

Nos. 19-1614, 20-1215

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

MAYOR AND CITY COUNCIL OF BALTIMORE,
PLAINTIFF-APPELLEE,

v.

ALEX M. AZAR, II, ET AL.,
DEFENDANTS-APPELLANTS.

**On Appeal from the United States District Court
for the Fourth District of Maryland
No. 1:19-cv-01103-RDB**

**SUPPLEMENTAL EN BANC BRIEF OF AMICI CURIAE CALIFORNIA,
NEVADA, COLORADO, CONNECTICUT, DELAWARE, HAWAII,
ILLINOIS, MAINE, MARYLAND, MASSACHUSETTS, MICHIGAN,
MINNESOTA, NEW JERSEY, NEW MEXICO, NEW YORK, NORTH
CAROLINA, OREGON, PENNSYLVANIA, RHODE ISLAND, VERMONT,
VIRGINIA, WASHINGTON, AND THE DISTRICT OF COLUMBIA IN
SUPPORT OF PLAINTIFF-APPELLEE AND AFFIRMANCE**

AARON D. FORD
Attorney General of Nevada
HEIDI PARRY STERN
Solicitor General
JEFFREY M. CONNER
Deputy Solicitor General
NEVADA OFFICE OF THE ATTORNEY
GENERAL
555 East Washington Ave., Suite 3900
Las Vegas, Nevada 89101
(702) 486-3420
hstern@ag.nv.gov
Attorneys for the State of Nevada

XAVIER BECERRA
Attorney General of California
RENU R. GEORGE
Senior Assistant Attorney General
KATHLEEN BOERGERS
Supervising Deputy Attorney General
KETAKEE KANE
KARLI EISENBERG
Deputy Attorneys General
CALIFORNIA DEPARTMENT OF JUSTICE
1515 Clay Street, 20th Floor
Oakland, CA 94612-0550
(510) 879-1519
Ketakee.Kane@doj.ca.gov
Attorneys for the State of California

May 1, 2020

Additional Counsel on Signature Page

TABLE OF CONTENTS

	Page
INTRODUCTION AND INTERESTS OF AMICI CURIAE	1
ARGUMENT	2
I. THE AMICI STATES HAVE A STRONG PUBLIC HEALTH INTEREST IN PRESERVING ACCESS TO TITLE X FUNDING FOR WELL- QUALIFIED PROVIDERS	2
A. Since 1970 Title X Has Been a Vital Funding Source for the States and Healthcare Providers.....	2
B. Title X Provided Care to a Wide Array of Patients	5
II. THE NEW TITLE X RULE HAS HARMED THE STATES' PUBLIC HEALTH AND PUBLIC FISC.....	8
A. HHS's Rule Has Resulted in Title X Providers Leaving the Program	8
B. As a Result of the Rule, Several States Have Had to Fill the Financial Gap to Ensure Access to Essential Healthcare Services.....	16
CONCLUSION.....	19

TABLE OF AUTHORITIES

	Page
COURT RULES	
Federal Rules of Appellate Procedure Rule 29(a)(2).....	2
OTHER AUTHORITIES	
84 Fed. Reg. 7714 (Mar. 4, 2019).....	1
Adam Sonfield, et al., <i>The Social and Economic Benefits of Women’s Ability To Determine Whether and When to Have Children</i> , <i>Guttmacher Inst.</i> (March 2013), https://www.guttmacher.org/report/social-and-economic-benefits-womens-ability-determine-whether-and-when-have-children	4,5
Adrienne Stith Butler & Ellen Wright Clayton, eds., <i>A Review of the HHS Family Planning Program: Mission, Management, and Measurement Results</i> , Institute of Medicine (2009), https://www.ncbi.nlm.nih.gov/books/	3
Alan Yuhas, <i>Don’t Expect a Quarantine Baby Boom</i> , New York Times (Apr. 8, 2020), https://www.nytimes.com/2020/04/08/us/coronavirus-baby-boom.html	19
Amy Nakamura, <i>Hawaii Funds Women’s Health Services To Address Trump Rule On Abortion Services</i> , Hawaii Public Radio (July 18, 2019) https://www.hawaiipublicradio.org/post/hawaii-funds-womens-health-services-address-trump-rule-abortion-services#stream/0	17
Brittini Frederiksen, et al., <i>Data Note: Impact of New Title X Regulations on Network Participation</i> , Kaiser Family Foundation (Sept. 20, 2019), https://www.kff.org/womens-health-policy/issue-brief/data-note-impact-of-new-title-x-regulations-on-network-participation/	9, 10, 11, 16

