From: Clark, Charity
To: John Klar
Subject: PRA request, dated November 18, 2019 - Tranche 4
Date: Thursday, October 15, 2020 3:24:21 PM
Attachments: Klar Responses Tranche 4_Redacted.pdf
Klar PRA Tranche 4 Letter.pdf

Please see attached.

Charity R. Clark
Chief of Staff
Office of the Attorney General
109 State Street
Montpelier, Vermont 05609
802-828-3171
Pronouns: she/her/hers

THOMAS J. DONOVAN, JR.
ATTORNEY GENERAL

JOSHUA R. DIAMOND
DEPUTY ATTORNEY GENERAL

SARAH E.B. LONDON
CHIEF ASST. ATTORNEY GENERAL

TEL: (802) 828-3171

http://www.ago.vermont.gov

STATE OF VERMONT
OFFICE OF THE ATTORNEY GENERAL
109 STATE STREET
MONTPELIER, VT
05609-1001

October 15, 2020

via email to [redacted]

John Klar
[redacted]
Brookfield, VT 05036

Re: Responses to Vermont Public Records Act request, dated November 18, 2019, Tranche 4

Dear Mr. Klar:

The fourth tranche of records responsive to your Vermont Public Records Act ("PRA") request dated November 18, 2019, later revised to encompass records during the period May 1, 2018 to May 10, 2019, is now available. Your request asked for the following records:

> [C]opies of public records that relate to communications between Attorney General TJ Donovan, (the Vermont Office of the Attorney General (VOAG), its employees or agents) and Planned Parenthood, or any organizations, superpacs, agents, representatives or employees thereof, and emails, documents, memoranda, notes, files or other data related thereto. Also requested are any and all internal VOAG or state interagency emails, documents, memoranda, notes, files or other data related to Planned Parenthood or its agents, representatives, employees or related entities, particularly but not limited to any communications of any kind related to Act 57 or Proposal 5.

Documents that comprise Tranche 4 are attached. In this tranche, you will see that some records have been redacted due to the exemption provided under 1 V.S.A. §§ 317(c)(7) (personal information) and 317(c)(10) (list of names compiled). I have also redacted any content that is not responsive to your request, such as information about a case unrelated to the subject to your

request. If you believe any document has been redacted in error, you may appeal to:

Joshua Diamond, Deputy Attorney General
Vermont Attorney General's Office
109 State Street
Montpelier, Vermont 05609

Once we have collected an additional group of documents, I will send the fifth tranche of responsive records.

Sincerely yours,

/s/_____
Charity R. Clark

Attachment

From:	Clark, Charity
To:	Donovan, Thomas; Diamond, Joshua
Cc:	Silver, Natalie (Natalie.Silver@vermont.gov); Spottswood, Eleanor
Subject:	Draft press release: Title X lawsuit motion
Date:	Thursday, March 21, 2019 10:08:00 AM
Attachments:	Presser VERMONT MOVES TO PROTECT FUNDING IN TITLE X LAWSUIT -elps and nat edits + CRC edits.docx

Hi, T.J.,

Here is a draft press release in the Title X lawsuit. We don't have a time that the press embargo will be lifted, but we assume later this afternoon. We will link to the motion for PI once final. Please let us know if you approve the release. I have highlighted your quote.

[redacted]

Charity

VERMONT MOVES TO PROTECT FUNDING IN TITLE X LAWSUIT

Preliminary Injunction Would Stay New Federal Rule

MONTPELIER – Attorney General T.J. Donovan announced that Vermont, and 20 other states, have moved to protect Title X funding while a lawsuit challenging the constitutionality of the Trump Administration's Title X "gag rule" is pending. The "gag rule" limits providers' ability to give neutral, factual information to their patients about abortion, and prohibits abortion referrals. The new rule also redirects funding priorities from the CDC's birth control recommendations to "natural family planning methods." Attorney General Donovan seeks to protect funding to 10 of Vermont's Title X-funded healthcare centers that provide essential access to healthcare services. In Vermont, 10,000 people rely on Title X for basic healthcare. Title X is the only national federal grant program that is dedicated solely to providing comprehensive family planning and preventative health care. In Vermont, the only recipients of Title X funds are 10 Planned Parenthood healthcare centers located around the State.

"Thousands of low-income Vermonters rely on these funds for their basic healthcare," Attorney General Donovan said. Title X funds basic healthcare services, including wellness exams, cervical and breast cancer screenings, birth control, contraception education, and testing for sexually transmitted diseases and HIV. "It's unreasonable to ask healthcare providers to withhold crucial information from their patients."

As a result of the new regulations, Title X providers will be forced to give incomplete and misleading information to patients—a "gag rule" on providing services or information related to abortion, even to patients who affirmatively say that they want one. The gag rule would also apply to any "referral partners" of Title X health care centers. The new rule stretches Title X funding to try to cover gaps in healthcare created by employers who opt out of providing insurance to cover contraception. The new rule also redefines "family planning" to promote "natural family planning methods" over more effective forms of birth control. The new rule never mentions the CDC's evidence-based best practices guidelines, "Providing Quality Family Planning Services," which was the gold standard for healthcare under the old Title X regulations. In addition, the new rule requires Title X health care centers to be physically located in a separate facility from any abortion provider. Title X funding is not, and never has been, used for abortions.

"This gag rule violates medical ethics and nationally accredited standards, and reputable institutions including the American Medical Association strongly oppose it," said Lucy Leriche, Vice President of Public Policy at Planned Parenthood of Northern New England. "We are grateful to Attorney General Donovan for his leadership and action to prevent the Trump Administration's gag rule from taking effect in early May. We will continue fighting to protect the ability of providers to give the medically ethical, accurate, quality health care that our patients have come to expect from PPNNE."

Funding for all of Vermont's Title X healthcare centers is jeopardized by the new rule. Without Title X funding, there is not yet any other organization capable of providing Title X services statewide. Vermont has 10 healthcare centers supported by Title X funds, located in Barre, Bennington, Brattleboro, Hyde Park, Rutland, Middlebury, Newport, St. Albans, St. Johnsbury, and White River Junction. All provide crucial basic health care to underserved populations. Title X has been providing high quality preventative health care to millions of Americans for decades.

The basis for the lawsuit, filed by 21 states, is that the new Title X rule is contrary to

the U.S. Constitution and to governing statutes, including the Administrative Procedures Act. If the rule went into effect, it will harm Vermont by increasing health care costs, including costs to Medicaid spending, as a result of an increase in unintended pregnancies, cancers not detected in early stages, and the spread of sexually transmitted infections.

# # #

Charity R. Clark
Chief of Staff
Office of the Attorney General
109 State Street
Montpelier, Vermont 05609
802-828-3737

STATE OF VERMONT
OFFICE OF THE ATTORNEY GENERAL
109 STATE STREET
MONTPELIER, VT 05609-1001

FOR IMMEDIATE RELEASE:
March 21, 2019

CONTACT: Eleanor Spottswood
Assistant Attorney General
802-828-3171

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# # #

From:	Silver, Natalie
To:	[redacted]
Subject:	FOR IMMEDIATE RELEASE: AG DONOVAN JOINS BRIEF PROTECTING WOMEN'S ACCESS TO ABORTION SERVICES
Date:	Friday, April 5, 2019 2:48:54 PM
Attachments:	ATTORNEY GENERAL DONOVAN JOINS BRIEF PROTECTING WOMEN'S ACCESS TO ABORTION SERVICES .pdf

FOR IMMEDIATE RELEASE: April 5, 2019
CONTACT: Eleanor Spottswood
Assistant Attorney General
802-828-3171

ATTORNEY GENERAL DONOVAN JOINS BRIEF PROTECTING WOMEN'S ACCESS TO ABORTION SERVICES

MONTPELIER- Attorney General Donovan announced today that he joined a coalition of 20 attorneys general in filing an amicus brief asking the U.S. Court of Appeals for the Sixth Circuit to affirm a lower court's finding about a Kentucky abortion law. The lower court found that the regulating abortion services is unconstitutional under the 14th Amendment of the U.S. Constitution. The brief argues that the availability of abortion services in neighboring states does not excuse a state from the Constitution's prohibition on unduly burdening a woman's ability to access abortion services in her home state. Additionally, the brief urges the Court to ensure that regulations imposed on abortion services actually promote women's health without erecting substantial obstacles to the availability of these services. In Vermont, Attorney General Donovan has actively supported the passage of an amendment to the Vermont constitution that guarantees a woman's right to an abortion and has worked to protect women's access to preventative and reproductive healthcare services.

A copy of the brief can be found here.

The implications of this case for the women of Kentucky are particularly severe, as the law at issue would effectively eliminate the only abortion provider in the state. In their brief, the attorneys general further argue that allowing a state—like Kentucky—to rely on neighboring states for abortion services harms neighboring states. Allowing Kentucky's analysis could have unintended consequences on neighboring states whose demand for abortion services could increase.

Plaintiff-Appellee EMW Women's Surgical Center (EMW) is Kentucky's only

licensed abortion facility. While EMW has provided safe abortions since the 1980s, in 2017, Kentucky's Cabinet for Health and Family Services (Cabinet) notified EMW that its license to perform abortions had been renewed in error, citing alleged violations of Kentucky law. EMW filed suit in March 2017, with Planned Parenthood later intervening in the case. Planned Parenthood had been trying unsuccessfully to obtain an abortion license until the Cabinet abruptly informed the organization that its transfer and transport agreements with a hospital and ambulance company were allegedly "deficient."

The District Court for the Western District of Kentucky ultimately agreed with EMW and Planned Parenthood, finding that the Kentucky law regarding transport and transfer agreement requirements imposed an undue burden on Kentucky women seeking to exercise their constitutional right to access abortion services. In response, the Cabinet appealed this decision last month in the federal courts, challenging the District Court's findings. Today's brief was filed in support of Planned Parenthood and EMW's legal challenge.

Joining Attorney General Donovan in filing today's brief are the attorneys general of California, Connecticut, Delaware, the District of Columbia, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Mexico, New York, North Carolina, Oregon, Pennsylvania, Virginia and Washington.

###

Natalie Silver
Community Outreach and Policy Coordinator
Vermont Attorney General's Office
Natalie.Silver@vermont.gov
802 595 8679

STATE OF VERMONT
OFFICE OF THE ATTORNEY GENERAL
109 STATE STREET
MONTPELIER, VT 05609-1001

FOR IMMEDIATE RELEASE:
April 5, 2019

CONTACT: Eleanor Spottswood
Assistant Attorney General
802-828-3171

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Joining Attorney General Donovan in filing today's brief are the attorneys general of California, Connecticut, Delaware, the District of Columbia, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Mexico, New York, North Carolina, Oregon, Pennsylvania, Virginia and Washington.

###

From: Spottswood, Eleanor
To: Clark, Charity; Silver, Natalie
Subject: FW: re Revised Template Release re Kentucky Abortion Services
Date: Thursday, April 4, 2019 12:20:02 PM
Attachments: Kentucky Abortion Services Template Release.docx
DOC 53 Brief as Amici Curiae in Support of Plaintiff-Appellees.pdf

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Here you go.

Eleanor L.P. Spottswood
Assistant Attorney General
Vermont Attorney General's Office
109 State Street
Montpelier, Vermont 05609
802-828-3178
eleanor.spottswood@vermont.gov

From: Monica C. Moazez <MMoazez@ag.nv.gov>
Sent: Thursday, April 4, 2019 12:19 PM
To: 'KOHolleran@oag.state.va.us' <KOHolleran@oag.state.va.us>; 'Nathan.Blake@ag.iowa.gov' <Nathan.Blake@ag.iowa.gov>; 'Eric.Tabor@ag.iowa.gov' <Eric.Tabor@ag.iowa.gov>; 'ABraun@atg.state.il.us' <ABraun@atg.state.il.us>; 'KJanas@atg.state.il.us' <KJanas@atg.state.il.us>; 'Kamala.H.Shugar@doj.state.or.us' <Kamala.H.Shugar@doj.state.or.us>; 'Donna.Cassutt@ag.state.mn.us' <Donna.Cassutt@ag.state.mn.us>; 'Elizabeth.Wilkins@dc.gov' <Elizabeth.Wilkins@dc.gov>; 'Natalie.Ludaway@dc.gov' <Natalie.Ludaway@dc.gov>; 'William.Chang@dc.gov' <William.Chang@dc.gov>; 'Lisa.Raymond@dc.gov' <Lisa.Raymond@dc.gov>; 'Caroline.vanzile@dc.gov' <Caroline.vanzile@dc.gov>; 'loren.alikhan@dc.gov' <loren.alikhan@dc.gov>; 'Alfred.Dillione@state.de.us' <Alfred.Dillione@state.de.us>; 'Aaron.Goldstein@state.de.us' <Aaron.Goldstein@state.de.us>; 'Gregory.Patterson@state.de.us' <Gregory.Patterson@state.de.us>; 'Lauren.Vella@state.de.us' <Lauren.Vella@state.de.us>; Spottswood, Eleanor <Eleanor.Spottswood@vermont.gov>; 'Dana.O.Viola@hawaii.gov' <Dana.O.Viola@hawaii.gov>; 'Krishna.F.Jayaram@hawaii.gov' <Krishna.F.Jayaram@hawaii.gov>; 'clyde.j.wadsworth@hawaii.gov' <clyde.j.wadsworth@hawaii.gov>; 'Kimberly.T.Guidry@hawaii.gov' <Kimberly.T.Guidry@hawaii.gov>; 'SDearmin@ncdoj.gov' <SDearmin@ncdoj.gov>; 'SWood@ncdoj.gov' <SWood@ncdoj.gov>; 'TMaestas@nmag.gov' <TMaestas@nmag.gov>; 'susan.herman@maine.gov' <susan.herman@maine.gov>; 'Mike.Firestone@mass.gov' <Mike.Firestone@mass.gov>; 'Joanna.Lydgate@mass.gov' <Joanna.Lydgate@mass.gov>; 'bessie.dewar@mass.gov' <bessie.dewar@mass.gov>; 'david.kravitz@state.ma.us' <david.kravitz@state.ma.us>; 'KateK@atg.wa.gov' <KateK@atg.wa.gov>; 'JeffS2@atg.wa.gov' <JeffS2@atg.wa.gov>; Edmunson Kristina <kristina.edmunson@doj.state.or.us>; 'Andrea.Oser@ag.ny.gov' <Andrea.Oser@ag.ny.gov>; 'mfischer@attorneygeneral.gov' <mfischer@attorneygeneral.gov>; 'cquattrocki@oag.state.md.us' <cquattrocki@oag.state.md.us>; 'Clare.Kindall@ct.gov' <Clare.Kindall@ct.gov>; 'ShermanA@michigan.gov' <ShermanA@michigan.gov>
Cc: Heidi P. Stern <HStern@ag.nv.gov>; Jeffrey M. Conner <JConner@ag.nv.gov>; Jessica L. Adair

<JAdair@ag.nv.gov>
Subject: Re: re Revised Template Release re Kentucky Abortion Services

All,

Please see the attached template release in its final form—the only change is the addition of California to the list of states—including Nevada, our coalition is up to 21 states. I have also attached the filed amicus brief and am lifting the press embargo at this time. In your social media promotion, feel free to tag our office Twitter @NevadaAG or Facebook account https://www.facebook.com/NVAttorneyGeneral

Thank you for your participation in this coalition, and please let me know if you have any additional questions or concerns.

Best,

Monica Moazez
Communications Director
Nevada Attorney General's Office
555 E. Washington Ave.
Las Vegas, NV 89101
(702) 486-0657

From: Monica C. Moazez
Sent: Wednesday, April 3, 2019 10:34 AM
To: 'KOHolleran@oag.state.va.us'; 'Nathan.Blake@ag.iowa.gov'; 'Eric.Tabor@ag.iowa.gov'; 'ABraun@atg.state.il.us'; 'KJanas@atg.state.il.us'; 'Kamala.H.Shugar@doj.state.or.us'; 'Donna.Cassutt@ag.state.mn.us'; 'Elizabeth.Wilkins@dc.gov'; 'Natalie.Ludaway@dc.gov'; 'William.Chang@dc.gov'; 'Lisa.Raymond@dc.gov'; 'Caroline.vanzile@dc.gov'; 'loren.alikhan@dc.gov'; 'Alfred.Dillione@state.de.us'; 'Aaron.Goldstein@state.de.us'; 'Gregory.Patterson@state.de.us'; 'Lauren.Vella@state.de.us'; 'Eleanor.spottswood@vermont.gov'; 'Dana.O.Viola@hawaii.gov'; 'Krishna.F.Jayaram@hawaii.gov'; 'clyde.j.wadsworth@hawaii.gov'; 'Kimberly.T.Guidry@hawaii.gov'; 'SDearmin@ncdoj.gov'; 'SWood@ncdoj.gov'; 'TMaestas@nmag.gov'; 'susan.herman@maine.gov'; 'Mike.Firestone@mass.gov'; 'Joanna.Lydgate@mass.gov'; 'bessie.dewar@mass.gov'; 'david.kravitz@state.ma.us'; 'KateK@atg.wa.gov'; 'JeffS2@atg.wa.gov'; Edmunson Kristina; 'Andrea.Oser@ag.ny.gov'; 'mfischer@attorneygeneral.gov'; 'cquattrocki@oag.state.md.us'; 'Clare.Kindall@ct.gov'; 'ShermanA@michigan.gov'
Cc: Heidi P. Stern; Jeffrey M. Conner; Jessica L. Adair
Subject: re Revised Template Release re Kentucky Abortion Services

All,

Please see a slightly revised template release for today's press—revisions have been made to the paragraph beneath the AG Quote, as well as to the final paragraph listing the participating states. At this time, our coalition includes 20 states and territories (including Nevada), and I will let you know if there are any last minute participants. Please continue to hold until I follow up with an email noting that the embargo has been lifted.

Many thanks,

Monica Moazez
Communications Director
Nevada Attorney General's Office
555 E. Washington Ave.
Las Vegas, NV 89101
(702) 486-0657

Attorney General XXXX Joins Multi-State Amicus Brief Protecting Women's Access to Abortion Services

Today, Attorney General XXXX joined a coalition of 20 attorneys general in filing an amicus brief asking the U.S. Court of Appeals for the Sixth Circuit to affirm a lower court's finding that a Kentucky law regulating abortion services is unconstitutional under the 14th Amendment of the U.S. Constitution. The brief, led by Nevada Attorney General Ford, argues that the availability of abortion services in neighboring states does not excuse a state from the Constitution's prohibition on unduly burdening a woman's ability to access abortion services in her home state. Additionally, the brief urges the Court to ensure that regulations imposed on abortion services actually promote women's health without erecting substantial obstacles to the availability of these services.

The implications of this case for the women of Kentucky are particularly severe, as the law at issue would effectively eliminate the only abortion provider in the state. In their brief, the attorneys general further argue that allowing a state—like Kentucky—to rely on neighboring states for abortion services harms neighboring states. Allowing this analysis could have unintended consequences on neighboring states whose demand for abortion services could increase.

AG Quote

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This amicus brief was led by Nevada Attorney General Aaron Ford and joined by the attorneys general of California, Connecticut, Delaware, the District of Columbia, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Michigan, Minnesota, New Mexico, New York, North Carolina, Oregon, Pennsylvania, Vermont, Virginia and Washington.

###

From:	Spottswood, Eleanor
To:	Clark, Charity; Silver, Natalie
Subject:	FW:
Date:	Tuesday, March 19, 2019 10:36:56 AM
Attachments:	2019-03-19-Planned Parenthood v. HHS State Amicus.pdf TEMPLATE 19.03.19 Coalition of 21 Attorneys General File Amicus Brief in Support of Evidence.docx

Hi Charity and Natalie,

This is an amicus we joined in support of Planned Parenthood, challenging the new application criteria for the Teen Pregnancy Prevention (TPP) program. The new criteria shift the focus of the program away from evidence-based methods and towards abstinence-only education. I'm not sure why Josh only forwarded this draft template press release to me, but I'm passing it on to you!

Ella

Eleanor L.P. Spottswood
Assistant Attorney General
Vermont Attorney General's Office
109 State Street
Montpelier, Vermont 05609
802-828-3178
eleanor.spottswood@vermont.gov

From: Diamond, Joshua <Joshua.Diamond@vermont.gov>
Sent: Tuesday, March 19, 2019 10:34 AM
To: Spottswood, Eleanor <Eleanor.Spottswood@vermont.gov>
Subject: FW:

FYI

Joshua R. Diamond, Deputy Attorney General
Vermont Attorney General's Office
109 State Street
Montpelier, Vermont 05609
802-828-3175
joshua.diamond@vermont.gov

interactions with the Office of the Vermont Attorney General, you are advised to review Title 2, sections 261-268 of the Vermont Statutes Annotated, as well as the Vermont Secretary of State's most recent compliance guide available at https://www.sec.state.vt.us/elections/lobbying.aspx.

From: Hand, Karissa M. <khand@attorneygeneral.gov>
Sent: Tuesday, March 19, 2019 10:04 AM
To: Sartoretto, Marirose <msartoretto@attorneygeneral.gov>; Crandall, Jennifer <jcrandall@attorneygeneral.gov>
Subject:

Good morning all,

I've attached the template release for the Planned Parenthood Teen Pregnancy Prevention program amicus brief. As a reminder, this is embargoed until **today, March 19th, at 12pm EST.**

Thank you and have a great rest of your day.

Karissa Hand
Deputy Press Secretary
Office of Pennsylvania Attorney General Josh Shapiro
Email: khand@attorneygeneral.gov
Phone: 215-478-5990

No. 18-35920

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PLANNED PARENTHOOD OF GREATER WASHINGTON AND NORTHERN IDAHO; PLANNED PARENTHOOD OF THE GREAT NORTHWEST AND THE HAWAIIAN ISLANDS; PLANNED PARENTHOOD OF THE HEARTLAND,

Plaintiffs-Appellants,

v.

U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES; ALEX AZAR II, *in his official capacity as Secretary, U.S. Department of Health and Human Services*; VALERIE HUBER, *in her official capacity as the Senior Policy Advisor for the Office of the Assistant Secretary for Health*,

Defendants-Appellees.

On Appeal from the United States District Court
for the Eastern District of Washington (No. 18-cv-207)
Hon. Thomas O. Rice

BRIEF FOR THE COMMONWEALTHS OF PENNSYLVANIA, MASSACHUSETTS, AND VIRGINIA, AND THE STATES OF CALIFORNIA, CONNECTICUT, DELAWARE, HAWAI'I, ILLINOIS, IOWA, MARYLAND, MICHIGAN, MINNESOTA, NEVADA, NEW JERSEY, NEW YORK, NORTH CAROLINA, OREGON, RHODE ISLAND, VERMONT, AND WASHINGTON, AND THE DISTRICT OF COLUMBIA, AS AMICI CURIAE IN SUPPORT OF PLAINTIFFS-APPELLANTS

JOSH SHAPIRO
Attorney General of Pennsylvania

MICHAEL J. FISCHER
Chief Deputy Attorney General
AMBER SIZEMORE
Deputy Attorney General

Office of Attorney General
1600 Arch Street, Suite 300
Philadelphia, PA 19103
(215) 560-2171
mfischer@attorneygeneral.gov

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

INTEREST OF AMICI STATES

The Commonwealths of Pennsylvania, Massachusetts, and Virginia, and the States of California, Connecticut, Delaware, Hawai‘i, Illinois, Iowa, Maryland, Michigan, Minnesota, Nevada, New Jersey, New York, North Carolina, Oregon, Rhode Island, Vermont, and Washington, and the District of Columbia (the "States") as amici curiae have a fundamental interest in promoting their residents' health and well-being. The federal Teenage Pregnancy Prevention Program ("TPP Program") provides vital funding for state, local, and community programs that have been shown to reduce rates of teenage pregnancy. It also serves to incubate new and innovative programs that, if proven effective in addressing teenage pregnancy, can be replicated elsewhere on a broader scale. The TPP Program is an indispensable component of State efforts to reduce the physical and medical risks of teenage pregnancy as well as its associated emotional, social, and financial costs.[1]

[1] Ctr. for Disease Control (CDC), *Vital Signs: Preventing Pregnancies in Younger Teens* (Apr. 2014), https://www.cdc.gov/vitalsigns/young-teen-pregnancy/index.html; Ctr. for Disease Control, *About Teen Pregnancy in the United States* (May 2017), https://www.cdc.gov/teenpregnancy/about/index.htm; Office of Adolescent Health (OAH) of the U.S. Dep't of Health & Human Servs. (HHS), *Negative Impacts of Teen Childbearing* (Nov. 2016), https://www.hhs.gov/ash/oah/adolescent-development/reproductive-health-and-teen-pregnancy/teen-pregnancy-and-childbearing/teen-childbearing/index. html.

Teenage parenthood has been shown to have an adverse impact on educational opportunities and economic security.[2] Children born to teenagers are at increased risk of poor educational, behavioral, and health outcomes.[3] The States have a compelling interest in preventing teenage pregnancy to protect the well-being and economic security of their teenage residents and their children and families. In addition, teenage births cost taxpayers between $9.4 billion and $28 billion a year through public assistance payments, lost revenue, and greater expenditures for public health care, foster care, and criminal justice services.[4] Preventing teenage pregnancy is estimated to have saved U.S. taxpayers $4.4 billion in 2015 alone.[5] The States have a strong interest in protecting their taxpayers from these associated costs.

The TPP Program has played a critical role in State efforts to reduce teen pregnancy because it was designed by Congress to promote medically accurate, evidence-based programs that have been proven effective through rigorous evaluation. Unlike other government funding programs—including other programs

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[2] *Vital Signs*, *supra* note 1.

[3] *Negative Impacts*, *supra* note 1.

[4] *Negative Impacts*, *supra* note 1; Nat'l Conference of State Legislatures, *Teen Pregnancy Prevention* (Oct. 11, 2018), http://www.ncsl.org/research/health/teen-pregnancy-prevention.aspx#5.

[5] *About Teen Pregnancy*, *supra* note 1.

specifically targeted toward teen pregnancy—the TPP Program does not require adherence to any particular ideology or methodology. Rather, the emphasis is on identifying what works—and on replicating programs that work, while also fostering the development and testing of new programs.

Congress expressly directed that all TPP Program grant funds support programs that are "medically accurate and age appropriate." *See* Consolidated Appropriations Act, 2018, Pub. L. No. 115-141, 132 Stat. 348, 766 (2018) ("2018 Appropriations Act"). Consistent with these goals, Congress chose to direct the largest portion of grant funding under the TPP Program to replicate programs "that have been proven effective through rigorous evaluation to reduce teenage pregnancy, behavioral risk factors underlying teenage pregnancy, or other associated risk factors" ("Tier 1 Grants"). *Id*. Even the additional TPP Program funds Congress designated for "research and demonstration" must still be "medically accurate and age appropriate" and are intended to "develop, replicate, refine, and test additional models and innovative strategies for preventing teenage pregnancy." ("Tier 2 Grants"). *Id*.

The 2018 Funding Opportunity Announcements ("FOAs") threaten to frustrate the design of the TPP Program and undermine the States' efforts to reduce

teen pregnancy.[6] The FOAs would shift the focus of the grant process to rewarding programs that promote a particular "abstinence-only" ideology, rather than following Congress's mandate to fund programs that are medically accurate and have been proven to work through rigorous evaluation. If the 2018 FOAs are allowed to stand, federal funds will be directed to less-effective or medically inaccurate programs, while others that have been proven to work will languish. As a result, more teens will be at risk of becoming pregnant, imposing significant additional costs on the States and their residents. For these reasons, the district court should be reversed and directed to enter summary judgment in favor of Plaintiffs.

[6] U.S. Dep't of Health & Human Servs., *Phase I Replicating Programs (Tier 1) Effective in the Promotion of Healthy Adolescence and the Reduction of Teenage Pregnancy and Associated Risk Behaviors* (Apr. 20, 2018) ("2018 Tier 1 FOA"); *U.S. Dep't of Health & Human Servs., Phase I New and Innovative Strategies (Tier 2) to Prevent Teenage Pregnancy and Promote Healthy Adolescence* (Apr. 20, 2018) ("2018 Tier 2 FOA").

ARGUMENT

I. The States Have A Strong Interest In Ensuring That TPP Program Funds Are Used To Support Medically Accurate, Evidence-Based Programs Proven To Reduce Teen Pregnancy.

A. Congress Designed the TPP Program to Promote Programs That Have Been Proven Effective Through Rigorous Evaluation.

Since its creation in 2009, the TPP Program has provided nearly $1 billion[7] for medically accurate, evidence-based teenage pregnancy prevention, awarding grants to 186 state, local, and community programs.[8] Those programs reached half a million teens from FY2010–FY2014, and are anticipated to reach 1.2 million more from FY2015–FY2019, with a focus on high-need communities and vulnerable youth, including those of color, in foster care, or in rural areas.[9]

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[7] From 2010 to 2018, the TPP Program received appropriations totaling $923,000,000. *See* Cong. Research Serv., *Teenage Pregnancy Prevention: Statistics and Programs* (Jan. 15, 2016) at CRS-23-24; Consol. Appropriations Act, 2017, Pub. L. No. 115-31, 131 Stat 135; Consol. Appropriations Act, 2018, Pub. L. No. 115-141, 132 Stat 348 ("2018 Appropriations Act").

[8] There were 102 grantees for the first round of five-year funding cycles in 2010 and 84 grantees for the second round in 2015. *See* Off. of Adolescent Health of the U.S. Dep't of Health & Human Servs., *About the Teen Pregnancy Prevention (TPP) Program* (Feb. 2017), https://www.hhs.gov/ash/oah/grant-programs/teen-pregnancy-prevention-program-tpp/about/index.html.

[9] Off. of Adolescent Health of the U.S. Dep't of Health & Human Servs., *Teen Pregnancy Prevention Program By the Numbers*, https://www.hhs.gov/ash/oah/sites/default/files/tpp-cohort-1/tpp-bythenumbers-infographic.pdf; Off. of Adolescent Health of the U.S. Dep't of Health & Human Servs., *Teen Pregnancy Prevention Program Teens Reached*; https://www.hhs.gov/ash/oah/sites/default/files/tpp-cohort-1/tpp-teensreached-infographic.pdf; and Off. of Adolescent Health of the U.S. Dep't of Health & Human Servs., *Performance Measures Snapshot, The Teen Pregnancy Prevention*

In creating the TPP Program and appropriating its annual funding, Congress has consistently emphasized the need to base awards on evidence-based criteria, not ideology. To this end, Congress has mandated that TPP funding be used only to support programs that are "medically accurate." 2018 Appropriations Act, 132 Stat. at 733. In order to ensure that programs are effective while also encouraging innovation, Congress has mandated that TPP grant funding be administered through two distinct but interrelated grant award "tiers." Tier 1 funds are to be spent "replicating programs that have been proven effective through rigorous evaluation to reduce teenage pregnancy, behavioral risk factors underlying teenage pregnancy, or other associated risk factors." *Id.* Tier 2 funds, on the other hand, are to support grants that through "research and demonstration" will "develop, replicate, refine, and test additional models and innovative strategies for preventing teenage pregnancy."[10]

In devising this structure, Congress sought to ensure that Tier 1 funds are awarded exclusively to programs that have already been validated through rigorous

Program: Performance in Fiscal Year 2017 (Year 2) (Oct. 2017), https://www.hhs.gov/ash/oah/sites/default/files/tpp-performance-measures-year-2-brief.pdf.

[10] The appropriations acts governing the TPP Program have included virtually identical language from 2009 to the present. *Compare* Consol. Appropriations Act, 2010, Pub. L. No. 11-117, 123 Stat 3034, *with* Consol. Appropriations Act, 2018, Pub. L. No. 115-141, 132 Stat 348.

evaluation using evidence-based criteria. Tier 2 funds are to be used to support new and innovative programs that, if found to be effective, may eventually become eligible for Tier 1 funding. The result is that the majority of TPP funding is spent on programs that have proven effective, while some funding promotes the development of new ideas and adds to the body of evidence by which pregnancy prevention programs can be evaluated and improved. In part due to its innovative structure, the TPP Program has been recognized as a successful model of self-sustainable, evidence-based policy making.[11] But the TPP model only works if both programs function as intended. Altering the criteria for either tier threatens the thoughtful, deliberate balance achieved through the existing structure.

B. The TPP Program Helps the States Address the Significant Costs Associated with Teen Pregnancy.

The States utilize the TPP Program to identify and support effective, evidence-based programs to reduce teenage pregnancy among their residents and address the wide range of individual and public costs associated with teenage pregnancy. As a result, the States will bear the costs associated with reduced access to effective teenage pregnancy prevention programs.

[11] Comm'n on Evidence-Based Policy Making, *The Promise of Evidence-Based Policymaking* (Sept. 2017), https://www.cep.gov/report/cep-final-report.pdf.

1. Teenage pregnancies negatively impact the health and well-being of teenage parents and their children.

During 2017, there were 194,284 teenage births nationwide:[12] 5,899 in Pennsylvania,[13] and 18,935 in California.[14] Although teenage birth rates have generally declined in the United States since the creation of the TPP Program,[15] teenage pregnancies continue to carry serious physical and medical risks, as well as emotional, social, and financial costs, for teenage mothers and fathers, and their children.

The adverse consequences of becoming a teenage mother are well-documented.[16] Approximately half of teenage mothers do not finish high school, and teenage mothers and their families are more likely to live in poverty and depend on public assistance.[17] In Pennsylvania, 1,375 high school students cited child care issues as their reason for dropping out of school from 2011 to 2017, with

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[12] Ctr. for Disease Control, *Vital Statistics Rapid Release: Births: Provisional Data for 2017*, https://www.cdc.gov/nchs/data/vsrr/report004.pdf.

[13] Power to Decide (The Campaign to Prevent Unplanned Pregnancy), *Pennsylvania Data*, https://powertodecide.org/what-we-do/information/national-state-data/pennsylvania.

[14] Power to Decide (The Campaign to Prevent Unplanned Pregnancy), *California Data*, https://powertodecide.org/what-we-do/information/national-state-data/california.

[15] *Provisional Data for 2017*, *supra* note 12.

[16] *Vital Signs*, *supra* note 1.

[17] *Teen Pregnancy Prevention*, *supra* note 9.

the numbers highest in years in which the teenage birth rate was also the highest.[18] Teenage fathers also experience reduced educational opportunities and decreased earning potential.[19]

Children born to teenagers are also at increased risk of poor health, educational, and behavioral outcomes.[20] In Pennsylvania, teenage mothers are less likely to receive early and adequate prenatal care and are more likely to give birth before reaching full term.[21] Nationwide, children born to teenage mothers are at higher risk of low or very low birth weight and infant mortality.[22] They often have lower school achievement, including decreased readiness measures; they are 50 percent more likely to repeat a grade; and they are more likely to drop out of school.[23] They also enter the child welfare and correctional systems more

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[18] Pa. Dep't of Educ., *Dropouts by Public School 2011-2012, 2012-2013, 2013-2014, 2014-2015, and 2016-2017*, http://www.education.pa.gov/Data-and-Statistics/Pages/Dropouts.aspx.

[19] Teen Pregnancy Prevention, *supra* note 9.

[20] *Negative Impacts supra* note 1; and *Teen Pregnancy Prevention*, *supra* note *9.*

[21] Pa. Dep't of Health, *Pennsylvania Healthy People*, "Maternal, Infant, and Child Health," Objectives MICH-9.1, 9.4, and 10.2 (Dec. 2018), https://www.health.pa.gov/topics/HealthStatistics/HealthyPeople/Documents/current/state/maternal-infant-and-child-health.aspx.

[22] Ctr. for Disease Control, *Births: Final Data for 2016*, Table 23 (Jan. 31, 2018), https://www.cdc.gov/nchs/data/nvsr/nvsr67/nvsr67_01.pdf; *see also Pennsylvania Healthy People*, Objectives 8.1 and 8.2, *supra* note 21.

[23] *Teen Pregnancy Prevention*, *supra* note 9 .

frequently, and many become teenage parents themselves.[24] And ethnic and racial minorities are disproportionately impacted.[25] For instance, in California, despite declining birth rates, ethnical and racial disparities persist, with Hispanic females accounting for 75% of teen births.[26] Accordingly, preventing teenage pregnancy through efforts such as those funded by the TPP Program is essential to promote the health and well-being of the States' residents.

Preventing teenage pregnancies also protects the States' taxpayers. Teenage pregnancies nationwide cost taxpayers between $4.4 billion and $9.4 billion a year through public assistance payments, lost revenue, and greater expenditures for public health care, foster care, and criminal justice services.[27] The cost to Pennsylvania for providing medical and economic support during pregnancy and

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[24] *Negative Impacts supra* note 1; and *Teen Pregnancy Prevention*, *supra* note 9.

[25] Teresa Wiltz, *Racial and Ethnic Disparities Persist in Teen Pregnancy Rates*, Pew Charitable Trusts (Mar. 3, 2015), https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2015/3/03/racial-and-ethnic-disparities-persist-in-teen-pregnancy-rates.

