SUBMITTED VIA FEDERAL RULEMAKING PORTAL

July 31, 2018

Kevin H. Theriot
Denise M. Burke
Alliance Defending Freedom
15100 N. 90th Street
Scottsdale, AZ 85260

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: 83 Fed. Reg. 25502 (June 1, 2018), Compliance with Statutory Program Integrity Requirements

To whom it may concern:

On June 1, 2018, the Office of Population Affairs (OPA) announced that it had revised its Title X regulations to ensure compliance with and better enforcement of the statutory requirement that none of the funds appropriated for Title X may be used in programs where abortion is a method of family planning.

Specifically, OPA's proposed amendments to the Title X regulations would, in pertinent part, require a clear physical and financial separation between Title X programs and programs in which abortion is presented or provided as a method of family planning; mandate documented compliance with state laws requiring reporting of child abuse, including child sexual abuse and human trafficking; and eliminate the requirement that Title X projects provide abortion referral and counseling.

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In response, Alliance Defending Freedom (ADF) submits the following comments, which demonstrate that:

- The proposed amendments are consistent with the Supreme Court's decision in *Rust v. Sullivan*.
- The proposed amendments are also consistent with laws enacted in ten states to ensure that Title X funding is kept separate and distinct from a grantee's abortion-related activities, as well as with the laws enacted in sixteen states placing similar restrictions on recipients of state family planning grants.
- The need for the proposed amendments is clearly demonstrated by the repeated failure of abortion providers nationwide to comply with state laws mandating the reporting of crimes against children, including sexual abuse and human trafficking.
- The proposed amendment eliminating the requirement that Title X family planning providers counsel and refer for abortion appropriately recognizes the importance of and protects healthcare freedom of conscience.

I. The proposed amendments are consistent with the Supreme Court's decision in *Rust v. Sullivan* affirming similar rules adopted by OPA in 1988.

In *Rust v. Sullivan*,[1] the Supreme Court upheld Title X regulations (adopted in 1988) which are remarkably similar to those proposed here.[2] The 1988 regulations required that grantees physically and financially separate their Title X services from any abortion-related activities and prohibited projects funded by Title X from counseling or referring clients for abortion.[3]

The Supreme Court determined that the requirement that Title X recipients separate the facilities, personnel, and records involved in Title X family planning services from those involved in abortion-related services was "based on a permissible construction of the [Title X] statute and [was] not inconsistent with congressional intent."[4] Importantly, the Court noted, "if one thing is clear from the legislative history, it is

[1] 500 U.S. 173 (1991).
[2] These regulations were later abandoned by the Clinton Administration.
[3] 53 Fed. Reg. 2922 (February 2, 1988).
[4] *Rust v.* Sullivan, 500 U.S. at 188.

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that Congress intended that Title X funds be kept separate and distinct from abortion-related activities."[5]

In upholding the prohibition on abortion counseling and referral, the Court noted that it was "designed to ensure that the limits of the [Title X] program [were] observed"[6] and provided assurance that a Title X grantee or its employees was not engaging in activities outside of [Title X]'s scope" when providing federally funded family planning services.[7]

The proposed amendments have exactly the same purposes as their 1988 predecessors and are constitutionally sound.

II. The proposed amendments are also consistent with numerous state laws. Specifically, ten states have enacted laws ensuring that Title X funding is kept separate and distinct from a grantee's abortion-related activities, and sixteen states have placed similar restrictions on recipients of state family planning grants.

Numerous states have already taken legislative action to ensure that recipients of Title X and/or state family planning funding are complying with program integrity requirements. Ten states have enacted laws ensuring that Title X funding is kept separate and distinct from the provision of abortion.[8] This objective has been accomplished through a variety of means (with some states enacting more than one related requirement):

- Four states restrict the allocation of Title X family planning funding to entities that do not provide abortions, do not contract or affiliate with abortion providers, and/or do not counsel or refer for abortions.[9]

