as the overall Title X project offers a broad range of services. This will increase the pool of potential applicants and allow 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 will also allow 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.

Promoting compliance and accountability. AUL supports the proposed regulations that require assurances of compliance and set forth ways to enforce the regulations. In addition to the excellent proposed regulatory application review criteria, AUL proposes adding an additional criterion that takes into consideration the extent to which the applicant's prior Title X projects have adhered to the statutory purpose and goals as set forth in criteria (1).[7] AUL also agrees with HHS that Title X grantees should be leaders when it comes complying with state and local reporting laws for child abuse, child molestation, sexual abuse, rape, incest, intimate partner violence, and human trafficking, as the proposed revisions would

[6] Public Health Service Act sec. 1001(a); 42 U.S.C. § 300(a).
[7] *See* 83 Fed. Reg. at 25511 (stating proposed criteria for selection of Title X grantees).

require of Title X healthcare providers.[8] These proposed regulations will help ensure program integrity by promoting compliance and accountability.

II. The proposed regulations are constitutional because there is no right to government funding and the Supreme Court has upheld similar regulations.

The proposed regulations are constitutional because there is no "right" to a government benefit, including government funds.[9] Although "the government may not deny a benefit to a person because he exercises a constitutional right,"[10] there are any number of reasons for which the government may deny benefits.[11]

"[T]he 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."[12] "There is a basic difference between direct [government] interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy."[13] That is why the Supreme Court has consistently upheld the right of the federal government and states "to make a value judgment favoring childbirth over abortion, and to implement that judgment by the allocation of public funds."[14]

In *Maher v. Roe*, the Supreme Court held that a state's ban on public funding for nontherapeutic abortions "does not impinge upon the fundamental right recognized in *Roe*," because the ban "places no obstacles—absolute or otherwise—in the pregnant woman's path to an abortion."[15]

Next, in *Harris v. McRae*, the Court upheld the constitutionality of the Hyde Amendment, which denied public funding for certain medically necessary abortions, because "[t]he Hyde Amendment, like the [funding ban] at issue in *Maher*, places no governmental obstacle in the path of a woman who chooses to terminate her pregnancy."[16] "[R]ather, by means of unequal subsidization of abortion and other medical services, [the Hyde Amendment] encourages alternative activity deemed in

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[8] *See* 83 Fed. Reg. at 25520.
[9] *See Perry v. Sindermann*, 408 U.S. 593, 597 (1972).
[10] *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 604 (2013) (quoting *Regan v. Taxation with Representation of Wash.*, 461 U.S. 540, 545 (1983).
[11] *Perry*, 408 U.S. at 597.
[12] *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 507 (1989); *see also Regan*, 461 U.S. at 549 ("[A] legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right.").
[13] *Maher v. Roe*, 432 U.S. 464, 475 (1977).
[14] *Id.* at 474; *see also Rust v. Sullivan*, 500 U.S. 173, 192–93 (1991).
[15] 432 U.S. at 474.
[16] 448 U.S. 297, 315 (1980).

the public interest."[17] "[I]t simply does not follow that a woman's freedom of choice carries with it a constitutional entitlement to the financial resources to avail herself of the full range of protected choices."[18]

Again, in *Webster v. Reproductive Health Services*, the Court upheld a state ban "on the use of public employees and facilities for the performance or assistance of nontherapeutic abortions," because to hold otherwise in light of *Maher* and *Harris* would "strain[] logic."[19] The Court reiterated that the increased difficulty a woman may encounter to obtain an abortion under the restrictions left her in no different or worse position than she would have been if the government had not provided those services in the first place.[20]

Maher, *Harris*, and *Webster* make clear that there is no constitutional right to government funding for abortions, and that, consistent with Title X and the proposed rule, states and the federal government may choose not to fund or subsidize abortion through their resources, in their programs, and with their limited public funds.

In addition, the Supreme Court has never held it unconstitutional for states to give potential recipients a choice between accepting government subsidies and declining the subsidy and financing their own unsubsidized program.[21] In *Rust v. Sullivan*, the Supreme Court found that the similar Title X regulations were constitutional and did not violate the First or the Fifth Amendments.[22] The regulations in *Rust*, similar to the proposed regulations here, condition receipt of federal funds under Title X on forgoing abortion counseling and referral within the Title X federal family planning project, as well as on maintaining physical and financial separation from the prohibited abortion activities.[23]

The Court rejected the argument that the conditions on Title X grant funding were unconstitutional because they "penalize[ed]" protected rights funded outside the scope of Title X.[24] If Title X grant funds are subsidies, it explained, and "the recipient is in no way compelled to operate a Title X project; to avoid the force of the regulations, it can simply decline the subsidy."[25] By accepting the grant funds, a recipient "voluntarily consents to any restrictions placed on [the funds]."[26] The

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[17] *Id*.
[18] *Id*. at 316.
[19] 492 U.S. at 509, 511.
[20] *Id*. at 509 (citing *Harris*, 448 U.S. at 317).
[21] *See Rust*, 500 U.S. at 199 n.5.
[22] *Id*. at 178.
[23] *Id*. at 178–81.
[24] *Id*. at 199 n.5.
[25] *Id*.
[26] *Id*.