[26] Cal. Dep't of Public Health, *Adolescent Births in Cal. 2000–2016* (Aug. 2018), https://www.cdph.ca.gov/Programs/CFH/DMCAH/CDPH%20Document%20Library/Data/Adolescent/Adolescent-Birth-Rates-2016.pdf.

[27] *Negative Impacts supra* note 1; and *Teen Pregnancy Prevention*, *supra* note 9.

the first year of infancies averaged $19,000 per teen birth in 2015.[28] In fact, Pennsylvania is estimated to have saved $145 million in 2015 alone due to the declining teenage birth rate.[29] But Pennsylvania still spends an additional $68 million per year on costs associated with teenage pregnancies, which could be further reduced through additional educational efforts like those funded by the TPP Program.[30]

2. The TPP Program supports effective, medically accurate education and services to reduce teenage pregnancy.

Since its inception, the TPP Program has funded 186 programs, reaching approximately 1.7 million youth, including youth of color, those in foster care, and those in rural areas.[31] Many Pennsylvania teenagers and their families, especially from vulnerable and at-risk populations, have likewise accessed effective, evidence-based pregnancy prevention services through the TPP Program.

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[28] Power to Decide, *Progress Pays Off Pennsylvania Savings Fact Sheet* (Jan. 2018), https://powertodecide.org/sites/default/files/cost-fact-sheets/savings-fact-sheet-PA.pdf.

[29] *Pennsylvania Data supra* note 14 and *Pennsylvania Savings Fact Sheet, supra* note 28.

[30] *Pennsylvania Savings Fact Sheet*, *supra* note 28.

[31] *Teenage Pregnancy Prevention: Statistics and Programs supra* note 7 ; *About the Teen Pregnancy Prevention (TPP) Program supra* note 8 *; Teen Pregnancy Prevention Program By the Numbers supra* note 9; *Teen Pregnancy Prevention Program Teens Reached supra* note 9; *Performance Measures Snapshot, The Teen Pregnancy Prevention Program: Performance in Fiscal Year 2017*, *supra* note 9.

Specifically, two Tier 1 grants and four Tier 2 grants totaling $5,539,221 have provided Pennsylvanian teenagers with programs including awareness intervention for African American young men, sexual behavior intervention for high risk female adolescents, and contraception education for African American and Latina teenagers.[32]

These projects funded by the TPP Program are an essential component of efforts to continue reducing the teenage pregnancy rate. Nationwide, the teenage birth rate has been cut almost in half from 37.9 per 1,000 in 2009 to 20.3 births per 1,000 in 2016.[33] In Pennsylvania, the number of teenage pregnancies decreased by more than 50% from 2013 to 2016, down from 14,680 to 6,385.[34] In California, the teen birth rate declined 66% between 2000 to 2016.[35] Efforts to prevent teenage pregnancy in Pennsylvania averted approximately 12,000 teenage births in 2015

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[32] Power to Decide, *Key Information about Pennsylvania* (Jan. 2019), https://powertodecide.org/sites/default/files/resources/supporting-materials/key-Information-pennsylvania.pdf.

[33] Off. of Adolescent Health of the U.S. Dep't of Health & Human Servs., *Trends in Teen Pregnancy and Childbearing* (June 2, 2016), https://www.hhs.gov/ash/oah/adolescent-development/reproductive-health-and-teen-pregnancy/teen-pregnancy-and-childbearing/trends/index.html.

[34] *Pennsylvania Data*, *supra* note 14.

[35] California Department of Public Health, https://www.cdph.ca.gov/Programs/CFH/DMCAH/CDPH%20Document%20Library/Data/Adolescent/Adolescent-Birth-Rates-2016.pdf

alone, based on the decline in the state's teenage birth rate since 1991.[36] Effective, medically accurate projects such as those funded by the TPP Program are essential to the States' efforts to continue reducing teenage pregnancies.

Studies have repeatedly established that comprehensive, medically accurate programs based on evidence rather than ideology are effective in reducing teenage pregnancy.[37] By contrast, abstinence-only programs have been shown to be less effective.[38] As of 2015, 43 percent of teenagers nationwide had engaged in sex at least once.[39] In Pennsylvania, the number was 36.3 percent.[40] These statistics demonstrate that, for some teenagers, programs must go beyond abstinence-only principles to effectively prevent teenage pregnancies. Congress's decision to direct TPP Program funds toward medically accurate approaches while prioritizing

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[36] Power to Decide, *Progress Pays Off*, *supra* note 28.

[37] *See, e.g.*, Gorge C. Patton et. al., *Our Future: A Lancet Commission on Adolescent Health and Wellbeing* tbl.4 (June 11, 2016), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5832967/; Cora C. Bruener and Gerri Mattson, Am. Acad. of Pediatrics, *Clinical Report, Guidance for the Clinician in Rendering Pediatric Care: Sexuality Education for Children and Adolescents* e2-e7 (Aug. 2016), http://pediatrics.aappublications.org/content/early/2016/07/14/peds.2016-1348.

[38] Our Future, *supra* note 37. *See also* John S. Santelli et. al, 61 J. Adolescent Health 40001 (2017), https://www.jahonline.org/article/S1054-139X(17)30297-5/fulltext#intraref0010a.

[39] Ctr. for Disease Control, *Vital Signs: Preventing Teen Pregnancy* (Apr. 2015), https://www.cdc.gov/vitalsigns/larc/index.html.

[40] *Pennsylvania Data*, *supra* note 14.

rigorously evaluated, evidence-based programming—and to separate those funds from other federal grant programs for abstinence-only projects—is consistent with the recognition that programs that are guided by evidence rather than ideology are far more likely to be effective.

II. The 2018 Funding Opportunity Announcements Disregard Congress's Intent and Will Undermine the States' Efforts to Combat Teen Pregnancy.

Ignoring the TPP Program's carefully crafted statutory scheme, Defendants have sought to fundamentally change the nature of the TPP Program. After efforts to cancel the second cycle of TPP Program grant awards two years early were blocked by several courts,[41] Defendants issued the two FOAs, which significantly alter the criteria for participation in the TPP Program.

The first cycle of TPP Program grants ran from 2010 to 2014, followed by a second cycle running from 2015 to 2019. Grants for both cycles were awarded in accordance with Congress's direction to fund medically accurate programs, including Tier 1 programs that had already been rigorously evaluated and proven

[41] *See King Cnty. v. Azar*, 320 F. Supp. 3d 1167 (W.D. Wash. 2018), *appeal dismissed*, No. 18-35606, 2018 WL 5310765 (9th Cir. Sept. 20, 2018); *Policy & Research LLC v. HHS*, 313 F. Supp. 3d 62 (D.D.C. 2018), *appeal dismissed*, No. 18-5190, 2018 WL 6167378 (D.C. Cir. Oct. 29, 2018); *Healthy Teen Network v. Azar*, 322 F. Supp. 3d 647 (D. Md. 2018); *Planned Parenthood of Greater Wash. & N. Idaho v. HHS*, 328 F. Supp. 3d 1133 (E.D. Wash. 2018); and *Healthy Futures of Tex. v. HHS*, 315 F. Supp. 3d 339 (D.D.C. 2018), *appeal dismissed sub nom. Healthy Futures of Texas v. Dep't of Health & Human Res.*, No. 18-5236, 2018 WL 6167384 (D.C. Cir. Oct. 26, 2018).

effective and Tier 2 programs that could be replicated in the future if proven effective through rigorous research and evaluation. For FY 2018, Congress used the same language in again directing that 75 percent of TPP Program grant funding be awarded to Tier 1 programs, and that the remaining 25 percent be awarded to Tier 2 programs.[42]

However, in complete disregard of Congress's mandate, the 2018 Tier 1 and Tier 2 FOAs abandon any requirement that applicants demonstrate that their programs are medically accurate. The Tier 1 FOA further omits any requirement that applicants show their programs have been proven effective through rigorous evaluation. Instead, the Tier 1 FOA instructs applicants to "replicate a risk avoidance model or a risk reduction model that incorporates the common characteristics" of one of two "tools."[43] It requires applicants to choose either the Center for Relationship Education's Systematic Method for Assessing Risk-

[42] *See* Consol. Appropriations Act, 2018, Pub. L. No. 115-141, 132 Stat 348, 766; Consolidated Appropriations Act, 2010, Pub. L. No. 111-117, 123 Stat 3034, 3253. For FY 2018, "10 percent of the available funds shall be for training and tech. assistance, evaluation, outreach, and additional program support activities, and of the remaining amount 75 percent shall be for replicating programs that have been proven effective through rigorous evaluation to reduce teenage pregnancy, behavioral risk factors underlying teenage pregnancy, or other associated risk factors, and 25 percent shall be available for research and demonstration grants to develop, replicate, refine, and test additional models and innovative strategies for preventing teenage pregnancy."

[43] *Tier 1 FOA*, *supra* note 6, at 4.

Avoidance Tool ("SMARTool")[44] as a "risk avoidance model," or the Tool to Assess the Characteristics of Effective Sex and STD/HIV Education Programs ("TAC")[45] as a "risk reduction model." Neither "tool" is itself a program or provides any indication of whether a program identified or implemented using the tool has been proven effective through rigorous evaluation. The SMARTool is merely a self-described "resource to curriculum developers and educators and offers methods for comparing different curricula to one another" to "help organizations assess, select, and implement effective programs and curricula that support sexual risk avoidance."[46] Similarly, TAC describes itself as simply an "organized set of questions designed to help practitioners assess whether curriculum-based programs incorporated the common characteristics of effective programs."[47]

In addition, the two FOAs have added a new set of "Expectations of Recipients," including requirements that all projects seeking Tier 1 and Tier 2

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[44] Ctr. For Relationship Educ., *SMARTool: Assessing Potential Effectiveness for Sexual Risk Avoidance Curricula and Programs* (2010), https://www.myrelationshipcenter.org/getmedia/dbed93af-9424-4009-8f1f-8495b4aba8b4/SMARTool-Curricular.pdf.aspx.

[45] Kirby, D., Rolleri, L.A., & Wilson, M.M., *Tool to Assess the Characteristics of Effective STD/HIV Education Programs* (2007), http://recapp.etr.org/recapp/documents/programs/tac.pdf.

[46] SMARTool, *supra* note 44 .

[47] TAC, *supra* note 45.

funding "clearly communicate that teen sex is a risk behavior," "place a priority on providing information and practical skills to assist youth in avoiding sexual risk," and "provide affirming and practical skills" for "cessation" of sexual risk.[48] The FOAs also change the scoring metric, which now allots large percentages of the 100 total available points (up to 25 for Tier 1, and up to 30 for Tier 2) for incorporating these new expected priorities.[49] The FOAs define "sexual risk" as "engaging in any behavior that increases one's risk of the unintended consequences of sexual activity."[50] In the context of teenage pregnancy prevention programing, "sexual risk avoidance" refers to abstinence-only content: for example, a different federal "Sexual Risk Avoidance Educational Program" (SRAEP")[51] is appropriated entirely separately from the TPP Program and, unlike the TPP Program, is used solely "to fund projects to implement sexual risk avoidance education that teaches participants how to voluntarily refrain from non-marital sexual activity."[52]

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[48] 2018 Tier 1 FOA, *supra* note 6, at 14-15; 2018 Tier 2 FOA, *supra* note 6, at 11-13.

[49] 2018 Tier 1 FOA, *supra* note 6, at 59-60; Tier 2 FOA, *supra* note 6, at 53-54.

[50] 2018 Tier 1 FOA, *supra* note 6, at 14-15; 2018 Tier 2 FOA, *supra* note 6, at 11-13.

[51] Social Security Act, 42 U.S.C. § 1310, 1110; Consol. Appropriations Act, 2016, Pub. L. No. 114-113, 129 Stat. 2242.

[52] Family and Youth Serv. Bureau, U.S. Dep't of Health and Human Servs., *Sexual Risk Avoidance Educ. Program Fact Sheet* (Feb. 17, 2017), https://www.acf.hhs.gov/fysb/resource/srae-facts.

These provisions are inconsistent with Congress's clear intent that TPP Program funding decisions guided by science and evaluated based on evidence. They will undermine existing programs that have been proven to be effective while slowing the development of new programs. The FOAs' elimination of criteria requiring Tier 1 applicants to demonstrate their effectiveness through rigorous evaluation, as well as the prioritization of an abstinence-only message over providing medical accurate information in evaluating Tier 1 and Tier 2 applicants, will make it virtually impossible for many highly effective, non-abstinence only programs to receive funds without overhauling their curricula in ways that undermine their effectiveness.

Replacing highly effective programs with ones that are ineffective or unproven will increase the risk of teenage pregnancies and the resulting physical, emotional, and economic harms. Ultimately, the States will bear much of the cost of any reductions in access to effective teenage pregnancy prevention programs and any resulting increase in teenage pregnancies. States will be required to compensate for lost funding with their own resources, or be forced to bear increased expenditures for public assistance payments, public health care, foster care, and criminal justice services as a result of increasing teenage pregnancy rates.

III. Defendants Should Be Prevented From Relying on the 2018 FOAs in Making Future TPP Program Grants.

FOAs play a critical role in the grant-making process. Guidelines issued by the Office of Management and Budget require that FOAs detail "the criteria that the Federal awarding agency will use to evaluate applications" to include "the merit and other review criteria that evaluators will use to judge applications, including any statutory, regulatory, or other preferences." 2 CFR Part 200, app. 1 § E.1. The purpose of requiring such information is "to make the application process transparent so applicants can make informed decisions when preparing their applications to maximize fairness of the process." *Id.* If the FOAs are allowed to stand, applicants that intend to offer programs relying on evidence-based, effective techniques will be forced to modify their programs to utilize less effective methods or—like Plaintiffs here—forego funding entirely. The result will be that grants will be awarded to less effective programs that have not undergone rigorous evaluation and programs that are not medically accurate.

Courts have recognized that a decision to impose grant criteria is subject to judicial review if it "'represents the agency's definitive position on the question.'" *City of Philadelphia v. Sessions*, 280 F. Supp. 3d 579, 615 (E.D. Pa. 2017), *appeal dismissed sub nom.*, *City of Philadelphia v. Attorney Gen. United States*, No. 18-1103, 2018 WL 3475491 (3d Cir. July 6, 2018) (quoting *Univ. of Med. & Dentistry of New Jersey v. Corrigan*, 347 F.3d 57, 69 (3d Cir. 2003)). The harm resulting

from permitting Defendants to utilize the 2018 FOAs in making future grant awards cannot be undone through challenges to specific grant decisions, as some effective providers will chose not to apply and others will modify their programs to align them with the priorities expressed in the FOA. As a result, the injuries to the States can only be addressed by preventing Defendants from relying on the 2018 FOAs in issuing future TPP Program grants. For this reason, this Court should direct the district court to enter summary judgment in favor of Plaintiffs so that Defendants may not contravene Congress's clear intent in issuing future grant awards.

CONCLUSION

The amici States respectfully urge the Court to reverse the district court's decision and direct the district court to enter summary judgment in favor of Plaintiffs.

March 18, 2019

Respectfully submitted,

JOSH SHAPIRO
Attorney General of Pennsylvania

/s Michael J. Fischer
MICHAEL J. FISCHER
Chief Deputy Attorney General
AMBER SIZEMORE
Deputy Attorney General
Office of Attorney General
1600 Arch St., Suite 300
Philadelphia, PA 19103
(215) 560-2171
mfischer@attorneygeneral.gov

XAVIER BECERRA
Attorney General of California
1300 I Street
Sacramento, CA 94244

WILLIAM TONG
Attorney General of Connecticut
55 Elm Street
Hartford, CT 06106

KATHLEEN JENNINGS
Attorney General of Delaware
820 North French Street
Wilmington, DE 19801

KARL A. RACINE
Attorney General
District of Columbia
441 4th Street, N.W.
Washington, D.C. 20001

CLARE E. CONNORS
Attorney General of Hawai'i
425 Queen Street
Honolulu, HI 96813

KWAME RAOUL
Attorney General of Illinois
100 West Randolph Street, 12th Floor
Chicago, IL 60601

THOMAS J. MILLER
Attorney General of Iowa
1305 East Walnut Street
Des Moines, IA 50319

BRIAN E. FROSH
Attorney General of Maryland
200 Saint Paul Place
Baltimore, Maryland 21202

MAURA HEALEY
Attorney General
Commonwealth of Massachusetts
One Ashburton Place
Boston, MA 02108

DANA NESSEL
Attorney General of Michigan
P.O. Box 30212
Lansing, MI 48909

KEITH ELLISON
Attorney General of Minnesota
102 State Capitol
75 Rev. Dr. Martin Luther
King Jr. Blvd.
St. Paul, MN 55155

AARON D. FORD
Attorney General of Nevada
100 North Carson Street
Carson City, NV 89701

GURBIR S. GREWAL
Attorney General of New Jersey
25 Market Street, 8th Floor
Trenton, NJ 08625

LETITIA JAMES
Attorney General of New York
28 Liberty St., 23rd Floor
New York, NY 10005

JOSHUA H. STEIN
Attorney General of North Carolina
North Carolina Department of Justice
114 W. Edenton Street
Raleigh, NC 27603

ELLEN F. ROSENBLUM
Attorney General of Oregon
1162 Court St. NE
Salem, OR 97301

PETER F. NERONHA
Attorney General of Rhode Island
150 South Main Street
Providence, Rhode Island 02903

THOMAS J. DONOVAN, JR.
Attorney General of Vermont
Office of the Attorney General
109 State Street
Montpelier, VT 05609

MARK R. HERRING
Attorney General
Commonwealth of Virginia
202 N. Ninth Street
Richmond, VA 23219

ROBERT W. FERGUSON
Attorney General of Washington
PO Box 40100
Olympia, WA 98504-0100

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 8. Certificate of Compliance for Briefs

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9th Cir. Case Number(s) 18-35920

I am the attorney or self-represented party.

This brief contains 4227 words, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

I certify that this brief *(select only one)*:

[ ] complies with the word limit of Cir. R. 32-1.

[ ] is a **cross-appeal** brief and complies with the word limit of Cir. R. 28.1-1.

[X] is an **amicus** brief and complies with the word limit of Fed. R. App. P. 29(a)(5), Cir. R. 29-2(c)(2), or Cir. R. 29-2(c)(3).

[ ] is for a **death penalty** case and complies with the word limit of Cir. R. 32-4.

[ ] complies with the longer length limit permitted by Cir. R. 32-2(b) because *(select only one)*:
[ ] it is a joint brief submitted by separately represented parties;
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[ ] is accompanied by a motion to file a longer brief pursuant to Cir. R. 32-2(a).

Signature /s Michael J. Fischer **Date** March 19, 2019

*(use "*s/[typed name]*" to sign electronically-filed documents)*

CERTIFICATE OF SERVICE

I certify that on March 18, 2019, I electronically filed the foregoing document with the Clerk of the Court of the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Michael J. Fischer
Michael J. Fischer
Chief Deputy Attorney General

Dated: March 18, 2019

Coalition of 21 Attorneys General File Amicus Brief in Support of Evidence-Based Teen Pregnancy Prevention Program

HHS's Funding Opportunity Announcements Undermine States' Efforts to Reduce Teen Pregnancy by Shifting Focus to Abstinence-Only Programs

FOR IMMEDIATE RELEASE — March 19, 2019
CONTACT:

HARRISBURG — Today, a coalition of 21 Attorneys General filed an amicus brief supporting Planned Parenthood in their legal challenge against the U.S. Department of Health and Human Services' change to the funding structure of the Teen Pregnancy Prevention (TPP) grant program. The case, *Planned Parenthood v HHS*, is one of three lawsuits challenging two Funding Opportunity Announcements (FOAs) issued by HHS in 2018 for the TPP program, which Congress created to fund evidence-based programs proven effective in reducing teen pregnancy. The 2018 FOAs changed the requirements for the program by shifting the focus to abstinence-only education, rather than evidence-based programs shown to be effective.

Since its creation in 2009, the TPP Program has provided nearly $1 billion for state, local, and community programs that have been proven to reduce rates of teenage pregnancy. Those programs reached half a million teens from 2010-2014, and are anticipated to reach 1.2 million more from 2015-2019. The program puts an intentional focus on communities with the greatest need and most vulnerable youth, including those of color, in foster care, or in rural areas. The TPP Program is an indispensable component of State efforts to reduce the physical and medical risks of teenage pregnancy, as well as associated emotional, social, and financial costs.

The Attorneys General argue that the 2018 FOAs threaten to frustrate the design of the TPP Program and undermine the States' efforts to reduce teen pregnancy. The FOAs would shift the focus of the grant process to rewarding programs that promote a particular "abstinence-only" ideology, rather than following Congress' mandate to fund programs that are medically accurate and have been proven to work through rigorous evaluation.

If the FOAs are allowed to stand, federal funds will be directed to less-effective or medically inaccurate programs, while other programs that have been proven to work will languish. As a result, more teens will be at risk of becoming pregnant, imposing significant additional costs on the States and their residents.

"The Department of Health and Human Services is jeopardizing the health and well-being of teens across the country by undermining the Teen Pregnancy Prevention program," said Attorney General X. "The TPP Program has been proven to reduce teenage pregnancies and their associated costs, yet HHS is threatening to reverse that success by promoting abstinence-only education. I'm proud to stand with Planned Parenthood and my colleagues in support of medically accurate, evidence-based programs to reduce teen pregnancies."

In two similar cases, *Planned Parenthood of NYC v. HHS* and *Multnomah County v. Azar*, the District Court found that HHS had acted unlawfully and vacated or enjoined one of the FOAs. However, the district court dismissed the case at hand for lack of standing. Planned Parenthood appealed to the Ninth Circuit to reverse the District Court's decision and to direct the District Court to enter summary judgment in favor of Plaintiffs. The Attorneys General filed this amicus brief in support of that request.

The coalition was led by Pennsylvania Attorney General Josh Shapiro and included state attorneys general from California, Connecticut, Delaware, District of Columbia, Hawaii, Illinois, Iowa, Massachusetts, Maryland, Michigan, Minnesota, Nevada, New Jersey, New York, North Carolina, Oregon, Rhode Island, Vermont, Virginia, and Washington.

###

From:	Spottswood, Eleanor
To:	Clark, Charity; Silver, Natalie
Subject:	FW: re press embargo
Date:	Wednesday, April 3, 2019 4:02:53 PM
Attachments:	Kentucky Abortion Services Template Release.docx

FYI

From: Monica C. Moazez <MMoazez@ag.nv.gov>
Sent: Wednesday, April 3, 2019 4:02 PM
To: 'KOHolleran@oag.state.va.us' <KOHolleran@oag.state.va.us>; 'Nathan.Blake@ag.iowa.gov' <Nathan.Blake@ag.iowa.gov>; 'Eric.Tabor@ag.iowa.gov' <Eric.Tabor@ag.iowa.gov>; 'ABraun@atg.state.il.us' <ABraun@atg.state.il.us>; 'KJanas@atg.state.il.us' <KJanas@atg.state.il.us>; 'Kamala.H.Shugar@doj.state.or.us' <Kamala.H.Shugar@doj.state.or.us>; 'Donna.Cassutt@ag.state.mn.us' <Donna.Cassutt@ag.state.mn.us>; 'Elizabeth.Wilkins@dc.gov' <Elizabeth.Wilkins@dc.gov>; 'Natalie.Ludaway@dc.gov' <Natalie.Ludaway@dc.gov>; 'William.Chang@dc.gov' <William.Chang@dc.gov>; 'Lisa.Raymond@dc.gov' <Lisa.Raymond@dc.gov>; 'Caroline.vanzile@dc.gov' <Caroline.vanzile@dc.gov>; 'loren.alikhan@dc.gov' <loren.alikhan@dc.gov>; 'Alfred.Dillione@state.de.us' <Alfred.Dillione@state.de.us>; 'Aaron.Goldstein@state.de.us' <Aaron.Goldstein@state.de.us>; 'Gregory.Patterson@state.de.us' <Gregory.Patterson@state.de.us>; 'Lauren.Vella@state.de.us' <Lauren.Vella@state.de.us>; Spottswood, Eleanor <Eleanor.Spottswood@vermont.gov>; 'Dana.O.Viola@hawaii.gov' <Dana.O.Viola@hawaii.gov>; 'Krishna.F.Jayaram@hawaii.gov' <Krishna.F.Jayaram@hawaii.gov>; 'clyde.j.wadsworth@hawaii.gov' <clyde.j.wadsworth@hawaii.gov>; 'Kimberly.T.Guidry@hawaii.gov' <Kimberly.T.Guidry@hawaii.gov>; 'SDearmin@ncdoj.gov' <SDearmin@ncdoj.gov>; 'SWood@ncdoj.gov' <SWood@ncdoj.gov>; 'TMaestas@nmag.gov' <TMaestas@nmag.gov>; 'susan.herman@maine.gov' <susan.herman@maine.gov>; 'Mike.Firestone@mass.gov' <Mike.Firestone@mass.gov>; 'Joanna.Lydgate@mass.gov' <Joanna.Lydgate@mass.gov>; 'bessie.dewar@mass.gov' <bessie.dewar@mass.gov>; 'david.kravitz@state.ma.us' <david.kravitz@state.ma.us>; 'KateK@atg.wa.gov' <KateK@atg.wa.gov>; 'JeffS2@atg.wa.gov' <JeffS2@atg.wa.gov>; 'Edmunson Kristina' <kristina.edmunson@doj.state.or.us>; 'Andrea.Oser@ag.ny.gov' <Andrea.Oser@ag.ny.gov>; 'mfischer@attorneygeneral.gov' <mfischer@attorneygeneral.gov>; 'cquattrocki@oag.state.md.us' <cquattrocki@oag.state.md.us>; 'Clare.Kindall@ct.gov' <Clare.Kindall@ct.gov>; 'ShermanA@michigan.gov' <ShermanA@michigan.gov>; 'Stiles, John' <John.Stiles@ag.state.mn.us>
Cc: Jessica L. Adair <JAdair@ag.nv.gov>; Heidi P. Stern <HStern@ag.nv.gov>; Jeffrey M. Conner <JConner@ag.nv.gov>
Subject: re press embargo

All,

Thank you for your patience today. Seeing that a few other states may still have interest in joining our brief, we'd like to hold until tomorrow morning. Tomorrow, I will email you with the final list of states and the filing, indicating that you can send your releases out at that time.

If you have any questions or concerns, please let me know.

Best,

Monica Moazez
Communications Director
Nevada Attorney General's Office
555 E. Washington Ave.
Las Vegas, NV 89101
(702) 486-0657

Attorney General XXXX Joins Multi-State Amicus Brief Protecting Women's Access to Abortion Services

Today, Attorney General XXXX joined a coalition of 19 attorneys general in filing an amicus brief asking the U.S. Court of Appeals for the Sixth Circuit to affirm a lower court's finding that a Kentucky law regulating abortion services is unconstitutional under the 14th Amendment of the U.S. Constitution. The brief, led by Nevada Attorney General Ford, argues that the availability of abortion services in neighboring states does not excuse a state from the Constitution's prohibition on unduly burdening a woman's ability to access abortion services in her home state. Additionally, the brief urges the Court to ensure that regulations imposed on abortion services actually promote women's health without erecting substantial obstacles to the availability of these services.

The implications of this case for the women of Kentucky are particularly severe, as the law at issue would effectively eliminate the only abortion provider in the state. In their brief, the attorneys general further argue that allowing a state—like Kentucky—to rely on neighboring states for abortion services harms neighboring states. Allowing this analysis could have unintended consequences on neighboring states whose demand for abortion services could increase.

AG Quote

Plaintiff-Appellee EMW Women's Surgical Center (EMW) is Kentucky's only licensed abortion facility. While EMW has provided safe abortions since the 1980s, in 2017, Kentucky's Cabinet for Health and Family Services (Cabinet) notified EMW that its license to perform abortions had been renewed in error, citing alleged violations of Kentucky law. EMW filed suit in March 2017, with Planned Parenthood later intervening in the case. Planned Parenthood had been trying unsuccessfully to obtain an abortion license until the Cabinet abruptly informed the organization that its transfer and transport agreements with a hospital and ambulance company were allegedly "deficient."

The District Court for the Western District of Kentucky ultimately agreed with EMW and Planned Parenthood, finding that the Kentucky law regarding transport and transfer agreement requirements imposed an undue burden on Kentucky women seeking to exercise their constitutional right to access abortion services. In response, the Cabinet appealed this decision last month in the federal courts, challenging the District Court's findings. Today's brief was filed in support of Planned Parenthood and EMW's legal challenge.

This amicus brief was led by Nevada Attorney General Aaron Ford and joined by the attorneys general of Connecticut, Delaware, the District of Columbia, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Michigan, Minnesota, New Mexico, New York, North Carolina, Oregon, Pennsylvania, Vermont, Virginia and Washington.

###

From: Spottswood, Eleanor
To: Clark, Charity; Silver, Natalie
Subject: FW: re Revised Template Release re Kentucky Abortion Services
Date: Wednesday, April 3, 2019 1:48:19 PM
Attachments: Kentucky Abortion Services Template Release.docx

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Charity and Natalie,

No pressure to do this at all, just want you to have the revised info re the sample press release I sent this morning.

Ella

From: Monica C. Moazez <MMoazez@ag.nv.gov>
Sent: Wednesday, April 3, 2019 1:35 PM
To: 'KOHolleran@oag.state.va.us' <KOHolleran@oag.state.va.us>; 'Nathan.Blake@ag.iowa.gov' <Nathan.Blake@ag.iowa.gov>; 'Eric.Tabor@ag.iowa.gov' <Eric.Tabor@ag.iowa.gov>; 'ABraun@atg.state.il.us' <ABraun@atg.state.il.us>; 'KJanas@atg.state.il.us' <KJanas@atg.state.il.us>; 'Kamala.H.Shugar@doj.state.or.us' <Kamala.H.Shugar@doj.state.or.us>; 'Donna.Cassutt@ag.state.mn.us' <Donna.Cassutt@ag.state.mn.us>; 'Elizabeth.Wilkins@dc.gov' <Elizabeth.Wilkins@dc.gov>; 'Natalie.Ludaway@dc.gov' <Natalie.Ludaway@dc.gov>; 'William.Chang@dc.gov' <William.Chang@dc.gov>; 'Lisa.Raymond@dc.gov' <Lisa.Raymond@dc.gov>; 'Caroline.vanzile@dc.gov' <Caroline.vanzile@dc.gov>; 'loren.alikhan@dc.gov' <loren.alikhan@dc.gov>; 'Alfred.Dillione@state.de.us' <Alfred.Dillione@state.de.us>; 'Aaron.Goldstein@state.de.us' <Aaron.Goldstein@state.de.us>; 'Gregory.Patterson@state.de.us' <Gregory.Patterson@state.de.us>; 'Lauren.Vella@state.de.us' <Lauren.Vella@state.de.us>; Spottswood, Eleanor <Eleanor.Spottswood@vermont.gov>; 'Dana.O.Viola@hawaii.gov' <Dana.O.Viola@hawaii.gov>; 'Krishna.F.Jayaram@hawaii.gov' <Krishna.F.Jayaram@hawaii.gov>; 'clyde.j.wadsworth@hawaii.gov' <clyde.j.wadsworth@hawaii.gov>; 'Kimberly.T.Guidry@hawaii.gov' <Kimberly.T.Guidry@hawaii.gov>; 'SDearmin@ncdoj.gov' <SDearmin@ncdoj.gov>; 'SWood@ncdoj.gov' <SWood@ncdoj.gov>; 'TMaestas@nmag.gov' <TMaestas@nmag.gov>; 'susan.herman@maine.gov' <susan.herman@maine.gov>; 'Mike.Firestone@mass.gov' <Mike.Firestone@mass.gov>; 'Joanna.Lydgate@mass.gov' <Joanna.Lydgate@mass.gov>; 'bessie.dewar@mass.gov' <bessie.dewar@mass.gov>; 'david.kravitz@state.ma.us' <david.kravitz@state.ma.us>; 'KateK@atg.wa.gov' <KateK@atg.wa.gov>; 'JeffS2@atg.wa.gov' <JeffS2@atg.wa.gov>; Edmunson Kristina <kristina.edmunson@doj.state.or.us>; 'Andrea.Oser@ag.ny.gov' <Andrea.Oser@ag.ny.gov>; 'mfischer@attorneygeneral.gov' <mfischer@attorneygeneral.gov>; 'cquattrocki@oag.state.md.us' <cquattrocki@oag.state.md.us>; 'Clare.Kindall@ct.gov' <Clare.Kindall@ct.gov>; 'ShermanA@michigan.gov' <ShermanA@michigan.gov>
Cc: Heidi P. Stern <HStern@ag.nv.gov>; Jeffrey M. Conner <JConner@ag.nv.gov>; Jessica L. Adair <JAdair@ag.nv.gov>
Subject: re Revised Template Release re Kentucky Abortion Services

All,

Please see a slightly revised template release for today's press—revisions have been made to the paragraph beneath the AG Quote, as well as to the final paragraph listing the participating states. At this time, our coalition includes 20 states and territories (including Nevada), and I will let you know if there are any last minute participants. Please continue to hold until I follow up with an email noting that the embargo has been lifted.

Many thanks,

Monica Moazez
Communications Director
Nevada Attorney General's Office
555 E. Washington Ave.
Las Vegas, NV 89101
(702) 486-0657

Attorney General XXXX Joins Multi-State Amicus Brief Protecting Women's Access to Abortion Services

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###

Case No. 18-6161

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

EMW WOMEN'S SURGICAL CENTER, P.S.C., *et al.*,
Plaintiffs/Appellees,

and

PLANNED PARENTHOOD OF INDIANA AND KENTUCKY, INC.,
Intervenor Plaintiff/Appellee

v.

ADAM MEIER, in his official capacity as Secretary of
Kentucky's Cabinet for Health and Family Services, *et al.*,
Defendants/Appellants.

On Appeal from the United States District Court for the
Western District of Kentucky, No. 3:17-cv-00189-GNS

BRIEF OF THE STATES OF NEVADA, CALIFORNIA, CONNECTICUT, DELAWARE, HAWAII, ILLINOIS, IOWA, MAINE, MARYLAND, MASSACHUSETTS, MICHIGAN, MINNESOTA, NEW MEXICO, NEW YORK, NORTH CAROLINA, OREGON, PENNSYLVANIA, VERMONT, VIRGINIA, AND WASHINGTON, AND THE DISTRICT OF COLUMBIA AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFFS/APPELLEES

AARON D. FORD
Attorney General
HEIDI PARRY STERN
Solicitor General
JEFFREY M. CONNER
Deputy Solicitor General
Office of the Nevada Attorney General
100 North Carson Street
Carson City, Nevada 89701
(775) 684-1200
Counsel for Amici Curiae – Additional counsel listed with signature block

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AMICI'S STATEMENT OF IDENTITY AND INTEREST

The States of Nevada, California, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Michigan, Minnesota, New Mexico, New York, North Carolina, Oregon, Pennsylvania, Vermont, Virginia, and Washington, and the District of Columbia, submit this brief as *amici curiae* in support of Plaintiffs-Appellees. *Amici* have an interest in this case based on the Defendants-Appellants' (hereinafter Appellants) argument that this Court should consider the availability of abortion in neighboring states when applying the undue-burden standard. An analysis that considers abortion services in neighboring states is not only improper, but could have a detrimental impact on women already seeking abortion within *Amici* states and could limit the valid regulatory choices available to those states. Additionally, *Amici* have an interest in ensuring that the regulation of abortion services actually promotes women's health in the abortion context and does not create substantial obstacles to the availability of those services.

SUMMARY OF THE ARGUMENT

Kentucky's geographical features do not permit Kentucky to violate the constitutional rights of women within Kentucky's borders. In an analogous context, the Supreme Court has rejected the proposition—advanced here by Appellants—that states may satisfy the demands of the Constitution by relying on the present availability of services in neighboring states. *See Missouri ex rel. Gaines v. Canada*,

305 U.S. 337 (1938). And, contrary to Appellants' contentions, this Court did not adopt a "cross-border analysis" when applying the undue-burden standard in *Women's Medical Professional Corp. v. Baird*, 438 F.3d 595 (6th Cir. 2006). Even if it had, the Supreme Court implicitly rejected this method of analysis in *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016). A woman's ability to exercise her right to terminate a previable pregnancy in a neighboring state is irrelevant to the question of whether Kentucky law imposes an undue burden on that right within its own borders.

Additionally, *Amici* disagree with the argument of Appellants' *Amici* states that this Court should adopt a rule requiring it to consider a law affecting abortion providers in all of its applications, rather than considering the law specifically in the abortion context. Notwithstanding the fact that the application of that principle is irrelevant to this case—the Kentucky law at issue specifically regulates abortion clinics—this Court rejected that argument in *Baird*, and it is undermined by the Supreme Court's articulation of the undue-burden standard in *Whole Woman's Health*. Drawing directly from its prior decision in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 846 (1992), the Supreme Court reaffirmed that a state's general interest in women's health must give way to a woman's choice to terminate a previable pregnancy. *Whole Woman's Health*, 136 S. Ct. at 2309. Under *Whole Woman's Health*, this is true even for regulations that

marginally benefit women's health but have the effect of placing a substantial obstacle in the way of a woman's right to elect an abortion. A state's interest in protecting women's health—both generally and in the context of abortion—must be validated with evidence establishing the need for the regulation. It must not serve as a mere pretext for suppressing women's constitutional rights.