[5] *Id.* at 190.
[6] *Id.* at 193.
[7] *Id.* at 194.
[8] Arizona, Kansas, Kentucky, Louisiana, Mississippi, Nebraska, Ohio, Oklahoma, South Carolina, and Wisconsin. Federal family planning program integrity requirements in Louisiana are not being enforced (per an agreement of the parties) pending the outcome of litigation. *June Medical Serv. v. Gee*, No. 3:16-cv-00444-BAJ-RLB (M.D. La. 2016). Similar requirements in Ohio are also enjoined pending the outcome of litigation. *Planned Parenthood of Greater Ohio. v. Himes*, No. 16-4027 (6th Cir. April 18, 2018), http://www.opn.ca6.uscourts.gov/opinions.pdf/18a0076p-06.pdf (last visited July 27, 2018).
[9] Louisiana, Mississippi, Nebraska, and Wisconsin.

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- Three states prohibit the allocation of Title X family planning funding to private providers that focus or specialize in "reproductive health" (*i.e.*, abortion providers).[10]
- Four states maintain priority systems for distributing Title X family planning funding that places "reproductive health" programs (*i.e.*, providers that most commonly perform abortions) in the lowest priority tier.[11]

Further, 16 states have enacted program integrity requirements that apply to state-funded family planning programs (with some states enacting more than one related requirement):[12]

- Thirteen states restrict the allocation of state family planning funding to entities that do not provide abortion.[13]
- Eight states restrict the allocation of state family planning funding to entities that do not contract or affiliate with abortion providers.[14]
- Four states restrict the allocation of state family planning funding to entities that do not counsel or refer for abortion.[15]
- Two states prohibit the allocation of state family planning funding to private providers that focus or specialize in "reproductive health" (*i.e.*, abortion providers).[16]
- Three states maintain priority systems for distributing state family planning funding that places "reproductive health" providers (*i.e.*, providers that most commonly perform abortions) in the lowest priority tier.[17]

These laws, along with the proposed amendments to the Title X program, represent a growing consensus that program integrity requirements are necessary to ensure both quality and accessible patient care and the proper administration of taxpayer dollars.

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[10] Arizona, Kansas, and Oklahoma.
[11] Kentucky, Ohio, South Carolina, and Wisconsin.
[12] Arizona, Arkansas, Colorado, Indiana, Iowa, Kentucky, Louisiana, Michigan, Mississippi, Missouri, North Carolina, Ohio, Oklahoma, Tennessee, Texas, and Wisconsin. Louisiana's requirements for its state-funded family planning programs are not being enforced pending the outcome of litigation.
[13] Arizona, Arkansas, Colorado, Indiana, Iowa, Louisiana, Michigan, Mississippi, Missouri, North Carolina, Ohio, Texas, and Wisconsin.
[14] Arizona, Arkansas, Iowa, Louisiana, Mississippi, Missouri, Texas, and Wisconsin.
[15] Arkansas, Michigan, Ohio, and Wisconsin.
[16] Kentucky and Oklahoma.
[17] South Carolina, Tennessee, and Texas.

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III. The need for the proposed Title X amendments is clearly demonstrated by the repeated failure of abortion providers to comply with state laws mandating the reporting of crimes against children, including sexual abuse and human trafficking.

Planned Parenthood is the nation's largest abortion provider and its largest recipient of Title X family planning funding. It receives approximately about $60 million in Title X funding annually.[18] In 2015, 474 of Planned Parenthood's nearly 650 facilities were Title X recipients.[19] Despite clear expectations that Title X grantees will comply with state abuse reporting laws,[20] Planned Parenthood (and other abortion providers) have repeatedly failed to report crimes against children.

A May 2018 report effectively documents Planned Parenthood's repeated failures to comply with state laws on the reporting of child sexual abuse.[21] Over the last decade, Planned Parenthood facilities in Alabama, Arizona, California, Colorado, Connecticut, Ohio, and Washington failed to report suspected cases of child sexual abuse.[22]

Further, a study by the Loyola University Chicago's Beazley Institute for Health Law and Policy[23] documents how frequently Planned Parenthood clinics come into contact with victims of human trafficking, often committing abortion on these victims but regularly failing to report these criminally abusive situations. The report notes that trafficking victims, including children, often had "significant contact with clinical treatment facilities, most commonly Planned Parenthood."[24]

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[18] Live Action, "Aiding Abusers: Planned Parenthood's cover-up of child sexual abuse," (May 2018), https://www.liveaction.org/wp-content/uploads/2018/05/Planned%20Parenthood%20Sexual%20Abuse%20Report%202018.pdf), at 5 (last visited July 26, 2018).

