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AG Balderas Files Brief to Protect New Mexico Women's Access to Reproductive Health & Family Planning

More than 4 million Americans rely on Title X funding, which is currently being threatened by the Trump-Pence Administration

Albuquerque, NM – Today, Attorney General Hector Balderas joined a coalition of attorneys general in filing an amicus brief in the U.S. District Court for the District of Columbia in support of a nationwide preliminary injunction that would block a recent attempt by the Trump-Pence Administration to reduce access to Title X, the nation's family planning program. Title X provides family planning services including birth control, and other critical preventive care to uninsured and under-insured patients. The new set of requirements put forward by the Trump-Pence Administration would jeopardize the lives and the health of millions of low-income women and families across the United States by threatening funding for birth control, sexually transmitted disease testing, breast and cervical cancer screenings, and infertility treatment.

"President Trump and Vice President Pence have no business intruding in the reproductive health and family planning of New Mexico women," said Attorney General Balderas. "I will continue to stand up to the President's policies that harm New Mexico's children and families."

On February 23, 2018, the U.S. Department of Health and Human Services released a new set of requirements that would strip away funding for women's healthcare providers like Planned Parenthood, and instead provide funding for natural family planning methods and abstinence-only education. The new requirements threaten funding for comprehensive reproductive healthcare centers and instead favor facilities that do not provide women with fact-based information or comprehensive healthcare.

Planned Parenthood of Wisconsin, Planned Parenthood of Greater Ohio and Planned Parenthood Association of Utah, along with the National Family Planning and Reproductive Health Association, are challenging the Trump-Pence Administration. Filed in the U.S. District Court for the District of Columbia on May 2, 2018, these organizations argue that new funding requirements for Title X are in conflict with the underlying Title X statute and regulations. The plaintiffs also claim that the Administration has no clear basis for the policy change, and the resulting requirements are arbitrary and capricious. Lastly, they argue that the new criteria improperly change the nature of Title X funding. The current statute requires providers who receive Title X funding to provide patients with a range of family planning methods, yet the new requirements would emphasize only one set of family planning options (abstinence or natural family planning).

Joining Attorney General Balderas in filing today's motion are the attorneys general of California, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, New Jersey, New York, Oregon, Pennsylvania, Rhode Island, Virginia, Vermont, Washington, and the District of Columbia.

Please see attached for a copy of the filed brief.

# # #

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PLANNED PARENTHOOD OF WISCONSIN, PLANNED PARENTHOOD OF GREATER OHIO, PLANNED PARENTHOOD ASSOCIATION OF UTAH, and NATIONAL FAMILY PLANNING & REPRODUCTIVE HEALTH ASSOCIATION, Plaintiffs, **v.** **ALEX M. AZAR, in his official capacity as United States Secretary of Health and Human Services, and VALERIE HUBER, in her official capacity as Acting Deputy Assistant Secretary for the Office of Population Affairs,** Defendants.	No. 18 Civ. 1035-TNM (con)

BRIEF OF AMICI STATES CALIFORNIA, CONNECTICUT, DELAWARE, HAWAII, ILLINOIS, IOWA, MAINE, MARYLAND, MASSACHUSETTS, MINNESOTA, NEW JERSEY, NEW MEXICO, NEW YORK, OREGON, PENNSYLVANIA, RHODE ISLAND, VERMONT, VIRGINIA, WASHINGTON, AND THE DISTRICT OF COLUMBIA IN SUPPORT OF PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

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INTEREST OF AMICI STATES

The States of California, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, New Jersey, New Mexico, New York, Oregon, Pennsylvania, Rhode Island, Vermont, Virginia, Washington, and the District of Columbia[1] as amici curiae have a compelling interest in protecting the health, well-being, and economic security of their residents. The federal Title X family planning program serves four million women and men across the country, providing pregnancy tests, contraceptive counseling and services (including access to all 18 FDA-approved contraceptive methods), pelvic exams, screening for cervical and breast cancer, screening for high blood pressure, anemia and diabetes, screening for sexually transmitted diseases (STDs) and HIV/AIDS, infertility services, health education, and referrals for other health and social services. Title X providers are also valuable public health partners to States in protecting against health epidemics and ensuring quality comprehensive reproductive healthcare. Title X is the linchpin of publicly funded family planning in the United States, delivering quality care to vulnerable communities, including the uninsured, underinsured, and indigent populations.[2]

Defendants improperly attempt to transform Title X by inventing new application review criteria that are not otherwise contained in the statute or the regulations—criteria that favor abstinence-only counseling and "natural family planning" at the expense of contraception. The application review criteria contained in the latest Funding Opportunity Announcement (FOA) for the Title X program will result in serious harm to the amici States. The States depend on

[1] The District of Columbia, which is a municipal corporation empowered to sue and be sued, and is the local government for the territory constituting the permanent seat of the federal government of the United States, shall be included herein as a "State" for ease of reference.