ARGUMENT

I. Availability of Abortion Services in Neighboring States Is Not Relevant in Applying the Undue-Burden Standard.

The Fourteenth Amendment's Due Process Clause prohibits states from placing an undue burden on a woman's right to choose to terminate a previable pregnancy. *Casey*, 505 U.S. at 874–79. Appellants suggest that Kentucky does not need to abide by this binding precedent because Kentucky's "unique geographical situation" makes it easy for women in Kentucky—under present circumstances—to obtain an abortion in a neighboring state. ECF No. 32 at 51–54. Whether or not Kentucky's unique shape makes travel to other states to obtain an abortion feasible for some of Kentucky's female residents, that fact has no bearing on application of the undue-burden standard to Kentucky laws and regulations requiring written transfer and transportation agreements.

The uniqueness of Kentucky's geography is not grounds for Kentucky to violate the constitutional rights of women in Kentucky. Kentucky may not justify a

barrier that imposes an undue burden on a woman's right to have an abortion in Kentucky by relying on the fact that current circumstances make it possible for her to access the same services by traveling to a neighboring state. Appellants' position that this Court should consider the availability of abortion services in neighboring states finds no support in existing law, and principled reasons rooted in federalism support rejecting such a standard. Even Appellants' *Amici* states, which include Kentucky's neighbors Ohio, Indiana, Missouri, and West Virginia, do not join Appellants in advocating for such a rule.[1]

A. Kentucky May Not Adopt an Unconstitutional Legal Framework, Even if Women Can Vindicate Their Rights by Traveling to Another State.

The Supreme Court has rejected the argument that the government may impose unconstitutional restrictions as long as a neighboring jurisdiction provides an adequate forum for a person to vindicate the violation of their rights occasioned by the unconstitutional restrictions. *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938); *see also Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 76–77 (1981) ("One is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place.") (internal citation and quotation marks omitted). The obligation to refrain from infringing

[1] Kentucky's neighbors Illinois and Virginia have joined this brief.

constitutional rights is the "separate responsibility of each State within its own sphere[.]" *Gaines*, 305 U.S. at 350.

In *Gaines*, the Supreme Court struck down as unconstitutional a Missouri law that precluded Lloyd Gaines from being admitted to the law school at the University of Missouri on account of his race. 305 U.S. at 342–52. The Supreme Court found the law unconstitutional despite the fact that state law required Missouri to pay for the cost of Gaines attending law school in a neighboring state. *Id*. at 348–52.

Contrary to Appellants' contentions, the district court's reliance on *Gaines* in this context is not misplaced. ECF No. 32 at 55-56 (arguing that *Gaines* is distinguishable because it involved "a state's refusal to perform its affirmative duty of providing equal protection at a public institution within its borders"). As noted by the Supreme Court, the state in *Gaines* had to refrain from denying some of its residents a privilege on account of their race. *Gaines*, 305 U.S. at 349–50; *cf.* ECF No. 32 at 55-56 (acknowledging that "[t]he Supreme Court's jurisprudence involving abortion . . . requires each state *to refrain* from engaging in certain conduct") (emphasis in original). Like Missouri in *Gaines*, Kentucky must refrain from creating conditions that unduly burden a woman's ability to access abortion services within its boundaries.

Gaines did not, as Appellants argue, center on the question of whether Missouri had an affirmative obligation to provide its residents with a legal education.

The *Gaines* Court grounded its holding on the premise that the availability of services outside a state does not validate that state's adoption of laws and regulations that result in a violation of the constitutional rights of persons within the state. 305 U.S. at 350 ("We find it impossible to conclude that what otherwise would be an unconstitutional discrimination, with respect to the legal right to the enjoyment of opportunities within the State, can be justified by requiring resort to opportunities elsewhere."). A state may not justify infringement on rights guaranteed by the Constitution by suggesting that people can exercise their rights in a neighboring state. *Id.*; *see also Schad*, 452 U.S. at 76–77.

B. The Availability of Abortion in Neighboring States Is Not Relevant Under This Court's Precedent.

This Court's opinion in *Baird* does not support Appellants' contention that this Court must consider the availability of abortion in neighboring states when applying the undue-burden standard. *See* ECF No. 32 at 51–52 (suggesting that *Baird* makes availability of abortion in neighboring states a relevant consideration when applying the undue-burden standard). *Baird* does not discuss the availability of abortion in neighboring states at all, let alone announce a rule requiring consideration of out-of-state services when applying the undue-burden standard.

In *Baird*, this Court addressed an as-applied challenge to an Ohio regulatory decision requiring a Dayton abortion clinic to close because it did not have a written

transfer agreement with a local hospital. 438 F.3d at 598. After being unable to find a hospital that would enter a transfer agreement, the clinic requested a waiver of the requirement, and the clinic filed suit when the Ohio authorities declined that request. *Id*. at 599–601. Testimony at trial established that the Dayton clinic performed approximately 3,000 abortions per year and was the only place in southern Ohio conducting abortions in the later weeks of the second-trimester of a pregnancy (after 18 weeks). *Id*. at 599. *Baird* thus addressed women's ability to access abortion services in two contexts: (1) the approximately 3,000 women per year seeking services at other clinics generally; and (2) the group of women seeking an abortion after more than 18 weeks. This Court's analysis of the second context is at issue here.[2]

The *Baird* court based its ruling on (1) the complete absence of evidence in the record addressing how many women seeking an abortion between weeks 19 and 24 of their pregnancy would be impacted by the closure of the Dayton clinic; and (2) the ability of a woman to obtain an abortion for a pregnancy between 19 and 24 weeks at "any other *duly licensed* clinics[.]" *Baird*, 438 F.3d at 606–07. Read in

[2] This Court rejected the proposition that closure of the Dayton clinic would generally create a "substantial obstacle for Dayton-area women seeking an abortion in light of the availability of another clinic less than fifty-five miles away from the Dayton clinic." *Id*. at 605-06.

context, the *Baird* court's reference to other "duly licensed" clinics was a clear nod to the possibility that other clinics *licensed in Ohio* would be able to conduct late second-trimester abortions. The evidence showed that nearby clinics would conduct an abortion up to 18 weeks; a clinic in Cleveland would conduct an abortion for pregnancies through 24 weeks; and Dr. Haskell, the owner of the Dayton clinic, testified that it would theoretically be possible, though difficult, for him to conduct abortions through 24-weeks at his Cincinnati clinic. *Id.* at 599, 605–06. The *Baird* court's conclusion on this point followed a discussion of Dr. Haskell's testimony that he would be able to conduct such procedures at his "duly licensed clinic" in nearby Cincinnati. *Id*. at 606.[3] The *Baird* court did not focus on or even consider the availability of such abortions outside Ohio. *Cf.* ECF No. 32 at 56–57 (misconstruing the *Baird* court's statements about traveling to other clinics as meaning the court was referring to out-of-state clinics with respect to late second trimester abortions).

C. The Supreme Court Declined to Consider Out-of-State Availability of Abortion in *Whole Woman's Health*.

Any analysis that requires consideration of out-of-state services cannot be squared with the Supreme Court's reversal of the Fifth Circuit in *Whole Woman's*

[3] The sole reference to an out-of-state clinic in *Baird* is that the company operating the Dayton clinic also operated clinics in Cincinnati and Indianapolis. 439 F.3d at 599. But, unlike the in-state Cincinnati clinic, the *Baird* court never considered the availability of the out-of-state Indianapolis clinic.

Health. When an intervening decision from the Supreme Court undermines the rationale of a decision of this Court, this Court is compelled to follow the intervening Supreme Court decision…." *The Northeast Ohio Coalition of the Homeless v. Husted*, 831 F.3d 686, 720–21 (6th Cir. 2016) (requiring this Court to follow the rationale of intervening Supreme Court precedents even where the case is "not precisely on point"). This Court is thus bound to follow the Supreme Court's reasoning in *Whole Woman's Health*, regardless of its interpretation of *Baird*.

Whole Woman's Health addressed an as-applied challenge to regulations on abortion services regarding a licensed abortion facility in El Paso, Texas. *See Whole Woman's Health v. Cole*, 790 F.3d 563, 596–98 (5th Cir. 2015). The Fifth Circuit rested its decision upholding the regulation, in part, on the fact that many women were already choosing to obtain abortion services in the adjoining community of Santa Teresa, New Mexico.[4] *Id*. The Supreme Court declined to adopt this reasoning.

The majority opinion in *Whole Woman's Health* struck down the challenged regulations while focusing solely on the availability of abortion services inside Texas. 136 S. Ct. at 2309–18. In doing so, it rejected Texas's argument that women

[4] Notably, the Fifth Circuit distinguished its decision from *Jackson Women's Health Organization v. Currier*, 760 F.3d 448 (5th Cir. 2014), which struck down an admission privileges requirement because it would have resulted in closure of Mississippi's only abortion clinic.

in El Paso could travel "short distances across the state line to a Santa Teresa, New Mexico abortion facility[.]" Brief of Respondents, *Whole Woman's Health v. Hellerstedt*, No. 15–274, at 53-55 (Jan. 27, 2016).[5] The Supreme Court refused to accept the proposition that it should consider the availability of abortion services in neighboring states when applying the undue-burden test. The Court's analysis focused entirely on the effect of the challenged regulations on the availability of services within the State of Texas when determining undue burden.

The Supreme Court's decision in *Whole Woman's Health* undermines any suggestion that current availability of out-of-state facilities is relevant in determining what constitutes an undue burden. This Court must focus only on the effect of the challenged statutes and regulations on the availability of abortion services within the Commonwealth of Kentucky. To the extent *Baird* conflicts, this Court must treat the intervening Supreme Court decision as effectively overruling *Baird* on that point. The availability of abortion services in states neighboring Kentucky has no place in the application of the undue-burden standard to the Kentucky laws and regulations at issue.

[5] *Available at* https://www.scotusblog.com/wp-content/uploads/2016/02/15-274_resp.authcheckdam.pdf.

D. Requiring a Court to Consider the Availability of Abortion in Neighboring States Would Adversely Affect Women Seeking Abortions in Neighboring States.

Permitting a state to impose substantial, unconstitutional obstacles to abortion access within its borders, and then rely on the availability of abortion in neighboring states to excuse that burden, also improperly burdens women in neighboring states by straining the neighboring states' health-care systems. Additionally, accepting Appellants' proffered analysis could impair the neighboring states' regulatory authority as conditions change over time.

A significant increase in the number of women entering neighboring states to exercise their constitutional right to terminate a pregnancy could strain the health-care systems of those neighbors. Such a strain on the health-care systems of neighboring states would in turn have repercussions for the women of those states because it would interfere with their ability to access to abortion services within their own home state. Moreover, funding abortions for indigent women from out of state could divert scant health-care resources away from services for state residents.

In *Gaines*, the Supreme Court concluded that each State is "responsible for its own laws establishing the rights and duties of persons within its borders." 305 U.S. at 350. This precedent must apply here. Allowing the conditions in and regulations of one state to affect the constitutionality of another state's laws is a recipe for chaos

and confusion. Each state's regulations must be allowed to stand or fall based on their effects within the state's borders alone.

Adopting Appellants' proposed cross-border analysis could perversely encourage states to create substantial, unconstitutional obstacles to abortion. This is because it would cause the costs of providing abortion services to flow one way, from states that have enacted restrictions that create substantial obstacles to abortion access within their borders to states that regulate within constitutional bounds. Basic principles of federalism, and basic respect for women's constitutional right to choose to access abortion services, forbid that result.

II. States May Not Use General Health Regulations to Impose an Undue Burden on a Woman's Right to Abortion.

This Court should reject the assertion of the Appellants' *Amici* that the undue-burden standard requires consideration of all of the general benefits of a law that affects abortion providers, among others. As an initial matter, Appellants' *Amici* acknowledge that the Kentucky law at issue targets abortion clinics specifically. ECF No. 35 at 12. Nevertheless, this Court has already found that the undue-burden standard does apply to general laws, regardless of whether they target abortion providers in particular. The Supreme Court's articulation and application of the undue-burden standard in *Whole Woman's Health* supports that conclusion.

A. The Undue-Burden Standard Applies to Neutral Laws of General Applicability.

In *Baird*, Ohio argued that the undue-burden standard did not apply because the relevant regulation was "neutral towards abortion." 437 F.3d at 603. But this Court rejected that argument, concluding that the general nature of a health-care regulation does not relieve that regulation from scrutiny under *Casey*'s undue-burden standard. *Id*.

Whole Woman's Health is in accord, stating that the recognized purpose of the undue-burden test is to "consider the burdens a law imposes on abortion access together with the benefits those laws confer," for purposes of determining "whether any burden imposed on abortion access is 'undue.'" 136 S. Ct. at 2309–10. In articulating the relevant standard, the Court reiterated that state laws or regulations intended to further valid state interests—*e.g.* women's health—but having "'the effect of placing a substantial obstacle in the path of a woman's choice cannot be considered a permissible means of serving its legitimate ends.'" *Id*. at 2309 (quoting *Casey*, 505 U.S. at 877). Additionally, the Court acknowledged that "'[u]nnecessary health regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion impose an undue burden on the right.'" *Id*. (quoting *Casey*, 505 U.S. at 878) (brackets in original). Finally, the Court reiterated its independent constitutional obligation to evaluate the evidence before it to determine

the legitimacy of asserted state interests. This obligation requires the Court to ensure that, even if not specifically intended, any challenged regulations do not have the *effect* of unduly burden a woman's freedom to choose whether to carry a pregnancy to term. *Id*. at 2310 (quoting *Gonzales v. Carhart*, 550 U.S. 124, 165–66 (2007)); *see also Casey*, 505 U.S. at 846 ("Before viability, the State's interests are not strong enough to support a prohibition of abortion or the imposition of a substantial obstacle to the woman's effective right to elect the procedure.").

Applying the analysis propounded by Appellants' *Amici*—looking at the benefits of a law or regulation in an unrelated context, rather than as they relate to the abortion context specifically—would contradict the Supreme Court's statements in *Whole Woman's Health* and would make little sense as a practical matter. Determining whether the burden a regulation creates is "undue" in the context of abortion access requires examining it in that context.

B. Any General Health Benefit Here Is Outweighed by the Burden of Forcing Closure of the Only Abortion Clinic in Kentucky.

The burden imposed by an abortion regulation purportedly enacted to promote health must be proportional to the benefit that the regulation is expected to provide. *See Planned Parenthood of Wisconsin, Inc. v. Schimel*, 806 F.3d 908, 919 (7th Cir. 2015); *see also Casey,* 505 U.S. at 873–74 (comparing, in the plurality opinion, the

undue-burden standard to the standards applied in ballot-access cases that "grant substantial flexibility" to the states to set rules for elections). Even statutory and regulatory requirements that provide some marginal benefit to women's health must give way to a woman's interest in accessing abortion services. *Whole Woman's Health*, 136 S. Ct. at 2309-10 (noting that statutes that further valid state interest are unconstitutional if, in effect, they construct a substantial obstacle in the path of a woman's right to terminate her pregnancy); *see also Casey*, 505 U.S. at 846 (noting that relevant state "interests are not strong enough to support a prohibition of abortion or the imposition of a substantial obstacle to the woman's effective right to elect the procedure").

Here, Appellants essentially acknowledge that the benefit of the Kentucky law at issue—in the abortion services context—is minimal to non-existent. *See* ECF No. 32 at 42 (suggesting that testimony on the rarity of emergencies in providing abortion services makes the need for transfer- and transportation-agreements more important). A state's interest in regulating a procedure is not strengthened by decreases in the potential risks associated with the procedure. If it were, states could impose unnecessary regulations as a pretext for banning or limiting the availability

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/ / /

of abortion services. They cannot. *Whole Woman's Health* is clear: unnecessary health regulations are an undue burden if they establish a substantial obstacle to a woman's right to seek an abortion. 136 S. Ct. at 2309.

Any reliance on the purported general health benefits stemming from the regulatory framework itself are similarly unavailing. Even statutes that further legitimate state interest are impermissible if they have the effect of establishing a substantial obstacle to a woman's right to have an abortion. *Id*.

The ultimate burden in this case—the elimination of the only abortion services provider in the state of Kentucky—amounts to an insurmountable obstacle for the women of Kentucky to access constitutional healthcare. Any health benefit conferred by the law generally, as well as any minimal benefit of the law in the abortion services context, does not justify the resulting burden on a woman's right to an abortion. Women in Kentucky should not be forced to travel out of state in order to obtain constitutionally protected abortion services, particularly with no corresponding benefit. The Kentucky law at issue here imposes a disproportionate burden on women's constitutional rights under any analysis.

/ / /

/ / /

/ / /

CONCLUSION

Amici states respectfully request that this Court affirm the decision of the district court, finding the Kentucky law at issue unconstitutional because it violates Plaintiffs' and Intervenor-Plaintiff's rights under the Fourteenth Amendment of the U.S. Constitution.

DATED this 4th day of April, 2019.

AARON D. FORD
Attorney General

By: /s/ Heidi Parry Stern
HEIDI PARRY STERN
Solicitor General
JEFFREY M. CONNER
Deputy Solicitor General
Office of the Nevada Attorney General
100 North Carson Street
Carson City, Nevada 89701
(775) 684-1200
hstern@ag.nv.gov

Additional Counsel on Next Page

Xavier Becerra
Attorney General
State of California
Sacramento, California 95814

William Tong
Attorney General
State of Connecticut
55 Elm Street
Hartford, CT 06106

Kathleen Jennings
Attorney General of Delaware
Department of Justice
Carvel State Building, 6th Floor
820 North French Street
Wilmington, DE 19801

Clare E. Connors
Attorney General of Hawaii
425 Queen Street
Honolulu, Hawaii 96813

Kwame Raoul
Attorney General of Illinois
100 West Randolph Street
Chicago, Illinois 60601

Thomas J. Miller
Attorney General of Iowa
1305 E. Walnut Street
Des Moines, IA 50319

Aaron M. Frey
Attorney General of Maine
6 State House Station
Augusta, ME 04333-0006

Brian E. Frosh
Attorney General of Maryland
200 Saint Paul Place
Baltimore, Maryland 21202

Maura Healey
Attorney General
Commonwealth of Massachusetts
One Ashburton Place
Boston, MA 02108

Dana Nessel
Michigan Attorney General
P.O. Box 30212
Lansing, Michigan 48909

Keith Ellison
Attorney General
State of Minnesota
102 State Capitol
75 Rev. Dr. Martin Luther King Jr. Blvd.
St. Paul, MN 55155

Hector Balderas
New Mexico Attorney General
Postal Drawer 1508
Santa Fe, New Mexico 87504

Letitia James
Attorney General
State of New York
The Capitol
Albany, New York 12224

Joshua H. Stein
Attorney General
North Carolina Department of Justice
114 W. Edenton Street
Raleigh, NC 27603

Ellen F. Rosenblum
Attorney General of Oregon
1162 Court Street NE
Salem, OR 97301

Josh Shapiro
Attorney General
Commonwealth of Pennsylvania
16th Floor
Strawberry Square
Harrisburg, PA 17120

Thomas J. Donovan, Jr.
Attorney General
State of Vermont
Office of the Attorney General
109 State Street
Montpelier, Vermont 05609-1001

Mark R. Herring
Attorney General of Virginia
202 North 9th Street
Richmond, VA 23219

Robert W. Ferguson
Attorney General of Washington
PO Box 40100
Olympia, WA 98504-0100

Karl A. Racine
Attorney General
District of Columbia
One Judiciary Square
441 4th Street, NW, Suite 630 South
Washington, D.C. 20001

CERTIFICATE OF COMPLIANCE

I certify that pursuant to Rule 32(g)(1), the attached AMICUS CURIAE BRIEF is proportionately spaced, has a typeface of 14 points or more and contains 3,688 words.

RESPECTFULLY SUBMITTED this 4th day of April.

AARON D. FORD
Attorney General

By: /s/ Heidi Parry Stern
HEIDI PARRY STERN
Solicitor General

CERTIFICATE OF SERVICE

I certify that I am an employee of the Office of the Attorney General and that on April 4, 2019, I served a copy of the foregoing AMICUS CURIAE BRIEF, with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ Traci Plotnick
An Employee of the Office of the Attorney General

From:	Spottswood, Eleanor
To:	Clark, Charity; Silver, Natalie
Subject:	Fwd: Kentucky Abortion Services Template Release
Date:	Wednesday, April 3, 2019 7:26:41 AM
Attachments:	Kentucky Abortion Services Template Release.docx

FYI, this is for an amicus we signed on to.

Ella

From: Monica C. Moazez <mmoazez@ag.nv.gov>
Sent: Tuesday, April 2, 2019 6:57 PM
To: 'KOHolleran@oag.state.va.us'; 'Nathan.Blake@ag.iowa.gov'; 'Eric.Tabor@ag.iowa.gov'; 'ABraun@atg.state.il.us'; 'KJanas@atg.state.il.us'; 'Kamala.H.Shugar@doj.state.or.us'; 'Donna.Cassutt@ag.state.mn.us'; 'Elizabeth.Wilkins@dc.gov'; 'Natalie.Ludaway@dc.gov'; 'William.Chang@dc.gov'; 'Lisa.Raymond@dc.gov'; 'Caroline.vanzile@dc.gov'; 'loren.alikhan@dc.gov'; 'Alfred.Dillione@state.de.us'; 'Aaron.Goldstein@state.de.us'; 'Gregory.Patterson@state.de.us'; 'Lauren.Vella@state.de.us'; Spottswood, Eleanor; 'Dana.O.Viola@hawaii.gov'; 'Krishna.F.Jayaram@hawaii.gov'; 'clyde.j.wadsworth@hawaii.gov'; 'Kimberly.T.Guidry@hawaii.gov'; 'SDearmin@ncdoj.gov'; 'SWood@ncdoj.gov'; 'TMaestas@nmag.gov'; 'susan.herman@maine.gov'; 'Mike.Firestone@mass.gov'; 'Joanna.Lydgate@mass.gov'; 'bessie.dewar@mass.gov'; 'david.kravitz@state.ma.us'; 'KateK@atg.wa.gov'; 'JeffS2@atg.wa.gov'
Cc: Jessica L. Adair; Heidi P. Stern; Renee D. Carreau; Jeffrey M. Conner
Subject: Kentucky Abortion Services Template Release

Good afternoon,

You are receiving this email because your AG has signed on to an amicus brief regarding a Kentucky law regulating abortion services. Attached is a template release you can adapt for distribution tomorrow. Please keep the contents of this release embargoed until further notice—we anticipate filing the release around 11 a.m. P.S.T. tomorrow morning. Closer to that time, I will also be able to provide you with the final list of states and territories that have signed on to this brief. If you have any inquiries related to this release or the brief itself, please feel free to reach out.

Many thanks,

Monica Moazez
Communications Director
Nevada Attorney General's Office

555 E. Washington Ave.
Las Vegas, NV 89101
(702) 486-0657

Attorney General XXXX Joins Multi-State Amicus Brief Protecting Women's Access to Abortion Services

Today, Attorney General XXXX joined a coalition of XXX attorneys general in filing an amicus brief asking the U.S. Court of Appeals for the Sixth Circuit to affirm a lower court's finding that a Kentucky law regulating abortion services is unconstitutional under the 14th Amendment of the U.S. Constitution. The brief, led by Nevada Attorney General Ford, argues that the availability of abortion services in neighboring states does not excuse a state from the Constitution's prohibition on unduly burdening a woman's ability to access abortion services in her home state. Additionally, the brief urges the Court to ensure that regulations imposed on abortion services actually promote women's health without erecting substantial obstacles to the availability of these services.

The implications of this case for the women of Kentucky are particularly severe, as the law at issue would effectively eliminate the only abortion provider in the state. In their brief, the attorneys general further argue that allowing a state—like Kentucky—to rely on neighboring states for abortion services harms neighboring states. Allowing this analysis could have unintended consequences on neighboring states whose demand for abortion services could increase.

AG Quote

Plaintiff-Appellee EMW Women's Surgical Center (EMW) is Kentucky's only licensed abortion facility. While EMW has operated since the 1980s without incident, in 2017, Kentucky's Cabinet for Health and Family Services (Cabinet) declined to renew its license to perform abortions, citing alleged violations of Kentucky law. EMW filed suit in March 2017, with Planned Parenthood later intervening in the case. Planned Parenthood had been providing abortion services in the Kentucky since December 2015, until the Cabinet abruptly informed it that it must cease providing services because of allegedly "deficient" transfer and transport agreements with a hospital and ambulance company.

The District Court for the Western District of Kentucky ultimately agreed with EMW and Planned Parenthood, finding that the Kentucky law regarding transport and transfer agreement requirements imposed an undue burden on Kentucky women seeking to exercise their constitutional right to access abortion services. In response, the Cabinet appealed this decision last month in the federal courts, challenging the District Court's findings. Today's brief was filed in support of Planned Parenthood and EMW's legal challenge.

This amicus brief was led by Nevada Attorney General Aaron Ford and joined by the attorneys general of XXXX.

###

From: Silver, Natalie
To: Clark, Charity
Subject: kentucky brief
Date: Thursday, April 4, 2019 2:18:38 PM
Attachments: ATTORNEY GENERAL DONOVAN JOINS BRIEF PROTECTING WOMEN'S ACCESS TO ABORTION SERVICES .docx

---

Natalie Silver
Community Outreach and Policy Coordinator
Vermont Attorney General's Office
Natalie.Silver@vermont.gov
802 595 8679

STATE OF VERMONT
OFFICE OF THE ATTORNEY GENERAL
109 STATE STREET
MONTPELIER, VT 05609-1001

FOR IMMEDIATE RELEASE:
April 4, 2019

CONTACT: Eleanor Spottswood
Assistant Attorney General
802-828-3171

ATTORNEY GENERAL DONOVAN JOINS BRIEF PROTECTING WOMEN'S ACCESS TO ABORTION SERVICES

MONTPELIER- Today, Attorney General Donovan joined a coalition of 20 attorneys general in filing an amicus brief asking the U.S. Court of Appeals for the Sixth Circuit to affirm a lower court's finding that a Kentucky law regulating abortion services is unconstitutional under the 14th Amendment of the U.S. Constitution. The brief argues that the availability of abortion services in neighboring states does not excuse a state from the Constitution's prohibition on unduly burdening a woman's ability to access abortion services in her home state. Additionally, the brief urges the Court to ensure that regulations imposed on abortion services actually promote women's health without erecting substantial obstacles to the availability of these services.

A copy of the brief can be found here.

The implications of this case for the women of Kentucky are particularly severe, as the law at issue would effectively eliminate the only abortion provider in the state. In their brief, the attorneys general further argue that allowing a state—like Kentucky—to rely on neighboring states for abortion services harms neighboring states. Allowing this analysis could have unintended consequences on neighboring states whose demand for abortion services could increase.

Plaintiff-Appellee EMW Women's Surgical Center (EMW) is Kentucky's only licensed abortion facility. While EMW has provided safe abortions since the 1980s, in 2017, Kentucky's Cabinet for Health and Family Services (Cabinet) notified EMW that its license to perform abortions had been renewed in error, citing alleged violations of Kentucky law. EMW filed suit in March 2017, with Planned Parenthood later intervening in the case. Planned Parenthood had been trying unsuccessfully to obtain an abortion license until the Cabinet abruptly informed the organization that its transfer and transport agreements with a hospital and ambulance company were allegedly "deficient."

The District Court for the Western District of Kentucky ultimately agreed with EMW and Planned Parenthood, finding that the Kentucky law regarding transport and transfer agreement requirements imposed an undue burden on Kentucky women seeking to exercise their constitutional right to access abortion services. In response, the Cabinet appealed this decision last month in the federal courts, challenging the District Court's findings. Today's brief was filed in support of Planned Parenthood and EMW's legal challenge.

Joining Attorney General Donovan and the Attorney General of Nevada in today's brief are the Attorneys General of California, Connecticut, Delaware, the District of Columbia, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Michigan, Minnesota, New Mexico, New York, North Carolina, Oregon, Pennsylvania, Virginia and Washington.

###

From: Silver, Natalie
To: Donovan, Thomas; Clark, Charity; Diamond, Joshua
Subject: Kentucky press
Date: Thursday, April 4, 2019 4:41:32 PM
Attachments: Kentucky release CRC NRS edits.docx

A lot of press today. Sorry, trying to keep pace!

Attached is a press release on the Kentucky brief. The press embargo has lifted and we are now free to release and do social media. We can put this out tomorrow as well, but keep in mind border wall will go out tomorrow. Let me know your thoughts.

Natalie

Natalie Silver
Community Outreach and Policy Coordinator
Vermont Attorney General's Office
Natalie.Silver@vermont.gov
802 595 8679

STATE OF VERMONT
OFFICE OF THE ATTORNEY GENERAL
109 STATE STREET
MONTPELIER, VT 05609-1001

FOR IMMEDIATE RELEASE:
April 4, 2019

CONTACT: Eleanor Spottswood
Assistant Attorney General
802-828-3171

ATTORNEY GENERAL DONOVAN JOINS BRIEF PROTECTING WOMEN'S ACCESS TO ABORTION SERVICES

MONTPELIER- Today, Attorney General Donovan joined a coalition of 20 attorneys general in filing an amicus brief asking the U.S. Court of Appeals for the Sixth Circuit to affirm a lower court's finding about a Kentucky abortion law. The lower court found that the regulating abortion services is unconstitutional under the 14th Amendment of the U.S. Constitution. The brief argues that the availability of abortion services in neighboring states does not excuse a state from the Constitution's prohibition on unduly burdening a woman's ability to access abortion services in her home state. Additionally, the brief urges the Court to ensure that regulations imposed on abortion services actually promote women's health without erecting substantial obstacles to the availability of these services. In Vermont, Attorney General Donovan has actively supported the passage of an amendment to the Vermont constitution that guarantees a woman's right to an abortion and has worked to protect women's access to preventative and reproductive healthcare services.

A copy of the brief can be found here.

The implications of this case for the women of Kentucky are particularly severe, as the law at issue would effectively eliminate the only abortion provider in the state. In their brief, the attorneys general further argue that allowing a state—like Kentucky—to rely on neighboring

states for abortion services harms neighboring states. Allowing Kentucky's analysis could have unintended consequences on neighboring states whose demand for abortion services could increase.

Plaintiff-Appellee EMW Women's Surgical Center (EMW) is Kentucky's only licensed abortion facility. While EMW has provided safe abortions since the 1980s, in 2017, Kentucky's Cabinet for Health and Family Services (Cabinet) notified EMW that its license to perform abortions had been renewed in error, citing alleged violations of Kentucky law. EMW filed suit in March 2017, with Planned Parenthood later intervening in the case. Planned Parenthood had been trying unsuccessfully to obtain an abortion license until the Cabinet abruptly informed the organization that its transfer and transport agreements with a hospital and ambulance company were allegedly "deficient."

The District Court for the Western District of Kentucky ultimately agreed with EMW and Planned Parenthood, finding that the Kentucky law regarding transport and transfer agreement requirements imposed an undue burden on Kentucky women seeking to exercise their constitutional right to access abortion services. In response, the Cabinet appealed this decision last month in the federal courts, challenging the District Court's findings. Today's brief was filed in support of Planned Parenthood and EMW's legal challenge.

Joining Attorney General Donovan in filing today's brief are the attorneys general of California, Connecticut, Delaware, the District of Columbia, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Mexico, New York, North Carolina, Oregon, Pennsylvania, Virginia and Washington.

###

From: Spottswood, Eleanor
To: Silver, Natalie; Clark, Charity
Subject: RE: TItle X update
Date: Friday, March 22, 2019 10:16:26 AM

I'll just edit the one you sent earlier.

Eleanor L.P. Spottswood
Assistant Attorney General
Vermont Attorney General's Office
109 State Street
Montpelier, Vermont 05609
802-828-3178
eleanor.spottswood@vermont.gov

-----Original Message-----
From: Silver, Natalie <Natalie.Silver@vermont.gov>
Sent: Friday, March 22, 2019 10:15 AM
To: Clark, Charity <Charity.Clark@vermont.gov>
Cc: Spottswood, Eleanor <Eleanor.Spottswood@vermont.gov>
Subject: Re: TItle X update

Ella can you send to me please? [redacted]

Natalie Silver
Community Outreach and Policy Coordinator Vermont Attorney General's Office
109 State Street, Montpelier Vermont 05609-1001 natalie.silver@vermont.gov
Office: 802 828 3173
Cell: 802 595 8679

From: Silver, Natalie
Sent: Friday, March 22, 2019 10:07:08 AM
To: Clark, Charity
Cc: Spottswood, Eleanor
Subject: Re: TItle X update

Unfortunately I don't have access to the shared drive as I am in Burlington with TJ today. Would one of you mind sending me the most recent copy? I guess the one I thought was most recent is out of date. Apologies.

Natalie Silver
Community Outreach and Policy Coordinator Vermont Attorney General's Office
109 State Street, Montpelier Vermont 05609-1001 natalie.silver@vermont.gov
Office: 802 828 3173
Cell: 802 595 8679

From: Clark, Charity
Sent: Friday, March 22, 2019 10:05:59 AM
To: Silver, Natalie
Cc: Spottswood, Eleanor

Subject: Re: TItle X update

Thanks, Natalie.

Can you make sure that all of the latest edits are incorporated? I can spot one of Ella's edits that didn't make it to this draft:

"And, there is not yet any other organization capable of providing Title X services statewide."

I believe I saved the latest version in the S drive, 2019 press release file.

Otherwise, looks good!
Charity

Sent from my iPhone

> On Mar 22, 2019, at 9:55 AM, Silver, Natalie <Natalie.Silver@vermont.gov> wrote:
>
> Can you give this one last read before I release?
>
> I added a line at the beginning saying that we filed a motion for preliminary injunction. I realized that we never said in the first paragraph what we were actually doing.
>
> Let me know if there are any changes that need to be made. I also linked a copy of the filed motion.
>
> Natalie Silver
> Community Outreach and Policy Coordinator Vermont Attorney General's
> Office
> 109 State Street, Montpelier Vermont 05609-1001
> natalie.silver@vermont.gov
> Office: 802 828 3173
> Cell: 802 595 8679
>
>
>
> _____
> From: Clark, Charity
> Sent: Friday, March 22, 2019 9:43:27 AM
> To: Silver, Natalie
> Subject: Re: TItle X update
>
> Don't forget to update the date on the release to 3/22.
>
> Sent from my iPhone
>
>> On Mar 22, 2019, at 9:40 AM, Silver, Natalie <Natalie.Silver@vermont.gov> wrote:
>>
>> Ok. Ella maybe you can try getting in touch with someone there? Kamala and Kristina are not responding to me.
>>
>> Natalie Silver
>> Community Outreach and Policy Coordinator Vermont Attorney General's
>> Office
>> 109 State Street, Montpelier Vermont 05609-1001
>> natalie.silver@vermont.gov
>> Office: 802 828 3173
>> Cell: 802 595 8679
>>

>>
>>
>> _____
>> From: Spottswood, Eleanor
>> Sent: Friday, March 22, 2019 9:38:36 AM
>> To: Silver, Natalie; Diamond, Joshua; Clark, Charity
>> Cc: Donovan, Thomas
>> Subject: RE: TItle X update
>>
>> Hi Natalie,
>>
>> Sorry their press folks have been slow. They filed the PI motion last night at about 8:30. The filed version is attached.
>>
>> Ella
>>
>> Eleanor L.P. Spottswood
>> Assistant Attorney General
>> Vermont Attorney General's Office
>> 109 State Street
>> Montpelier, Vermont 05609
>> 802-828-3178
>> eleanor.spottswood@vermont.gov
>>
>> -----Original Message-----
>> From: Silver, Natalie <Natalie.Silver@vermont.gov>
>> Sent: Friday, March 22, 2019 9:36 AM
>> To: Spottswood, Eleanor <Eleanor.Spottswood@vermont.gov>; Diamond,
>> Joshua <Joshua.Diamond@vermont.gov>; Clark, Charity
>> <Charity.Clark@vermont.gov>
>> Cc: Donovan, Thomas <Thomas.Donovan@vermont.gov>
>> Subject: TItle X update
>>
>> Hi all,
>>
>> I reached out to Oregon a few times yesterday but have received no response as to when they are filing the motion for a preliminary injunction/when they want to do press.
>>
>> I will not be here next week, so unless they get in touch today, I am going to leave this in Charity and Ella's hands. TJ has approved the press release as has Planned Parenthood. We are all set to go. Just need word from Oregon.
>>
>>
>> Natalie
>>
>> Natalie Silver
>> Community Outreach and Policy Coordinator Vermont Attorney General's
>> Office
>> 109 State Street, Montpelier Vermont 05609-1001
>> natalie.silver@vermont.gov
>> Office: 802 828 3173
>> Cell: 802 595 8679
>>
>>
> <VERMONT MOVES TO PROTECT FUNDING IN TITLE X LAWSUIT.docx>

From:	Silver, Natalie
To:	Spottswood, Eleanor; Clark, Charity
Subject:	RE: Title x press release
Date:	Thursday, March 21, 2019 9:22:34 AM
Attachments:	Presser VERMONT MOVES TO PROTECT FUNDING IN TITLE X LAWSUIT -elps and nat edits.docx

I have made further changes. Updating and adding some new info. Please review. Id like to send to TJ can get quote from him

Natalie Silver
Community Outreach and Policy Coordinator
Vermont Attorney General's Office
Natalie.Silver@vermont.gov
802 595 8679

From: Spottswood, Eleanor <Eleanor.Spottswood@vermont.gov>
Sent: Wednesday, March 20, 2019 2:19 PM
To: Silver, Natalie <Natalie.Silver@vermont.gov>; Clark, Charity <Charity.Clark@vermont.gov>
Subject: RE: Title x press release

Hi team,

Thanks for doing this. A couple minor edits and a substantive suggestion attached.