[19] Jennifer Frost, et. al., "Publicly Funded Contraceptive Services at U.S. Clinics, 2015," (April 2017), https://www.guttmacher.org/sites/default/files/report_pdf/publicly_funded_contraceptive_services_2015_3.pdf, at 7 (last visited July 26, 2017).

[20] *See, e.g.,* OPA, "Program Requirements for Title X Funded Family Planning Projects" (April 2014), at 16 ("Notwithstanding any other provision of law, no provider of services under Title X of the Public Health Service Act shall be exempt from any State law requiring notification or the reporting of child abuse, child molestation, sexual abuse, rape, or incest").

[21] Live Action, "Aiding Abusers: Planned Parenthood's cover-up of child sexual abuse," at 5.

[22] *Id* at 7-19.

[23] Laura Lederer and Christopher Wetzel, "The Health Consequences of Sex Trafficking and Their Implications for Identifying Victims in Healthcare Facilities," ANNALS OF HEALTH LAW, Vol. 23, Issue 1 (Winter 2014).

[24] *Id*. at 77.

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Planned Parenthood clinics were one of the most-visited facilities for trafficking victims,[25] second only to hospital emergency rooms. When asked why victims and their abusers went to Planned Parenthood facilities, one trafficking survivor said "because [Planned Parenthood] didn't ask any questions."[26]

Planned Parenthood is not the only abortion provider that has failed in its legal duty to report sexual crimes against children. For example, a December 2016 report[27] revealed that, between 2008 and 2016, at least 13 abortion providers (including non-Planned Parenthood providers) in at least 6 states (Alabama, Colorado, Indiana, Louisiana, Pennsylvania, and Texas) either failed to report suspected sexual abuse of minors or failed to implement practices to protect minors from ongoing sexual abuse.[28]

IV. The proposed amendment eliminating the requirement that Title X providers counsel and refer for abortion recognizes the importance of and provides protection for the First Amendment freedom of conscience.

A current requirement[29] that Title X grantees must, regardless of their deeply held beliefs and convictions, counsel and refer for abortion violates our Nation's longstanding commitment to protecting freedom of conscience. Conversely, the proposed elimination of this requirement comports with America's history, tradition, and laws and affirms that no one should be forced to commit an act that is against his or her moral, religious, or conscientious beliefs.

a. America's Founders Affirm Freedom of Conscience.

At the very root of the First Amendment's promise of the Free Exercise of Religion is the guarantee that the government cannot force a person to commit an act in violation of his or her religious faith or beliefs. The signers to the religion provisions of the First Amendment were united in a desire to protect freedom of conscience.

For example, Thomas Jefferson made it clear that freedom of conscience is not to be subordinate to the government: "[O]ur rulers can have authority over such natural

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[25] *Id.* Planned Parenthood saw nearly 30% of human trafficking victims who received medical care during their "abusive situations."
[26] *Id.* at 79.
[27] Americans United for Life, *Unsafe: America's Dangerous, Profit-Driven Abortion Industry Puts Women at Risk* (December 2016), www.unsafereport.org (last visited July 27, 2018).
[28] *Id.* at 86-87.
[29] 65 Fed. Reg. 41270 (July 3, 2000).

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rights only as we have submitted to them. The rights of conscience we never submitted, we could not submit. We are answerable for them to our God."[30] Jefferson also stated that no provision in the Constitution "ought to be dearer to man than that which protects the rights of conscience against the enterprises of civil authority."[31]

Likewise, James Madison, considered the Father of the Bill of Rights, was deeply concerned that the freedom of conscience of all Americans be protected. He stated that "[t]he Religion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate. This right is in its nature *an unalienable right*."[32] In fact, Madison described the conscience as "the most sacred of all property."[33]

b. The U.S. Supreme Court Affirms Freedom of Conscience.