[2] Amici file this brief pursuant to Local Civil Rule 7(o).

established networks of well-qualified providers in their communities, which have been sustained by a longstanding, stable regulatory framework. Defendants' new preference for clinics that emphasize abstinence-only and "historically underrepresented" methods of family planning, set forth for the first time in the FOA application review criteria, would not improve family planning care but would be a step backward. Further, it creates an untenable situation in which the new criteria favor providers that may not be willing or able to seamlessly provide the full range of family planning and related preventive care needed by vulnerable populations.

Strikingly, the new FOA omits the requirement that Title X providers follow defendants' own clinical standards of care, the Quality Family Planning Guidelines—the gold standard of recommendations for providers on what to offer during a family planning visit and how to provide such services. By de-emphasizing FDA-approved contraceptive methods in favor of less effective strategies and removing all reference to the Quality Family Planning Guidelines, the new FOA encourages and permits direct grants to health centers that do not provide women with comprehensive family planning care and often times provide women with incomplete information about their reproductive health. Funding less-qualified applicants will reduce funding available for established, qualified family planning providers. Ultimately, the States will bear the costs of any reductions in access to family planning services.

The States also share a strong interest in a fair and transparent regulatory process, as required by the federal Administrative Procedure Act (APA). Amici depend on federal agencies to follow proper rulemaking procedures designed to ensure consideration of a broad array of interests, including those of state and local governments, before making important, and often complex, changes to agency rules. Agency action that does not comport with required

rulemaking procedures or standards for quality decision-making undercuts public trust in the process, policy changes, and the agencies themselves.

ARGUMENT

I. THE AMICI STATES HAVE A STRONG PUBLIC HEALTH INTEREST IN PRESERVING ACCESS TO TITLE X FUNDING FOR WELL-QUALIFIED PROVIDERS

A. Since 1970 Title X Has Been a Vital Funding Source for the States and Healthcare Providers

In a message to Congress in July 1969, President Richard Nixon wrote that "no American woman should be denied access to family planning assistance because of her economic condition. I believe, therefore, that we should establish as a national goal the provision of adequate family planning services within the next five years to all those who want them but cannot afford them."[3] Following the directive of President Nixon, Congress enacted Title X to make comprehensive, voluntary family planning services available to "all persons desiring such services." *See* Pub. L. No. 91-572 § 2, 84 Stat. 1504 (1970). Congress also intended to support the "public and nonprofit private entities to plan and develop comprehensive programs of family planning services" and to evaluate and improve the effectiveness of these programs. *Id*.

Title X requires that the Secretary of HHS make grants available to "family planning projects which shall offer a broad range of acceptable and effective family planning methods and services." 42 U.S.C. § 300(a). Title X provides that, in awarding funds, the Secretary must take into account the number of patients to be served, the extent to which family planning services are

[3] Adrienne Stith Butler & Ellen Wright Clayton, eds., Institute of Medicine, A REVIEW OF THE HHS FAMILY PLANNING PROGRAM: MISSION, MANAGEMENT, AND MEASUREMENT RESULTS, at ix (2009), https://www.ncbi.nlm.nih.gov/books/ (2009), https://www.ncbi.nlm.nih.gov/books/NBK215217/pdf/Bookshelf_NBK215217.pdf; "The [Institute of Medicine] is an arm of the National Academy of Sciences, an organization Congress established 'for the explicit purpose of furnishing advice to the Government.'" *Burwell v. Hobby Lobby*, 134 S.Ct. 2751, 2789 n.3 (2014) (Ginsburg, J., dissenting).

needed locally, the relative need of the applicant, and its capacity to make rapid and effective use of such assistance. 42 U.S.C. § 300(b).

Hewing closely to the statutory language, the implementing regulations have for decades provided that the Secretary must take into account seven criteria when deciding whether to approve applications for Title X funding. 42 C.F.R. § 59.7(a)(1)-(7). More broadly, the regulations mandate that grantees "[p]rovide a broad range of acceptable and effective medically approved family planning methods" and that such medical services must be provided "without subjecting individuals to any coercion to accept services or to employ or not to employ any particular methods of family planning." 42 C.F.R. § 59.5(a)(1), (2). Additionally, the regulations require that Title X family planning grantees must "[o]ffer pregnant women the opportunity to be provided with information and counseling regarding . . . pregnancy termination." 42 C.F.R. § 59.5(a)(5)(i)(C). If a pregnant woman requests such information, the Title X grantee must "provide neutral, factual information and nondirective counseling." 42 C.F.R. § 59.5(a)(5)(ii).

Over the years, HHS's Office of Population Affairs, which administers Title X, has worked with the Centers for Disease Control and Prevention (CDC) to establish evidence-informed clinical recommendations, the Quality Family Planning Guidelines. *See* ECF No. 18-9. The Guidelines set the standard of care for family planning services. Among other things, the Quality Family Planning Guidelines provide that Title X clinicians "should offer contraceptive services," including the full range of FDA-approved contraceptive methods. *Id.* at 10. The Guidelines emphasize that contraceptive counseling, a "process that enables [patients] to make and follow through on decisions about their contraceptive use," is an "integral component" of

providing healthcare so that patients "make informed decisions and obtain the information they need to use contraceptive methods correctly." *Id*.