Ella

Eleanor L.P. Spottswood
Assistant Attorney General
Vermont Attorney General's Office
109 State Street
Montpelier, Vermont 05609
802-828-3178
eleanor.spottswood@vermont.gov

From: Silver, Natalie <Natalie.Silver@vermont.gov>
Sent: Wednesday, March 20, 2019 11:11 AM
To: Spottswood, Eleanor <Eleanor.Spottswood@vermont.gov>; Clark, Charity <Charity.Clark@vermont.gov>
Subject: Title x press release

Hi there,
Ella can you take a look at this and make sure everything is A OK?

I think aside from a quote from TJ this is basically done.

Natalie

Natalie Silver
Community Outreach and Policy Coordinator
Vermont Attorney General's Office
Natalie.Silver@vermont.gov
802 595 8679

STATE OF VERMONT
OFFICE OF THE ATTORNEY GENERAL
109 STATE STREET
MONTPELIER, VT 05609-1001

FOR IMMEDIATE RELEASE:
March 21, 2019

CONTACT: Eleanor Spottswood
Assistant Attorney General
802-828-3171

VERMONT MOVES TO PROTECT FUNDING IN TITLE X LAWSUIT

Preliminary Injunction Would Stay New Federal Rule

Commented [CC1]: Is this what the effect will be?

Commented [SE2R1]: Yes

MONTPELIER – Attorney General T.J. Donovan ~~moved to protect funding while a lawsuit against the federal government is pending~~announced today that Vermont, and 20 other states, filed a lawsuit challenging the constitutionality of the Trump Administration's Title X "gag rule". The lawsuit filed today in XXX, . The new rule includes a "gag rule" that limits providers' ability to give neutral, factual information to their patients about abortion, and prohibits abortion referrals. The new rule also redirects funding priorities from the CDC's birth control recommendations to "natural family planning methods." In filing the suit today, Attorney General Donovan seeks to protect funding to Vermont's 10 Title X funded healthcare centers that provide essential access to services for Vermonters around the state. In Vermont, 10,000 people rely on Title X for basic healthcare. ~~The basis of the lawsuit is a new Title X funding regulation.~~ Title X is the only national federal grant program that is dedicated solely to providing comprehensive family planning and preventative health care. ~~In Vermont, 10,000 people rely on Title X for basic healthcare. The new rule includes a "gag rule" that limits providers' ability to give neutral, factual information to their patients about abortion, and prohibits abortion referrals. The new rule also redirects funding priorities from the CDC's birth control recommendations to "natural family planning methods."~~ In Vermont, the only recipient of Title X funds are 10 Planned Parenthood health care centers located around the State.

"Quote from T.J.," Attorney General Donovan said. Title X funds basic healthcare services, including wellness exams, cervical and breast cancer screenings, birth control, contraception education, and testing for sexually transmitted diseases and HIV.

As a result of the new regulations, Title X providers will be forced to give incomplete and misleading information to patients—a "gag rule" on providing services or information related to abortion, even to patients who affirmatively say that they want one. The gag rule would also apply to any "referral partners" of Title X health care centers. The new rule stretches Title X funding to try to cover gaps in healthcare created by employers who opt out of providing insurance to cover contraception. The new rule also redefines "family planning" to promote "natural family planning methods" over more effective forms of birth control. The new rule never mentions the CDC's evidence-based best practices guidelines, "Providing Quality Family Planning Services," which was the gold standard for healthcare under the old Title X regulations. In addition, the new rule requires Title X health care centers to be physically located in a separate facility from any abortion provider. Title X funding is not, and never has been, used for abortions.

"This gag rule violates medical ethics and nationally accredited standards, and reputable institutions including the American Medical Association strongly oppose it," said Lucy Leriche, Vice President of Public Policy at Planned Parenthood of Northern New England. "We are grateful to Attorney General Donovan for his leadership and action to prevent the Trump administration's gag rule from taking effect in early May. We will continue fighting to protect the ability of providers to give the medically ethical, accurate, quality health care that our patients have come to expect from PPNNE."

Funding for all of Vermont's Title X healthcare centers is jeopardized by the new rule. Without Title X funding, there is not yet any other organization capable of providing Title X

Commented [SE3]: Lucy has confirmed to me that if the gag rule goes into effect, PPNNE will withdraw from the Title X program / no longer apply for funding.

As far as our dept of health can tell, no organization other than PPNNE has ever applied for these funds in Vermont in the almost 50 years of the program. We also haven't identified any other org that is capable of providing Title X services statewide.

Not sure if you want to include these facts but I found them pretty striking.

services statewide. Vermont has ten health care centers supported by Title X funds, located in Barre, Bennington, Brattleboro, Hyde Park, Rutland, Middlebury, Newport, St. Albans, St. Johnsbury, and White River Junction. All provide crucial basic health care to underserved populations. Funding for each of these health care centers is jeopardized by the new rule. Title X has been providing high quality preventative health care to millions of Americans for decades.

The basis for the lawsuit, filed by 21 states, is that the new Title X rule is contrary to the U.S. Constitution and to governing statutes, including the Administrative Procedures Act. If the rule went into effect, it will harm Vermont by increasing health care costs, including costs to Medicaid spending, as a result of an increase in unintended pregnancies, cancers not detected in early stages, and the spread of sexually transmitted infections.

# # #

From: Clark, Charity
To: Silver, Natalie; Spottswood, Eleanor
Subject: RE:
Date: Tuesday, March 19, 2019 11:21:00 AM
Attachments: Teen Pregnancy Press Release.docx

Yes, or Lund. Here's a cleaned up template (saved in the S drive).
Thanks!
Charity

-----Original Message-----
From: Silver, Natalie <Natalie.Silver@vermont.gov>
Sent: Tuesday, March 19, 2019 11:15 AM
To: Clark, Charity <Charity.Clark@vermont.gov>; Spottswood, Eleanor <Eleanor.Spottswood@vermont.gov>
Subject: Re:

Ok sounds good. Do you think Planned Parenthood would have this?

Natalie Silver
Community Outreach and Policy Coordinator Vermont Attorney General's Office
109 State Street, Montpelier Vermont 05609-1001 natalie.silver@vermont.gov
Office: 802 828 3173
Cell: 802 595 8679

From: Clark, Charity
Sent: Tuesday, March 19, 2019 11:14:08 AM
To: Silver, Natalie; Spottswood, Eleanor
Subject: RE:

T.J. gave us the thumbs up. I will reformat the template in tracked changes and send it to you both. Natalie, I will need your help getting Vermont-specific data and finalizing the release.
Thanks,
Charity

-----Original Message-----
From: Silver, Natalie <Natalie.Silver@vermont.gov>
Sent: Tuesday, March 19, 2019 11:01 AM
To: Clark, Charity <Charity.Clark@vermont.gov>; Spottswood, Eleanor <Eleanor.Spottswood@vermont.gov>
Subject: Re:

I am not about to call. In committee.

But it would be great if we could put this out. The TPP has absolutely helped VT achieve that low rate. And, interestingly enough, the county that has one of the highest rates of teen pregnancy, Bennington County, does not have widespread sex education and limited access to contraceptive services/education through health clinics. This is true of the other two counties, orleans and Essex that have high TP rates. Just my personal commentary.

Also, check out this op ed that touches on this subject (sorry, I know you both are busy, but man this gets me fired up): https://www.benningtonbanner.com/stories/amelia-w-silver-abortion-rights-must-be-protected-in-vermont,567901

Natalie Silver

Community Outreach and Policy Coordinator Vermont Attorney General's Office
109 State Street, Montpelier Vermont 05609-1001 natalie.silver@vermont.gov
Office: 802 828 3173
Cell: 802 595 8679

From: Clark, Charity
Sent: Tuesday, March 19, 2019 10:57:21 AM
To: Silver, Natalie; Spottswood, Eleanor
Subject: RE:

Natalie, are you about to call T.J. to see if he is ok with us issuing this release today? He said he'd be out of pocket after 11:15. If not, let me know and I will call.

We will want to get Vermont-specific statistics. I know we have a very low teen pregnancy rate here in the greatest state in the union, and we'd like to keep it that way!
Thanks,
Charity

-----Original Message-----
From: Silver, Natalie <Natalie.Silver@vermont.gov>
Sent: Tuesday, March 19, 2019 10:42 AM
To: Spottswood, Eleanor <Eleanor.Spottswood@vermont.gov>; Clark, Charity <Charity.Clark@vermont.gov>
Subject: Re:

I'd be in full support of putting this out. We could use some positive press today and these new criteria are horrendous.

Natalie Silver
Community Outreach and Policy Coordinator Vermont Attorney General's Office
109 State Street, Montpelier Vermont 05609-1001 natalie.silver@vermont.gov
Office: 802 828 3173
Cell: 802 595 8679

From: Spottswood, Eleanor
Sent: Tuesday, March 19, 2019 10:36:53 AM
To: Clark, Charity; Silver, Natalie
Subject: FW:

Hi Charity and Natalie,

This is an amicus we joined in support of Planned Parenthood, challenging the new application criteria for the Teen Pregnancy Prevention (TPP) program. The new criteria shift the focus of the program away from evidence-based methods and towards abstinence-only education. I'm not sure why Josh only forwarded this draft template press release to me, but I'm passing it on to you!

Ella

Eleanor L.P. Spottswood
Assistant Attorney General
Vermont Attorney General's Office
109 State Street

Montpelier, Vermont 05609
802-828-3178
eleanor.spottswood@vermont.gov<mailto:eleanor.spottswood@vermont.gov>

From: Diamond, Joshua <Joshua.Diamond@vermont.gov>
Sent: Tuesday, March 19, 2019 10:34 AM
To: Spottswood, Eleanor <Eleanor.Spottswood@vermont.gov>
Subject: FW:

FYI

Joshua R. Diamond, Deputy Attorney General Vermont Attorney General's Office
109 State Street
Montpelier, Vermont 05609
802-828-3175
joshua.diamond@vermont.gov<mailto:joshua.diamond@vermont.gov>

From: Hand, Karissa M. <khand@attorneygeneral.gov<mailto:khand@attorneygeneral.gov>>
Sent: Tuesday, March 19, 2019 10:04 AM
To: Sartoretto, Marirose <msartoretto@attorneygeneral.gov<mailto:msartoretto@attorneygeneral.gov>>; Crandall, Jennifer <jcrandall@attorneygeneral.gov<mailto:jcrandall@attorneygeneral.gov>>
Subject:

Good morning all,

I've attached the template release for the Planned Parenthood Teen Pregnancy Prevention program amicus brief. As a reminder, this is embargoed until today, March 19th, at 12pm EST.

Thank you and have a great rest of your day.

Karissa Hand
Deputy Press Secretary
Office of Pennsylvania Attorney General Josh Shapiro
Email: khand@attorneygeneral.gov<mailto:khand@attorneygeneral.gov>
Phone: 215-478-5990

STATE OF VERMONT
OFFICE OF THE ATTORNEY GENERAL
109 STATE STREET
MONTPELIER, VT 05609-1001

FOR IMMEDIATE RELEASE:
March 19, 2019

CONTACT: Eleanor Spottswood
Deputy Solicitor General
802-828-3171

Vermont Joins Coalition ~~of 21 Attorneys General File Amicus Brief~~ in Support of Evidence-Based Teen Pregnancy Prevention Program

HHS's Funding Opportunity Announcements Undermine States' Efforts to Reduce Teen Pregnancy by Shifting Focus to Abstinence-Only Programs

~~HARRISBURG~~ MONTPELIER — ~~Today,~~ Attorney General T.J. Donovan announced that Vermont has joined a coalition of 21 Attorneys General in filing~~ed~~ an amicus brief supporting Planned Parenthood in their legal challenge against the U.S. Department of Health and Human Services' change to the funding structure of the Teen Pregnancy Prevention (TPP) grant program. The case, *Planned Parenthood v. HHS*, is one of three lawsuits challenging two Funding Opportunity Announcements (FOAs) issued by HHS in 2018 for the TPP program, which Congress created to fund evidence-based programs proven effective in reducing teen pregnancy. The 2018 FOAs changed the requirements for the program by shifting the focus to abstinence-only education, rather than evidence-based programs shown to be effective.

Since its creation in 2009, the TPP Program has provided nearly $1 billion for state, local, and community programs that have been proven to reduce rates of teenage pregnancy. Those programs reached half a million teens from 2010-2014, and are anticipated to reach 1.2 million more from 2015-2019. The program puts an intentional focus on communities with the greatest need and most vulnerable youth, including those of color, in foster care, or in rural areas. The TPP Program is an indispensable component of State efforts to reduce the physical and medical risks of teenage pregnancy, as well as associated emotional, social, and financial costs.

Commented [CC1]: Vermont statistics

The Attorneys General argue that the 2018 FOAs threaten to frustrate the design of the TPP Program and undermine the States' efforts to reduce teen pregnancy. The FOAs would shift the focus of the grant process to rewarding programs that promote a particular "abstinence-only" ideology, rather than following Congress' mandate to fund programs that are medically accurate and have been proven to work through rigorous evaluation.

If the FOAs are allowed to stand, federal funds will be directed to less-effective or medically inaccurate programs, while other programs that have been proven to work will languish. As a result, more teens will be at risk of becoming pregnant, imposing significant additional costs on the States and their residents.

"The Department of Health and Human Services is jeopardizing the health and well-being of teens across the country by undermining the Teen Pregnancy Prevention program," said Attorney

General X. "The TPP Program is designed to support programs proven to reduce teenage pregnancies and their associated costs, yet HHS is threatening to reverse that success by promoting abstinence-only education. I'm proud to stand with Planned Parenthood and my colleagues in support of medically accurate, evidence-based programs to reduce teen pregnancies."

Commented [CC2]: Better quote for T.J.

In two similar cases, *Planned Parenthood of NYC v. HHS* and *Multnomah County v. Azar*, the District Court found that HHS had acted unlawfully and vacated or enjoined one of the FOAs. However, the district court dismissed the case at hand for lack of standing. Planned Parenthood appealed to the Ninth Circuit to reverse the District Court's decision and to direct the District Court to enter summary judgment in favor of Plaintiffs. The Attorneys General filed this amicus brief in support of that request.

The coalition ~~was led by Pennsylvania Attorney General Josh Shapiro and~~ included~~d~~s state attorneys general from California, Connecticut, Delaware, District of Columbia, Hawaii, Illinois, Iowa, Massachusetts, Maryland, Michigan, Minnesota, Nevada, New Jersey, New York, North Carolina, Oregon, Pennsylvania, Rhode Island, Vermont, Virginia, and Washington.

###

From:	Clark, Charity
To:	Silver, Natalie
Subject:	Re: kentucky brief
Date:	Thursday, April 4, 2019 4:29:29 PM
Attachments:	Kentucky release CRC edits.docx

I made some small suggestions here.

From: Silver, Natalie
Sent: Thursday, April 4, 2019 3:36:59 PM
To: Clark, Charity
Subject: RE: kentucky brief

I added a line. I tracked the changes. Let me know your thoughts

Natalie Silver
Community Outreach and Policy Coordinator
Vermont Attorney General's Office
Natalie.Silver@vermont.gov
802 595 8679

From: Clark, Charity <Charity.Clark@vermont.gov>
Sent: Thursday, April 4, 2019 2:59 PM
To: Silver, Natalie <Natalie.Silver@vermont.gov>
Subject: Re: kentucky brief

I think we need to somehow anchor this in Vermont or in our values. Otherwise, I'm not sure we will get press. Spitballing: In contrast to Kentucky, every Vermonter is at least x hours from an abortion provider. Or, Vermont has consistently protected women's healthcare and right to an abortion. We want to stand up for women (and our constitutional rights) everywhere. I dunno, none of these sound great. Maybe the brief has a compelling line or two about why Vermont is doing this?

Sent from my iPhone

On Apr 4, 2019, at 2:18 PM, Silver, Natalie <Natalie.Silver@vermont.gov> wrote:

> Natalie Silver
> Community Outreach and Policy Coordinator
> Vermont Attorney General's Office
> Natalie.Silver@vermont.gov
> 802 595 8679
>
> <ATTORNEY GENERAL DONOVAN JOINS BRIEF PROTECTING WOMEN'S ACCESS TO ABORTION SERVICES .docx>

STATE OF VERMONT
OFFICE OF THE ATTORNEY GENERAL
109 STATE STREET
MONTPELIER, VT 05609-1001

FOR IMMEDIATE RELEASE:
April 4, 2019

CONTACT: Eleanor Spottswood
Assistant Attorney General
802-828-3171

ATTORNEY GENERAL DONOVAN JOINS BRIEF PROTECTING WOMEN'S ACCESS TO ABORTION SERVICES

MONTPELIER- Today, Attorney General Donovan joined a coalition of 20 attorneys general in filing an amicus brief asking the U.S. Court of Appeals for the Sixth Circuit to affirm a lower court's finding ~~that~~ about a Kentucky abortion law. The lower court found that the regulating abortion services is unconstitutional under the 14th Amendment of the U.S. Constitution. The brief argues that the availability of abortion services in neighboring states does not excuse a state from the Constitution's prohibition on unduly burdening a woman's ability to access abortion services in her home state. Additionally, the brief urges the Court to ensure that regulations imposed on abortion services actually promote women's health without erecting substantial obstacles to the availability of these services. In Vermont, Attorney General Donovan has actively supported the passage of an amendment to the Vermont constitution that guarantees a woman's right to an abortion and has worked to protect women's access to preventative and reproductive healthcare services.

A copy of the brief can be found here.

The implications of this case for the women of Kentucky are particularly severe, as the law at issue would effectively eliminate the only abortion provider in the state. In their brief, the attorneys general further argue that allowing a state—like Kentucky—to rely on neighboring

states for abortion services harms neighboring states. Allowing Kentucky's~~this~~ analysis could have unintended consequences on neighboring states whose demand for abortion services could increase.

Plaintiff-Appellee EMW Women's Surgical Center (EMW) is Kentucky's only licensed abortion facility. While EMW has provided safe abortions since the 1980s, in 2017, Kentucky's Cabinet for Health and Family Services (Cabinet) notified EMW that its license to perform abortions had been renewed in error, citing alleged violations of Kentucky law. EMW filed suit in March 2017, with Planned Parenthood later intervening in the case. Planned Parenthood had been trying unsuccessfully to obtain an abortion license until the Cabinet abruptly informed the organization that its transfer and transport agreements with a hospital and ambulance company were allegedly "deficient."

The District Court for the Western District of Kentucky ultimately agreed with EMW and Planned Parenthood, finding that the Kentucky law regarding transport and transfer agreement requirements imposed an undue burden on Kentucky women seeking to exercise their constitutional right to access abortion services. In response, the Cabinet appealed this decision last month in the federal courts, challenging the District Court's findings. Today's brief was filed in support of Planned Parenthood and EMW's legal challenge.

Joining Attorney General Donovan ~~and the Attorney General of Nevada~~ in filing today's brief are the a~~A~~ttorneys gs~~G~~eneral of California, Connecticut, Delaware, the District of Columbia, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Mexico, New York, North Carolina, Oregon, Pennsylvania, Virginia and Washington.

###

From:	Silver, Natalie
To:	Clark, Charity
Subject:	RE: kentucky brief
Date:	Thursday, April 4, 2019 3:37:01 PM
Attachments:	ATTORNEY GENERAL DONOVAN JOINS BRIEF PROTECTING WOMEN'S ACCESS TO ABORTION SERVICES NRS edits.docx

I added a line. I tracked the changes. Let me know your thoughts

Natalie Silver
Community Outreach and Policy Coordinator
Vermont Attorney General's Office
Natalie.Silver@vermont.gov
802 595 8679

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To: Silver, Natalie <Natalie.Silver@vermont.gov>
Subject: Re: kentucky brief

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> <ATTORNEY GENERAL DONOVAN JOINS BRIEF PROTECTING WOMEN'S ACCESS TO ABORTION SERVICES .docx>

STATE OF VERMONT
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109 STATE STREET
MONTPELIER, VT 05609-1001

FOR IMMEDIATE RELEASE:
April 4, 2019

CONTACT: Eleanor Spottswood
Assistant Attorney General
802-828-3171

ATTORNEY GENERAL DONOVAN JOINS BRIEF PROTECTING WOMEN'S ACCESS TO ABORTION SERVICES

MONTPELIER- Today, Attorney General Donovan joined a coalition of 20 attorneys general in filing an amicus brief asking the U.S. Court of Appeals for the Sixth Circuit to affirm a lower court's finding that a Kentucky law regulating abortion services is unconstitutional under the 14th Amendment of the U.S. Constitution. The brief argues that the availability of abortion services in neighboring states does not excuse a state from the Constitution's prohibition on unduly burdening a woman's ability to access abortion services in her home state. Additionally, the brief urges the Court to ensure that regulations imposed on abortion services actually promote women's health without erecting substantial obstacles to the availability of these services. In Vermont, Attorney General Donovan has actively supported the passage of an amendment to the Vermont constitution that guarantees a woman's right to an abortion and worked to protect women's access to preventative and reproductive healthcare services.

A copy of the brief can be found here.

The implications of this case for the women of Kentucky are particularly severe, as the law at issue would effectively eliminate the only abortion provider in the state. In their brief, the attorneys general further argue that allowing a state—like Kentucky—to rely on neighboring states for abortion services harms neighboring states. Allowing this analysis could have

unintended consequences on neighboring states whose demand for abortion services could increase.

Plaintiff-Appellee EMW Women's Surgical Center (EMW) is Kentucky's only licensed abortion facility. While EMW has provided safe abortions since the 1980s, in 2017, Kentucky's Cabinet for Health and Family Services (Cabinet) notified EMW that its license to perform abortions had been renewed in error, citing alleged violations of Kentucky law. EMW filed suit in March 2017, with Planned Parenthood later intervening in the case. Planned Parenthood had been trying unsuccessfully to obtain an abortion license until the Cabinet abruptly informed the organization that its transfer and transport agreements with a hospital and ambulance company were allegedly "deficient."

The District Court for the Western District of Kentucky ultimately agreed with EMW and Planned Parenthood, finding that the Kentucky law regarding transport and transfer agreement requirements imposed an undue burden on Kentucky women seeking to exercise their constitutional right to access abortion services. In response, the Cabinet appealed this decision last month in the federal courts, challenging the District Court's findings. Today's brief was filed in support of Planned Parenthood and EMW's legal challenge.

Joining Attorney General Donovan and the Attorney General of Nevada in today's brief are the Attorneys General of California, Connecticut, Delaware, the District of Columbia, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Michigan, Minnesota, New Mexico, New York, North Carolina, Oregon, Pennsylvania, Virginia and Washington.

###

From:	Clark, Charity
To:	Sullivan, Eileen
Cc:	Leriche, Lucy Rose; Silver, Natalie (Natalie.Silver@vermont.gov)
Subject:	RE: Planned Parenthood quote for your Title X press release
Date:	Tuesday, March 19, 2019 9:54:00 AM

Great! Thank you, Eileen. Yes, the motion is still set to be filed on Thursday.
Charity

From: Sullivan, Eileen <Eileen.Sullivan@ppnne.org>
Sent: Monday, March 18, 2019 5:47 PM
To: Clark, Charity <Charity.Clark@vermont.gov>
Cc: Leriche, Lucy Rose <Lucy.Leriche@ppnne.org>
Subject: Planned Parenthood quote for your Title X press release

Hi Charity!

Below is the quote from Lucy for the Title X announcement this week. Are you still looking at Thursday?

“This gag rule violates medical ethics and nationally accredited standards, and reputable institutions including the American Medical Association strongly oppose it,” said Lucy Leriche, Vice President of Public Policy at Planned Parenthood of Northern New England. "We are grateful to Attorney General Donovan for his leadership and action to prevent the Trump administration’s gag rule from taking effect in early May. We will continue fighting to protect the ability of providers to give the medically ethical, accurate, quality health care that our patients have come to expect from PPNNE.”

Thank you!

Eileen

Eileen Sullivan (She/Her/Hers)
Communications Director, Vermont
Planned Parenthood of Northern New England
Planned Parenthood Vermont Action Fund
784 Hercules Drive, Suite 110
Colchester, Vermont 05446
O: 802-448-9751
C: 646-467-0674
www.ppnne.org | Eileen.Sullivan@ppnne.org

From:	Sullivan, Eileen
To:	Clark, Charity
Cc:	Leriche, Lucy Rose; Silver, Natalie
Subject:	RE: Planned Parenthood quote for your Title X press release
Date:	Tuesday, March 19, 2019 11:36:30 AM

Thank you, Charity!

Eileen

Eileen Sullivan (She/Her/Hers)
Communications Director, Vermont
Planned Parenthood of Northern New England
Planned Parenthood Vermont Action Fund
784 Hercules Drive, Suite 110
Colchester, Vermont 05446
O: 802-448-9751
C: 646-467-0674
www.ppnne.org | Eileen.Sullivan@ppnne.org

From: Clark, Charity <Charity.Clark@vermont.gov>
Sent: Tuesday, March 19, 2019 9:55 AM
To: Sullivan, Eileen <Eileen.Sullivan@ppnne.org>
Cc: Leriche, Lucy Rose <Lucy.Leriche@ppnne.org>; Silver, Natalie <Natalie.Silver@vermont.gov>
Subject: RE: Planned Parenthood quote for your Title X press release

Great! Thank you, Eileen. Yes, the motion is still set to be filed on Thursday.
Charity

From: Sullivan, Eileen <Eileen.Sullivan@ppnne.org>
Sent: Monday, March 18, 2019 5:47 PM
To: Clark, Charity <Charity.Clark@vermont.gov>
Cc: Leriche, Lucy Rose <Lucy.Leriche@ppnne.org>
Subject: Planned Parenthood quote for your Title X press release

Hi Charity!

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that our patients have come to expect from PPNNE.”

Thank you!

Eileen

Eileen Sullivan (She/Her/Hers)
Communications Director, Vermont
Planned Parenthood of Northern New England
Planned Parenthood Vermont Action Fund
784 Hercules Drive, Suite 110
Colchester, Vermont 05446
O: 802-448-9751
C: 646-467-0674
www.ppnne.org | Eileen.Sullivan@ppnne.org

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From:	Clark, Charity
To:	Spottswood, Eleanor; Sullivan, Eileen; Silver, Natalie
Cc:	Leriche, Lucy Rose
Subject:	RE: Press conference
Date:	Wednesday, March 6, 2019 1:42:00 PM

Thanks, Ella! Eileen, let's connect next week when we have a better picture of the date of the filing.
Charity

From: Spottswood, Eleanor
Sent: Wednesday, March 6, 2019 1:34 PM
To: Clark, Charity <Charity.Clark@vermont.gov>; Sullivan, Eileen <Eileen.Sullivan@ppnne.org>; Silver, Natalie <Natalie.Silver@vermont.gov>
Cc: Leriche, Lucy Rose <Lucy.Leriche@ppnne.org>
Subject: RE: Press conference

Hi Charity and Eileen,

The latest I have heard from lead state Oregon is that the PI motion may actually be filed the week of March 18. I will keep you all updated as I learn more.

Ella

Eleanor L.P. Spottswood
Assistant Attorney General
Vermont Attorney General's Office
109 State Street
Montpelier, Vermont 05609
802-828-3178
eleanor.spottswood@vermont.gov

From: Clark, Charity <Charity.Clark@vermont.gov>
Sent: Wednesday, March 6, 2019 1:30 PM
To: Sullivan, Eileen <Eileen.Sullivan@ppnne.org>; Silver, Natalie <Natalie.Silver@vermont.gov>
Cc: Leriche, Lucy Rose <Lucy.Leriche@ppnne.org>; Spottswood, Eleanor <Eleanor.Spottswood@vermont.gov>
Subject: RE: Press conference

Hi, Eileen,

We will want to have the press conference when the motion for preliminary injunction is filed. My understanding is that this won't occur until late next week at the earliest, but I have looped in Ella Spottswood for clarification. Ella, do we have a tentative date for filing?

Thank you,
Charity

From: Sullivan, Eileen [mailto:Eileen.Sullivan@ppnne.org]
Sent: Wednesday, March 6, 2019 1:26 PM
To: Silver, Natalie <Natalie.Silver@vermont.gov>; Clark, Charity <Charity.Clark@vermont.gov>
Cc: Leriche, Lucy Rose <Lucy.Leriche@ppnne.org>
Subject: Press conference

Hi Charity and Natalie,

I'm reaching out to see if you have a date in mind for the press conference about the lawsuit? Any update would be helpful. Thank you!

Eileen

Eileen Sullivan (She/Her/Hers)
Communications Director, Vermont
Planned Parenthood of Northern New England
Planned Parenthood Vermont Action Fund
784 Hercules Drive, Suite 110
Colchester, Vermont 05446
O: 802-448-9751
C: 646-467-0674
www.ppnne.org | Eileen.Sullivan@ppnne.org

From: Silver, Natalie <Natalie.Silver@vermont.gov>
Sent: Monday, March 4, 2019 1:52 PM
To: Sullivan, Eileen <Eileen.Sullivan@ppnne.org>; Clark, Charity <Charity.Clark@vermont.gov>; Leriche, Lucy Rose <Lucy.Leriche@ppnne.org>
Subject: RE: Draft press release for today

Thats fine with us. We will make the change. Thanks!

Natalie Silver
Community Outreach and Policy Coordinator
Vermont Attorney General's Office
Natalie.Silver@vermont.gov
802 595 8679

From: Sullivan, Eileen <Eileen.Sullivan@ppnne.org>
Sent: Monday, March 4, 2019 1:51 PM
To: Clark, Charity <Charity.Clark@vermont.gov>; Leriche, Lucy Rose <Lucy.Leriche@ppnne.org>
Cc: Silver, Natalie <Natalie.Silver@vermont.gov>
Subject: RE: Draft press release for today
Importance: High

Hi Charity – in reading this again we changed the word “clinics” to “heath care centers” in the attached version. Are you okay with that language?

Many thanks!

Eileen

Eileen Sullivan (She/Her/Hers)
Communications Director, Vermont
Planned Parenthood of Northern New England
Planned Parenthood Vermont Action Fund
784 Hercules Drive, Suite 110
Colchester, Vermont 05446
O: 802-448-9751
C: 646-467-0674
www.ppnne.org | Eileen.Sullivan@ppnne.org

From: Clark, Charity <Charity.Clark@vermont.gov>
Sent: Monday, March 4, 2019 1:14 PM
To: Sullivan, Eileen <Eileen.Sullivan@ppnne.org>; Leriche, Lucy Rose <Lucy.Leriche@ppnne.org>
Cc: Silver, Natalie <Natalie.Silver@vermont.gov>
Subject: Draft press release for today

Hi, Eileen and Lucy,

I have attached our draft press release regarding the Title X lawsuit. Please let me know if you have any feedback.

We are hoping to send this out as soon as we can once the press embargo is lifted at 2 p.m. Please send along a quote when you can! Give me a ring if you have any questions.

Thanks,
Charity

Charity R. Clark
Chief of Staff
Office of the Attorney General
109 State Street
Montpelier, Vermont 05609
802-828-3737

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From:	Sullivan, Eileen
To:	Spottswood, Eleanor; Clark, Charity
Subject:	RE: Title X comments to HHS
Date:	Tuesday, March 26, 2019 9:50:43 AM

Hi Ella,

Thank you so much for getting back to me so quickly!

Eileen

From: Spottswood, Eleanor <Eleanor.Spottswood@vermont.gov>
Sent: Tuesday, March 26, 2019 9:48 AM
To: Sullivan, Eileen <Eileen.Sullivan@ppnne.org>; Clark, Charity <Charity.Clark@vermont.gov>
Subject: RE: Title X comments to HHS

Hi Eileen,

I wish I could help but sadly, it turns out that our website doesn't track this information. This has been a disappointment to our office as well.

Good luck with your proposal!

Ella

Eleanor L.P. Spottswood
Assistant Attorney General
Vermont Attorney General's Office
109 State Street
Montpelier, Vermont 05609
802-828-3178
eleanor.spottswood@vermont.gov

From: Sullivan, Eileen <Eileen.Sullivan@ppnne.org>
Sent: Tuesday, March 26, 2019 9:45 AM
To: Clark, Charity <Charity.Clark@vermont.gov>; Spottswood, Eleanor <Eleanor.Spottswood@vermont.gov>
Subject: Title X comments to HHS

Good morning Charity and Ella,

I hope you're both doing well!

A colleague is working on a proposal and asked how many comments Vermont helped to drive to HHS in opposition to the gag rule last summer. PPNNE supported 1,419 Vermonters in submitting

their comments to HHS. I'd love to include the number of Vermonters your office helped – do you know how many comments were submitted through your portal?
https://ago.vermont.gov/act_now_for_reproductive_health/

Many thanks for any info you can provide!

Eileen

Eileen Sullivan (She/Her/Hers)
Communications Director, Vermont
Planned Parenthood of Northern New England
Planned Parenthood Vermont Action Fund
784 Hercules Drive, Suite 110
Colchester, Vermont 05446
O: 802-448-9751
C: 646-467-0674
www.ppnne.org | Eileen.Sullivan@ppnne.org

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From:	Spottswood, Eleanor
To:	Silver, Natalie; Clark, Charity
Subject:	RE: Title X press contacts
Date:	Thursday, March 21, 2019 9:53:47 AM
Attachments:	Presser VERMONT MOVES TO PROTECT FUNDING IN TITLE X LAWSUIT -elps2 and nat edits.docx

Here are a few more comments.

Thanks

Ella

Eleanor L.P. Spottswood
Assistant Attorney General
Vermont Attorney General's Office
109 State Street
Montpelier, Vermont 05609
802-828-3178
eleanor.spottswood@vermont.gov

-----Original Message-----
From: Silver, Natalie <Natalie.Silver@vermont.gov>
Sent: Thursday, March 21, 2019 9:34 AM
To: Spottswood, Eleanor <Eleanor.Spottswood@vermont.gov>; Clark, Charity <Charity.Clark@vermont.gov>
Subject: RE: Title X press contacts

Ok no problem. I know Kristina. Thanks!

Natalie Silver
Community Outreach and Policy Coordinator Vermont Attorney General's Office Natalie.Silver@vermont.gov
802 595 8679

-----Original Message-----
From: Spottswood, Eleanor <Eleanor.Spottswood@vermont.gov>
Sent: Thursday, March 21, 2019 9:30 AM
To: Silver, Natalie <Natalie.Silver@vermont.gov>; Clark, Charity <Charity.Clark@vermont.gov>
Subject: FW: Title X press contacts

Hi Natalie,

It looks like Kristina Edmunson is the press contact in Oregon--see her contact info below. I am focused on a deadline for Act 46 today. Can you coordinate with Kristina directly re timing?

Thanks

Ella

Eleanor L.P. Spottswood
Assistant Attorney General
Vermont Attorney General's Office
109 State Street
Montpelier, Vermont 05609
802-828-3178
eleanor.spottswood@vermont.gov

-----Original Message-----
From: Shugar Kamala H <kamala.h.shugar@doj.state.or.us>
Sent: Wednesday, January 2, 2019 5:50 PM
To: Spottswood, Eleanor <Eleanor.Spottswood@vermont.gov>; Edmunson Kristina <kristina.edmunson@doj.state.or.us>; Kaplan Scott <Scott.Kaplan@doj.state.or.us>
Cc: Clark, Charity <Charity.Clark@vermont.gov>; Silver, Natalie <Natalie.Silver@vermont.gov>
Subject: Re: Title X press contacts

Copying Kristina Edmunson.

Kamala H. Shugar, Special Counsel
Office of the Attorney General
Oregon Department of Justice
1162 Court Street NE, Salem OR 97301
503.378.6002(desk)
541.521.2708(cell)

On Jan 2, 2019, at 4:31 PM, Spottswood, Eleanor <Eleanor.Spottswood@vermont.gov<mailto:Eleanor.Spottswood@vermont.gov>> wrote:

Hi Kamala,

Thanks for the update just now on the potentially imminent Title X lawsuit, and for all the hard work your office is doing.

Please make sure that your press team includes our press team, Charity Clark and Natalie Silver (cc'd), on any communications regarding this matter.

Thanks again.