Court reaffirmed this position more recently in *Agency for International Development v. Alliance for Open Society International, Inc. (AOSI)*, when it explained that the government's policy requirement violated the unconstitutional conditions doctrine because it went "*beyond* preventing recipients from using private funds in a way that would undermine the federal program" by requiring recipients "to pledge allegiance to the Government's policy."[27]

Title X grant recipients have no right to government funding. Just because the government chooses to subsidize one area of health care—*e.g.*, family planning—it does not follow that the government must subsidize counterpart services—*e.g.*, abortion. Title X grant funds are subsidies, and recipients are not compelled to operate a Title X project.[28] If they do not want to adhere to the regulations they can "simply decline the subsidy."[29] Conversely, if grant recipients accept Title X funds, they "voluntarily consent[]" to the regulations placed upon the funds.[30]

Rust and *AOSI* make clear that the proposed Title X regulations are constitutional because there is no material difference between the regulations upheld in *Rust* and the proposed rule here, and unlike *AOSI*, the proposed regulations here do not condition funding on recipients adopting the government's policy as their own.

III. The proposed regulations protect the conscience rights of healthcare providers, employers, and taxpayers.

AUL applauds the steps this proposed rule makes to protect the conscience rights of healthcare providers, employers, and taxpayers. First, the proposed rule rescinds former regulations that required Title X projects to provide abortion referral and counseling. The existing requirement is inherently inconsistent with the scope of Title X and infringes on the conscience rights of healthcare providers who are opposed to abortion—in violation of federal conscience statutes.

Second, the proposed rule will require compliance with, and provide for the enforcement of, federal conscience rights laws, including the Church Amendments[31] the Coats-Snowe Amendment,[32] and the Weldon Amendment.[33] As part of the Public Health Service Act, Title X is subject to the provisions of the Church

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[27] 570 U.S. 205, 220 (2013) (emphasis added).
[28] *See Rust*, 500 U.S. at 199 n.5.
[29] *See id.*
[30] *See id.*
[31] 42 U.S.C. § 300a-7.
[32] Public Health Service Act sec. 245; 42 U.S.C. § 238n.
[33] *See* Consolidated Appropriations Act 2018, Pub. Law 115-141, Div. H, sec. 507(d), 132 Stat. 348, 764 (2018).

Amendments, which prohibits grant recipients from discriminating in (A) "the employment, promotion, or termination of employment of any physician or other health care personnel," or (B) "the extension of staff or other privileges to any physician or other health care personnel," because:

> *he performed or assisted in the performance of a lawful sterilization procedure or abortion,* because he refused to perform or assist in the performance of such a procedure or abortion on the grounds that his performance or assistance in the performance of the procedure or abortion would be contrary to his religious beliefs or moral convictions, or because of his religious beliefs or moral convictions respecting sterilization procedures or abortions.[34]

It is unclear whether this provision would condition receipt of Title X grant funds by religious and pro-life groups on being willing to hire someone who disagrees with their religious beliefs and moral convictions regarding abortion. AUL suggests that HHS clarify whether religious and pro-life applicants will be subject to those conditions or if there are other statutes or constitutional provisions—such as the Religious Freedom Restoration Act[35] or the First Amendment—that protect these groups from having to choose between violating their conscience and running a Title X project.

Third, the proposed rule defines "low income family" to include "women who are unable to obtain certain family planning services under their employer-sponsored health insurance policies due to their employers' religious beliefs or moral convictions."[36] By doing this, HHS has found one (of many) lesser restrictive means for the government to provide contraception to women instead of requiring religious employers to violate their sincerely held beliefs.[37] This is a win-win solution to the government's asserted compelling interest in giving women access to contraceptives while still protecting the conscience rights of employers.

IV. Conclusion

In sum, AUL urges HHS to adopt this proposed rule.

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[34] 42 U.S.C. § 300a-7(c)(1) (emphasis added).
[35] 42 U.S.C. § 2000bb *et seq*.
[36] 83 Fed. Reg. at 25514.
[37] *See Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2780–83 (2014) (discussing how HHS had not proven that compelling employers to violate their sincerely held religious beliefs was the least restrictive means of providing contraception).

Sincerely,

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Americans United for Life