Under Title X, grantees need not provide family planning services themselves but may contract with agencies operating under the umbrella of the grantee. 42 C.F.R. § 59.5(a)(1); ECF No. 1-1 at 6. In many instances, Title X funds flow initially to state and local governmental agencies and non-profit healthcare organizations, which distribute the funds to sub-grantees. The Title X funding structure anticipates that states and local governments will work collaboratively with sub-grantees to ensure residents receive crucial family planning services. Over time, according to the Institute of Medicine, this has resulted in the stable delivery of safety-net services created through Title X. *See* n.2 at 133.

California benefits from the largest Title X grant in the nation, which funds healthcare providers throughout the State to support the delivery of quality sexual and reproductive healthcare. California's Title X federal family planning program collectively serves more than one million women, men, and teens annually—over 25% of all Title X patients nationwide—through 59 healthcare organizations, operating nearly 350 health centers in 37 of California's 58 counties. The State's Title X provider network includes a broad spectrum of sub-grantee providers, including federally qualified health centers, city and county health departments, stand-alone family planning and women's health centers (similar to the Planned Parenthood plaintiffs), and community or free clinics.

Other states likewise rely on Title X to ensure that their residents receive evidence-based, holistic comprehensive healthcare.

- Connecticut's Title X clinics served 40,440 patients in 2016. In 2010, the Title X clinics prevented 9,500 unintended pregnancies, 14 cervical cancer cases, 29 gonorrhea cases,

400 chlamydia cases, and saved the federal and state government a net total of $80,942,000.

- In Delaware, Title X supports 55 clinics, which served 19,132 patients in 2017.
- In the District of Columbia, there are 34 Title X clinics which served 39,984 women and 14,570 men over the past year.
- Illinois has 94 Title X clinics which served 110,158 patients.
- Maryland has 73 Title X clinics which served 73,675 patients in 2017.
- In Massachusetts, there are 90 Title X clinics and in the past year, they served 69,723 patients.
- New Jersey's Title X grantee oversees a network of 43 clinics with statewide coverage. In 2017, New Jersey's Title X clinics served 89,975 women and 9,899 men.
- New York has 173 Title X clinic sites that served 301,128 patients in 2017.
- Rhode Island has 23 Title X providers and in 2017, those providers served 26,789 patients with a variety of services including family planning visits (38,443), pregnancy tests (7,983), HIV tests (5,332), chlamydia tests (11,123), breast exams (6,080), and pap smears (3,072).
- In Vermont, there are ten Title X clinics which in 2014 served 8,719 patients.
- In Washington, there are 72 Title X clinics and in 2016, they served 90,168 patients.

B. Title X Funds Are Crucial for the States' Residents

Title X plays a crucial role for low-income women, women of color, and women in rural communities. It provides no-cost family planning services to people with very low incomes, and services on a sliding fee scale for others. For example, in New York, nearly ninety percent (90%) of Title X patients had incomes at or below 250% of the federal poverty level, and thirteen

percent (13%) of all patients received their services at no cost.[4] Title X also serves a high proportion of patients of color. Nationwide, 21% of Title X patients self-identify as black or African-American and 32% as Hispanic or Latino/a, as compared to 13.3% and 17.6% of the nation, respectively. ECF No. 18-4 at 10 (Coleman Decl. ¶ 31); *see also* ECF No. 18-2 at 4 (Harvey Decl. ¶ 12).[5] Many Title X providers have particular expertise meeting the needs of diverse patients, including persons with disabilities and lesbian, gay, bisexual or transgender patients. Title X family planning clinics are especially critical in rural areas, where reproductive health access is often limited by healthcare provider shortages, lack of transportation, and other factors. *See, e.g.* ECF No. 18-2 (Harvey Decl. ¶¶ 13-15). In seven rural California counties, a Title X clinic is the only publicly funded clinic offering a full range of contraceptive methods. Likewise, in New Jersey, eight of its Title X clinics are sole providers in rural areas, and in New York, eight of its Title X clinics are rural areas' only publicly funded clinics.

Title X family planning programs play a proven role in ensuring women's ability to use the most effective forms of birth control to time and space their pregnancies. Providers give

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[4] Similarly, in California, ninety-one percent (91%) of Title X patients had incomes at or below 250% of the federal poverty level, and nearly 60% were uninsured in 2016. In Washington, seventy-one (71%) of Title X patients had incomes at or below 138% of the federal poverty level, and in Vermont, forty-seven percent (47%) of patients had incomes at or below 100% of the federal poverty level, while seventy-seven percent (77%) of patients had incomes at or below 250% of the federal poverty level. In Connecticut, forty percent (40%) of patients had incomes at or below 101% of the federal poverty level, forty-six (46%) had incomes between 101% -250% of the federal poverty level, and thirteen percent (13%) had incomes more than 250% of the federal poverty level. In the District of Columbia, eighty-five percent (85%) of Title X patients had incomes at or below 250% of the federal poverty level.