Ella

Eleanor L.P. Spottswood
Assistant Attorney General
Vermont Attorney General's Office
109 State Street
Montpelier, Vermont 05609
802-828-3178
eleanor.spottswood@vermont.gov<mailto:eleanor.spottswood@vermont.gov>

STATE OF VERMONT
OFFICE OF THE ATTORNEY GENERAL
109 STATE STREET
MONTPELIER, VT 05609-1001

FOR IMMEDIATE RELEASE:
March 21, 2019

CONTACT: Eleanor Spottswood
Assistant Attorney General
802-828-3171

VERMONT MOVES TO PROTECT FUNDING IN TITLE X LAWSUIT

Preliminary Injunction Would Stay New Federal Rule

MONTPELIER – Attorney General T.J. Donovan ~~moved to protect funding while a lawsuit against the federal government is pending~~announced today that Vermont, and 20 other states, filed a lawsuit challenging the constitutionality of the Trump Administration's Title X "gag rule". ~~The lawsuit filed today in XXX, .~~ The new rule includes a "gag rule" that limits providers' ability to give neutral, factual information to their patients about abortion, and prohibits abortion referrals. The new rule also redirects funding priorities from the CDC's birth control recommendations to "natural family planning methods." In filing the ~~suit~~motion for preliminary injunction today, Attorney General Donovan seeks to protect funding to Vermont's 10 Title X funded healthcare centers that provide essential access to services for Vermonters around the state. In Vermont, 10,000 people rely on Title X for basic healthcare. ~~The basis of the lawsuit is a new Title X funding regulation.~~ Title X is the only national federal grant program that is dedicated solely to providing comprehensive family planning and preventative health care. ~~In Vermont, 10,000 people rely on Title X for basic healthcare. The new rule includes a "gag rule" that limits providers' ability to give neutral, factual information to their patients about abortion, and prohibits abortion referrals. The new rule also redirects funding priorities from the CDC's birth control recommendations to "natural family planning methods."~~ In Vermont, the only recipient of Title X funds are 10 Planned Parenthood health care centers located around the State.

Commented [CC1]: Is this what the effect will be?

Commented [SE2R1]: Yes

Commented [SE3]: The lawsuit was filed on 3/5. This week we are filing a motion for preliminary injunction, which asks the court to stay the implementation of the new rule, which would otherwise go into effect very soon.

"Quote from T.J.," Attorney General Donovan said. Title X funds basic healthcare services, including wellness exams, cervical and breast cancer screenings, birth control, contraception education, and testing for sexually transmitted diseases and HIV.

As a result of the new regulations, Title X providers will be forced to give incomplete and misleading information to patients—a "gag rule" on providing services or information related to abortion, even to patients who affirmatively say that they want one. The gag rule would also apply to any "referral partners" of Title X health care centers. The new rule stretches Title X funding to try to cover gaps in healthcare created by employers who opt out of providing insurance to cover contraception. The new rule also redefines "family planning" to promote "natural family planning methods" over more effective forms of birth control. The new rule never mentions the CDC's evidence-based best practices guidelines, "Providing Quality Family Planning Services," which was the gold standard for healthcare under the old Title X regulations. In addition, the new rule requires Title X health care centers to be physically located in a separate facility from any abortion provider. Title X funding is not, and never has been, used for abortions.

"This gag rule violates medical ethics and nationally accredited standards, and reputable institutions including the American Medical Association strongly oppose it," said Lucy Leriche, Vice President of Public Policy at Planned Parenthood of Northern New England. "We are grateful to Attorney General Donovan for his leadership and action to prevent the Trump administration's gag rule from taking effect in early May. We will continue fighting to protect the ability of providers to give the medically ethical, accurate, quality health care that our patients have come to expect from PPNNE."

Funding for all of Vermont's Title X healthcare centers is jeopardized by the new rule. ~~Without Title X funding~~And, there is not yet any other organization capable of providing Title X

Commented [SE4]: Lucy has confirmed to me that if the gag rule goes into effect, PPNNE will withdraw from the Title X program / no longer apply for funding.

As far as our dept of health can tell, no organization other than PPNNE has ever applied for these funds in Vermont in the almost 50 years of the program. We also haven't identified any other org that is capable of providing Title X services statewide.

Not sure if you want to include these facts but I found them pretty striking.

Commented [SE5]: Even with Title X funding—we don't know anyone who will be able to use it under the new rule.

services statewide. Vermont has ten health care centers supported by Title X funds, located in Barre, Bennington, Brattleboro, Hyde Park, Rutland, Middlebury, Newport, St. Albans, St. Johnsbury, and White River Junction. All provide crucial basic health care to underserved populations. ~~Funding for each of these health care centers is jeopardized by the new rule.~~ Title X has been providing high quality preventative health care to millions of Americans for decades.

The basis for the lawsuit, filed ~~by 21 states~~on March 5, 2019, is that the new Title X rule is contrary to the U.S. Constitution and to governing statutes, including the Administrative Procedures Act. If the rule went into effect, it will harm Vermont by increasing health care costs, including costs to Medicaid spending, as a result of an increase in unintended pregnancies, cancers not detected in early stages, and the spread of sexually transmitted infections.

# # #

Commented [SE6]: Redundant w first sentence of para

Commented [SE7]: Redundant w first para

From:	Spottswood, Eleanor
To:	Silver, Natalie; Clark, Charity
Subject:	RE: Title x press release
Date:	Wednesday, March 20, 2019 2:19:16 PM
Attachments:	Presser VERMONT MOVES TO PROTECT FUNDING IN TITLE X LAWSUIT -elps.docx

Hi team,

Thanks for doing this. A couple minor edits and a substantive suggestion attached.

Ella

Eleanor L.P. Spottswood
Assistant Attorney General
Vermont Attorney General's Office
109 State Street
Montpelier, Vermont 05609
802-828-3178
eleanor.spottswood@vermont.gov

From: Silver, Natalie <Natalie.Silver@vermont.gov>
Sent: Wednesday, March 20, 2019 11:11 AM
To: Spottswood, Eleanor <Eleanor.Spottswood@vermont.gov>; Clark, Charity <Charity.Clark@vermont.gov>
Subject: Title x press release

Hi there,
Ella can you take a look at this and make sure everything is A OK?

I think aside from a quote from TJ this is basically done.

Natalie

Natalie Silver
Community Outreach and Policy Coordinator
Vermont Attorney General's Office
Natalie.Silver@vermont.gov
802 595 8679

STATE OF VERMONT
OFFICE OF THE ATTORNEY GENERAL
109 STATE STREET
MONTPELIER, VT 05609-1001

FOR IMMEDIATE RELEASE:
March 21, 2019

CONTACT: Eleanor Spottswood
Assistant Attorney General
802-828-3171

VERMONT MOVES TO PROTECT FUNDING IN TITLE X LAWSUIT

Preliminary Injunction Would Stay New Federal Rule

MONTPELIER – Attorney General T.J. Donovan moved to protect funding while a lawsuit against the federal government is pending. The basis of the lawsuit is a new Title X funding regulation. Title X is the only national federal grant program that is dedicated solely to providing comprehensive family planning and preventative health care. In Vermont, 10,000 people rely on Title X for ~~their~~ healthcare. The new rule includes a "gag rule" that limits providers' ability to give neutral, factual information to their patients about abortion, and prohibits abortion referrals. The new rule also redirects funding priorities from the CDC's birth control recommendations to ~~only~~ "natural family planning methods." In Vermont, the only recipient of Title X funds are ~~the~~ 10 Planned Parenthood health care centers located around the State.

"Quote from T.J.," Attorney General Donovan said. Title X funds basic healthcare services, including wellness exams, cervical and breast cancer screenings, birth control, contraception education, and testing for sexually transmitted diseases and HIV.

As a result of the new regulations, Title X providers will be forced to give incomplete and misleading information to patients—a "gag rule" on providing services or information related to abortion, even to patients who affirmatively say that they want one. The gag rule would also apply to any "referral partners" of Title X health care centers. The new rule stretches Title X funding to try to cover gaps in healthcare created by employers who opt out of providing

Commented [CC1]: Is this what the effect will be?

Commented [SE2R1]: Yes

Commented [SE3]: It's great, but it's not all-inclusive healthcare. Maybe we could say "basic healthcare needs" or something else vague?

Commented [SE4]: The rule isn't explicit about requiring only natural family planning, but it does allow orgs that provide only natural family planning to apply for funds

Commented [SE5]: 10 of 12 planned parenthood clinics in Vermont get funding

insurance to cover contraception. The new rule also redefines "family planning" to promote "natural family planning methods" over more effective forms of birth control. The new rule never mentions the CDC's evidence-based best practices guidelines, "Providing Quality Family Planning Services," which was the gold standard for healthcare under the old Title X regulations. In addition, the new rule requires Title X health care centers to be physically located in a separate facility from any abortion provider. Title X funding is not, and never has been, used for abortions.

Vermont has ten health care centers supported by Title X funds, located in Barre, Bennington, Brattleboro, Hyde Park, Rutland, Middlebury, Newport, St. Albans, St. Johnsbury, and White River Junction. All provide crucial basic health care to underserved populations. Funding for each of these health care centers is jeopardized by the new rule. Title X has been providing high quality preventative health care to millions of Americans for decades.

""This gag rule violates medical ethics and nationally accredited standards, and reputable institutions including the American Medical Association strongly oppose it," said Lucy Leriche, Vice President of Public Policy at Planned Parenthood of Northern New England. ""We are grateful to Attorney General Donovan for his leadership and action to prevent the Trump administration's gag rule from taking effect in early May. We will continue fighting to protect the ability of providers to give the medically ethical, accurate, quality health care that our patients have come to expect from PPNNE."

The basis for the anticipated lawsuit, filed by 21 states, is that the new Title X rule is contrary to the U.S. Constitution and to governing statutes, including the Administrative Procedures Act. If the rule went into effect, it will harm Vermont by increasing health care costs, including costs to Medicaid spending, as a result of an increase in unintended pregnancies, cancers not detected in early stages, and the spread of sexually transmitted infections.

Commented [SE6]: Lucy has confirmed to me that if the gag rule goes into effect, PPNNE will withdraw from the Title X program / no longer apply for funding.

As far as our dept of health can tell, no organization other than PPNNE has ever applied for these funds in Vermont in the almost 50 years of the program. We also haven't identified any other org that is capable of providing Title X services statewide.

Not sure if you want to include these facts but I found them pretty striking.

###

From: Silver, Natalie
To: Clark, Charity; ella.spotswood@vermont.gov
Subject: Re: TItle X update
Date: Friday, March 22, 2019 9:55:48 AM
Attachments: VERMONT MOVES TO PROTECT FUNDING IN TITLE X LAWSUIT.docx

---

Can you give this one last read before I release?

I added a line at the beginning saying that we filed a motion for preliminary injunction. I realized that we never said in the first paragraph what we were actually doing.

Let me know if there are any changes that need to be made. I also linked a copy of the filed motion.

Natalie Silver
Community Outreach and Policy Coordinator
Vermont Attorney General's Office
109 State Street, Montpelier Vermont 05609-1001
natalie.silver@vermont.gov
Office: 802 828 3173
Cell: 802 595 8679

From: Clark, Charity
Sent: Friday, March 22, 2019 9:43:27 AM
To: Silver, Natalie
Subject: Re: TItle X update

Don’t forget to update the date on the release to 3/22.

Sent from my iPhone

> On Mar 22, 2019, at 9:40 AM, Silver, Natalie <Natalie.Silver@vermont.gov> wrote:
>
> Ok. Ella maybe you can try getting in touch with someone there? Kamala and Kristina are not responding to me.
>
> Natalie Silver
> Community Outreach and Policy Coordinator
> Vermont Attorney General's Office
> 109 State Street, Montpelier Vermont 05609-1001
> natalie.silver@vermont.gov
> Office: 802 828 3173
> Cell: 802 595 8679
>
>
>
> _____
> From: Spottswood, Eleanor
> Sent: Friday, March 22, 2019 9:38:36 AM
> To: Silver, Natalie; Diamond, Joshua; Clark, Charity
> Cc: Donovan, Thomas
> Subject: RE: TItle X update
>
> Hi Natalie,

>
> Sorry their press folks have been slow. They filed the PI motion last night at about 8:30. The filed version is attached.
>
> Ella
>
> Eleanor L.P. Spottswood
> Assistant Attorney General
> Vermont Attorney General’s Office
> 109 State Street
> Montpelier, Vermont 05609
> 802-828-3178
> eleanor.spottswood@vermont.gov
>
> -----Original Message-----
> From: Silver, Natalie <Natalie.Silver@vermont.gov>
> Sent: Friday, March 22, 2019 9:36 AM
> To: Spottswood, Eleanor <Eleanor.Spottswood@vermont.gov>; Diamond, Joshua <Joshua.Diamond@vermont.gov>; Clark, Charity <Charity.Clark@vermont.gov>
> Cc: Donovan, Thomas <Thomas.Donovan@vermont.gov>
> Subject: TItle X update
>
> Hi all,
>
> I reached out to Oregon a few times yesterday but have received no response as to when they are filing the motion for a preliminary injunction/when they want to do press.
>
> I will not be here next week, so unless they get in touch today, I am going to leave this in Charity and Ella's hands. TJ has approved the press release as has Planned Parenthood. We are all set to go. Just need word from Oregon.
>
>
> Natalie
>
> Natalie Silver
> Community Outreach and Policy Coordinator Vermont Attorney General's Office
> 109 State Street, Montpelier Vermont 05609-1001 natalie.silver@vermont.gov
> Office: 802 828 3173
> Cell: 802 595 8679
>
>

STATE OF VERMONT
OFFICE OF THE ATTORNEY GENERAL
109 STATE STREET
MONTPELIER, VT 05609-1001

FOR IMMEDIATE RELEASE:
March 22, 2019

CONTACT: Eleanor Spottswood
Assistant Attorney General
802-828-3171

VERMONT MOVES TO PROTECT FUNDING IN TITLE X LAWSUIT

Preliminary Injunction Would Stay New Federal Rule

MONTPELIER – Attorney General T.J. Donovan announced that Vermont, and 20 other states, have filed a motion for preliminary injunction that would stay the Trump Administration's new federal rules governing the Title X program. The coalition of state attorneys general moved to protect Title X funding while a lawsuit challenging the constitutionality of the Trump Administration's Title X "gag rule" is pending. The "gag rule" limits providers' ability to give neutral, factual information to their patients about abortion, and prohibits abortion referrals. The new rule also redirects funding priorities from the CDC's birth control recommendations to "natural family planning methods." Attorney General Donovan seeks to protect funding to 10 of Vermont's Title X-funded healthcare centers that provide essential access to healthcare services. In Vermont, 10,000 people rely on Title X for basic healthcare. Title X is the only national federal grant program that is dedicated solely to providing comprehensive family planning and preventative health care. In Vermont, the only recipients of Title X funds are 10 Planned Parenthood healthcare centers located around the State.

A copy of the motion can be found here.

"Thousands of low-income Vermonters rely on these funds for their basic healthcare," Attorney General Donovan said. "It's unreasonable to ask healthcare providers to withhold crucial information from their patients." Title X funds basic healthcare services, including

wellness exams, cervical and breast cancer screenings, birth control, contraception education, and testing for sexually transmitted diseases and HIV.

As a result of the new regulations, Title X providers will be forced to give incomplete and misleading information to patients—a "gag rule" on providing services or information related to abortion, even to patients who affirmatively say that they want one. The gag rule would also apply to any "referral partners" of Title X health care centers. The new rule stretches Title X funding to try to cover gaps in healthcare created by employers who opt out of providing insurance to cover contraception. The new rule also redefines "family planning" to promote "natural family planning methods" over more effective forms of birth control. The new rule never mentions the CDC's evidence-based best practices guidelines, "Providing Quality Family Planning Services," which was the gold standard for healthcare under the old Title X regulations. In addition, the new rule requires Title X health care centers to be physically located in a separate facility from any abortion provider. Title X funding is not, and never has been, used for abortions.

"This gag rule violates medical ethics and nationally accredited standards, and reputable institutions including the American Medical Association strongly oppose it," said Lucy Leriche, Vice President of Public Policy at Planned Parenthood of Northern New England. "We are grateful to Attorney General Donovan for his leadership and action to prevent the Trump Administration's gag rule from taking effect in early May. We will continue fighting to protect the ability of providers to give the medically ethical, accurate, quality health care that our patients have come to expect from PPNNE."

Funding for all of Vermont's Title X healthcare centers is jeopardized by the new rule. Without Title X funding, there is not yet any other organization capable of providing Title X services statewide. Vermont has 10 healthcare centers supported by Title X funds, located in

Barre, Bennington, Brattleboro, Hyde Park, Rutland, Middlebury, Newport, St. Albans, St. Johnsbury, and White River Junction. All provide crucial basic health care to underserved populations. Title X has been providing high quality preventative health care to millions of Americans for decades.

The basis for the lawsuit, filed by 21 states, is that the new Title X rule is contrary to the U.S. Constitution and to governing statutes, including the Administrative Procedures Act. If the rule went into effect, it will harm Vermont by increasing health care costs, including costs to Medicaid spending, as a result of an increase in unintended pregnancies, cancers not detected in early stages, and the spread of sexually transmitted infections.

# # #

From:	Spottswood, Eleanor
To:	Silver, Natalie; Diamond, Joshua; Clark, Charity
Cc:	Donovan, Thomas
Subject:	RE: TItle X update
Date:	Friday, March 22, 2019 9:38:38 AM
Attachments:	Title X Motion for Preliminary Injunction.pdf

Hi Natalie,

Sorry their press folks have been slow. They filed the PI motion last night at about 8:30. The filed version is attached.

Ella

Eleanor L.P. Spottswood
Assistant Attorney General
Vermont Attorney General's Office
109 State Street
Montpelier, Vermont 05609
802-828-3178
eleanor.spottswood@vermont.gov

-----Original Message-----
From: Silver, Natalie <Natalie.Silver@vermont.gov>
Sent: Friday, March 22, 2019 9:36 AM
To: Spottswood, Eleanor <Eleanor.Spottswood@vermont.gov>; Diamond, Joshua <Joshua.Diamond@vermont.gov>; Clark, Charity <Charity.Clark@vermont.gov>
Cc: Donovan, Thomas <Thomas.Donovan@vermont.gov>
Subject: TItle X update

Hi all,

I reached out to Oregon a few times yesterday but have received no response as to when they are filing the motion for a preliminary injunction/when they want to do press.

I will not be here next week, so unless they get in touch today, I am going to leave this in Charity and Ella's hands. TJ has approved the press release as has Planned Parenthood. We are all set to go. Just need word from Oregon.

Natalie

Natalie Silver
Community Outreach and Policy Coordinator Vermont Attorney General's Office
109 State Street, Montpelier Vermont 05609-1001 natalie.silver@vermont.gov
Office: 802 828 3173
Cell: 802 595 8679

ELLEN F. ROSENBLUM
Attorney General
CHRISTINA L. BEATTY-WALTERS #981634
SCOTT J. KAPLAN #913350
Senior Assistant Attorneys General
Oregon Department of Justice
100 SW Market Street
Portland, OR 97201
Phone: (971) 673-1880
Fax: (971) 673-5000
Email: Tina.BeattyWalters@doj.state.or.us
Scott.Kaplan@doj.state.or.us

Additional counsel listed on signature page

UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

EUGENE DIVISION

STATE OF OREGON, et al.,

Plaintiffs,

v.

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

Defendants.

Case No. 6:19-cv-00317-MC

PLAINTIFF STATES' MOTION FOR PRELIMINARY INJUNCTION

Pursuant to Fed. R. Civ. P. 65 and 5 U.S.C. § 705

Request for Oral Argument

EXPEDITED HEARING REQUESTED

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CASES

FEDERAL STATUTES

FEDERAL RULES AND REGULATIONS

MISCELLANEOUS AUTHORITIES

LOCAL RULE 7-1 CERTIFICATION

Pursuant to LR 7-1(a), undersigned counsel for the State of Oregon and State of New York certify that they, as lead counsel for the plaintiffs, made a good faith effort to confer with counsel for the defendants by telephone conference to resolve the disputed matters addressed in this motion, but were unable to resolve the dispute.

MOTION FOR PRELIMINARY INJUNCTION

Pursuant to Fed. R. Civ. P. 65, Plaintiffs the States of Oregon, New York, Colorado, Connecticut, Delaware, the District of Columbia,[1] Hawai'i, Illinois, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New Mexico, North Carolina, Pennsylvania, Rhode Island, Vermont, Virginia, and Wisconsin (collectively "States") respectfully move this Court for a preliminary injunction against the implementation of Defendants' Final Rule governing the Title X family planning program, *see* *Compliance with Statutory Program Integrity Requirements*, 84 Fed. Reg. 7714 (Mar. 4, 2019), in order to preserve the status quo until this case is decided on the merits and final judgment is entered. Alternatively, pursuant to 5 U.S.C. § 705, the States move for a stay postponing the effective date of the Final Rule until this case is decided on the merits and final judgment is entered. This motion is supported by the following memorandum of law, the declarations filed herewith (*see* Appendix 1), and the pleadings and papers on file herein.[2]

[1] Plaintiff States as used herein include the District of Columbia.

[2] Plaintiff States also join the Motion for Preliminary Injunction filed by plaintiffs *American Medical Association et al.* in Case No. 6:19-cv-00318-MC ("the *AMA* case").

MEMORANDUM OF LAW

I. Introduction

On March 4, 2019, disregarding hundreds of thousands of comments and decades' worth of evidence and experience, the Department of Health and Human Services ("HHS") adopted a regulation (the "Final Rule") implementing Title X of the Public Health Service Act ("Title X") that should be enjoined as contrary to law and arbitrary and capricious. For decades, federal Title X grants have funded a crucial network of providers that deliver effective and medically appropriate family planning services to low-income individuals. The Final Rule would devastate the program by, among other things: (1) prohibiting health care professionals from providing complete and unbiased information to pregnant patients about their legal options, including abortion, for those who desire it; (2) requiring the unnecessary and arbitrary physical and financial separation of all Title X clinics from any activities relating to abortion, including abortion referral and counseling; and (3) revoking the requirement that family planning information provided under the Title X program be evidence-based.

Title X's current rules, in compliance with federal law and medical ethical standards, protect patients' ability to obtain neutral and comprehensive information about family planning from their health care providers. The Final Rule prohibits this kind of nondirective counseling about abortion and expressly mandates that health care professionals provide information about prenatal care, even if the patient is only interested in terminating the pregnancy. The Final Rule further straightjackets health care professionals by mandating that clinicians obscure the identities of abortion care providers in response to a request for an abortion referral. This *directive counseling* violates the nondirective mandate in the federal appropriations statute that funds HHS, key provisions of the Affordable Care Act ("ACA"), and professional medical codes of ethics. Incredibly, HHS suggests that requiring health care professionals to conceal

information from patients should not be problematic because patients can rely on an Internet search for reliable health care information.

The Final Rule would also implement draconian physical and financial "separation" of abortion-related activities from Title X activities. And it would divert Title X funding from programs offering an array of medically-approved contraceptive methods to programs primarily focused on abstinence or natural family planning.

The Final Rule is invalid under the Administrative Procedure Act and should be enjoined because it is not in accordance with statutory requirements established in Title X itself, the ACA, and every appropriations statute funding HHS since 1996. The Final Rule is also arbitrary and capricious in departing from the statutory text, decades of history, prior practice, and recognized standards of care for health care practitioners. Implementation of the Final Rule will cause irreparable harm to Plaintiff States and their residents. The States will be forced to try to use scarce state public health funds to make up for the loss of Title X funding. Even then, certain residents would not receive services, resulting in unintended pregnancies, an increase in sexually transmitted diseases, and other negative public health outcomes. By contrast, the federal government will not be harmed at all by a preliminary injunction or a stay of the Final Rule. The balance of the equities therefore supports such preliminary relief. Injunctive relief is necessary to protect a vital public health program with nearly fifty years of success from being eviscerated by administrative fiat.

II. Background

A. Statutory and regulatory framework

1. The Title X statute. Title X is a landmark federal safety-net program that since 1970 has funded grants to states and other entities to provide high-quality reproductive health care to low-income individuals. *See* 42 U.S.C. § 300(a). Key provisions of Title X and its

implementation history are described in Plaintiffs' Complaint, ¶¶ 41-57 (Docket No. 1).

2. The nondirective appropriations mandate. Beginning in 1996, and following the Supreme Court's decision in *Rust v. Sullivan*, 500 U.S. 173 (1991), Congress's Title X appropriation statutes have required that "all pregnancy counseling" in Title X programs "shall be nondirective." Omnibus Consolidated Rescissions and Appropriations Act ("Consolidated Rescissions and Appropriations Act"), 1996, Pub. L. No. 104-134, Title II, 110 Stat. 1321, 1321-22 (1996). This statutory mandate ("Nondirective Mandate") has appeared in every subsequent Title X appropriations statute since 1996. *See, e.g.*, Department of Defense and Labor, Health and Human Services, and Education Appropriations Act, 2019 and Continuing Appropriations Act, 2019 ("2019 Health and Human Servs. Appropriations Act"), Pub. L. No. 115-245, Title II, 132 Stat. 2981, 3070-71 (Sept. 28, 2018).

3. The 2000 Title X regulation currently in effect. In 2000, HHS issued a final rule (the "2000 regulation") that is still largely in effect today. 65 Fed. Reg. 41270 (July 3, 2000). Implementing the Nondirective Mandate, the 2000 regulation provided that each Title X project must "[n]ot provide abortion [as] a method of family planning," and must:

> (i) Offer pregnant women the opportunity to be provided information and counseling regarding each of the following options: (A) Prenatal care and delivery; (B) Infant care, foster care, or adoption; and (C) Pregnancy termination.
> (ii) If requested to provide such information and counseling, provide neutral, factual information and nondirective counseling on each of the options, and referral upon request, except with respect to any option(s) about which the pregnant woman indicates she does not wish to receive such information and counseling.

Id. at 41279 (codified at 42 C.F.R. § 59.5(a)(5)). The 2000 regulation is described in more detail in Plaintiffs' Complaint, ¶¶ 52-57 (Docket No. 1).

4. The Affordable Care Act. In 2010, Congress restricted HHS's ability to interfere with the provision of medical care by enacting Section 1554 of the ACA, which provides:

> Notwithstanding any other provision of this Act, the Secretary of Health and Human Services shall not promulgate any regulation that—
>
> (1) creates any unreasonable barriers to the ability of individuals to obtain appropriate medical care; (2) impedes timely access to health care services; (3) interferes with communications regarding a full range of treatment options between the patient and the provider; (4) restricts the ability of health care providers to provide full disclosure of all relevant information to patients making health care decisions; (5) violates the principles of informed consent and the ethical standards of health care professionals; or (6) limits the availability of health care treatment for the full duration of a patient's medical needs.

42 U.S.C. § 18114.

B. The challenged rulemaking

1. *The Department's 2018 proposal.* The 2018 proposed rule, 83 Fed. Reg. 25502 (June 1, 2018), and the strenuous opposition HHS received in response, are described in detail in Plaintiffs' Complaint, ¶¶ 261-73 (Docket No. 1).[3]

[3] *See* Letter from the Attorneys General of Washington, Oregon, Vermont, and Massachusetts to Alex Azar, Sec'y, U.S. Dep't of Health & Human Servs. (July 31, 2018) ("WA Ltr."); Letter from the Attorneys General of California, Connecticut, Delaware, Hawai'i, Illinois, Iowa, Maine, Maryland, Minnesota, New Jersey, New Mexico, North Carolina, and the District of Columbia to Alex Azar, Sec'y, U.S. Dep't of Health & Human Servs. (July 30, 2018) ("CA Ltr."); Letter from the New York Attorney General to Alex Azar, Sec'y, U.S. Dep't of Health & Human Servs. (July 31, 2018) ("NY Ltr."); Letter from New York State Dep't of Health to Alex Azar, Sec'y, U.S. Dep't of Health & Human Servs. (July 27, 2018) ("NY DOH Ltr."); Letter from James L. Madara, CEO & Exec. Vice President, Am. Med. Ass'n, to Alex Azar, Sec'y, U.S. Dep't of Health & Human Servs. (July 31, 2018) ("AMA Ltr."); Letter from Danielle M. Salhany, Chair, Me. Section of the Am. Coll. of Obstetricians & Gynecologists, to Alex Azar, Sec'y, U.S. Dep't of Health & Human Servs. (July 31, 2018) ("ACOG Ltr."); Letter from Karen S. Cox, President, Am. Acad. of Nursing, to Alex Azar, Sec'y, U.S. Dep't of Health & Human Servs. (July 26, 2018) ("AAN Ltr."); Letter from Colleen A. Kraft, President, Am. Acad. of Pediatrics to Alex Azar, Sec'y, U.S. Dep't of Health & Human Servs. (July 31, 2018) ("AAP Ltr.); Letter from Dana Singiser, Vice President of Pub. Policy & Gov't Relations, Planned Parenthood Action Fund, to Alex Azar, Sec'y, U.S. Dep't of Health & Human Servs. (July 31, 2018) ("PPFA Ltr."); Letter from Rachel Benson Gold, Vice President for Pub. Policy, Guttmacher Inst., to Office of Population Affairs, U.S. Dep't of Health & Human Servs. (July 31, 2018) ("Guttmacher Ltr."); Letter from John Meigs, Jr., Board Chair, Am. Acad. of Family Physicians to Alex Azar, Sec'y, U.S. Dep't of Health & Human Servs. (July 25, 2018) ("AAFP Ltr."); Letter from Catherine Thomasson, Senior Population Campaigner, Center for Biological

2. The Final Rule. On March 4, 2019, HHS published the Final Rule in the Federal Register. 84 Fed. Reg. 7714. The Final Rule adopted a provision (the "gag requirement") that both restricts information health care providers may share with their patients and forces them to provide certain information to patients, whether or not that information is desired. While not included in the proposed rule, the Final Rule adds a proviso that only physicians or "advanced practice providers" ("APP")—providers with a graduate degree and license to diagnose, treat, and counsel patients—may provide what HHS calls "nondirective pregnancy counseling." But actual nondirective pregnancy counseling is no longer required, and, when counseling on patient options is permitted, HHS directs providers not to discuss abortion as "the only option" and to "discuss the possible risks and side effects to both mother and unborn child of any pregnancy option presented." *Id.* at 7747.

The gag requirement permits health care providers to provide only "information about maintaining the health of the mother and unborn child during pregnancy" without providing any other information about pregnancy options. *Id.* at 7789. This is true even if the patient requests information only about abortion care. In response to such a request, the provider may give the patient a list of providers, but this list need not contain any providers who offer abortion care, regardless of patient request, and if it does, the abortion care providers must be fewer than half the providers on the list and must not be identified in any way as providers of abortion care.

Moreover, the gag requirement prohibits direct referrals for abortion care: "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." *Id.* at 7788-

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Diversity to Office of the Asst. Sec'y for Health, U.S. Dep't of Health & Human Servs. (July 10, 2018) ("CBD Ltr.").

89. Though it *prohibits* abortion care referrals, the gag requirement *requires* prenatal care referrals, regardless of patient request. The Final Rule provides, "[b]ecause Title X funds are intended only for family planning, once a client served by a Title X project is medically verified as pregnant, *she shall be referred to a health care provider for medically necessary prenatal health care*." *Id.* at 7789 (emphasis added).

The Final Rule also imposes onerous physical separation requirements on providers. Prior to adoption of the Final Rule, HHS required financial but not physical separation of Title X-funded care from abortion care. 65 Fed. Reg. 41281, 41282 (June 28, 2000). Under the Final Rule, a Title X project "must be organized so that it is physically and financially separate . . . from activities which are prohibited . . . from inclusion in the Title X program." 84 Fed. Reg. at 7789 (to be codified at 42 C.F.R. § 59.15). In order to comply, a project "must have an objective integrity and independence from prohibited activities." *Id.* The rule identifies nonexclusive factors relevant to the Secretary's determination of whether such objective integrity and independence exist, including separate health care records, workstations, personnel, and signs. *Id.* Title X project activities must be separated not only from abortion care but also any other restricted activity under the Final Rule, including referrals for abortion care.

In addition, the Final Rule weakens the quality and scope of care that must be provided in Title X-funded projects. The Final Rule removes the regulatory requirement that family planning methods and services be "medically approved." *Id.* And it encourages less effective contraceptive care by emphasizing "natural" fertility awareness methods and allowing projects not to include "every acceptable and effective family planning method or service." *Id.*

C. Harms to the States

The Final Rule harms the States in multiple ways. First, the Rule would impair and delay access to high quality contraceptive care and abortion care and place women at greater risk of

harm from abortions at later gestational ages or from unwanted pregnancies.[4] These consequences would cause damage to women's physical, emotional, and economic well-being as well as that of any future children born in a financially unstable or unprepared household.[5] Second, the Rule would force many providers, including Planned Parenthood, and also, for example, community hospitals and clinics, to withdraw from the program and leave the States' residents at risk of losing access to health care altogether.[6] This reduction of and disruption in service would lead to negative public health outcomes, even outside the reproductive health context.[7] Finally, these public health impacts will have fiscal implications for States because State funds will be needed to restructure existing programs and to pay for medical care that would not have been incurred absent the Final Rule.[8]

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[4] Darney Decl. ¶¶ 13, 16; Kost Decl. ¶¶ 65, 93-94, 96-101 (The Kost declaration is filed in the *AMA* case. The States request the Court to consider the Kost declaration as support for their motion and, if this case is not consolidated with the *AMA* case, reserve the right to file the identical declaration in this case if necessary to complete their record on appeal); Byrd Decl. (DC) ¶ 4; Gallagher Decl. (VT) ¶¶ 20, 22, 26; Gillespie Decl. (WI) ¶¶ 29-30; Handler Decl. (NV) ¶ 9; Holmes Decl. (VT) ¶ 18; Kunkel Decl. (NM) ¶¶ 22-25; Reece Decl. (CO) ¶ 13.

[5] Darney Decl. ¶ 23; Kost Decl. ¶¶ 49-59, 65; Zoll Decl. (MA) ¶ 13.

[6] PPFA Ltr., 15; CA Ltr.,10-11; WA Ltr., 23-24; NY Ltr., 8; Tobias Decl. (NY) ¶¶ 45-46; Alifante Decl. (NJ) ¶ 32; Gallagher Decl. (VT) ¶ 23; Gillespie Decl. (WI) ¶ 27; Holmes Decl. (VT) ¶¶ 18-19; Keenan Decl. (CT) ¶¶ 5-6; Lytle-Barnaby Decl. (DE) ¶¶ 27-29; Brandt Decl. (MN) ¶ 9; Charest Decl. (MI) ¶¶ 7-10; Cooke Decl. (MA) ¶ 10; Childs-Roshak Decl. (MA) ¶ 16; Drew Decl. (MA) ¶ 18; MacNaughton Decl. (MA) ¶¶ 11-12; Preiss Decl. (MA) ¶ 11; Nelson Decl. (MD) ¶ 16; Skinner Decl. (CT) ¶¶ 24-25.

[7] Kost Decl. ¶ 66; Tobias Decl. (NY) ¶¶ 19, 26, 43, 44-45; David Decl. (NY) ¶ 22; Schaler-Haynes Decl. (NJ) ¶¶ 27-37; Alifante Decl. (NJ) ¶¶ 31, 32; Alexander-Scott Decl. (RI) ¶ 11; Walker Harris Decl. (VA) ¶ 4; Gillespie Decl. (WI) ¶¶ 27, 29-30; Handler Decl. (NV) ¶¶ 7-9; Holmes Decl. (VT) ¶ 18; Wilson Decl. (NC) ¶ 12; Anderson Decl. (HI) ¶ 19; Stephens Decl. (DE) ¶¶ 19-20, 23; Drew Decl. (MA) ¶ 19; Reece Decl. (CO) ¶ 16.

[8] Rimberg Decl. (OR) ¶¶ 40-43, 48; Byrd Decl. (DC) ¶¶ 6-7, 9; Gallagher Decl. (VT) ¶¶ 24-25; Gillespie Decl. (WI) ¶ 30; Handler Decl. (NV) ¶ 9; Holmes Decl. (VT) ¶ 18; Keenan Decl (CT) ¶¶ 8, 10-11; Rattay Decl. (DE) ¶¶ 20-21, 23-25; Brandt Decl. (MN) ¶¶11-12; Charest Decl. (MI) ¶ 7; Cooke Decl. (MA) ¶ 13; Lightner Decl. (IL) ¶ 32.

III. Argument

To obtain a preliminary injunction, Plaintiffs must establish that "(1) they are likely to succeed on the merits; (2) they are likely to suffer irreparable harm in the absence of preliminary relief; (3) the balance of the equities tips in their favor; and (4) an injunction is in the public interest." *Short v. Brown*, 893 F.3d 671, 675 (9th Cir. 2018) (citing *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008)). When the federal government is a party, the last two factors merge. *Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1092 (9th Cir. 2014). The Ninth Circuit weighs these factors on a sliding scale, such that where there are only "serious questions going to the merits" a preliminary injunction may still issue so long as "the balance of hardships tips *sharply* in the plaintiff's favor" and the other two factors are satisfied. *Shell Offshore, Inc. v. Greenpeace, Inc.*, 709 F.3d 1281, 1291 (9th Cir. 2013) (citation omitted).