TABLE OF AUTHORITIES
(continued)

	Page
Brittini Frederiksen, et al., <i>Data Note: Is the Supplemental Title X Funding Awarded by HHS Filling in the Gaps in the Program?</i> , Kaiser Family Foundation (Oct. 18, 2019), https://www.kff.org/womens-health-policy/issue-brief/data-note-is-the-supplemental-title-x-funding-awarded-by-hhs-filling-in-the-gaps-in-the-program/	8, 11, 16
<i>California’s Statewide Title X Network Coverage Map 2018 vs. 2020</i> , Essential Access Health (Apr. 2020), https://www.essentialaccess.org/sites/default/files/essential-access-health-california-title-x-network-comparison-april-2020.pdf	13
Comment Letter submitted on behalf of the Attorneys General of California, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, Minnesota, New Jersey, New Mexico, North Carolina, and the District of Columbia (July 30, 2018), https://www.regulations.gov/document?D=HHS-OS-2018-0008-161828	8
Comment Letter submitted on behalf of Washington State Attorney General Bob Ferguson, Massachusetts Attorney General Maura Healey, Oregon Attorney General Ellen Rosenblum, and Vermont Attorney General Thomas J. Donovan, Jr. (July 31, 2018), https://www.regulations.gov/document?D=HHS-OS-2018-0008-182278	8
Comment Letter submitted on behalf of National Family Planning & Reproductive Health Association (July 31, 2018), https://www.regulations.gov/document?D=HHS-OS-2018-0008-192227	8
Declaration of J. Rabinovitz in support of Motion for Preliminary Injunction ECF 38, <i>California v. Azar</i> , Case No. 3:19-cv-01184-EMC (N.D. Cal.).....	7, 13

TABLE OF AUTHORITIES
(continued)

	Page
Declaration of J. Rabinovitz in support of California’s Motion for Summary Judgment at ECF 163-1, ¶ 9, California v. Azar, Case No. 3:19-cv-01184-EMC (N.D. Cal.)	7,
Declaration of M. Byrd in support of Motion for Preliminary Injunction, ECF 40, Oregon v. Azar, Case No. 3:19-cv-00317-MC (D. Or.).....	6
<i>Governor Murphy Signs Legislation Appropriating \$9.5 Million for Family Planning Services</i> , Governor Phil Murphy, State of New Jersey (Jan. 1, 2020), https://www.nj.gov/governor/news/news/562019/approved/20200102a.shtml	18
<i>HHS Issues Supplemental Grant Awards to Title X Recipients</i> , U.S. Dep’t of Health and Human Servs. (Sept. 30, 2019) https://www.hhs.gov/about/news/2019/09/30/hhs-issues-supplemental-grant-awards-to-title-x-recipients.html	8, 10
Jeffrey F. Peipert et al., <i>Preventing Unintended Pregnancies by Providing No-Cost Contraception</i> , Obstetrics & Gynecology Vol. 120, Issue 6 (Dec. 2012), http://journals.lww.com/greenjournal/Fulltext/2012/12000/Preventing_Unintended_Pregnancies_by_Providing.7.aspx	4
Jennifer J. Frost et al., <i>Publicly Funded Contraceptive Services at U.S. Clinics 2015</i> , Guttmacher Inst. (Apr. 2017), https://www.guttmacher.org/report/publicly-funded-contraceptive-services-us-clinics-2015	4, 11
Joan R. Bloch, et al., <i>Pregnancy Intention and Contraceptive Use at Six Months Postpartum Among Women With Recent Preterm Delivery</i> , J. of Obstetric, Gynecologic & Neonatal Nursing, Vol. 41, Issue 3 (May 2012) https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3409429/	4

TABLE OF AUTHORITIES
(continued)