[5] These statistics are consistent with amici States' Title X patient populations. For example, in the District of Columbia, more than sixty percent (60%) of Title X patients identified as black or African-American and thirty-two (32%) identified as Hispanic or Latino/a. In New York, twenty-four percent (24%) of Title X patients were black and thirty-four percent (34%) were Hispanic.

women access to the most effective contraceptive method that fits their family planning needs, including all 18 FDA-approved contraceptive methods. By reducing or eliminating patient costs, Title X leads to more effective and continuous use of contraception, because some low-cost, over-the-counter contraceptive methods—male condoms and spermicide—are far less effective than alternative methods with a higher up-front cost.[6] Without low- or no-cost access to contraceptive methods, nearly half of women using hormonal birth control, implants or intrauterine devices (IUDs), or tubal ligation would likely switch to less effective methods, and 28 percent would use no contraception at all, resulting in unintended pregnancies.[7]

By reducing the risk of unintended pregnancy, Title X reduces the need for abortions. For example, a study of more than 9,000 women in the St. Louis region found that the number of abortions declined by 21% when the study participants were offered the reversible contraceptive method of their choice at no cost.[8] Study participants' abortion rate was less than half the national average. Similarly, when Colorado expanded access to long-acting birth control

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[6] James Trussell et al., *Cost Effectiveness of Contraceptives in the United States*, 79 CONTRACEPTION 5, 10 (2009), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3638200/pdf/nihms458012; Adam Sonfield et al., *Moving Forward: Family Planning in the Era of Health Reform*, GUTTMACHER INST., at 10 (March 2014), https://www.guttmacher.org/sites/default/files/report_pdf/family-planning-and-health-reform.pdf.

[7] Jennifer J. Frost & Lawrence B. Finer., *Unintended Pregnancies Prevented by Publicly Funded Family Planning Services: Summary of Results and Estimation Formula*, GUTTMACHER INST. (June 23, 2017), at 3, https://www.guttmacher.org/sites/default/files/pdfs/pubs/Guttmacher-Memo-on-Estimation-of-Unintended-Pregnancies-Prevented-June-2017.pdf.

[8] Jeffrey F. Peipert et al., *Preventing Unintended Pregnancies by Providing No-Cost Contraception*, 120 Obstetricians & Gynecology 1291-1297 (Dec. 2012), http://journals.lww.com/greenjournal/Fulltext/2012/12000/Preventing_Unintended_Pregnancies_by_Providing.7.aspx; *see* Aparna Sundaram et al., *Contraceptive Failure in the United States: Estimates from the 2006-2010 National Survey of Family Growth*, 49 PERSPECTIVES ON SEXUAL AND REPRODUCTIVE HEALTH, 7–16 (2017) (using any method of contraception greatly reduces a woman's risk of unintended pregnancy).

delivered through Title X family planning clinics, it found that offering free IUDs and implants led to dramatic declines in both birth and abortion rates, nearly 50 percent among teenagers and 38 percent among women without a high school education.[9]

Women benefit from the option to receive services from reproductive healthcare clinics, one of many types of providers supported by Title X funds. Planned Parenthood specifically serves 41% of all Title X patients across the country.[10] Women's health clinics, like plaintiffs', act as a "one stop shop" where a patient can seamlessly see medical providers, get screened and tested as necessary for disease, and access any needed prescription or medical supplies, without having to travel offsite to a pharmacy, additional medical facility, or lab testing facility. This service is particularly important for low-income patients served by Title X who may lack the time, money, or resources to take additional time off work or school or the ability to arrange for childcare.

Access to effective contraception is also essential to women's broader health, financial independence, and social well-being. Contraceptive use can prevent preexisting health conditions from worsening and new health problems from occurring, because pregnancy may exacerbate existing health conditions such as diabetes, hypertension, and heart disease.[11]

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[9] *Taking the Unintended Out of Pregnancy: Colorado's Success with Long-Acting Reversible Contraception*, Colorado Dep't of Public Health and Environment (Jan. 2017), https://www.colorado.gov/pacific/sites/default/files/PSD_TitleX3_CFPI-Report.pdf.

[10] Jennifer J. Frost et al., *Publicly Funded Contraceptive Services at U.S. Clinics 2015*, GUTTMACHER INST. (Apr. 2017), https://www.guttmacher.org/report/publicly-funded-contraceptive-services-us-clinics-2015.

[11] Hal C. Lawrence, Testimony of American Congress of Obstetricians and Gynecologists, submitted to the Committee on Preventive Services for Women, Institute of Medicine (2011), http://www.nationalacademies.org/hmd/~/media/8BA65BAF76894E9EB8C768C01C84380E.ashx.