Alternatively, the Administrative Procedures Act ("APA") empowers courts "to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings." 5 U.S.C. § 705. Courts have concluded that the standard for such a stay is the same as the standard for a preliminary injunction. *See, e.g.*, *Bauer v. DeVos*, 325 F. Supp. 3d 74, 104-05 (D.D.C. 2018) (citing cases).

A. Plaintiffs are likely to succeed on the merits.

The APA provides that courts must "hold unlawful and set aside" agency action that is "not in accordance with law"; "in excess of statutory jurisdiction, authority, or limitations"; "arbitrary, capricious, [or] an abuse of discretion"; or "without observance of procedure required by law." 5 U.S.C. §§ 706(2)(A), (C), (D). The APA requires this Court to conduct "plenary review of the Secretary's decision," which is to be "thorough, probing, [and] in-depth." *Citizens to Pres. Overton Park v. Volpe*, 401 U.S. 402, 415, 420 (1971). Plaintiffs are likely to succeed on the merits of their claims because the Final Rule fails to meet both the substantive and the

procedural requirements of the APA.

1. The Final Rule is not in accordance with law.

The Final Rule is "not in accordance with law" and is "in excess of statutory jurisdiction, authority, or limitations," 5 U.S.C. §§ 706(2)(A), (C), because (a) the gag requirement contravenes the Nondirective Mandate that has been included in every appropriations statute funding HHS since 1996; and (b) the gag and separation requirements both violate a core provision of the Affordable Care Act that forbids HHS interference in the provision of medical care and in communications between medical providers and their patients.

This Court may preliminarily enjoin the Final Rule if the Rule is contrary to law. *See E. Bay Sanctuary Covenant v. Trump*, 909 F.3d 1219, 1248, 1256 (9th Cir. 2018) (denying government's motion for stay of temporary restraining order prohibiting enforcement of agency rule pending appeal); *E. Bay Sanctuary Covenant v. Trump*, 354 F. Supp. 3d 1094 (N.D. Cal. Dec. 19, 2018) (granting preliminary injunction against implementation of rule). As the Supreme Court made clear in *Chevron, U.S.A., Inc. v. NRDC*, "if Congress has directly spoken to the precise question at issue . . . that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." 467 U.S. 837, 842-43 (1984); *see also City of Arlington v. FCC*, 569 U.S. 290, 297-98 (2013) (in determining whether an agency action is in excess of statutory authority, "the question . . . is always whether the agency has gone beyond what Congress has permitted it to do").

a. The gag requirement is contrary to the Nondirective Mandate.

Plaintiffs are likely to succeed on the merits of their APA claim because the gag requirement contravenes express statutory language that has constrained the Department's administration of the Title X program from 1996 to the present. The appropriations statute that funds HHS requires, in connection with the Title X program, that "all pregnancy counseling be

nondirective." 2019 Health & Human Servs. Appropriations Act, 132 Stat. at 3070-71. Congress included this Nondirective Mandate in each preceding appropriations statute dating to 1996. *See supra* Part II.A.2; Complaint ¶ 51. Since 1981, HHS has defined nondirective counseling to mean a neutral presentation of all pregnancy options, including information on prenatal care, adoption, and abortion, as well as referrals on request. *See* Complaint ¶¶ 44-51; *see also* 42 C.F.R. § 59.5(a)(5). It is this well-established definition of nondirective counseling that Congress incorporated in 1996. *See* Consolidated Rescissions and Appropriations Act of 1996. And since the 2000 regulations were promulgated, Congress has repeatedly reenacted the Nondirective Mandate, ratifying the Department's construction of that mandate as codified by the 2000 Rule.

This construction is consistent with clinical guidance and codes of ethics in the relevant medical professions. Leading medical organizations have adopted both clinical and ethical guidelines that require unbiased and complete pregnancy options counseling and appropriate referrals upon request.[9] Additionally, clinical guidelines issued in 2014 by the Centers for Disease Control and HHS's Office of Population Affairs ("OPA")—the office charged with administering Title X—recommend comprehensive nondirective counseling by endorsing the ethical and clinical standards of leading medical organizations.[10] The 2014 guidelines also urge providers that "[e]very effort should be made to expedite and follow through on all referrals."[11]

[9] *See, e.g.*, AMA Ltr. 2; ACOG Ltr. 6; AAN Ltr. 4; Guttmacher Ltr. 7-8.

[10] Loretta Gavin, Susan Moskosky, et al., Providing Quality Family Planning Services: Recommendations of CDC and the U.S. Office of Population Affairs, Morbidity and Mortality Weekly Report, 63 Recommendations and Reports No. 4, 13 (April 25, 2014) ("QFP").

[11] *Id.* at 14.

The Final Rule contravenes the statutory Nondirective Mandate in multiple ways. The Final Rule does not require nondirective pregnancy counseling, but rather purports to make it optional. *See* 84 Fed. Reg. at 7789 (to be codified at 42 C.F.R. § 59.14(b)(1)). Further, the "nondirective counseling" in the Final Rule is actually directive counseling slanted in favor of pregnancy continuation. Numerous provisions of the Final Rule make that clear.

First, the Final Rule mandates directive counseling towards carrying a pregnancy to term and away from abortion care by prohibiting referral for abortion care and *requiring*—in every case—referral of a pregnant patient for prenatal care. *Id.* at 7788-89 (to be codified at 42 C.F.R. § 59.14(a), (b)(1)). *This is true regardless of the patient's request*. The Final Rule in this respect is plainly inconsistent with the statutory Nondirective Mandate. The Final Rule does not satisfy the Nondirective Mandate by allowing providers to provide a list of "comprehensive primary health care providers" to pregnant patients that may, but is not required to, contain abortion care providers. As noted above, any list given to the patient need not contain any providers that offer abortion care and, if the list does include abortion providers, these providers must comprise less than half the providers on the list and must not be identified in any way as providers of abortion care. The list must, in other words, conceal from patients seeking abortion care the identity of providers actually offering that care. *Id.* at 7789 (to be codified at 42 C.F.R. § 59.14(c)(2)). This is inconsistent with the Nondirective Mandate.

Second, the Final Rule affirmatively permits directive counseling towards pregnancy continuation. It would allow providers *not* to provide what HHS now calls "nondirective pregnancy counseling" and instead to provide only a list of prenatal care providers, "referral to social services or adoption agencies," and "information about maintaining the health of the mother and unborn child during pregnancy," even when the pregnant patient has decided to

pursue abortion care and requests a referral. *Id.* at 7789 (to be codified at 42 C.F.R. § 59.14(b)(1)(ii)-(iv)). It also limits all manner of activities relating to abortion, including "counseling . . . as an indirect means of encouraging or promoting abortion as a method of family planning." *Id.* at 7789 (to be codified at 42 C.F.R. § 59.16(a)). Even making a brochure available about a clinic that provides abortion care would violate this provision. *Id.* at 7790 (to be codified at 42 C.F.R. § 5.16(b)(1)). This is plainly inconsistent with the Nondirective Mandate.

Third, to the extent pregnancy options counseling is permitted by the Final Rule, the Final Rule adds a restriction that only a limited subset of providers may provide it. The Final Rule provides that only physicians and other "advanced practice providers" may provide "nondirective pregnancy counseling." *Id.* at 7789 (to be codified at 42 C.F.R. § 59.14(b)(1)(i)). As a result, a sizeable portion of providers currently providing nondirective pregnancy counseling would not be permitted to continue to do so.[12] In Oregon, for example, about 33 percent of the nondirective pregnancy counseling is currently provided by registered nurses who are not APPs. Rimberg Decl. (OR) ¶ 30. Limiting the provision of nondirective pregnancy counseling to a subset of qualified providers, but allowing, without limitation, the provision of directive counseling in favor of pregnancy continuation, is contrary to the Nondirective Mandate.

Finally, the pregnancy counseling that HHS claims is "nondirective" and that *is* purportedly permitted is not consistent with the Nondirective Mandate. HHS directs that "abortion must not be the only option presented" and also that "[p]hysicians or APPs should

[12] HHS, Office of Population Affairs, *Title X Family Planning Annual Report: 2017 National Summary*, at 4 (Aug. 2018); *accord* Alifante Decl. (NJ) ¶ 28 ; Gillespie Decl. (WI) ¶ 28; David Decl. (NY) ¶¶ 42-44; Gallagher Decl. (VT) ¶ 6; Handler Decl. (NV) ¶ 11; Wilson Decl. (NC) ¶ 26; Anderson Decl. (HI) ¶ 12; Walker Harris Decl. (VA) ¶ 23.

discuss the possible risks and side effects to both mother and unborn child of any pregnancy option presented." 84 Fed. Reg. at 7747. The HHS redefinition of "nondirective" pregnancy counseling thus requires health care providers to disregard the requests of patients who only want counseling and information on abortion care in favor of governmentally mandated speech to the contrary.

The Final Rule violates the unambiguously expressed intent of Congress to require pregnancy counseling that is actually nondirective; indeed, the Rule expressly *prohibits* the nondirective counseling that the statute requires. For that reason, the States are likely to prevail on their claim that the Final Rule is contrary to law.

b. The gag and separation requirements contravene the Affordable Care Act.

The Final Rule is also directly contrary to key provisions of the ACA and in excess of HHS's statutory authority. 5 U.S.C. § 706(2)(A), (C). The ACA's plain text could not be clearer: It expressly prohibits HHS from issuing regulations that interfere with full and frank communications with medical providers and the provision of appropriate medical care. 42 U.S.C. § 18114(1)-(4). The ACA also prohibits regulations that violate principles of informed consent and the ethical standards of medical professionals. 42 U.S.C. § 18114(5). These provisions were designed to prevent exactly the type of agency rules at issue here: rules that annihilate long-standing protections for patients that entitle them to receive comprehensive medical advice. The gag requirement, the separation requirements, and the changes to the scope of the Title X program are all contrary to § 18114.

i. The gag requirement interferes with the provider-patient relationship and violates principles of informed consent.

First, the gag requirement contravenes at least five of the six subsections of 42 U.S.C. § 18114. By allowing health care providers to withhold requested medical information from

pregnant clients and prohibiting referrals for abortion care, the Final Rule has the effect of creating an unreasonable barrier to abortion care in violation of 42 U.S.C. § 18114(1). The Final Rule requires providers to answer a request for an abortion referral with a confusing and potentially misleading list, and the rule requires referrals of *all* pregnant women for prenatal and/or social services, regardless of whether they intend to continue their pregnancy. 84 Fed. Reg. at 7789 (to be codified at 52 C.F.R. § 59.14(b)).[13] These provisions will erect a barrier to accessing abortion care because providers will be unwilling to violate standards of professional ethics. For these same reasons, the Final Rule impedes timely access to services contrary to 42 U.S.C. § 18114(2)—indeed that appears to be the entire purpose of providing a list that conceals the identity of abortion care providers. The Final Rule's restrictions on counseling and referrals for abortion care would thus delay access to abortion care for those seeking that care.[14]

In addition, for all the reasons discussed, the gag requirement does—actually—gag providers. The Final Rule, therefore, "interferes with communications regarding a full range of treatment options between the patient and the provider," 42 U.S.C. § 18114(3), and "restricts the ability of health care providers to provide full disclosure of all relevant information to patients making health care decisions," 42 U.S.C. § 18114(4).[15]

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[13] *Accord* PPFA Ltr. 14; Guttmacher Ltr. 7.

[14] ACOG Ltr. 5-6.

[15] In addition, the Final Rule requires providers to actively "encourage family participation" in the health services provided to minors, regardless of state laws that expand access to family planning services for minors. This requirement, which has only very narrow exceptions, is an unreasonable barrier to the ability of teenagers to obtain confidential medical care, interferes with the communication regarding treatment options between Title X providers and their patients, and will delay access to care. 84 Fed. Reg. 7717-18, 7787; *see* Byrd Decl. (DC) ¶ 8; Zoll Decl. (MA) ¶ 14.

For similar reasons, the gag requirement also violates 42 U.S.C. § 18114(5) by violating the principles of informed consent. Comments by the Guttmacher Institute explain that "Title X's long-standing counseling requirements . . . are essential to ensuring informed consent in reproductive health care—a bedrock principle of modern medical practice in the United States deeply rooted in legal, ethical, and medical standards developed over the course of decades." Guttmacher Ltr. 7.

The Final Rule similarly violates 42 U.S.C. § 18114(5) because it would require health care providers to violate their professions' ethical standards.[16] For example, the American College of Obstetricians and Gynecologists explains that physicians have an ethical obligation to "provide a pregnant woman who may be ambivalent about her pregnancy full information about all options in a balanced manner, including raising the child herself, placing the child for adoption, and abortion." ACOG Ltr. 6. Similarly, the nurses' code of ethics indicates that "patients have the right 'to be given accurate, complete, and understandable information in a manner that facilitates an informed decision.'" AAN Ltr. 4. The American Academy of Nursing explains that this requires nurses to "share with the client all relevant information about health choices that are legal and to support that client regardless of the decision the client makes." *Id.* The biased and incomplete information required by the Final Rule would violate these standards.

For these reasons, the Final Rule's gag requirement is contrary to the ACA.

ii. The physical separation requirements create unreasonable barriers to medical care.

The Final Rule's separation requirements, 84 Fed. Reg. at 7789 (to be codified at 42 C.F.R. § 59.15), also "create[] . . . unreasonable barriers to the ability of individuals to obtain

[16] *See* ACOG Ltr. 3-5; PPFA Ltr. 11 (citing standards of professional ethics).

appropriate medical care" and "impede[] timely access to health care services." 42 U.S.C. § 18114(1), (2). The separation requirements would create substantial impediments to accessing Title X services because they would require providers to implement onerous and extensive physical separation from all abortion-related activities. *See* 84 Fed. Reg. at 7789 (to be codified at 42 C.F.R. § 59.15). Providers would have to open a second clinic that does not share any of the same overhead services with their principal locations in order to continue Title X funding. Those who cannot afford the costs of doubling their expenditures may have no choice but to withdraw from the program.[17]

The separation requirements violate the ACA by depriving patients of access to providers. Effectively, the separation requirements target providers that have a demonstrated history of successfully delivering family planning services to their communities and jeopardize continuity of care for patients with existing relationships with Title X providers.[18] This is especially problematic because, "[f]or many clients, Title X providers are their only ongoing source of health care and health education."[19] Many clients also rely on Title X providers for testing and treatment related to sexually transmitted diseases as well as routine gynecological and breast cancer screenings.[20] The existing network of providers would be decimated by the separation requirements because "[o]ver forty percent of all services provided to Title X eligible

[17] Kost Decl. ¶¶ 102-104; Darney Decl. ¶ 18.

[18] *See* Tobias Decl. (NY) ¶¶ 44-45; David Decl. (NY) ¶ 41; Gillespie Decl. (WI) ¶ 25, 29; Handler Decl. (NV) ¶ 8; Holmes Decl. (VT) ¶ 18; Kunkel Decl. (NM) ¶¶ 22-25.

[19] HHS, Office of Population Affairs, Title X Family Planning Annual Report, 2016 National Summary, at ES-1 (Aug. 2017).

[20] AMA Ltr. 5.

recipients are provided by agencies that may also provide abortion . . . ."[21] Promulgating rules that deprive patients of medical care directly contravenes each provision of 42 U.S.C. § 18114.

Moreover, the separation requirements would effectively ensure that the majority of providers that do remain in the Title X program refrain from offering abortion counseling or referral services because to do so would trigger separation obligations that are simply too onerous for many providers to feasibly handle.[22] Thus, the separation requirements would deprive patients of both complete information and appropriate and available care–violating the ACA's requirement that HHS refrain from interfering with the communications between health care providers and their clients. 42 U.S.C. § 18114(1), (3), (4), (5).

iii. The Final Rule will decrease access to medically-approved family planning.

Additionally, the Final Rule would effectively deprive patients of evidence-based care, in violation of 42 U.S.C. § 18114(1) and (5). The Final Rule deemphasizes comprehensive contraceptive care that includes the full range of FDA-approved contraceptive methods. Under current rules, all Title X projects must "[p]rovide a broad range of acceptable and effective medically [i.e., FDA] approved family planning methods." 42 C.F.R. § 59.5(a)(1). The Final Rule removes "medically approved" from this provision. 84 Fed. Reg. at 7787 (to be codified at 42 C.F.R. § 59.5(a)(1)). This change would increase the participation of providers who provide less effective methods of contraception.[23] Indeed, the Final Rule adopts a definition of "family planning" that emphasizes fertility-based awareness methods (specifically, natural family planning) and permits Title X projects not to provide "every acceptable and effective family

[21] CBD Ltr. 2; *accord* ACOG Ltr. 11.

[22] *See* Alexander-Scott Decl. (RI) ¶ 19; Alifante Decl. (NJ) ¶ 30; Gillespie Decl. (WI) ¶ 29; Kunkel Decl. (NM) ¶ 23; Schaler-Haynes Decl. (NJ) ¶ 39; Wilson Decl. (NC) ¶¶ 37-38.

[23] Guttmacher Ltr. 15.

planning method or service." 84 Fed. Reg. at 7787 (to be codified at 42 C.F.R. § 59.2)). Numerous comments to the proposed rule explained that these changes would narrow the scope of methods and services available for patients under Title X by making it less likely that the full range of medically-approved contraceptives, including the most effective methods, remain available to those who need them.[24] By allowing funding for projects that have a limited non-evidence-based scope, while at the same time deemphasizing the need to offer a legitimately broad range of options, the Final Rule represents the kind of restriction and barrier that 42 U.S.C. § 18114 was designed to prevent. As HHS itself has recognized, "[c]ontraceptive services should include consideration of a full range of FDA-approved contraceptive methods."[25]

For all these reasons, Plaintiffs are likely to prevail on their claim that the Final Rule is contrary to the ACA and should be vacated on those grounds.

2. The Final Rule is arbitrary and capricious in violation of the APA.

Under the APA, the Court must "hold unlawful and set aside" agency action that is "arbitrary, capricious, [or] an abuse of discretion." 5 U.S.C. § 706(2)(A). Plaintiffs are likely to prevail on their claim that the Final Rule is arbitrary and capricious.

The APA requires an agency to engage in "reasoned decisionmaking" that rests on a "logical and rational" "consideration of the relevant factors." *Michigan v. E.P.A.*, 135 S. Ct. 2699, 2706 (2015). Generally, to survive an arbitrary and capricious challenge, an agency must articulate a "rational connection between the facts found and the choice made." *State Farm*, 463 U.S. at 43. Where an agency reverses a prior policy, however, it must provide "a more detailed justification than what would suffice for a new policy created on a blank slate." *FCC v. Fox*

[24] *See, e.g.*, AMA Ltr. 3-4; ACOG Ltr. 8-11; AAFP Ltr. 2; Guttmacher Ltr. 1-3.
[25] QFP at 7.

Television Stations, 556 U.S. 502, 515 (2009). In such circumstances, an agency acts arbitrarily and capriciously when it fails to offer a "reasoned explanation" for changing course, *State Farm*, 463 U.S. at 41-42, or refuses to consider "when its prior policy has engendered serious reliance interests," *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1209 (2015).

In promulgating the gag requirement, the separation requirements, and the changes to the scope of the program, HHS disregards substantial evidence that the changes will diminish access to affordable and reliable reproductive-health-related services.

a. The Supreme Court's holding in *Rust v. Sullivan* does not give HHS license to revive outdated and irrelevant regulations.

First, HHS's revival of the gag and the separation requirements from the 1988 Regulations, without consideration of the experience and expertise over the last three decades from the Department itself, Title X grantees, or the leading organizations in the medical community, is arbitrary and capricious. HHS does not articulate new findings or information to support its promulgation of the gag and separation requirements. Instead, the Department relies heavily on the Supreme Court's decision in *Rust*, 500 U.S. at 189, which rejected the argument that the 1988 Regulations were arbitrary and capricious in violation of the APA. *See* 84 Fed. Reg. at 7766 ("Nothing in the [APA] precludes the Department from re-adopting regulatory provisions that it had previously adopted, successfully defended in court, and then rescinded."); *see generally id.* at 7714-86 (citing *Rust* 25 times). The holding in *Rust* on whether the 1988 Regulations were arbitrary and capricious, however, focuses on the process behind, not the substance of, the 1988 Regulations and (even setting aside the post-*Rust* enactment of the Nondirective Mandate and the ACA) does not insulate the gag or separation requirements in the Final Rule from challenge.

In 1988, HHS issued gag and separation provisions similar to those in the Final Rule primarily based on findings that the Government Accountability Office ("GAO") and the Office of the Inspector General ("OIG") published in 1982. *See* 53 Fed. Reg. 2922-24 (Feb. 2, 1988). The decision in *Rust* upheld HHS's reliance on the results from these "critical reports" for the 1988 Regulations. *See Rust*, 500 U.S. at 189. The *Rust* Court's holding has little bearing, however, on the question of whether HHS may rely, decades later, on that same information to reinstate the gag and separation requirements without regard to more recent developments. What served as a rational basis for the provisions in 1988 does not maintain that status indefinitely; survey results from a small set of Title X grantees in 1982 have limited applicability in 2019. *See Sierra Club v. E.P.A.*, 671 F.3d 955, 966 (9th Cir. 2012) (an agency stands on "shaky legal ground relying on significantly outdated data, given the amount of time that [new information] was available" before it acted). The decision in *Rust* does not give HHS license to blind itself to Title X's changing landscape.

In the 37 years since the GAO and OIG issued their reports, HHS has determined that the facts and assumptions supporting the 1988 gag and separation requirements were either incorrect or no longer relevant. As discussed *infra* III.A.2.b and III.A.2.c, recent evidence shows that the provisions are not only unnecessary to comply with Title X requirements, but also impose deleterious burdens on providers and beneficiaries. HHS's failure to take into account updated information about grantees' experience with Title X is arbitrary and capricious.

b. The gag requirement is arbitrary and capricious.

HHS's departure from its longstanding policy requiring healthcare professionals to provide nondirective pregnancy counseling is arbitrary and capricious. *See supra* III.A.1.a. HHS previously concluded that similar restrictions on counseling and referrals "endanger[ed] women's lives and health" and "interfere[d] with the doctor-patient relationship." 65 Fed. Reg. at

41271. HHS's abrupt reversal of course ignores its own experience in implementing Title X for decades, as well as the evidence commenters submitted, which demonstrate that the counseling and referrals for abortion do not encourage or promote abortion as a method of family planning. Furthermore, the Department disregards the consensus from leading medical organizations that the gag requirement contravenes the providers' ethical requirements and would force providers to either deliver substandard care or to withdraw from the program. There is no rational basis to support the gag rule.

(1) Mandatory referrals for prenatal care are coercive and not medically necessary. The Final Rule's directive mandating referral of all pregnant clients to prenatal care lacks sufficient justification. *See* 84 Fed. Reg. at 7789 (to be codified at 42 C.F.R. § 59.14(b)(1)). The Department has previously explained that if "projects were to counsel on an option even where a client indicated that she did not want to consider that option, there would be a real question as to whether the counseling was truly nondirective or whether the client was being steered to choose a particular option." 65 Fed. Reg. at 41273. In particular, HHS found that "requiring a referral for prenatal care" was "coercive" and "inconsistent" with the nondirective requirement. *Id.* at 41275.

HHS pays lip service to the importance of nondirective counseling under Title X, *see* 84 Fed. Reg. at 7787 (to be codified at 42 C.F.R. § 59.2) ("services are never to be coercive and must always be strictly voluntary"), yet mandates prenatal care referrals for all pregnant patients. *See* 84 Fed. Reg. at 7787 (to be codified at 42 C.F.R. § 59.14(b)(1)). HHS defines referrals for prenatal care, regardless of the views of the patient, as "nondirective" because they are "medically necessary." *Id.* at 7760. As an initial matter, HHS creates an untenable and internally inconsistent definition of referrals as simultaneously directive and nondirective: the

Final Rule characterizes unsolicited and mandatory referrals as nondirective in the prenatal care context, yet considers patient-requested referrals to be directive in the abortion context. *See* *Alliance for the Wild Rockies v. U.S. Forest Serv.*, 907 F.3d 1105, 1116-17 (9th Cir. 2018) (finding an agency's new definition of an existing term to be arbitrary and capricious where the new and existing definitions were internally inconsistent); *Arizona Cattle Growers' Ass'n v. U.S. Fish & Wildlife*, 273 F.3d 1229, 1242 (9th Cir. 2001) (an agency's position that is contrary to the "plain meaning of the statute" is arbitrary and capricious). Additionally, in support of its stated justification that prenatal care is "medically necessary" for all pregnant women even if they seek termination, HHS cites two sources that only explain the value of prenatal care to attaining positive birth outcomes among low-income women. *See* 84 Fed. Reg. at 7762 nn. 99, 100. These studies do not provide a rational basis for the conclusion that prenatal care is necessary or desirable for women seeking abortions. *See* *S. Yuba River Citizens League v. Nat'l Marine Fisheries Serv.*, 723 F. Supp. 2d 1247, 1256 (E.D. Cal. 2010) ("Even for scientific questions . . . a court must intervene when the agency's determination is counter to the evidence or otherwise unsupported.") (citing *Sierra Club v. E.P.A.*, 346 F.3d 955, 961 (9th Cir. 2003)).

(2) Referrals do not promote or encourage abortion. There is no rational basis for prohibiting providers from offering referrals upon the patient's request. HHS has specifically found, based on its experience and the expertise of providers, that referrals did "little, if anything, to encourage or promote the selection of abortion as a method of family planning." 65 Fed. Reg. at 4125. HHS provides no evidence to the contrary. *See supra* III.A.1.a (HHS itself and leading medical organizations consider referrals upon request to fall within the well-established definition of "nondirective counseling"). In the absence of reasoned analysis for revoking its prior rule, HHS's restrictions on referrals are arbitrary and capricious. *See* *Fox*

Television, 556 U.S. at 516 (noting that "a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy").

(3) Limiting who can provide pregnancy counseling is irrational. HHS is similarly unable to justify its requirement that medical professionals hold advanced degrees in order to provide pregnancy counseling. This change, which excludes a substantial proportion of provider personnel from giving counseling on all options for pregnant patients, lacks evidentiary support or even a purported rationale. HHS acknowledges that the "nondirective" counseling on abortion care the Rule authorizes complies with Title X's restriction on funding abortion for family planning purposes. *See* 84 Fed. Reg. at 7724, 7760. HHS is also aware that a large percentage of participants currently provide nondirective pregnancy counseling through nurses and medical assistants.[26] Yet, it nonetheless would prohibit a large section of the provider community from offering this crucial service.

HHS does not offer any reason for this limitation. HHS does not contend, nor is there any evidence to support the view, that pregnancy counseling requires specialized medical knowledge or that professionals without advanced degrees are unsuited to offer counseling in some other respect.[27] *See* *King Cty. v. Azar*, 320 F. Supp. 3d 1167, 1177 (W.D. Wash. 2018) ("HHS's failure to articulate *any* explanation for its action, much less a reasoned one based on relevant factors, exemplifies arbitrary and capricious agency action meriting reversal."). The gag requirement creates an irrational distinction between two categories of personnel, all of whom are qualified to give nondirective pregnancy counseling. *See* *Hicks v. Comm'r of Soc. Sec.*, 909

[26] AAN Ltr. 3 (nurse practitioners constitute 75 percent of clinicians at Planned Parenthood sites).

[27] *See* CA Ltr. 8; Alifante Decl. (NJ) ¶¶ 8, 28; Gallagher Decl. (VT) ¶ 6; Gillespie Decl. (WI) ¶ 28; Handler Decl. (NV) ¶ 11.

F.3d 786, 808 (6th Cir. 2018) (agency's distinctions between two classes of individuals must be based on sufficient justifications).

(4) Current regulations do not conflict with federal conscience statutes. As a rationale for the sweeping gag requirement, HHS offers speculative concerns about the current rule's consistence with federal conscience laws. Title X's facially neutral provisions do not conflict, however, with conscience statutes, which act as a shield against religious discrimination, not a sword to strike down neutral and generally applicable laws. *See generally* 83 Fed. Reg. at 3880 (addressing anti-discrimination provisions of conscience laws); *see also* 84 Fed. Reg. at 7747 (recognizing that Title X has coexisted with federal conscience laws for 40 years). Furthermore, OPA has confirmed that it "would not enforce [the] Title X regulatory requirement on objecting grantees or applicants," 83 Fed. Reg. at 25506 (quoting 73 Fed. Reg. at 78087), and that it is already responsible for ensuring that Title X grantees comply with federal conscience laws. 84 Fed. Reg. at 7747.

HHS offers no explanation or basis to conclude that these robust compliance mechanisms are insufficient. Indeed, HHS fails to provide a single example of a complaint about a Title X grantee's violation of conscience laws, and does not supply any other basis for concluding that the two sets of laws conflict. It is arbitrary and capricious for HHS to finalize significant changes to the rule to address a nonexistent problem. *See State Farm*, 463 U.S. at 43 (an agency may not "offe[r] an explanation for its decision that runs counter to the evidence before [it]"); *Nat'l Fuel Gas Supply Corp. v. F.E.R.C.*, 468 F.3d 831, 841 (D.C. Cir. 2006) (agency rule was arbitrary and capricious where agency lacked any evidence to support key factual conclusion).

(5) The gag requirement undermines the provider-patient relationship. HHS failed to consider substantial evidence that the Final Rule would undermine the provider-patient

relationship by coercing medical professionals to violate their medical ethics standards and offer substandard care, in violation of OPA's own 2014 clinical guidelines. In order to avoid giving compromised care to patients, many grantees and subgrantees, including Planned Parenthood, have explained that they will no longer be able to participate in the program when the gag requirement becomes effective, which will unravel the current network of the Title X providers.[28] The resulting reduction of eligible providers would cause profound harm to the program's beneficiaries because, as explained above, *supra* III.A.1.b.iii, many clients rely on Title X providers as their only ongoing source of health care and education.[29] *See also infra* III.B.1.

Without explanation, HHS failed to consider the serious consequences that commenters have highlighted. *See State Farm*, 463 U.S. at 43 (an agency's failure to "consider an important aspect of the problem" renders a decision arbitrary and capricious); *see also Stewart v. Azar*, 313 F. Supp. 3d 237, 263 (D.D.C. 2018) (vacating HHS's regulations and explaining that "the Secretary never once *mentions* the estimated 95,000 people who would lose coverage, which gives the Court little reason to think that he seriously grappled with the bottom-line impact on healthcare") (emphasis in original). HHS summarily concludes that the rule does not "require health care professionals to violate medical ethics," 84 Fed. Reg. at 7748, and, in any case, that "information about abortion and abortion providers is widely available and easily accessible, including on the internet," *id.* at 7746. This is a stunning position: HHS is suggesting that,

[28] Commenters explained that providers would have to withdraw, and as a result, beneficiaries would have significantly reduced access to care. WA Ltr. 23-25; NY Ltr. 8-9; NY DOH Ltr. 1; CA Ltr. 10-11, 14; AMA Ltr. 4; ACOG Ltr. 10-13; AAN Ltr. 2-3; AAP Ltr. 1; PPFA Ltr. 13, 15-16; Guttmacher Ltr. 9-12.

[29] WA Ltr. 4, 6-9; NY Ltr. 2-4; NY DOH Ltr. 1; CA Ltr. 12, 15-16; AMA Ltr. 5; ACOG Ltr. 1-2; AAN Ltr. 3; PPFA Ltr. 1-2, 17-19; Guttmacher Ltr. 12-13.

rather than rely on trained health care professionals for counseling, patients seeking access to a legal medical procedure should instead surf the Internet for information.

In any event, HHS does not provide citations to these allegedly available and accessible resources, let alone evidence-based, reliable resources. *See* Encino Motorcars, LLC v. Navarro, 136 S. Ct. 2117, 2126 (2016) (a "summary discussion" offering "barely any explanation" does not suffice for APA purposes where an agency is overruling a long-held previous policy). HHS also arbitrarily failed to consider the costs associated with either delays in receiving abortion services, which will force more women to carry unwanted pregnancies to term or undergo riskier abortions, or the withdrawal of current providers from the program, which will destabilize the Title X network.[30] This refusal to quantify or fully explain the financial implications of the gag requirement is arbitrary and capricious. *See* *Am. Wild Horse Pres. Campaign v. Perdue*, 873 F.3d 914, 932 (D.C. Cir. 2017) (agencies must "adequately analyze . . . the consequences" of their actions); *Nat'l Ass'n of Home Builders v. E.P.A.*, 682 F.3d 1032, 1039-40 (D.C. Cir. 2012) (an agency's reliance on a cost-benefit analysis that drastically underestimates the costs is arbitrary and capricious).

c. The physical separation requirements are arbitrary and capricious.

The Final Rule is arbitrary and capricious because it imposes onerous and irrational separation requirements on Title X providers that engage in abortion-related activities outside the Title X program. These separation requirements represent a radical departure from the Department's established policy of mandating financial, but not physical, segregation between a

[30] Commenters explained the social and financial consequences of reduced access to Title X providers. WA Ltr. 22-27; NY Ltr. 8-10; NY DOH Ltr. 1; CA Ltr. 10-16; AMA Ltr. 1-4; ACOG Ltr. 8-13; AAN Ltr. 2-3; AAP Ltr. 1; PPFA Ltr. 15-22; Guttmacher Ltr. 1-3. 7-18.

provider's abortion- and non-abortion-related facilities. *See* 65 Fed. Reg. 41276. HHS offers no reasoned analysis or substantiating evidence, but argues that these changes are necessary to ensure that grantees do not use, or appear to use, Title X funds for improper purposes. *See* 83 Fed. Reg. at 25507. In reaching this conclusion, however, HHS disregards findings from both its own auditors and state grantees that providers comply with Title X funding segregation requirements.

HHS does not identify any recent evidence or studies suggesting that grantees are improperly using Title X funds, are confused about proper segregation procedures, or otherwise need guidance on this issue. To the contrary, the record demonstrates that HHS and grantees have effectively established robust monitoring and auditing procedures that protect program integrity demands. OPA reported to the Congressional Research Service in 2017 and 2018 that Title X projects are "closely monitored to ensure that federal funds are used appropriately and that funds are not used for prohibited activities such as abortion."[31] Additionally, many state grantees have developed additional oversight mechanisms.[32] None of these numerous internal and external reviews revealed evidence of misuse or comingling of funds.[33] The Department's

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[31] Angela Napili, Cong. Research Serv., RL 33644, *Title X (Public Health Service Act) Family Planning Program* at 22 (Aug. 31, 2017); Angela Napili, Cong. Research Serv., R 45181, *Family Planning Program under Title X of the Public Health Service Act* at 14 (Apr. 27, 2018). Both reports explain that HHS's monitoring includes "(1) careful review of grant applications . . . (2) independent financial audits. . . (3) yearly comprehensive reviews of the grantees financial status and budget report; and (4) periodic and comprehensive program reviews and site visits by OPA regional offices." *Id.*

[32] WA Ltr. 17-19; NY Ltr. 4-6; CA Ltr. 19-20; Rimberg Decl. (OR) ¶¶ 31-26; Tobias Decl. (NY) ¶¶ 29-37; Alifante Decl. (NJ) ¶¶ 9-10; Walker Harris Decl. (VA) ¶ 20; Gillespie Decl. (WI) ¶ 8; Holmes Decl. (VT) ¶¶ 15-17; Kunkel Decl. (NM) ¶¶ 15-20; MacNaughton Decl. (MA) ¶ 7; Drew Decl. (MA) ¶ 8; Zoll Decl. (MA) ¶ 4; Preiss Decl. (MA) ¶ 7; Camp Decl. (CO) ¶ 21.

[33] Despite access to years of its own audit data, HHS identified only one example of Title X funding misuse two decades ago. 83 Fed. Reg. at 25509. Of the handful of examples that HHS offered of funding comingling, almost all involved irrelevant and outdated findings of allegedly

alleged concerns about Title X's program integrity requirements are not only speculative but also run contrary to the evidence before it. *See* *Planned Parenthood of Greater Washington & N. Idaho v. U.S. Dep't of Health & Human Servs.*, 328 F. Supp. 3d 1133, 1148-49 (E.D. Wash. 2018) (HHS's reversal of course on its project funding was arbitrary and capricious where "HHS's various stated rationales fail to take account of all the evidence before it and ignore the facts in favor of the Administration's political agenda," and "HHS's claim that the TPP Program as a whole was ineffective, is contradicted by the demonstrated evidence of the Program's success and HHS's own positive statements about the Program").

In addition to ignoring the evidence about use of Title X funds, HHS also failed to consider the reliance interests of both current providers and of patient beneficiaries.[34] The Final Rule will impose severe financial hardship on grantees and subgrantees that will drive providers out of the program.[35] As described *infra* III.B.1 and III.B.2, the reduction in service will have consequences on all aspects of reproductive health for low-income clients, from access to contraception and abortion to screening and treatment for sexually transmitted infections.[36]

HHS does not give serious consideration to the magnitude of these costs and summarily concludes that the changes to the rule will not "have a significant impact on access to services." 84 Fed. Reg. at 7782. Although HHS acknowledges that some providers may have to "relocate

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improper Medicaid billing practices. *Id.*; *accord* Rimberg Decl. (OR) ¶ 36.