	Page
<p>Nizquel T. Ellis, <i>‘Teetering on a public health crisis.’ New Title X policy forces Ohio Planned Parenthood clinics to close</i>, USA Today (Sept. 20, 2019), https://www.usatoday.com/story/news/nation/2019/09/20/new-title-x-policy-funding-forces-ohio-planned-parenthood-clinics-close/2345553001/</p>	12
<p><i>Quick Facts: United States, Population Estimates July 1, 2018</i>, U.S. Census Bureau, https://www.census.gov/quickfacts/fact/table/US/PST045218</p>	6
<p>Rachel B. Gold & Adam Sonfield, <i>Title X Family Planning Services: Impactful but at Severe Risk</i>, Guttmacher Inst. (Oct. 31, 2019), https://www.guttmacher.org/article/2019/10/title-x-family-planning-services-impactful-severe-risk#.....</p>	5
<p>Rachel B. Gold & Lauren Cross, <i>The Title X Gag Rule is Wreaking Havoc – Just at Trump Intended</i>, Guttmacher Inst. (Aug. 29, 2019), https://www.guttmacher.org/article/2019/08/title-x-gag-rule-wreaking-havoc-just-trump-intended</p>	12
<p>Sarah McCammon, <i>Planned Parenthood Withdraws From Title X Program Over Trump Abortion Rule</i>, NPR (Aug. 19, 2020), https://www.npr.org/2019/08/19/752438119/planned-parenthood-out-of-title-x-over-trump-rule</p>	9
<p><i>State Opts Out Of Title X Funding That Would Limit Family Planning Services: State will use its own funds to ensure Vermonters can access full services</i>, Vermont Dep’t of Health (Aug. 19, 2019), https://www.healthvermont.gov/sites/default/files/documents/pdf/Title%20X%20news%20release%208-19-2019.pdf.....</p>	18
<p><i>Statement From PHS President & CEO Lisa M. David Rejecting Title X Funding</i>, Public Health Solutions (Aug. 2, 2019), https://www.healthsolutions.org/blog/statement-from-phs-president-ceo-lisa-m-david-rejecting-title-x-funding/</p>	10

TABLE OF AUTHORITIES
(continued)

	Page
Taylor Riley, et al., <i>Estimates of the Potential Impact of the COVID-19 Pandemic on Sexual and Reproductive Health in Low- and Middle-Income Countries</i> , Guttmacher Inst. (Apr. 16, 2020), https://www.guttmacher.org/journals/ipsrh/2020/04/estimates-potential-impact-covid-19-pandemic-sexual-and-reproductive-health#	19
<i>The Status of Participation in the Title X Federal Family Planning Program</i> , Kaiser Family Foundation (Dec. 20, 2019), https://www.kff.org/interactive/the-status-of-participation-in-the-title-x-federal-family-planning-program/	<i>passim</i>
<i>Title X Family Planning Annual Report: 2018 National Summary</i> , U.S. Dep’t of Health and Human Servs. (Aug. 2019), https://www.hhs.gov/opa/sites/default/files/title-x-fpar-2018-national-summary.pdf	3, 6, 7
<i>Title X Family Planning Directory</i> , Office of Population Affairs, U.S. Dep’t of Health & Human Servs. (June 2019), https://www.hhs.gov/opa/sites/default/files/Title-X-Family-Planning-Directory-June2019.pdf	7, 15
<i>Treasurer Fiona Ma Encourages Health Facilities to Apply for Lifeline Grants Before Time Runs Out</i> , California State Treasurer (Oct. 2019), https://www.treasurer.ca.gov/newsletter/2019/oct/lifeline-grants.html	17
<i>Trump Administration Gag Rule Forces Planned Parenthood Out Of Title X National Program For Birth Control</i> , Planned Parenthood Federation of America (Aug. 19, 2019) https://www.plannedparenthood.org/about-us/newsroom/press-releases/trump-administration-gag-rule-forces-planned-parenthood-out-of-title-x-national-program-for-birth-control-2	9

TABLE OF AUTHORITIES
(continued)