Contraceptives also provide other important health benefits, including decreasing the risk of certain ovarian and uterine cancers, treating menstrual disorders, and preventing other menstrual-related health effects. Unintended pregnancy is also associated with undue financial burdens and late prenatal care.[12] Further, ensuring that contraception is readily available to women who want it, without cost-sharing and with minimal practical barriers, promotes gender equity in healthcare services.[13]

Enabling women to reliably plan pregnancies contributes to their educational and professional advancement. Women's use of oral contraceptives positively affects their education, labor force participation, and average earnings, narrowing the gender-based wage gap.[14] For example, in one 2011 study, women reported that access to contraception enabled them to take better care of themselves or their families (63%), support themselves financially (56%), stay in school or complete their education (51%), get or keep a job, or pursue a career (50%).[15] Therefore, limiting access to contraception would cause social and economic

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[12] Reproductive Life Planning to Reduce Unintended Pregnancy, Committee Opinion 654 (Feb. 2016), American College of Obstetricians and Gynecologists, at 1 (Feb. 2016) https://www.acog.org/-/media/Committee-Opinions/Committee-on-Health-Care-for-Underserved-Women/co654.pdf?dmc=1&ts=20160131T1016396951.

[13] Notably, women of child-bearing age spend 68 percent more in out-of-pocket healthcare costs than men, primarily owing to reproductive and gender-specific conditions. 155 Cong. Rec. S12, 021-02, 12,027 (daily ed. Dec. 1, 2009) (statement of Sen. Gillibrand); Clinical Preventive Services for Women: Closing the Gaps 12, Institute of Medicine (2011) https://www.nap.edu/read/13181/chapter/1.

[14] Adam Sonfield et al., *The Social and Economic Benefits of Women's Ability to Determine Whether and When to Have Children*, GUTTMACHER INST., at 7-9, 11-14 (2013), https://www.guttmacher.org/sites/default/files/report_pdf/social-economic-benefits.pdf.

[15] Jennifer J. Frost & Laura Duberstein Lindberg, *Reasons for Using Contraception: Perspective of US Women Seeking Care at Specialized Family Planning Clinics*, 87 CONTRACEPTION 4465, 465-472 (Apr. 2013), http://www.guttmacher.org/pubs/journals/j.contraception.2012.08.012.pdf.

repercussions flowing from lost opportunities for affected women to succeed in the classroom, participate in the workforce, and contribute as taxpayers. These are lifelong consequences for women and their families, and for the States. Restricting the economic productivity of their residents necessarily harms the States as well.

Finally, access to birth control promotes child well-being. Pregnancies that occur too early or too late in a woman's life, or that are spaced too closely, increase the risk of harmful birth outcomes, including preterm birth, low birth weight, stillbirth, and early neonatal death.[16] According to the American College of Obstetricians and Gynecologists, infants born as a result of unintended pregnancies are at greater risk of birth defects, low birth weight, and poor mental and physical functioning in early childhood.[17] The CDC included the development of and improved access to methods of family planning among the 10 great public health achievements of the 20th century because of its numerous benefits to the health of women and children.[18]

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[16] Megan L. Kavanaugh & Ragnar Anderson, *Contraception and Beyond: The Health Benefits of Services Provided at Family Planning Centers*, GUTTMACHER INST., at 8 (July 2013), https://www.guttmacher.org/sites/default/files/report_pdf/health-benefits.pdf; Amanda Wendt et al., *Impact of Increasing Inter-Pregnancy Interval on Maternal and Infant Health*, 26 (Supp. 1) PEDIATRIC & PERINATAL EPIDEMIOLOGY 239, 248 (2012), http://tinyurl.com/gnmvbxe; Agustin Conde-Agudelo et al., *Birth Spacing and Risk of Adverse Perinatal Outcomes*, 295 JAMA 1809, 1821 (2006); Jessica D. Gipson et al., *The Effects of Unintended Pregnancy on Infant, Child, and Parental Health*, 39 STUD. FAM. PLAN. 18, 23-25 (2008).

[17] Reproductive Life Planning to Reduce Unintended Pregnancy, Committee Opinion 654 (Feb. 2016), American College of Obstetricians and Gynecologists, https://www.acog.org/-/media/Committee-Opinions/Committee-on-Health-Care-for-Underserved-Women/co654.pdf?dmc=1&ts=20160131T1016396951.

[18] Ctrs. for Disease Control & Prevention, *Achievements in Public Health, 1900-1999: Family Planning*, 48 MORBIDITY & MORTALITY WKLY. REP. 1073 (1999); Ctrs. for Disease Control & Prevention, *A Vision for an Integrated State Health System: Challenges, Solutions and Opportunities* (Aug. 27, 2013), http://www.ncsl.org/portals/1/documents/health/JMonroePHI812.pdf.