The Supreme Court has consistently ruled in favor of protecting the freedom of conscience of every American. It has clearly stated that "[f]reedom of conscience. . . cannot be restricted by law."[34] In fact, "freedom of conscience" is referenced explicitly throughout the Supreme Court's more than two centuries of jurisprudence.[35]

c. Federal and State Laws Protect Freedom of Conscience.

The federal government and the states have enacted numerous measures expressing their commitment to protecting the First Amendment freedom of conscience of healthcare providers – such as Title X family planning grantees – not to participate in abortion (such as through mandated abortion counseling and referral).

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[30] Jefferson, *Notes on Virginia* (1785).
[31] Jefferson, Letter to New London Methodists (1809).
[32] Madison, *Memorial and Remonstrance Against Religious Assessments* ¶ 15 (1785) (emphasis added).
[33] Milton, THE QUOTABLE FOUNDING FATHERS: A TREASURY OF 2,500 WISE AND WITTY QUOTATIONS 36-37 (2005).
[34] *Cantwell v. Conn.*, 310 U.S. 296, 303 (1940).
[35] *See*, *e.g.*, *Baird v. State Bar of Ariz.*, 401 U.S. 1, 6 (1971) ("This conjunction of liberties is not peculiar to religious activity and institutions alone. The First Amendment gives freedom of mind the same security as freedom of conscience."); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 n.2 (1969) (referencing "constitutionally protected freedom of conscience"); *National Institute of Family and Life Advocates v. Beccera*, No. 16-1140, slip op. at 26 (Kennedy, J. concurring) (June 26, 2018) ("Governments must not be allowed to force persons to express a message contrary to their deepest convictions. Freedom of speech secures freedom of thought and belief. This law imperils those liberties.").

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Federal laws, including the "Church Amendments,"[36] the Coates Amendment to the Public Services Act,[37] and the Weldon Amendment,[38] protect the right of both individual and institutional healthcare providers to decline to participate in abortion.

Similarly, 48 states protect the right of individual healthcare providers to decline to participate in abortion,[39] while 43 states provide similar protections to healthcare institutions.[40]

[36] 42 U.S.C. §300a-7(b), *et. seq*. The first "Church Amendment" was adopted in 1973, the year *Roe v. Wade* was decided. It provides that the receipt of funding through three federal programs cannot be used as a basis to compel a hospital or individual to participate in an abortion to which the hospital or individual has a moral or religious objection.

[37] 42 U.S.C. § 238n. This provision prohibit the federal government and state or local governments that receive federal financial assistance from discriminating against individual and institutional healthcare providers, including participants in medical training programs, who refuse to receive training in abortion; require or provide such training; perform abortions; or provide referrals or make arrangements for such training or abortions.

[38] Consolidated Appropriations Act 2008, Pub. L. No. 110-161, § 508(d), 121 Stat. 1844, 2209 (2007) (formerly known as the Hyde-Weldon Amendment). The Weldon Amendment provides that no federal, state, or local government agency or program that receives funds in the Labor, Health and Human Services (LHHS) appropriations bill may discriminate against a healthcare provider because the provider refuses to provide, pay for, provide coverage of, or refer for abortion.

[39] Forty-eight states protect (to varying degrees) the freedom of conscience of certain healthcare providers to decline to participate in abortion: Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, Wisconsin, West Virginia, and Wyoming.

Only New Hampshire and Vermont failed to protect healthcare freedom of conscience.

[40] Forty-three states protect healthcare institutions that decline to participate in abortion: Alaska (private), Arizona, Arkansas, California (religious), Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana (private), Iowa (private), Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts (private), Michigan, Minnesota (private), Mississippi, Missouri, Montana (private), Nebraska, Nevada (private), New Jersey (private), New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon (private), Pennsylvania (private), South Carolina (private), South Dakota, Tennessee, Texas (private), Utah, Virginia, Washington, Wisconsin, and Wyoming (private).

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The elimination of the requirement that family planning services funded by Title X provide abortion counseling and referral similarly protects the fundamental freedom of conscience and is in keeping with the letter and spirit of dozens of federal and state laws.

Respectfully submitted,

/s/ Kevin H. Theriot
Senior Counsel

/s/ Denise M. Burke
Senior Counsel

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