	Page
Veronica M. Jacobo, <i>Rules about abortion counseling prompt Delaware's Planned Parenthood to refuse federal money</i> , Delaware Online (Aug. 13, 2019) https://www.delawareonline.com/story/news/2019/08/13/planned-parenthood-delaware-refuses-title-x-funding/1860219001/	14
<i>Women's Health Will Not Be Gagged</i> , Boulder Valley Women's Health Center, https://www.boulderwomenshealth.org/blog/womens-health-will-not-be-gagged	10

INTRODUCTION AND INTERESTS OF AMICI CURIAE

The States of California, Nevada, Colorado, Connecticut, Delaware, Hawaii, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, New Jersey, New Mexico, New York, North Carolina, Oregon, Pennsylvania, Rhode Island, Vermont, Virginia, Washington, and the District of Columbia as amici curiae have a compelling interest in protecting the health, well-being, and economic security of their residents. The Title X family planning program, which serves four million women, men, and adolescents across the country, is instrumental in the States' efforts to secure those interests for individuals and families who live within the States. And, over the last 50 years, Title X has created a strong network of medical providers committed to delivering high-quality, evidence-based preventive health services. But the U.S. Department of Health and Human Services' new Title X Rule has harmed the Title X program nationwide. 84 Fed. Reg. 7714 (Mar. 4, 2019) (the Rule).

Prior to 2019, the Title X program funded a wide array of critical public health services—including not only family planning counseling and access to all 18 FDA-approved contraceptive methods, but also screenings for high blood pressure, anemia, diabetes, sexually transmitted diseases and infections (STDs/STIs), and cervical and breast cancer. Title X providers also assisted the States in protecting against public health threats, such as the Zika virus. Title X

was the linchpin of publicly funded family planning in the United States and a critical part of the Amici States' efforts to deliver crucial preventive care to their most vulnerable communities.

However, since the new Title X Rule became effective in August 2019, the Amici States' Title X programs have been upended, with many valued, qualified providers leaving the Title X program. In 13 states, over 50 percent of Title X grantees have withdrawn from the program, and several states no longer have *any* Title X providers. Further, new providers have not filled the gap caused by the withdrawals. The end result has been significant harm to the health and well-being of the Amici States' residents and increased burdens on state budgets to mitigate the adverse effects of the new Rule.¹ For the reasons stated by the Mayor and City Council of Baltimore, the judgment of the district court should be affirmed.

ARGUMENT

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

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

In a message to Congress in July 1969, President Richard Nixon wrote that “no American woman should be denied access to family planning assistance

¹ The Amici States file this supplemental brief under Federal Rules of Appellate Procedure Rule 29(a)(2) to elaborate on the impact of the new Rule.

because of her economic condition. I believe, therefore, that we should establish as a national goal the provision of adequate family planning services within the next five years to all those who want them but cannot afford them.”² Heeding that recommendation, Congress enacted Title X to make comprehensive, voluntary family planning services available to “all persons desiring such services.” See Pub. L. No. 91-572 § 2, 84 Stat. 1504 (1970).

Through grants to health care providers, Title X supports family planning and reproductive health care services, including providing contraception services, counseling and education, testing and treatment for STIs, breast and cervical cancer screening, and pregnancy testing and counseling, including referrals.³ The Title X program has historically been a great success in meeting its stated goals, resulting in tremendous public health benefits.⁴

² Adrienne Stith Butler & Ellen Wright Clayton, eds., *A Review of the HHS Family Planning Program: Mission, Management, and Measurement Results*, Inst. of Med., at ix (2009), <https://www.ncbi.nlm.nih.gov/books/> (2009), https://www.ncbi.nlm.nih.gov/books/NBK215217/pdf/Bookshelf_NBK215217.pdf

³ *Title X Family Planning Annual Report: 2018 National Summary*, U.S. Dep’t of Health and Human Servs. (Aug. 2019) at 1, <https://www.hhs.gov/opa/sites/default/files/title-x-fpar-2018-national-summary.pdf>.

⁴ *Id.* (summarizing the success of the program in 2018); *A Review of the HHS Family Planning Program: Mission, Management, and Measurement Results*, *supra* note 2 (discussing Title X’s success in increasing access to healthcare,

Title X-provided contraceptive services have lowered unintended pregnancy and abortion rates across the United States.⁵ These services help avoid the many risks and adverse health outcomes associated with unintended pregnancy for both women and infants, including preterm birth, low birth weight, and stillbirth.⁶ Access to contraceptives also helps women time and space their pregnancies, affording women greater control over their life choices, such as pursuing educational and work opportunities.⁷ Further, by identifying and treating STIs,

increasing access to contraceptive and reproductive healthcare, and promoting health and social well-being).