C. Title X Funds Provide Valuable Support for the Work and Mission of the States' Public Health Entities

The States have a strong interest in providing access to comprehensive family planning services in order to promote statewide public health. Title X is one piece of their efforts to provide extensive healthcare coverage and comprehensive family planning services.

Regular access to reproductive healthcare and other Title X services promotes the States' interest in population health. For instance, California's Department of Public Health partners with Title X organizations across the state to provide integration of preconception care into public health practice and promote preconception health messages to women of reproductive age. These efforts deliver major public health benefits. Services at publicly supported family planning clinics prevented 164,190 preterm or low-birth-weight births in 2010.[19]

Title X clinics play a major role in the detection and early treatment of a range of STDs and other serious medical conditions. "The diagnosis and treatment of STDs is an essential component of comprehensive reproductive healthcare and helps reduce rates of infertility—a problem Title X was directed to address."[20] Indeed, between 2006 and 2010, 18 percent of all

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[19] Jennifer J. Frost et al., *Return on Investment: A Fuller Assessment of the Benefits and Cost Savings of the US Publicly Funded Family Planning Program*, 92 MILBANK QUARTERLY 6674, 668 (2014), https://www.guttmacher.org/sites/default/files/pdfs/pubs/journals/MQ-Frost_1468-0009.12080.pdf.

[20] Adrienne Stith Butler & Ellen Wright Clayton, eds., Institute of Medicine, A REVIEW OF THE HHS FAMILY PLANNING PROGRAM: MISSION, MANAGEMENT, AND MEASUREMENT RESULTS 6 (2009), https://www.ncbi.nlm.nih.gov/books/NBK215217/pdf/Bookshelf_NBK215217.pdf. Since the enactment of Title X, the need for STD testing has increased. For instance, while HIV was nonexistent when Title X was enacted, the CDC estimates that approximately 1.1 million persons were living with HIV infection in 2006. *Id.* As a result, there is an increased demand that Title X providers include STD testing as part of providing preventive health services. Current Title X providers have met this demand. A recent student concluded that in California, "only Title X providers were more likely to adhere to screening guidelines." Joan M. Chow et al., *Comparison of Adherence to Chlamydia Screening Guidelines*

women who were tested, treated, or received counseling for an STD did so at a Title X clinic, as did 14 percent of women tested for HIV and 10 percent of those receiving a Pap test or pelvic exam.[21] These services provide measurable benefits to overall state public health; in 2010 alone, Title X clinics prevented an estimated 53,000 chlamydia infections, 8,800 gonorrhea infections, 1,900 cases of cervical cancer and 1,100 cervical cancer deaths.[22] During public health crises, such as the Zika outbreak, Title X providers play an important role in providing contraceptive methods to prevent the transmission of the disease and collaborating with the CDC.[23]

Helping women avoid unplanned pregnancies and investing in early detection and treatment of disease all play a role in protecting the public fisc. Collectively, in 2010, publicly funded family planning services yielded $13.6 billion nationally in government savings, or $7.09 for every public dollar spent.[24] Nationally, 68% of unplanned births are paid for with public funds. The average cost of an unintended pregnancy is $15,364 and of a miscarriage is $4,249.

Among Title X Providers and Non-Title X Providers in the California Family Planning, Access, Care, and Treatment Program, 21 J. OF WOMEN'S HEALTH 837 (Nov. 8, 2012), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3411333/pdf/jwh.2011.3376.pdf.

[21] Kinsey Hasstedt, *Title X: An Essential Investment, Now More than Ever*, 16 GUTTMACHER POLICY REVIEW 14, 15 (Summer 2013), https://www.guttmacher.org/sites/default/files/article_files/gpr160314.pdf.

[22] Fact Sheet: Publicly Funded Family Planning Services in the United States, GUTTMACHER INST. (Oct. 2014), https://www.guttmacher.org/sites/default/files/factsheet/fb_contraceptive_serv_0.pdf.

[23] Ctrs. for Disease Control & Prevention, *The Importance of Pregnancy Planning in Areas with Active Zika Transmission*, (June 2, 2016), at 23, https://www.cdc.gov/zika/pdfs/postzap-familyplanning.pdf; *see also* Office of Population Affairs, U.S. Health & Human Servs. Dep't: Providing Family Planning Care for Non-Pregnant Women and Men of Reproductive Age in the Context of Zika (Nov. 2016), https://www.hhs.gov/opa/reproductive-health/zika/toolkit/index.html (providing a toolkit, based on CDC guidance, for Title X clinics).

[24] Publicly Funded Family Planning Services in the United States, GUTTMACHER INST. (Sept. 2016), at 4, https://www.guttmacher.org/sites/default/files/factsheet/fb_contraceptive_serv_0.pdf.

The most effective way to reduce costs associated with unintended pregnancy is by improving access to consistent, effective, and affordable contraception. Colorado's family planning initiative, described in Section I(B) above, allowed the state to avoid almost $70 million in public assistance costs as the result of family planning clinics' provision of long-acting contraception. Thus, facilitating affordable access to crucial Title X services not only improves health but also reduces states' healthcare costs.