[34] Commenters described the burden that the separation requirements would impose on current providers. WA Ltr. 23-27; NY DOH Ltr. 17-20; CA Ltr. 10-11; PPFA Ltr. 26-40; Guttmacher Ltr. 9-12.

[35] Several state grantees, in addition to Planned Parenthood sites, would have to withdraw from the program immediately due to both ethical concerns from the gag requirement and the burden of the separation requirements. WA Ltr. 23-25; NY Ltr. 8-9; CA Ltr. 10-12; AMA Ltr. 4; ACOG Ltr. 11-13; PPFA Ltr. 15; Guttmacher Ltr. 1-9, 19-20.

[36] WA Ltr. 23-26; NY Ltr. 8-9, 12-13; CA Ltr. 10-12; AMA Ltr. 4; ACOG Ltr. 11-13; AAN Ltr. 2-3; PPFA Ltr. 16-19; Guttmacher Ltr. 9-1, 19-20.

in response to the new [physical separation] requirement," it estimates that affected providers will only spend an average of between $20,000 and $40,000 to comply with the rule. *Id.* at 7781-82. The Department does not, however, offer any basis for its financial analysis, which differs drastically from estimates commenters have submitted.[37] Planned Parenthood, for example, estimates that the average expenditure would be $625,000 per provider.[38] HHS's disregard of reliance interests, in addition to its flawed financial analysis, is arbitrary and capricious. *See Fox Television Stations, Inc.*, 556 U.S. at 515 (an agency must provide a more detailed justification for a changed policy when prior policy "has engendered serious reliance interests"); *see also Regents of Univ. of California v. U.S. Dep't of Homeland Sec.*, 279 F. Supp. 3d 1011, 1045 (N.D. Cal. 2018) (agency action arbitrary and capricious where "[t]he administrative record includes no consideration to the disruption" it would cause).

d. Elimination of requirements to provide medically-approved contraceptive care is arbitrary and capricious.

HHS's abandonment of Title X's protection for medically-approved contraceptive care does not rest on a rational basis. The Final Rule makes two major changes to established Title X policies: (i) eliminating the requirement that family planning methods offered be "medically approved," and (ii) emphasizing "natural family planning" over contraceptive care. HHS does not provide adequate explanation for enacting changes that significantly dilute the quality and scope of Title X services.

[37] PPFA Ltr. 30-31; *see also* NY Ltr. 20-21; CA Ltr. 23; Letter from Clare Coleman, President & CEO, Nat'l Family Planning & Reprod. Health Ass'n, to Diane Foley, Deputy Assistant Sec'y for Population Affairs, U.S. Dep't of Health & Human Servs., at 37 (July 31, 2018), (estimating costs at $300,000 per site at the low end).

[38] PPFA Ltr. 32.

As described *supra* III.A.1.b.iii, the current rules protect the patients' ability to learn about and obtain a range of medically-approved contraceptive methods. The Final Rule alters this policy by promoting natural family planning options, regardless of their acceptance in the medical community, and weakening the focus on FDA-approved contraceptive care. 84 Fed. Reg. at 7787 (to be codified at 42 C.F.R. § 59.2). HHS provides a definition of family planning that disproportionately highlights non-contraceptive methods. Of the five family planning methods that the Final Rule describes, four are abstinence, natural family planning, other fertility-awareness-based methods, and referral for or information about adoption;[39] the fifth is contraception. *Id.*

Despite these changes to the scope of Title X services, HHS barely acknowledges that any of these revisions depart from existing policies. Rather, HHS contends that the Final Rule simply clarifies or corrects prior definitions that had the potential to cause confusion. *See id.* at 7729-31, 7733, 7741, 7743. There is no evidence, however, that the definitions of "medically approved" or "family planning" caused any grantees or prospective grantees confusion.[40] In the absence of any rational explanation, the Department's erosion of long-standing policies that ensure access to a broad range of medically-approved contraceptive care is arbitrary and capricious. *Wild Rockies*, 907 F.3d at 1116-17 (rejecting an agency's explanation that "newly-added" "criteria" merely "flesh[ed] out" the "existing definition" where the new definition conflicted with established agency policy).

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[39] *See* Guttmacher Ltr. 4 (less than 0.5% of Title X clients use natural family planning as their primary method of contraception).

[40] HHS's own clinical guidelines, in addition to grantees and providers, have construed "medically approved family planning" to mean FDA-approved methods. QFP at 7; WA Ltr. 14; NY Ltr. 9; NY DOH Ltr. 6; CA Ltr. 17-18; ACOG Ltr. 10-11; AAN Ltr. 5; PPFA Ltr. 65-66; Guttmacher Ltr. 1-2.

HHS also failed to adequately consider the objections that these changes invite antiabortion counseling organizations (often referred to as "crisis pregnancy centers"), which often do not employ any medical staff or provide the most common forms of FDA-approved contraceptives, to be eligible for Title X funding.[41] As many commenters observed, allowing entities that refuse to offer information or services relating to medically-approved contraception to participate will degrade the quality of care patients receive and strain the resources of the program.[42]

3. The Final Rule was promulgated without observance of procedure required by law.

In addition, the Final Rule should be preliminarily enjoined because Plaintiffs are likely to succeed on their claim that Defendants have failed to comply with the APA's procedural requirements. Under the APA, the Court must "hold unlawful and set aside" agency action that is "without observance of procedure required by law." 5 U.S.C. § 706(2)(D). Among other procedural requirements, the APA generally requires agencies to publish a notice of proposed rulemaking and solicit public comment on all rulemakings. *Id.* § 553. The required notice must describe "either the terms or substance of the proposed rule or a description of the subjects and issues involved," *id.* § 553(b)(3), and must be sufficient to "give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments." *Id.* § 553(c). "Review of an agency's procedural compliance with statutory norms is an exacting one." *NRDC v. EPA*, 683 F.2d 752, 760 (3d Cir. 1982) (citation omitted).

Here, the Final Rule falls short of the APA's procedural requirements both because HHS's restrictions on who may provide nondirective pregnancy counseling was not a logical

[41] Guttmacher Ltr. 15.

[42] WA Ltr. 13-15; NY Ltr. 9; CA Ltr. 17-18; AMA Ltr. 3; ACOG Ltr. 10; PPFA Ltr. 64-67.

outgrowth of the Proposed Rule, and because HHS failed to disclose sufficient information about its cost-benefit assumptions to allow informed comment by affected parties.

First, the Final Rule is procedurally invalid under the APA because the Final Rule's limit on pregnancy counseling to physicians or APPs only, 84 Fed. Reg. at 7789, was nowhere described in – and was not reasonably foreseeable from – the Proposed Rule. The Proposed Rule's discussion of nondirective counseling was limited expressly to abortion. *See* 83 Fed. Reg. at 25506-07 n.11, 25518 n.55. Yet the Final Rule includes a new and unprecedented requirement that medical professionals hold advanced degrees in order to provide nondirective pregnancy counseling. 84 Fed. Reg. at 7761, 7789. This new restriction would prohibit, for example, registered nurses and medical assistants from providing the allegedly "nondirective" pregnancy counseling the Final Rule allows (including allowable counseling on abortion), causing dramatic disruption to the Title X program given the large share of family planning services that medical professionals who do not hold advanced degrees currently provide. *See supra* III.A.1.a and III.A.2.a.

The Supreme Court has explained that the APA's notice requirement "mean[s] that the final rule the agency adopts must be a logical outgrowth of the rule proposed." *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 174 (2007) (citation omitted). In determining whether a final regulation fails the logical outgrowth test, the Ninth Circuit "consider[s] whether the complaining party should have anticipated that a particular requirement might be imposed." *Envtl. Def. Ctr., Inc. v. EPA*, 344 F.3d 832, 851 (9th Cir. 2003).

Here, there was no way for interested parties to have anticipated that the Department intended to impose speaker-based restrictions, tied to educational attainment levels, on all nondirective pregnancy counseling – there simply was no notice of this limitation anywhere in

the Proposed Rule. Because the notice of proposed rulemaking "did not afford interested parties the opportunity to comment" on this significant substantive change, Plaintiffs are likely to succeed on the merits of their claim that the Final Rule violated the APA. *Nat. Res. Def. Council v. EPA*, 279 F.3d 1180, 1186-89 (9th Cir. 2002) (concluding that the agency's notice and comment procedure was inadequate where a final permit redefined the area within which water quality standards could be violated, with no notice or opportunity to comment on whether the new definition complied with state environmental requirements); *see also Alameda Health Sys. v. Ctrs. for Medicare & Medicaid Servs.*, 287 F. Supp. 3d 896, 918-19 (N.D. Cal. 2017).

Second, HHS failed to disclose sufficient information in its regulatory impact analysis to satisfy the APA's notice requirement, because it did not sufficiently identify and quantify the costs and benefits of the intended rulemaking. *See* 83 Fed. Reg. at 25521. This analysis included no estimate for the costs of the proposal for patients, including the health-related costs of any increase in unintended pregnancies and sexually transmitted infections. *Id.* at 25524-25. And the analysis included an estimate of the costs of complying with the physical separation requirement that projected – with no support or quantitative basis – a "central estimate of $20,000" for each affected service site to "come into compliance with the physical separation requirement in the first year."[43] *Id.* at 25525.

These omissions evade the APA's procedural protections that ensure agency regulations are tested through exposure to public comment. "'[T]he Administrative Procedure Act requires

[43] The regulatory impact analysis in the Final Rule similarly includes no quantification of the costs this regulation will impose on patients, and fails to include any economic analysis of the Final Rule's revised definition of "low income family." 84 Fed. Reg. at 7779-82. The Final Rule revised its estimated costs for the physical separation requirement to a "central estimate of $30,000" per affected service site, again without providing any support or quantitative basis for that "central estimate." *Id.* at 7781-82.

the agency to make available to the public, in a form that allows for meaningful comment, the data the agency used to develop the proposed rule.'" *Am. Med. Ass'n v. Reno*, 57 F.3d 1129, 1132-33 (D.C. Cir. 1995) (quoting *Engine Mfrs. Ass'n v. EPA*, 20 F.3d 1177, 1181 (D.C. Cir. 1994)).

B. The States will suffer irreparable harm absent preliminary injunctive relief.

To be entitled to preliminary relief, the States must "demonstrate that irreparable injury is likely in the absence of an injunction." *Winter*, 555 U.S. at 22 (emphasis omitted). The focus is "on irreparability, 'irrespective of the magnitude of the injury.'" *California v. Azar*, 911 F.3d 558, 581 (9th Cir. 2018) (quoting *Simula, Inc. v. Autoliv, Inc.*, 175 F.3d 716, 725 (9th Cir. 1999)). The States are highly likely to be irreparably injured immediately upon the Final Rule's implementation if the Court does not grant preliminary relief.

1. Irreparable harm to Plaintiffs' sovereign and quasi-sovereign interests

The implementation of the Final Rule on May 3 would immediately injure the States' interests in protecting the health of their residents, and public health more broadly, by destroying the established network of Title X providers and compromising the quality of care beneficiaries receive. It would also immediately injure the States' sovereign interests in regulating the practice of the medical professions. *See* *Watson v. State of Maryland*, 218 U.S. 173, 176 (1910) ("It is too well settled to require discussion at this day that the police power of the states extends to regulation of certain trades and callings, particularly those which closely concern the public health."); *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 792 (1975) (states have "broad power to establish standards for licensing practitioners and regulating the practice of professions").

Harm to the health and public health of all the residents in the States is likely for at least two reasons. First, when the Final Rule becomes effective, Title X grantees and providers would

be required to immediately comply with most of the Rule's requirements. However, many Title X grantees and subgrantees (participating clinics) would be unable to comply and would, therefore, suddenly become ineligible, mid-grant, for Title X funds on May 3, 2019. For example, Planned Parenthood affiliates, which now provide contraceptive services for 40 percent of all Title X beneficiaries,[44] would discontinue their participation in Title X if the Final Rule goes into effect.[45] Indeed, in Vermont, Planned Parenthood is the only provider of Title X services.[46] States expect other current Title X providers to similarly become ineligible for Title X funds because, among other reasons, they will refuse to compromise their professional ethics.[47] Some grantees themselves, including New York, Oregon and Hawai'i, would be at risk of losing all Title X funding, and every Title X clinic in their current networks would withdraw from the program.[48] This sudden exodus would cause an immediate and dramatic reduction (if not elimination) of the Title X provider networks in each State, causing residents of those States to lose access to the Title X provider they count on for care.[49] This would have a significant public

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[44] *See* Kost Decl. ¶ 69.

[45] Kost Decl. ¶ 109; Guttmacher Ltr. Table 1 (of all contraceptive care for Title X beneficiaries, Planned Parenthood services account for 88% in Connecticut, 42% in Illinois; 60% in Michigan; 71% in Minnesota; 72% in New Jersey; 52% in New York; 100% in Vermont; and 79% in Wisconsin); PPFA Ltr. 15; CA Ltr. 10-11; WA Ltr. 23-24; NY Ltr. 8; Keenan Decl. (CT) ¶ 5; Lytle-Barnaby Decl. (DE) ¶¶ 27-29; Brandt Decl. (MN) ¶ 9; Charest Decl. (MI) ¶ 8; Walker Harris Decl. (VA) ¶ 25; Lightner Decl. (IL) ¶ 33; Skinner Decl. (CT) ¶ 24.

[46] Holmes Decl. (VT) ¶¶ 6, 19.

[47] Rimberg Decl. (OR) ¶ 44; Kost Decl. ¶ 108; Alexander-Scott Decl. (RI) ¶ 12; Alifante Decl. (NJ) ¶¶ 17, 27, 30; Gallagher Decl. (VT) ¶ 23; Gillespie Decl. (WI) ¶ 27; Holmes Decl. (VT) ¶¶ 18-19; Schaler-Haynes Decl. (NJ) ¶ 40; Rattay Decl. (DE) ¶ 19; Childs-Roshak Decl. (MA) ¶ 16; Reece Decl. (CO) ¶¶ 11, 15; Camp Decl. (CO) ¶ 26.

[48] Tobias Decl. (NY) ¶ 43; Rimberg Decl. (OR) ¶¶ 38, 44; Anderson Decl. (HI) ¶ 6.

[49] Rimberg Decl. ¶ 45; Darney Decl.18; Kost Decl. ¶ 109-118; David Decl. (NYPHS) ¶ 41; Gallagher Decl. (VT) ¶ 25; Gillespie Decl. (WI) ¶ 27; Holmes Decl. (VT) ¶¶ 18-19; Schaler-Haynes Decl. (NJ) ¶ 27; Tobias Decl. (NY) ¶¶ 44-45; Brandt Decl. (MN) ¶ 10; Charest Decl. (MI) ¶¶ 8-9; Cooke Decl. (MA) ¶ 10; Childs-Roshak Decl. (MA) ¶ 17; Drew Decl. (MA) ¶ 15;

health impact. For example, unintended pregnancies would increase, sexually transmitted infections would go undetected and untreated, and cancers would not be diagnosed in early, more easily-treatable, stages.[50]

States that are eventually able to replace their subgrantees would only be able to start repairing their Title X networks after delay and disruption.[51] Finding new clinics and attracting health care professionals that are willing to comply with the Final Rule, able to absorb the need for care, and located in the places where care is needed, would take time, if it is possible at all.[52] It would also take time to complete the administrative work required to make sure those new clinics meet the necessary standards to be a part of the Title X network.[53] Meanwhile, Title X patients—and the public health in the States—would suffer. *See* *Planned Parenthood of Greater Washington*, 328 F. Supp. 3d at 1150 (reduction in services and funding to state's pregnancy prevention program is irreparable injury); *accord* *Doe v. Trump*, 288 F. Supp. 3d 1045, 1082 (W.D. Wash. 2017).

Second, for those grantees and providers that continue to accept Title X funds and could comply with the Final Rule should it be implemented, the quality of care provided would be

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Ross Decl. (MA) ¶ 16); Preiss Decl. (MA) ¶ 10; Reece Decl. (CO) ¶¶ 4, 15-16; Skinner Decl. (CT) ¶ 25.

[50] Kost Decl. ¶ 82; Darney Decl. ¶¶14, 17-23; *see also* Alexander-Scott Decl. (RI) ¶¶ 11, 13; Walker Harris Decl. (VA) ¶ 16; Gallagher Decl. (VT) ¶ 26; Gillespie Decl. (WI) ¶ 30; Holmes Decl. (VT) ¶ 18; Schaler-Haynes Decl. (NJ) ¶¶ 31-32; Camp Decl. (CO) ¶ 26; Wilson Decl. (NC) ¶ 19; Keenan Decl. (CT) ¶¶ 6-7, 11; Stephens Decl. (DE) ¶ 19; Rattay Decl. (DE) ¶¶ 20-21, 23-27; Anderson Decl. (HI) ¶¶ 18-19; Skinner Decl. (CT) ¶ 27.

[51] *See* Guttmacher Ltr. 9-10 ("Guttmacher analyses estimate that other Title X sites would have to increase their client caseloads by 70%, on average" to absorb demand of former providers); *see also* Gallagher Decl. (VT) ¶¶ 24-25; Gillespie Decl. (WI) ¶¶ 25, 29; Holmes Decl. (VT) ¶ 18; Kunkel Decl. (NM) ¶ 23; Rattay Decl. (DE) ¶ 20; Kost Decl. ¶ 112.

[52] *See* Stephens Decl. (DE) ¶22; Charest Decl. (MI) ¶ 10.

[53] *See* NY DOH Ltr. 22; Alexander-Scott Decl. (RI) ¶ 19; Gillespie Decl. (WI) ¶ 29; Kunkel Decl. (NM) ¶¶ 23-24; Cooke Decl. (MA) ¶ 13.

greatly diminished, which would negatively impact patient and public health. Title X providers would be required to provide care that contravenes national professional standards and ethical guidelines.[54] The result would be that patients no longer receive complete information and unbiased care, which will lead to less informed decision-making about both abortion and contraception, in addition to corrosion of trust between the patient and the provider.[55] Recipients of substandard care would be at risk of undergoing later, and less safe, abortions or carrying an unwanted pregnancy to term. Because abortion is a time-sensitive procedure and risks increase as weeks pass, compelling women who have chosen to have an abortion to delay their care needlessly increases their health risks.[56] If a woman is unable to obtain a timely abortion, both she and the future child are more likely to suffer both emotional and financial hardship.[57]

The harmful consequences to the public health of implementing the flawed and unlawful regulations are irreparable. HHS's interference with the States' sovereign interests in regulating the practice of professions—including the counseling and referrals that medical professionals are qualified by their licenses to provide—is also irreparable. The Plaintiff States are entitled to injunctive relief.

2. Irreparable harm to the States' proprietary interests

Implementation of the Final Rule would also inflict irreparable economic injury on the

[54] Kunkel Decl. (NM) ¶ 22; Childs-Roshak Decl. (MA) ¶ 14; Preiss Decl. (MA) ¶ 14; MacNaughton Decl. (MA) ¶ 14; Ross Decl. (MA) ¶ 14; Zoll Decl. (MA) ¶ 12; Kost Decl. ¶¶ 91-95; Camp Decl. (CO) ¶ 26; David Decl. (NY) ¶ 39; Tobias Decl. (NY) ¶ 43; Skinner Decl. (CT) ¶ 24.

[55] Byrd Decl. (DC) ¶¶ 4, 7; Handler Decl. (NV) ¶ 9; Gillespie Decl. (WI) ¶ 28; Kunkel Decl. (NM) ¶ 22; Kost Decl. ¶ 95.

[56] Darney Decl. ¶ 13; Kost Decl. ¶ 93; *see also* *Doe v. Bolton*, 410 U.S. 179, 198 (1973) ("Time, of course, is critical in abortion," because "[r]isks during the first trimester of pregnancy are admittedly lower than during later months.").

[57] Darney Decl. ¶ 14; Schaler-Haynes Decl. (NJ) ¶¶ 35-37; Childs-Roshak Decl. (MA) ¶ 19.

States. Economic harm is not ordinarily considered irreparable. *L.A. Mem'l Coliseum Comm'n v. Nat'l Football League*, 634 F.2d 1197, 1202 (9th Cir. 1980). It is irreparable, however, where, as here, the party seeking relief will not be able to recover monetary damages to compensate for the impacts caused by an illegal rule. *See* 5 U.S.C. § 702 (permitting relief "other than money damages"); *see also California*, 911 F.3d at 582-84 (finding that states would suffer irreparable economic harm if HHS rules limiting insurance coverage of contraceptives were not enjoined). This is the case here for multiple reasons.

The loss of Title X providers who are unable to comply with the Final Rule on May 3, 2019, and/or the physical separation requirement on March 4, 2020, would cause economic harm to the States. As noted, many Title X providers would become ineligible and State residents will lose access to care. As a result, State residents will develop health care needs that would have previously been prevented or treated at early stages at Title X clinics. States would incur treatment costs in their state Medicaid and other programs that they would not otherwise have incurred.[58] For example, lack of access to the most effective contraceptives will result in unplanned pregnancies and State costs for delivery and infant care.[59] Lack of access to preventive cancer screenings is likely to result in later-discovered cancers that require more

[58] Byrd Decl. (DC) ¶¶ 6-9; Walker Harris Decl. (VA) ¶ 25; Rimberg Decl. (OR) ¶ 47; Darney Decl.¶¶ 16, 19; Kost Decl. ¶¶ 52-61, 82, 123; Alexander-Scott Decl. (RI) ¶ 11; Gillespie Decl. (WI) ¶ 30; Handler Decl. (NV) ¶ 9; Holmes Decl. (VT) ¶ 18; Kunkel Decl. (NM) ¶ 25; Schaler-Haynes Decl. (NJ) ¶¶ 33-34; Tobias Decl. (NY) ¶¶ 48-49; Keenan Decl. (CT) ¶ 11; Brandt Decl. (MN) ¶¶ 11-12; Charest Decl. (MI) ¶ 7; Childs-Roshak Decl. (MA) ¶ 18; Skinner Decl. (CT) ¶ 30.

[59] Darney Decl. ¶ 14, 16; Kost Decl. ¶ 66; Rimberg Decl. (OR) ¶ 47; Alexander-Scott Decl. (RI) ¶ 11; Alifante Decl. (NJ) ¶ 24; Gillespie Decl. (WI) ¶ 30; Handler Decl. (NV) ¶ 9; Holmes Decl. (VT) ¶ 18; Schaler-Haynes Decl. (NJ) ¶ 32; Keenan Decl. (CT) ¶ 11; Drew Decl. (MA) ¶¶ 19-20; Zoll Decl. (MA) ¶¶ 11, 13.

significant treatment regimens at advanced stages.[60] States will incur costs to treat those conditions as well through their Medicaid programs.[61]

Some States may ultimately consider trying to plug the gap left by the loss of Title X providers with state funds. In that case, those States' taxpayers will bear the cost. Those taxpayer funds would not be recoverable in the event the Final Rule is vacated and its implementation is ultimately enjoined in a final judgment. *See* 5 U.S.C. § 702 (permitting relief "other than money damages"). Other States may be unable to cover the loss of funds and must face the significant public health and economic consequences. Irreparable economic harm will result in either case.

Some grantee States face an additional type of proprietary harm because they face a "Hobson's choice." Their options are (1) implement costly changes to their policies and administrative structure for utilizing Title X funds in order to accept Title X funding under conditions they believe are unlawful; or (2) forfeit Title X funding and suffer the economic and public health consequences.[62] A Hobson's choice can establish irreparable harm. *See Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 381 (1992) (holding that a forced choice between acquiescing to a law that the plaintiff believed to be unconstitutional and violating the law under pain of liability was sufficient to establish irreparable injury). Courts have applied the same irreparable injury analysis when the alleged harm was a denial of statutory, rather than constitutional rights. *See O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft*, 342 F.3d 1170, 1187 (10th Cir. 2003); *Jolly v. Coughlin*, 76 F.3d 468, 482 (2d Cir. 1996).

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[60] Darney Decl. ¶ 22. Gillespie Decl. (WI) ¶ 30; Handler Decl. (NV) ¶¶ 8-9; Holmes Decl. (VT) ¶ 18; Nelson Decl. (MD) ¶ 17.

[61] Handler Decl. (NV) ¶ 9.

[62] *See, e.g.,* Anderson Decl. (HI) ¶¶ 2, 6; Schaler-Haynes Decl. (NJ) ¶ 40.

Because the States are likely to suffer irreparable harm to their sovereign and quasi-sovereign interests as well as their proprietary interests from the implementation of the Final Rule, the Final Rule should be preliminarily enjoined.

C. The balance of equities and public interest sharply favor preliminary relief.

The balance of the equities and public interest tip sharply in the States' favor. When the government is a party, courts consider the balance of equities and the public interest together. *Jewell*, 747 F.3d at 1092. The Title X program has successfully provided high-quality reproductive health care to low-income people across the country for decades. Protecting access to family planning services regardless of income is clearly in the public interest. It is also evident that "[t]here is generally no public interest in the perpetuation of an unlawful agency action." *League of Women Voters of U.S. v. Newby*, 838 F.3d 1, 12 (D.C. Cir. 2016). On the other hand, "there is a substantial public interest in 'having government agencies abide by the federal laws that govern their existence and operations.'" *Id.* at 12 (citation and internal quotations omitted).

If implemented, the Final Rule will cause irreparable and grave harm to the Plaintiff States and the health of their residents. The financial costs to the States will ultimately be borne by the taxpayers, which is also adverse to the public interest. By contrast, defendants will not be harmed by a preliminary injunction. Indeed, because the federal government would share increased Medicaid costs with the States, provisional relief will also protect the federal fisc. Provisional relief will preserve the status quo pending resolution of the merits of the Plaintiff States' challenges. The only cost to the agency of a preliminary injunction is the continuation of a regulatory regime that has been in place and working effectively for millions of Americans for decades. The balance of the equities and the public interest therefore support the entry of preliminary relief.

D. Scope of provisional relief

The Court should enjoin Defendants from implementing the Final Rule without geographic restriction or, in the alternative, postpone the effective date of the Final Rule pursuant to 5 U.S.C. § 705 to preserve the status quo pending judicial review.

The purpose of interim equitable relief "is not to conclusively determine the rights of the parties. . . but to balance the equities as the litigation moves forward," bearing in mind "'the overall public interest.'" *Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080, 2087 (2017) (quoting *Winter*, 555 U.S. at 26). Because the Final Rule violates federal law and is arbitrary and capricious, and because "[f]orcing federal agencies to comply with the law is undoubtedly in the public interest," *Cent. United Life, Inc. v. Burwell*, 128 F. Supp. 3d 321, 330 (D.D.C. 2015), *aff'd*, 827 F.3d 70 (D.C. Cir. 2016), enjoining Defendants from implementing the Final Rule without geographic limitation is the appropriate balance of the equities as this litigation moves forward.

To be sure, the Ninth Circuit has recently cautioned district courts to be mindful that preliminary injunctive relief not be overbroad. *See, e.g.*, *California*, 911 F.3d at 582-84. But as the Supreme Court has held, the "scope of injunctive relief is dictated by the extent of the violation established, not by the geographical extent of the plaintiff class." *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979). Here, Plaintiffs have demonstrated a likelihood of success on the merits of their claims that Defendants violated the APA, and nationwide relief is the usual course in an APA action because "when a reviewing court determines that agency regulations are unlawful, the ordinary result is that the rules are vacated – not that their application to the individual petitioners is proscribed." *Harmon v. Thornburgh*, 878 F.2d 484, 495 n.21 (D.C. Cir. 1989); *see also NAACP v. Trump*, 315 F. Supp. 3d 457, 474 n.3 (D.D.C. 2018) (order setting aside agency decision under APA did not implicate any concerns about nationwide injunctions).

In addition, the States' challenge is to a federal health care regulation that Defendants themselves described as necessary to provide national uniformity in the administration of the Title X program. *See, e.g.*, Final Rule, 84 Fed. Reg. at 7782-83; Proposed Rule, 83 Fed. Reg. at 25525-26. Where the challenged agency action has nationwide impact, a nationwide injunction is appropriate and advances the public interest by promoting efficiency and certainty. *Cf. Texas v. United States*, 809 F.3d 134, 187-88 (5th Cir. 2015) (affirming nationwide injunction for uniform immigration rules).

Plaintiffs' expansive geographic presence also minimizes any concerns about this Court's power to award relief without geographic limitation. Plaintiffs in this action are 21 States located in nine of the twelve federal judicial circuits. The plaintiffs in the related challenge before this Court include the American Medical Association, the largest professional association of physicians, residents, and medical students in the country, with members who practice and reside in all States. *See* Complaint ¶ 25, *Am. Med. Ass'n v. Azar*, No. 6:19-cv-00318-MC (filed Mar. 5, 2019). This is not a case where a single plaintiff seeks to leverage a localized dispute into national relief; it is instead a challenge by plaintiffs with national scope to an unlawful regulation with significant national impact.

In the alternative, the Court should stay the effective date of the Final Rule pending adjudication of this case on the merits, as permitted by the APA. Section 705 permits this Court to "postpone the effective date of an agency action" where "necessary to prevent irreparable injury . . . pending conclusion of the review proceedings." 5 U.S.C. § 705. Courts assessing requests for a Section 705 stay apply the same four-factor test used to evaluate requests for preliminary injunctive relief. *Bauer*, 325 F. Supp. 3d at 104-05. Here, for the reasons discussed in Parts III.A to III.C above, Plaintiffs have satisfied the typical four-factor showing required of a

request for preliminary injunctive relief. The Court should therefore stay all implementation deadlines in the Final Rule pending resolution of this case on the merits, to avoid irreparable harm to Plaintiffs.[63] *See, e.g.*, *Texas v. U.S. Envtl. Prot. Agency*, 829 F.3d 405, 435 (5th Cir. 2016); *B & D Land and Livestock Co. v. Conner*, 534 F. Supp. 2d 891, 905 (N.D. Iowa 2008); *Salt Pond Assocs. v. U.S. Army Corps of Eng'rs*, 815 F. Supp. 766, 774-75 (D. Del. 1993).

[63] The Final Rule contains an "effective date" of May 3, 2019, and a series of "compliance dates" that follow (including a May 3, 2019 deadline to comply with the gag requirement; a July 2, 2019 deadline to comply with the financial separation requirement; and a March 4, 2020 deadline to comply with the physical separation requirement). 84 Fed. Reg. at 7714, 7791. Because the Department described all of the Rule's compliance dates by reference to the Rule's effective date, however, a Section 705 stay of the effective date would appropriately stay all compliance dates as well. *Id.* at 7774 (describing the Rule's "compliance dates" as the date "by which covered entities must comply with [certain] sections after their effective date"); *id.* at 7775 (unless specified, the compliance date for all requirements of the Rule is "the effective date").

IV. Conclusion

Plaintiffs respectfully request that the Court enjoin implementation of the Final Rule.

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Respectfully submitted,

ELLEN F. ROSENBLUM
Attorney General

s/Christina L. Beatty-Walters
CHRISTINA L. BEATTY-WALTERS #981634
SCOTT J. KAPLAN #913350
Senior Assistant Attorney General
Trial Attorneys
100 SW Market St
Portland, OR 97201
Tel (971) 673-1880
Fax (971) 673-5000
Tina.BeattyWalters@doj.state.or.us
Scott.Kaplan@doj.state.or.us
Attorneys for State of Oregon

LETITIA JAMES
Attorney General
State of New York

s/ Matthew Colangelo
MATTHEW COLANGELO,
Chief Counsel for Federal Initiatives
(Special Admission Granted)
LISA LANDAU
Bureau Chief, Health Care
(Special Admission Granted)
MING-QI CHU
KATE MATUSCHAK
Assistant Attorneys General
Office of the New York State
Attorney General
28 Liberty St., 19th Floor
New York, NY 10005
Phone: (212) 416-6305
Matthew.Colangelo@ag.ny.gov
Lisa.Landau@ag.ny.gov
Ming-Qi.Chu@ag.ny.gov
Kate.Matuschak@ag.ny.gov
Attorneys for State of New York

PHILIP J. WEISER
Attorney General
State of Colorado

s/Eric R. Olson
ERIC R. OLSON
Solicitor General
(Special Admission Granted)
JENNIFER L. WEAVER
First Assistant Attorney General
(Special Admission Granted)
W. ERIC KUHN
Senior Assistant Attorney General
(Special Admission Granted)
Colorado Judicial Center
1300 Broadway, 10th Floor
Denver, CO 80203
Tel (720) 508-6548/6145/6143
eric.olson@coag.gov
jennifer.weaver@coag.gov
eric.kuhn@coag.gov
Colorado Bar Numbers: 36414, 28882, 38083
Attorneys for State of Colorado

WILLIAM TONG
Attorney General
State of Connecticut

s/Maura Murphy Osborne
MAURA MURPHY OSBORNE
Assistant Attorney General
(Special Admission Granted)
55 Elm St.
Hartford, CT 06106
Tel (860) 808-5020
Fax (860) 808-5347
Maura.MurphyOsborne@ct.gov
Attorneys for State of Connecticut

KATHLEEN JENNINGS
Attorney General
State of Delaware

s/Ilona Kirshon
ILONA KIRSHON (#3705)
Deputy State Solicitor
(Special Admission Granted)
JOANNA SUDER (#5808)
Deputy Attorney General
(Special Admission Granted)
Department of Justice
Carvel State Building, 6th Floor
820 North French Street
Wilmington, DE 19801
Tel (302) 577-8323
Fax (302) 577-6630
Kathleen.jennings@delaware.gov
ilona.kirshon@delaware.gov
joanna.suder@delaware.gov
Attorneys for State of Delaware

KARL A. RACINE
Attorney General
District of Columbia

s/Robyn R. Bender
ROBYN R. BENDER
Deputy Attorney General
VALERIE M. NANNERY
Assistant Attorney General
(Special Admission Granted)
441 4th Street, N.W., Suite 630 South
Washington, DC 20001
Tel (202) 442-9596
Fax (202) 730-1465
robyn.bender@dc.gov
valerie.nannery@dc.gov
Attorneys for District of Columbia

CLARE E. CONNORS
Attorney General
State of Hawai‘i

s/Diane K. Taira
DIANE K. TAIRA
ANGELA A. TOKUDA
JILL T. NAGAMINE
Deputy Attorneys General
(Special Admission Granted)
Department of the Attorney General
State of Hawai‘i
425 Queen Street
Honolulu, Hawai‘i 96813
Tel (808) 587-3050
Fax (808) 587-3077
Diane.K.Taira@Hawai‘i.gov
Angela.A.Tokuda@Hawai‘i.gov
Jill.T.Nagamine@Hawai‘i.gov
Attorneys for State of Hawai‘i

KWAME RAOUL
Attorney General
State of Illinois

s/Elizabeth Morris
ELIZABETH MORRIS
Assistant Attorney General
(Special Admission Granted)
LEIGH J. RICHIE
(Special Admission Granted)
Assistant Attorney General
ELIZABETH ROBERSON-YOUNG
Public Interest Counsel
100 West Randolph Street, 11th Floor
Chicago, IL 60601
(312) 814-3000
EMorris@atg.state.il.us
LRichie@atg.state.il.us
ERobersonYoung@atg.state.il.us
Attorneys for State of Illinois

BRIAN E. FROSH
Attorney General
State of Maryland

s/Carolyn A. Quattrocki
STEVE M. SULLIVAN
Solicitor General
CAROLYN A. QUATTROCKI
Deputy Attorney General
JEFFREY P. DUNLAP
Assistant Attorney General
(Special Admission Granted)
200 St. Paul Place
Baltimore, MD 21202
jdunlap@oag.state.md.us
Attorneys for State of Maryland

MAURA HEALEY
Attorney General
Commonwealth of Massachusetts

s/Amanda Hainsworth
AMANDA HAINSWORTH
Assistant Attorney General
(Special Admission Granted)
One Ashburton Place
Boston, MA 02108
Amanda.hainsworth@state.ma.us
Attorneys for Commonwealth of Massachusetts

DANA NESSEL
Attorney General
State of Michigan

s/Fadwa A. Hammoud
FADWA A. HAMMOUD (P74185)
Solicitor General
(Special Admission Granted)
TONI L. HARRIS (P63111)
Assistant Attorney General
(Special Admission Granted)
Michigan Department of Attorney General
P.O. Box 30758
Lansing, MI 48909
Telephone: (517) 335-7603
HammoudF1@michigan.gov
Harrist19@michigan.gov
Attorneys for State of Michigan

KEITH ELLISON
Attorney General
State of Minnesota

s/Megan McKenzie
MEGAN MCKENZIE
Assistant Attorney General
(Special Admission Granted)
445 Minnesota Street, Suite 900
St. Paul, Minnesota 55101-2127
Telephone: (651) 757-1405
Email: megan.mckenzie@ag.state.mn.us
Attorneys for State of Minnesota

AARON D. FORD
Attorney General
State of Nevada

s/Heidi Parry Stern
HEIDI PARRY STERN
Solicitor General
(Special Admission Granted)
Office of the Nevada Attorney General
100 North Carson Street
Carson City, Nevada 89701-4717
(775) 684-1100
hstern@ag.nv.gov
Attorneys for State of Nevada