⁵ Jeffrey F. Peipert et al., *Preventing Unintended Pregnancies by Providing No-Cost Contraception*, *Obstetrics & Gynecology* Vol. 120, Issue 6 at 1291-97 (Dec. 2012),

http://journals.lww.com/greenjournal/Fulltext/2012/12000/Preventing_Unintended_Pregnancies_by_Providing.7.aspx. In 2015 alone, experts estimate that the Title X program nationwide helped women avoid an estimated 822,000 unplanned pregnancies, which would have resulted in 387,000 unintended births and 278,000 abortions, and reduced teen unintended pregnancy rates by 44 percent. Jennifer J. Frost et al., *Publicly Funded Contraceptive Services at U.S. Clinics 2015*, Guttmacher Inst. (Apr. 2017), <https://www.guttmacher.org/report/publicly-funded-contraceptive-services-us-clinics-2015>.

⁶ Joan R. Bloch, et al., *Pregnancy Intention and Contraceptive Use at Six Months Postpartum Among Women With Recent Preterm Delivery*, *J. of Obstetric, Gynecologic & Neonatal Nursing*, Vol. 41, Issue 3 at 389-397 (May 2012) <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3409429/> (“Adverse outcomes associated with unintended pregnancy include child health and development issues, relationship instability, and low birth weight and prematurity.”).

⁷ Adam Sonfield, et al., *The Social and Economic Benefits of Women’s Ability To Determine Whether and When to Have Children*, Guttmacher Inst. (March 2013),

Title X clinics have prevented tens of thousands of infections each year.⁸ The screening and vaccination services provided by Title X-supported clinics at family planning visits helped patients avoid infertility, ectopic pregnancies, and cervical cancer.⁹

B. Title X Provided Care to a Wide Array of Patients

Before HHS's new Rule took effect, the Amici States relied on Title X to ensure that their residents receive comprehensive reproductive healthcare.

Traditionally, Title X has played a crucial role for low-income women, women of color, and women in rural communities. It provides no-cost family planning services to people with very low incomes, and services on a sliding fee scale for others. In 2018, 89 percent of Title X users—approximately 3.5 million people—had family incomes that qualified them for subsidized or no-charge

<https://www.guttmacher.org/report/social-and-economic-benefits-womens-ability-determine-whether-and-when-have-children>.

⁸ Researchers estimate that in 2016, by identifying and treating thousands of STIs that would otherwise have gone undetected, Title X clinics prevented about 44,000 chlamydia infections, 7,200 gonorrhea infections, and 370 cases of HIV among the partners of women obtaining this care. Rachel B. Gold & Adam Sonfield, *Title X Family Planning Services: Impactful but at Severe Risk*, Guttmacher Inst. (Oct. 31, 2019), <https://www.guttmacher.org/article/2019/10/title-x-family-planning-services-impactful-severe-risk#>.

⁹ In 2016, Title X prevented an estimated 4,600 cases of pelvic inflammatory disease, 780 cases of infertility, 410 ectopic pregnancies, and 740 cases of cervical cancer. *Id.*

services.¹⁰ Title X also historically has served a high proportion of patients of color. Nationwide, 22 percent of Title X patients self-identified as black or African-American and 33 percent as Hispanic or Latino/a, as compared to 13.4 percent and 18.3 percent of the nation, respectively.¹¹ Many Title X providers also had particular expertise meeting the needs of diverse patients, including persons with disabilities and lesbian, gay, bisexual, or transgender patients. Title X family planning clinics were especially critical in rural areas, where reproductive health access is often limited by healthcare provider shortages, lack of transportation, and other factors. In rural California counties, a Title X clinic was often the only

¹⁰ *Title X Family Planning Annual Report: 2018 National Summary*, *supra* note 3 at 21. Similarly, in California, 93 percent of Title X patients had incomes at or below 250 percent of the federal poverty level in 2018. *Id.* at B-4. In Nevada, 88 percent of Title X patients had incomes at or below 250 percent of the federal poverty level. *Id.* In New York, nearly 90 percent of Title X patients had incomes at or below 250 percent of the federal poverty level. *Id.*