II. THE NEW FUNDING OPPORTUNITY ANNOUNCEMENT (FOA) WILL HARM STATES' PUBLIC HEALTH INTEREST AND PUBLIC FISCS

A. Changes to the Application Review Criteria Will Crowd Out Existing, Well-Qualified Title X Providers

Defendants' arbitrary and capricious change in the FOA application review criteria will undermine established, high quality provider networks. The unlawful changes in the FOA, described in detail in plaintiffs' motion (ECF No. 18 at 16-34), include the elimination of any reference to the Quality Family Planning Guidelines—the gold standard in evidence-based family planning care—as well as any reference to contraception as an effective family planning method. These unfounded changes will likely increase the number of providers deemed eligible to compete for the same fixed pot of federal Title X dollars. Because the new, unlawful criteria provide a major advantage to less-qualified providers and allow them to obtain Title X funding, the criteria will decrease the funds available to the broad range of existing, well-qualified Title X providers that have already demonstrated their commitment to evidence-based best practices for patients' health. This is significant for States; in the absence of the publicly supported family planning services provided at safety-net health centers, the "rates of unintended pregnancy, unplanned birth and abortion in the United States might have been 33% higher, and the rate of teen pregnancy might have been 30% higher." *Supra* n.24 at 4.

Amici States also value the stability provided by Title X grant funds that have been allocated according to consistent federal criteria. Title X providers successfully assist their clients in avoiding unintended pregnancies in part by ensuring that patients have access to local providers whom they trust to provide quality, confidential services and who provide care based on current clinical guidelines and best practices. As Colorado's state health department explained, its successful family planning initiative benefitted from "a really solid Title X program both at the state level and at the local level. A lot of the local clinicians had been there forever and were very committed and dedicated." *Supra* n.9 at xii. Patient trust and provider quality take years to establish, making defendants' abrupt change to the Title X FOA application review criteria particularly detrimental.

The harms caused by loss of grant funds for well-qualified providers will be compounded by defendants' decision to end all multi-year grants, and to order the entire Title X national network to file new competitive grant applications. ECF No. 1-1 at ¶ 5. The historic practice of awarding grants for a multi-year period, so that only a portion of Title X providers compete for a grant at a given time, has contributed to the stability of the provider network and their ability to reach and serve vulnerable patients. In combination with the new, improper grant review criteria, this decision will further undermine the States' Title X networks.

B. Defendants' Illegal Changes to Title X Will Undermine States' Ability to Ensure Accurate and Timely Healthcare

The amici States have a strong interest in ensuring not only women's continued access to the full range of reproductive healthcare, but also in safeguarding women's ability to obtain comprehensive and accurate information. In healthcare, information can "save lives," *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 566 (2011), permit "alleviation of physical pain," *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 763-64 (1976), and enable

people to act in "'their own best interest,'" *Sorell*, 564 U.S. at 578 (quoting *Va. State Bd. of Pharmacy*, 425 U.S. at 770). Information about contraception allows women to take control of their most "intimate and personal choices . . . central to personal dignity and autonomy." *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992) (plurality op.). Indeed, the Supreme Court has emphasized that "'people will perceive their own best interests if only they are well enough informed.'" *Sorrell*, 564 U.S. at 578. For healthcare, "'information is power'" and increased knowledge leads to "'better decisions.'" *Id*. (quoting physician's statement).

The burdens that result from restricting access to or information about reproductive healthcare, including information about contraception, often fall disproportionately on a State's most vulnerable residents, including low-income women and women of color. And apart from the intrinsic value of protecting residents' constitutional right to procreative choice, the States know from experience that restricting access to reproductive healthcare also burdens the public.

Defendants' changes to the FOA application review criteria threaten these interests. By weighting the criteria towards factors like promoting abstinence, and eliminating any reference to contraception or evidence-based family planning, defendants' changed criteria will open the door to applications from less qualified providers, including those with no experience in providing family planning clinical care and those focused more on their own advocacy than patients' expressed needs. For example, facilities known as "crisis pregnancy centers" are known to provide limited or no medical care, and often times give women incomplete information about healthcare options, directing women towards pregnancy over preventive family planning care.[25] One study revealed that such centers routinely misstate medical facts,

[25] *Unmasking Fake Clinics: The Truth About Crisis Pregnancy Centers in California*, NARAL PRO-CHOICE CALIFORNIA FOUNDATION, at 2 (2010) (finding a "systematic pattern of

such as several centers in California that claim that abortions cause breast cancer or that condoms have holes in them.[26] Yet the new FOA application review criteria improperly give an advantage to these types of centers.