GURBIR S. GREWAL
Attorney General
State of New Jersey

s/Glenn Moramarco
GLENN MORAMARCO
Assistant Attorney General
KIMBERLY CAHALL
(Special Admission Granted)
ELSPETH HANS
(Special Admission Granted)
Deputy Attorneys General
Richard J. Hughes Justice Complex
25 Market Street
Trenton, NJ 08625
(609) 984-3900
Glenn.Moramarco@law.njoag.gov
Kimberly.Cahall@njoag.gov
Elspeth.Hans@law.njoag.gov
Attorneys for State of New Jersey

HECTOR BALDERAS
Attorney General
State of New Mexico

s/ Jennie Lusk
JENNIE LUSK
Assistant Attorney General, Director New Mexico Office of Attorney General
201 Third NW, Suite 300
Albuquerque, NM 87102
JLusk@nmag.gov
(505) 717-3500
Attorneys for State of New Mexico

JOSHUA H. STEIN
Attorney General
State of North Carolina

s/Sripriya Narasimhan
SRIPRIYA NARASIMHAN
Deputy General Counsel
North Carolina Department of Justice
114 W. Edenton Street
Raleigh, NC 27603
SNarasimhan@ncdoj.gov
Attorneys for State of North Carolina

JOSH SHAPIRO
Attorney General
Commonwealth of Pennsylvania

s/Michael J. Fischer
MICHAEL J. FISCHER
Chief Deputy Attorney General
(Special Admission Granted)
AMBER J. SIZEMORE
Deputy Attorney General
Office of Attorney General
Strawberry Square
Harrisburg, PA 17120
(215) 560-2171
mfischer@attorneygeneral.gov
asizemore@attorneygeneral.gov
Attorneys for Commonwealth of Pennsylvania

PETER F. NERONHA
Attorney General
State of Rhode Island

s/Maria R. Lenz
MARIA R. LENZ
Assistant Attorney General
(Special Admission Granted)
Office of the Attorney General
150 South Main Street
Providence, Rhode Island 02903
1-401-274-4400, ext. 2225
marialenz@riag.ri.gov
Attorneys for the State of Rhode Island

THOMAS J. DONOVAN, JR.
Attorney General
State of Vermont

s/Eleanor Spottswood
ELEANOR SPOTTSWOOD
Assistant Attorney General
(Special Admission Granted)
Office of the Attorney General
109 State Street
Montpelier, VT 05609-1001
(802) 828-3178
eleanor.spottswood@vermont.gov
Attorneys for State of Vermont

JOSHUA L. KAUL
Attorney General
State of Wisconsin

s/Maura FJ Whelan
MAURA FJ WHELAN
Assistant Attorney General
(Special Admission Granted)
Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
Tel (608) 266-3859
whelanmf@doj.state.wi.us
Attorneys for State of Wisconsin

MARK R. HERRING
Attorney General
State of Virginia

s/Toby J. Heytens
TOBY J. HEYTENS
Solicitor General
MATTHEW R. MCGUIRE
Principal Deputy Solicitor General
MICHELLE S. KALLEN
Deputy Solicitor General
(Special Admission Granted)
BRITTANY M. JONES
John Marshall Fellow
(Special Admission Granted)
Office of the Attorney General
202 North Ninth Street
Richmond, Virginia 23219
(804) 786-7240
solicitorgeneral@oag.state.va.us
Attorneys for State of Virginia

Appendix 1 – Index of Submitted Declarations

	Short Title	State	Full Title
1	Alexander-Scott Decl. (RI)	Rhode Island	Declaration of Dr. Nicole Alexander-Scott, Director of Rhode Island Department of Health, in Support of States' Motion for Preliminary Injunction
2	Alifante Decl. (NJ)	New Jersey	Declaration of Joseph L. Alifante in Support of States' Motion for Preliminary Injunction
3	Anderson Decl. (HI)	Hawaii	Declaration of Bruce S. Anderson, PH.D. in Support of States' Motion for Preliminary Injunction
4	Brandt Decl. (MN)	Minnesota	Declaration of Joan Brandt in Support of States' Motion for Preliminary Injunction
5	Byrd Decl. (DC)	District of Columbia	Declaration of Melisa Byrd
6	Camp Decl. (CO)	Colorado	Declaration of Jody Camp in Support of States' Motion for Preliminary Injunction
7	Charest Decl. (MI)	Michigan	Declaration of Deanna Charest
8	Childs-Roshak Decl. (MA)	Massachusetts	Declaration of Dr. Jennifer Childs-Roshak, MD, MBA
9	Cooke Decl. (MA)	Massachusetts	Declaration of Margret R. Cooke, Esquire
10	Darney Decl.		Declaration of Dr. Blair Darney in Support of States' Motion for Preliminary Injunction
11	David Decl. (NY)	New York	Declaration of Lisa M. David in Support of States' Motion for Preliminary Injunction
12	Drew Decl. (MA)	Massachusetts	Declaration of John J. Drew, MBA
13	Gallagher Decl. (VT)	Vermont	Declaration of Meagan Gallagher in Support of States' Motion for Preliminary Injunction
14	Gillespie Decl. (WI)	Wisconsin	Declaration of Katie Gillespie in Support of States' Motion for Preliminary Injunction
15	Handler Decl. (NV)	Nevada	Declaration of Beth Handler in Support of

Appendix 1 – Index of Submitted Declarations

	Short Title	State	Full Title
			States' Motion for Preliminary Injunction
16	Holmes Decl. (VT)	Vermont	Declaration of Breena Holmes in Support of States' Motion for Preliminary Injunction
17	Keenan Decl. (CT)	Connecticut	Declaration of Mark Keenan in Support of States' Motion for Preliminary Injunction
18	Kost Decl.		Declaration of Kathryn Kost in Support of Plaintiffs' Motion for Preliminary Injunction *AMA v Azar*, Case No. 6:19 cv 00318-MC
19	Kunkel Decl. (NM)	New Mexico	Declaration of Kathyleen Kunkel in Support of States' Motion for Preliminary Injunction
20	Lightner Decl. (IL)	Illinois	Declaration of Shannon Lightner in Support of States' Motion for Preliminary Injunction
21	Lytle-Barnaby Decl. (DE)	Delaware	Declaration of Ruth Lytle-Barnaby, MSW
22	MacNaughton Decl. (MA)	Massachusetts	Declaration of Honor MacNaughton, MD
23	Nelson Decl. (MD)	Maryland	Declaration of Karen Nelson in Support of States' Motion for Preliminary Injunction
24	Preiss Decl. (MA)	Massachusetts	Declaration of Rachel Preiss, NP
25	Rattay Decl. (DE)	Delaware	Declaration of Karyl T. Rattay, M.D., M.S.
26	Reece Decl. (CO)	Colorado	Declaration of Melanie S. Reece, PH.D. in Support of States' Motion for Preliminary Injunction
27	Rimberg Decl. (OR)	Oregon	Declaration of Helene Rimberg in Support of States' Motion for Preliminary Injunction
28	Ross Decl. (MA)	Massachusetts	Declaration of Dr. Gabrielle Ross, PhD, MPH, MIA
29	Schaler-Haynes Decl. (NJ)	New Jersey	Declaration of Magda Schaler-Haynes in Support of States' Motion for Preliminary Injunction
30	Skinner Decl. (CT)	Connecticut	Declaration of Amanda Skinner in Support of

Appendix 1 – Index of Submitted Declarations

	Short Title	State	Full Title
			States' Motion for Preliminary Injunction
31	Stephens Decl. (DE)	Delaware	Declaration of Thomas E. Stephens, MD
32	Tobias Decl. (NY)	New York	Declaration of Lauren Tobias in Support of States' Motion for Preliminary Injunction
33	Walker-Harris Decl. (VA)	Virginia	Declaration of Vanessa Walker Harris, MD in Support of States' Motion for Preliminary Injunction
34	Wilson Decl. (NC)	North Carolina	Declaration of Walker Wilson in Support of States' Motion for Preliminary Injunction
35	Zoll Decl. (MA)	Massachusetts	Declaration of Dr. Cheryl Zoll, PhD

From: Sullivan, Eileen
To: Silver, Natalie; Leriche, Lucy Rose
Cc: Clark, Charity
Subject: RE: TPP criteria
Date: Tuesday, March 19, 2019 1:27:58 PM

Hi Natalie,

It appears PPNNE has not applied for TPP grants in the past.

Eileen

Eileen Sullivan (She/Her/Hers)
Communications Director, Vermont
Planned Parenthood of Northern New England
Planned Parenthood Vermont Action Fund
784 Hercules Drive, Suite 110
Colchester, Vermont 05446
O: 802-448-9751
C: 646-467-0674
www.ppnne.org | Eileen.Sullivan@ppnne.org

From: Silver, Natalie <Natalie.Silver@vermont.gov>
Sent: Tuesday, March 19, 2019 12:47 PM
To: Sullivan, Eileen <Eileen.Sullivan@ppnne.org>; Leriche, Lucy Rose <Lucy.Leriche@ppnne.org>
Cc: Clark, Charity <Charity.Clark@vermont.gov>
Subject: RE: TPP criteria

Thank you. It does also appear that Vermont does not have any recipients of TPP grants? Do you have any sense if that is accurate? Has Planned Parenthood ever received one of these grants in the past?

Natalie Silver
Community Outreach and Policy Coordinator
Vermont Attorney General's Office
Natalie.Silver@vermont.gov
802 595 8679

From: Sullivan, Eileen <Eileen.Sullivan@ppnne.org>
Sent: Tuesday, March 19, 2019 12:43 PM
To: Silver, Natalie <Natalie.Silver@vermont.gov>; Leriche, Lucy Rose <Lucy.Leriche@ppnne.org>
Cc: Clark, Charity <Charity.Clark@vermont.gov>
Subject: RE: TPP criteria

Hi Natalie,

Thank you for your call! I checked with our Population Health and Education managers and we all agree that the Vermont Department of Health would have the stats you're looking for. In the meantime, I'm sharing this Vermont-specific data from the Guttmacher Institute.

State Facts About Unintended Pregnancy: Vermont
https://www.guttmacher.org/sites/default/files/factsheet/vt_8_0.pdf

U.S. Teenage Pregnancy Statistics
https://www.guttmacher.org/sites/default/files/pdfs/pubs/state_pregnancy_trends.pdf

Please let me know if you need any additional support on this!

Eileen

Eileen Sullivan (She/Her/Hers)
Communications Director, Vermont
Planned Parenthood of Northern New England
Planned Parenthood Vermont Action Fund
784 Hercules Drive, Suite 110
Colchester, Vermont 05446
O: 802-448-9751
C: 646-467-0674
www.ppnne.org | Eileen.Sullivan@ppnne.org

From: Silver, Natalie <Natalie.Silver@vermont.gov>
Sent: Tuesday, March 19, 2019 11:49 AM
To: Leriche, Lucy Rose <Lucy.Leriche@ppnne.org>; Sullivan, Eileen <Eileen.Sullivan@ppnne.org>
Cc: Clark, Charity <Charity.Clark@vermont.gov>
Subject: TPP criteria

Hi Lucy and Eileen,

The AG has signed an amicus brief in support of Planned Parenthood with 20 other states challenging the change to the TPP funding structure. I'm wondering if you all have Vermont specific data as to how much money Vermont has received from the TPP program and if we have any correlative data in regards to our teen pregnancy rate. If there is any way to get this to me shortly that would be excellent! We are planning to put out a release shortly.

I've attached a draft release for your reference.

Let me know! Thanks.

Natalie

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This email and any files transmitted with it are confidential and intended solely for the use of the individual or entity to whom they are addressed. If you have received this email in error please notify the system manager. Please note that any views or opinions presented in this email are solely those of the author and do not necessarily represent those of the company. Finally, the recipient should check this email and any attachments for the presence of viruses. The company accepts no liability for any damage caused by any virus transmitted by this email.

From: Silver, Natalie
To: Clark, Charity; Donovan, Thomas
Subject: Fwd: re Revised Template Release re Kentucky Abortion Services
Date: Wednesday, April 3, 2019 2:12:11 PM
Attachments: Kentucky Abortion Services Template Release.docx

---

This is the amicus brief about Kentucky's recent action on abortion. Please let me know if you want to put this out.

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From: Spottswood, Eleanor <eleanor.spottswood@vermont.gov>
Sent: Wednesday, April 3, 2019 1:48 PM
To: Clark, Charity; Silver, Natalie
Subject: FW: re Revised Template Release re Kentucky Abortion Services

Charity and Natalie,

No pressure to do this at all, just want you to have the revised info re the sample press release I sent this morning.

Ella

From: Monica C. Moazez <MMoazez@ag.nv.gov>
Sent: Wednesday, April 3, 2019 1:35 PM
To: 'KOHolleran@oag.state.va.us' <KOHolleran@oag.state.va.us>; 'Nathan.Blake@ag.iowa.gov' <Nathan.Blake@ag.iowa.gov>; 'Eric.Tabor@ag.iowa.gov' <Eric.Tabor@ag.iowa.gov>; 'ABraun@atg.state.il.us' <ABraun@atg.state.il.us>; 'KJanas@atg.state.il.us' <KJanas@atg.state.il.us>; 'Kamala.H.Shugar@doj.state.or.us' <Kamala.H.Shugar@doj.state.or.us>; 'Donna.Cassutt@ag.state.mn.us' <Donna.Cassutt@ag.state.mn.us>; 'Elizabeth.Wilkins@dc.gov' <Elizabeth.Wilkins@dc.gov>; 'Natalie.Ludaway@dc.gov' <Natalie.Ludaway@dc.gov>; 'William.Chang@dc.gov' <William.Chang@dc.gov>; 'Lisa.Raymond@dc.gov' <Lisa.Raymond@dc.gov>; 'Caroline.vanzile@dc.gov' <Caroline.vanzile@dc.gov>; 'loren.alikhan@dc.gov' <loren.alikhan@dc.gov>; 'Alfred.Dillione@state.de.us' <Alfred.Dillione@state.de.us>; 'Aaron.Goldstein@state.de.us' <Aaron.Goldstein@state.de.us>; 'Gregory.Patterson@state.de.us' <Gregory.Patterson@state.de.us>; 'Lauren.Vella@state.de.us' <Lauren.Vella@state.de.us>; Spottswood, Eleanor <Eleanor.Spottswood@vermont.gov>; 'Dana.O.Viola@hawaii.gov' <Dana.O.Viola@hawaii.gov>; 'Krishna.F.Jayaram@hawaii.gov' <Krishna.F.Jayaram@hawaii.gov>; 'clyde.j.wadsworth@hawaii.gov' <clyde.j.wadsworth@hawaii.gov>; 'Kimberly.T.Guidry@hawaii.gov' <Kimberly.T.Guidry@hawaii.gov>;

'SDearmin@ncdoj.gov' <SDearmin@ncdoj.gov>; 'SWood@ncdoj.gov' <SWood@ncdoj.gov>; 'TMaestas@nmag.gov' <TMaestas@nmag.gov>; 'susan.herman@maine.gov' <susan.herman@maine.gov>; 'Mike.Firestone@mass.gov' <Mike.Firestone@mass.gov>; 'Joanna.Lydgate@mass.gov' <Joanna.Lydgate@mass.gov>; 'bessie.dewar@mass.gov' <bessie.dewar@mass.gov>; 'david.kravitz@state.ma.us' <david.kravitz@state.ma.us>; 'KateK@atg.wa.gov' <KateK@atg.wa.gov>; 'JeffS2@atg.wa.gov' <JeffS2@atg.wa.gov>; Edmunson Kristina <kristina.edmunson@doj.state.or.us>; 'Andrea.Oser@ag.ny.gov' <Andrea.Oser@ag.ny.gov>; 'mfischer@attorneygeneral.gov' <mfischer@attorneygeneral.gov>; 'cquattrocki@oag.state.md.us' <cquattrocki@oag.state.md.us>; 'Clare.Kindall@ct.gov' <Clare.Kindall@ct.gov>; 'ShermanA@michigan.gov' <ShermanA@michigan.gov>
Cc: Heidi P. Stern <HStern@ag.nv.gov>; Jeffrey M. Conner <JConner@ag.nv.gov>; Jessica L. Adair <JAdair@ag.nv.gov>
Subject: re Revised Template Release re Kentucky Abortion Services

All,

Please see a slightly revised template release for today's press—revisions have been made to the paragraph beneath the AG Quote, as well as to the final paragraph listing the participating states. At this time, our coalition includes 20 states and territories (including Nevada), and I will let you know if there are any last minute participants. Please continue to hold until I follow up with an email noting that the embargo has been lifted.

Many thanks,

Monica Moazez
Communications Director
Nevada Attorney General's Office
555 E. Washington Ave.
Las Vegas, NV 89101
(702) 486-0657

Attorney General XXXX Joins Multi-State Amicus Brief Protecting Women's Access to Abortion Services

Today, Attorney General XXXX joined a coalition of 19 attorneys general in filing an amicus brief asking the U.S. Court of Appeals for the Sixth Circuit to affirm a lower court's finding that a Kentucky law regulating abortion services is unconstitutional under the 14th Amendment of the U.S. Constitution. The brief, led by Nevada Attorney General Ford, argues that the availability of abortion services in neighboring states does not excuse a state from the Constitution's prohibition on unduly burdening a woman's ability to access abortion services in her home state. Additionally, the brief urges the Court to ensure that regulations imposed on abortion services actually promote women's health without erecting substantial obstacles to the availability of these services.

The implications of this case for the women of Kentucky are particularly severe, as the law at issue would effectively eliminate the only abortion provider in the state. In their brief, the attorneys general further argue that allowing a state—like Kentucky—to rely on neighboring states for abortion services harms neighboring states. Allowing this analysis could have unintended consequences on neighboring states whose demand for abortion services could increase.

AG Quote

Plaintiff-Appellee EMW Women's Surgical Center (EMW) is Kentucky's only licensed abortion facility. While EMW has provided safe abortions since the 1980s, in 2017, Kentucky's Cabinet for Health and Family Services (Cabinet) notified EMW that its license to perform abortions had been renewed in error, citing alleged violations of Kentucky law. EMW filed suit in March 2017, with Planned Parenthood later intervening in the case. Planned Parenthood had been trying unsuccessfully to obtain an abortion license until the Cabinet abruptly informed the organization that its transfer and transport agreements with a hospital and ambulance company were allegedly "deficient."

The District Court for the Western District of Kentucky ultimately agreed with EMW and Planned Parenthood, finding that the Kentucky law regarding transport and transfer agreement requirements imposed an undue burden on Kentucky women seeking to exercise their constitutional right to access abortion services. In response, the Cabinet appealed this decision last month in the federal courts, challenging the District Court's findings. Today's brief was filed in support of Planned Parenthood and EMW's legal challenge.

This amicus brief was led by Nevada Attorney General Aaron Ford and joined by the attorneys general of Connecticut, Delaware, the District of Columbia, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Michigan, Minnesota, New Mexico, New York, North Carolina, Oregon, Pennsylvania, Vermont, Virginia and Washington.

###

From: Silver, Natalie
To: Donovan, Thomas; Clark, Charity; Diamond, Joshua
Cc: Spottswood, Eleanor
Subject: RE: Draft press release: Title X lawsuit motion
Date: Thursday, March 21, 2019 10:47:58 AM

Great. Will do.

Natalie Silver
Community Outreach and Policy Coordinator
Vermont Attorney General's Office
Natalie.Silver@vermont.gov
802 595 8679

From: Donovan, Thomas <Thomas.Donovan@vermont.gov>
Sent: Thursday, March 21, 2019 10:33 AM
To: Clark, Charity <Charity.Clark@vermont.gov>; Diamond, Joshua <Joshua.Diamond@vermont.gov>
Cc: Silver, Natalie <Natalie.Silver@vermont.gov>; Spottswood, Eleanor <Eleanor.Spottswood@vermont.gov>
Subject: Re: Draft press release: Title X lawsuit motion

Looks good
Please do sm as well

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From: Clark, Charity
Sent: Thursday, March 21, 2019 7:08:54 AM
To: Donovan, Thomas; Diamond, Joshua
Cc: Silver, Natalie; Spottswood, Eleanor
Subject: Draft press release: Title X lawsuit motion

Hi, T.J.,

Here is a draft press release in the Title X lawsuit. We don't have a time that the press embargo will be lifted, but we assume later this afternoon. We will link to the motion for PI once final. Please let us know if you approve the release. I have highlighted your quote.

[redacted]

Charity

VERMONT MOVES TO PROTECT FUNDING IN TITLE X LAWSUIT

Preliminary Injunction Would Stay New Federal Rule

MONTPELIER – Attorney General T.J. Donovan announced that Vermont, and 20 other states, have moved to protect Title X funding while a lawsuit challenging the constitutionality of the Trump Administration's Title X "gag rule" is pending. The "gag rule" limits providers' ability to give neutral, factual information to their patients about abortion, and prohibits abortion referrals. The new rule also redirects funding priorities from the CDC's birth control recommendations to "natural family planning methods." Attorney General Donovan seeks to protect funding to 10 of Vermont's Title X-funded healthcare centers that provide essential access to healthcare services. In Vermont, 10,000 people rely on Title X for basic healthcare. Title X is the only national federal grant program that is dedicated solely to providing comprehensive family planning and preventative health care. In Vermont, the only recipients of Title X funds are 10 Planned Parenthood healthcare centers located around the State.

"Thousands of low-income Vermonters rely on these funds for their basic healthcare," Attorney General Donovan said. Title X funds basic healthcare services, including wellness exams, cervical and breast cancer screenings, birth control, contraception education, and testing for sexually transmitted diseases and HIV. "It's unreasonable to ask healthcare providers to withhold crucial information from their patients."

As a result of the new regulations, Title X providers will be forced to give incomplete and misleading information to patients—a "gag rule" on providing services or information related to abortion, even to patients who affirmatively say that they want one. The gag rule would also apply to any "referral partners" of Title X health care centers. The new rule stretches Title X funding to try to cover gaps in healthcare created by employers who opt out of providing insurance to cover contraception. The new rule also redefines "family planning" to promote "natural family planning methods" over more effective forms of birth control. The new rule never mentions the CDC's evidence-based best practices guidelines, "Providing Quality Family Planning Services," which was the gold standard for healthcare under the old Title X regulations. In addition, the new rule requires Title X health care centers to be physically located in a separate facility from any abortion provider. Title X funding is not, and never has been, used for abortions.

"This gag rule violates medical ethics and nationally accredited standards, and reputable institutions including the American Medical Association strongly oppose it," said Lucy Leriche, Vice President of Public Policy at Planned Parenthood of Northern New England. "We are grateful to Attorney General Donovan for his leadership and action to prevent the Trump Administration's gag rule from taking effect in early May. We will continue fighting to protect the ability of providers to give the medically ethical, accurate, quality health care that our patients have come to expect from PPNNE."

Funding for all of Vermont's Title X healthcare centers is jeopardized by the new rule. Without Title X funding, there is not yet any other organization capable of providing Title X services statewide. Vermont has 10 healthcare centers supported by Title X funds, located in Barre, Bennington, Brattleboro, Hyde Park, Rutland, Middlebury, Newport, St. Albans, St. Johnsbury, and White River Junction. All provide crucial basic health care to underserved populations. Title X has been providing high quality preventative health care to millions of Americans for decades.

The basis for the lawsuit, filed by 21 states, is that the new Title X rule is contrary to the U.S. Constitution and to governing statutes, including the Administrative Procedures Act. If the rule went into effect, it will harm Vermont by increasing health care costs, including costs to Medicaid spending, as a result of an increase in unintended pregnancies, cancers not detected in early stages, and the spread of sexually transmitted infections.

# # #

Charity R. Clark
Chief of Staff
Office of the Attorney General
109 State Street
Montpelier, Vermont 05609
802-828-3737

From: Clark, Charity
To: Silver, Natalie (Natalie.Silver@vermont.gov)
Subject: Title X Lawsuit PI Motion.docx
Date: Friday, March 15, 2019 1:26:00 PM
Attachments: Title X Lawsuit PI Motion.docx

Hi, Natalie,

When the PI motion is filed in our Title X lawsuit, we are going to issue a press release only rather than hold a press conference. The press release will go out late Thursday 3/21 or early Friday 3/22, depending on what time the motion is filed.

Can you work on the press release please? I've created the bones (attached) using the press release from when we filed the lawsuit. Eileen from PPNNE will work on getting us a quote on Monday.

Thanks!
Charity

STATE OF VERMONT
OFFICE OF THE ATTORNEY GENERAL
109 STATE STREET
MONTPELIER, VT 05609-1001

FOR IMMEDIATE RELEASE:
March 21, 2019

CONTACT: Eleanor Spottswood
Assistant Attorney General
802-828-3171

VERMONT MOVES TO PROTECT FUNDING IN TITLE X LAWSUIT

Preliminary Injunction Would Stay New Federal Rule

Commented [CC1]: Is this what the effect will be?

MONTPELIER – Attorney General T.J. Donovan moved to protect funding while a lawsuit against the federal government is pending. The basis of the lawsuit is a new Title X funding regulation. Title X is the only national federal grant program that is dedicated solely to providing comprehensive family planning and preventative health care. In Vermont, 10,000 people rely on Title X for their healthcare. The new rule includes a "gag rule" that limits providers' ability to give neutral, factual information to their patients about abortion, and prohibits abortion referrals. The new rule also redirects funding priorities from the CDC's birth control recommendations to only "natural family planning methods." In Vermont, the only recipient of Title X funds are the 10 Planned Parenthood health care centers located around the State.

"Quote from T.J.," Attorney General Donovan said. Title X funds basic healthcare services, including wellness exams, cervical and breast cancer screenings, birth control, contraception education, and testing for sexually transmitted diseases and HIV.

As a result of the new regulations, Title X providers will be forced to give incomplete and misleading information to patients—a "gag rule" on providing services or information related to abortion, even to patients who affirmatively say that they want one. The gag rule would also apply to any "referral partners" of Title X health care centers. The new rule stretches Title X funding to try to cover gaps in healthcare created by employers who opt out of providing

insurance to cover contraception. The new rule also redefines “family planning” to promote “natural family planning methods” over more effective forms of birth control. The new rule never mentions the CDC’s evidence-based best practices guidelines, “Providing Quality Family Planning Services,” which was the gold standard for healthcare under the old Title X regulations. In addition, the new rule requires Title X health care centers to be physically located in a separate facility from any abortion provider. Title X funding is not, and never has been, used for abortions.

Vermont has ten health care centers supported by Title X funds, located in Barre, Bennington, Brattleboro, Hyde Park, Rutland, Middlebury, Newport, St. Albans, St. Johnsbury, and White River Junction. All provide crucial basic health care to underserved populations. Funding for each of these health care centers is jeopardized by the new rule. Title X has been providing high quality preventative health care to millions of Americans for decades.

“Quote from PPNNE,” said Meagan Gallagher, President and CEO of Planned Parenthood of Northern New England.

The basis for the anticipated lawsuit, filed by 21 states, is that the new Title X rule is contrary to the U.S. Constitution and to governing statutes, including the Administrative Procedures Act. If the rule went into effect, it will harm Vermont by increasing health care costs as a result of an increase in unintended pregnancies, cancers not detected in early stages, and the spread of sexually transmitted infections.

# # #

From:	Silver, Natalie
To:	Leriche, Lucy Rose; Sullivan, Eileen
Cc:	Clark, Charity
Subject:	TPP criteria
Date:	Tuesday, March 19, 2019 11:49:17 AM
Attachments:	Teen Pregnancy Press Release.docx

Hi Lucy and Eileen,

The AG has signed an amicus brief in support of Planned Parenthood with 20 other states challenging the change to the TPP funding structure. I'm wondering if you all have Vermont specific data as to how much money Vermont has received from the TPP program and if we have any correlative data in regards to our teen pregnancy rate. If there is any way to get this to me shortly that would be excellent! We are planning to put out a release shortly.

I've attached a draft release for your reference.

Let me know! Thanks.

Natalie

STATE OF VERMONT
OFFICE OF THE ATTORNEY GENERAL
109 STATE STREET
MONTPELIER, VT 05609-1001

FOR IMMEDIATE RELEASE:
March 19, 2019

CONTACT: Eleanor Spottswood
Deputy Solicitor General
802-828-3171

Vermont Joins Coalition ~~of 21 Attorneys General File Amicus Brief~~ in Support of Evidence-Based Teen Pregnancy Prevention Program

HHS's Funding Opportunity Announcements Undermine States' Efforts to Reduce Teen Pregnancy by Shifting Focus to Abstinence-Only Programs

~~HARRISBURG~~ MONTPELIER — ~~Today,~~ Attorney General T.J. Donovan announced that Vermont has joined a coalition of 21 Attorneys General in filing~~ed~~ an amicus brief supporting Planned Parenthood in their legal challenge against the U.S. Department of Health and Human Services' change to the funding structure of the Teen Pregnancy Prevention (TPP) grant program. The case, *Planned Parenthood v. HHS*, is one of three lawsuits challenging two Funding Opportunity Announcements (FOAs) issued by HHS in 2018 for the TPP program, which Congress created to fund evidence-based programs proven effective in reducing teen pregnancy. The 2018 FOAs changed the requirements for the program by shifting the focus to abstinence-only education, rather than evidence-based programs shown to be effective.

Since its creation in 2009, the TPP Program has provided nearly $1 billion for state, local, and community programs that have been proven to reduce rates of teenage pregnancy. Those programs reached half a million teens from 2010-2014, and are anticipated to reach 1.2 million more from 2015-2019. The program puts an intentional focus on communities with the greatest need and most vulnerable youth, including those of color, in foster care, or in rural areas. The TPP Program is an indispensable component of State efforts to reduce the physical and medical risks of teenage pregnancy, as well as associated emotional, social, and financial costs.

Commented [CC1]: Vermont statistics

The Attorneys General argue that the 2018 FOAs threaten to frustrate the design of the TPP Program and undermine the States' efforts to reduce teen pregnancy. The FOAs would shift the focus of the grant process to rewarding programs that promote a particular "abstinence-only" ideology, rather than following Congress' mandate to fund programs that are medically accurate and have been proven to work through rigorous evaluation.

If the FOAs are allowed to stand, federal funds will be directed to less-effective or medically inaccurate programs, while other programs that have been proven to work will languish. As a result, more teens will be at risk of becoming pregnant, imposing significant additional costs on the States and their residents.

"The Department of Health and Human Services is jeopardizing the health and well-being of teens across the country by undermining the Teen Pregnancy Prevention program," said Attorney

General X. "The TPP Program is designed to support programs proven to reduce teenage pregnancies and their associated costs, yet HHS is threatening to reverse that success by promoting abstinence-only education. I'm proud to stand with Planned Parenthood and my colleagues in support of medically accurate, evidence-based programs to reduce teen pregnancies."

Commented [CC2]: Better quote for T.J.

In two similar cases, *Planned Parenthood of NYC v. HHS* and *Multnomah County v. Azar*, the District Court found that HHS had acted unlawfully and vacated or enjoined one of the FOAs. However, the district court dismissed the case at hand for lack of standing. Planned Parenthood appealed to the Ninth Circuit to reverse the District Court's decision and to direct the District Court to enter summary judgment in favor of Plaintiffs. The Attorneys General filed this amicus brief in support of that request.

The coalition ~~was led by Pennsylvania Attorney General Josh Shapiro and~~ included~~d~~s state attorneys general from California, Connecticut, Delaware, District of Columbia, Hawaii, Illinois, Iowa, Massachusetts, Maryland, Michigan, Minnesota, Nevada, New Jersey, New York, North Carolina, Oregon, Pennsylvania, Rhode Island, Vermont, Virginia, and Washington.

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From: Silver, Natalie
To: Spottswood, Eleanor; Clark, Charity
Subject: Title x press release
Date: Wednesday, March 20, 2019 11:10:48 AM
Attachments: VERMONT MOVES TO PROTECT FUNDING IN TITLE X LAWSUIT.docx

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Hi there,
Ella can you take a look at this and make sure everything is A OK?

I think aside from a quote from TJ this is basically done.

Natalie

Natalie Silver
Community Outreach and Policy Coordinator
Vermont Attorney General's Office
Natalie.Silver@vermont.gov
802 595 8679

STATE OF VERMONT
OFFICE OF THE ATTORNEY GENERAL
109 STATE STREET
MONTPELIER, VT 05609-1001

FOR IMMEDIATE RELEASE:
March 21, 2019

CONTACT: Eleanor Spottswood
Assistant Attorney General
802-828-3171

VERMONT MOVES TO PROTECT FUNDING IN TITLE X LAWSUIT

Preliminary Injunction Would Stay New Federal Rule

Commented [CC1]: Is this what the effect will be?

MONTPELIER – Attorney General T.J. Donovan moved to protect funding while a lawsuit against the federal government is pending. The basis of the lawsuit is a new Title X funding regulation. Title X is the only national federal grant program that is dedicated solely to providing comprehensive family planning and preventative health care. In Vermont, 10,000 people rely on Title X for their healthcare. The new rule includes a "gag rule" that limits providers' ability to give neutral, factual information to their patients about abortion, and prohibits abortion referrals. The new rule also redirects funding priorities from the CDC's birth control recommendations to only "natural family planning methods." In Vermont, the only recipient of Title X funds are the 10 Planned Parenthood health care centers located around the State.

"Quote from T.J.," Attorney General Donovan said. Title X funds basic healthcare services, including wellness exams, cervical and breast cancer screenings, birth control, contraception education, and testing for sexually transmitted diseases and HIV.

As a result of the new regulations, Title X providers will be forced to give incomplete and misleading information to patients—a "gag rule" on providing services or information related to abortion, even to patients who affirmatively say that they want one. The gag rule would also apply to any "referral partners" of Title X health care centers. The new rule stretches Title X funding to try to cover gaps in healthcare created by employers who opt out of providing

insurance to cover contraception. The new rule also redefines “family planning” to promote “natural family planning methods” over more effective forms of birth control. The new rule never mentions the CDC’s evidence-based best practices guidelines, “Providing Quality Family Planning Services,” which was the gold standard for healthcare under the old Title X regulations. In addition, the new rule requires Title X health care centers to be physically located in a separate facility from any abortion provider. Title X funding is not, and never has been, used for abortions.

Vermont has ten health care centers supported by Title X funds, located in Barre, Bennington, Brattleboro, Hyde Park, Rutland, Middlebury, Newport, St. Albans, St. Johnsbury, and White River Junction. All provide crucial basic health care to underserved populations. Funding for each of these health care centers is jeopardized by the new rule. Title X has been providing high quality preventative health care to millions of Americans for decades.

““This gag rule violates medical ethics and nationally accredited standards, and reputable institutions including the American Medical Association strongly oppose it,” said Lucy Leriche, Vice President of Public Policy at Planned Parenthood of Northern New England. "We are grateful to Attorney General Donovan for his leadership and action to prevent the Trump administration’s gag rule from taking effect in early May. We will continue fighting to protect the ability of providers to give the medically ethical, accurate, quality health care that our patients have come to expect from PPNNE.”

The basis for the anticipated lawsuit, filed by 21 states, is that the new Title X rule is contrary to the U.S. Constitution and to governing statutes, including the Administrative Procedures Act. If the rule went into effect, it will harm Vermont by increasing health care costs as a result of an increase in unintended pregnancies, cancers not detected in early stages, and the spread of sexually transmitted infections.

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From: Silver, Natalie
To: Clark, Charity; Donovan, Thomas
Subject: TPP info and VT data
Date: Tuesday, March 19, 2019 12:54:17 PM

It does not appear that Vermont has any TPP grant recipients right now. However, in 2017 a Vermont based organization, Youth Catalytics, was a TPP recipient, and in the second year of their five year grant, when Federal Government abruptly pulled all funding with no explanation. https://vtdigger.org/2017/07/24/teen-pregnancy-program-abruptly-loses-millions-from-feds/ Youth Catalytics had won the funding to improve communication between parents, foster care providers, educators and teens about sexual health and pregnancy prevention.

Public and private organizations in Vermont may apply and receive these grants in the future. I am not sure if that changes our feelings about putting out the release. Planned Parenthood of NNE is in support of this release and feel the TPP Grant is an essentially piece of teen pregnancy prevention. I have asked if they know of any organizations applying for funding currently. Let me know what you both think.

For reference, I found these numbers about teen pregnancy in Vermont:

Vermont Department of Health Report in 2016:

74% of unplanned births are publicly funded in VT
VT spends $30 million per year on unintended pregnancies
Pregnancy and delivery services yield highest potentially avoidable costs

Source: Guttmacher 2010-2015, Medicaid Maternal & Infant Health Initiative 2015, Brandeis Report 2014.

According to UVMMC:
Teen pregnancy rates in Vermont are reducing largely due to increased contraceptive use. UVMMC attributes 86% of the decline to increased access to contraceptives.

Link to VTDPH report:
https://women.vermont.gov/sites/women/files/pdf/PreventiveReproductiveHealthFeb2016.pdf

Natalie Silver
Community Outreach and Policy Coordinator
Vermont Attorney General's Office
Natalie.Silver@vermont.gov
802 595 8679