Providing resources to these centers in lieu of Title X clinics able to meet the established criteria jeopardizes the health and lives of many women, especially low-income and other at-risk women. As the California Legislature concluded in passing the Reproductive Freedom, Accountability, Comprehensive Care, and Transparency (FACT) Act, delay alone causes harm to women seeking reproductive healthcare. 2015 Cal. Legis. Serv. Ch. 700 (A.B. 775) § 1(c). Moreover, in the Title X context, if a family planning site does not offer complete information and access to the most effective contraceptive methods, the patients in that community may never receive it.

III. DEFENDANTS SHOULD BE ENJOINED FROM USING THE FOA

As just explained, the challenged changes to the Title X FOA threaten vital family programs across the Nation, including in amici States. These unlawful changes to the Title X program require program-wide relief.

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exploitation," including that "[w]hile the majority of the centers advertised that they provide options counseling and accurate information to women seeking guidance, they did neither. Instead, many of these centers practiced manipulative counseling and provided medically inaccurate information."), https://www.sfcityattorney.org/wp-content/uploads/2015/08/Unmasking-Fake-Clinics-The-Truth-About-Crisis-Pregnancy-Centers-in-California-.pdf; Br. of Amici Curiae Equal Rights Advocates et al., at 6, *NIFLA v. Becerra*, 138 S. Ct. 464, 2018 WL 1156613 (No. 16-1140) (Feb. 27, 2018).

[26] *See* Minority Staff of H. Comm. on Gov't Reform, 109th Cong., False and Misleading Health Information Provided by Federally Funded Pregnancy Resource Centers, at 7 (July 2006) (finding that 87 percent of clinics surveyed "provided false or misleading information"); Robin Abcarian, *Going Undercover at Crisis Pregnancy Centers*, L.A. TIMES (May 1, 2015), http://www.latimes.com/local/abcarian/la-me-0501-abcarian-crisis-pregnancy-20150501-column.html.

In fact, program-wide relief is the natural result here. This is a lawsuit under the APA, seeking to "set aside" challenged "agency action," in this case, the FOA. 5 U.S.C. § 706. As such, an injunction aimed at defendants' wrongful conduct is the accepted remedy for violations of the APA, which often implicate matters of national concern. *See, e.g. Nat'l Mining Ass'n v. U.S. Army Corps. of Eng'rs*, 145 F.3d 1399, 1409 (D.C. Cir. 1998) (When regulations are deemed invalid, the "'ordinary result is that the rules are vacated—not that their application to the individual petitions is proscribed.'"); *see also Earth Island Inst. v. Ruthenbeck*, 490 F.3d 687, 699 (9th Cir. 2007) (affirming issuance of nationwide injunction), *rev'd in part on other grounds.*

Even outside the APA context, the Supreme Court has recognized that a suit by a sole plaintiff can alter an entire federal program. *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 890 n.2 (1990); *Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080, 2087 (2017). The Supreme Court itself recently decided to leave intact a nationwide injunction. *Trump*, 137 S. Ct. at 2087. That makes perfect sense in a suit challenging a single, program-wide governmental action. "[T]he scope of injunctive relief is dictated by the extent of the violation established, not by the geographic extent of the plaintiff class." *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979).

A program-wide injunction also best serves the public interest by preserving the continuation of the Title X program as Congress intended it during the pendency of the litigation. *See, e.g., University of Texas v. Camenisch*, 451 U.S. 390, 395 (1981) (noting that a preliminary injunction is customarily granted on the basis of less formal procedures and less complete evidence than at trial in order to preserve the relative positions of the parties); *District 50, United Mine Worker of Am. v. Int'l Union*, 412 F.2d 165, 168 (D.C. Cir. 1969) (status quo is "the last uncontested status which preceded the pending controversy"). Preserving the status quo prevents

irreparable harm to the States and their residents, who rely on the Title X program. *See N. Mariana Islands v. United States*, 686 F.Supp.2d 7, 21 (D.D.C. 2009) ("The public interest is served when administrative agencies comply with their obligations under the APA."). Indeed, the public interest is especially important to the grant of preliminary relief in the context of a challenge to unlawful governmental policies. *Cf. Scripps-Howard Radio v. F.C.C.*, 316 U.S. 4, 15 (1942) (such relief is justified "to save the public interest from injury or destruction" during the pendency of proceedings); *see also Sampson v. Murray*, 415 U.S. 61, 69 n.15 (1974) (explaining that APA Section 705 was "primarily intended to reflect existing law under the *Scripps-Howard* doctrine.").

Here, where plaintiffs challenge a program-wide agency action that threatens public health in amici States across the country, there is no reason to deviate from normal course. A program-wide preliminary injunction should issue.

CONCLUSION

The amici States join in asking the Court to grant plaintiffs' motion for a preliminary injunction.

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CERTIFICATE OF SERVICE

I, Karli Eisenberg, hereby certify that a true copy of the above document, filed through the CM/ECF system, will be sent electronically to the registered participants as identified on the Notice of Electronic Filing and paper copies will be sent to those indicates as non-registered participants on this date.

Dated: May 15, 2018

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