¹¹ *Id.* at 12; *Quick Facts: United States, Population Estimates July 1, 2018*, U.S. Census Bureau, <https://www.census.gov/quickfacts/fact/table/US/PST045218>. These statistics are consistent with Amici States' Title X patient populations. For example, in the District of Columbia, the sole Title X grantee served about 58,000 patients in 2018, of which 61 percent were African-American and 33 percent were Hispanic or Latino/a. Declaration of M. Byrd in support of Motion for Preliminary Injunction, ECF 40 at ¶¶ 3, 5, *Oregon v. Azar*, Case No. 3:19-cv-00317-MC (D. Or.). In New York, 24 percent of Title X patients were black and 34 percent were Hispanic.

provider offering a full range of contraceptive methods.¹² Similarly, Nevada has relied upon Title X to provide publicly funded family planning services at 12 sites throughout eight rural counties, including four sites that serve federally designated Medically Underserved Areas.

California's program served more than one million people through 63 agencies, operating 366 health centers in 2018.¹³ Other States had similarly robust programs. In 2018, for example, New York had 180 Title X clinic sites that served 313,055 patients.¹⁴ New Jersey had 47 clinics with statewide coverage that served 110,118 patients.¹⁵ In 2019, Illinois had 10 Title X clinics that served 112,426 patients.¹⁶

¹² Declaration of J. Rabinovitz in support of Motion for Preliminary Injunction ECF 38 at ¶ 26, *California v. Azar*, Case No. 3:19-cv-01184-EMC (N.D. Cal.).

¹³ Declaration of J. Rabinovitz in support of California's Motion for Summary Judgment at ECF 163-1, ¶ 9, *California v. Azar*, Case No. 3:19-cv-01184-EMC (N.D. Cal.).

¹⁴ *The Status of Participation in the Title X Federal Family Planning Program*, Kaiser Family Foundation (Dec. 20, 2019), <https://www.kff.org/interactive/the-status-of-participation-in-the-title-x-federal-family-planning-program/>; *Title X Family Planning Annual Report: 2018 National Summary*, *supra* note 3 at B-4.

¹⁵ *Id.*; *Title X Family Planning Directory*, Office of Population Affairs, U.S. Dep't of Health & Human Servs. (June 2019), <https://www.hhs.gov/opa/sites/default/files/Title-X-Family-Planning-Directory-June2019.pdf>.

¹⁶ *Id.*

II. THE NEW TITLE X RULE HAS HARMED THE STATES' PUBLIC HEALTH AND PUBLIC FISC

A. HHS's Rule Has Resulted in Title X Providers Leaving the Program

As the States and stakeholders warned,¹⁷ HHS's Title X Rule has resulted in an unprecedented number of providers withdrawing from the Title X program, and no providers with sufficient capacity to fill the gaps in Amici States have materialized.¹⁸ Before the Rule became effective, HHS funded 90 grantees that supported approximately 4,000 clinics nationwide, including specialized family

¹⁷ Comment Letter submitted on behalf of the Attorneys General of California, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, Minnesota, New Jersey, New Mexico, North Carolina, and the District of Columbia (July 30, 2018) at 4, <https://www.regulations.gov/document?D=HHS-OS-2018-0008-161828>; Comment Letter submitted on behalf of Washington State Attorney General Bob Ferguson, Massachusetts Attorney General Maura Healey, Oregon Attorney General Ellen Rosenblum, and Vermont Attorney General Thomas J. Donovan, Jr. (July 31, 2018) at 23, <https://www.regulations.gov/document?D=HHS-OS-2018-0008-182278>; Comment Letter submitted on behalf of National Family Planning & Reproductive Health Association (July 31, 2018) at 33, <https://www.regulations.gov/document?D=HHS-OS-2018-0008-192227>.

¹⁸ Brittini Frederiksen, et al., *Data Note: Is the Supplemental Title X Funding Awarded by HHS Filling in the Gaps in the Program?*, Kaiser Family Foundation (Oct. 18, 2019), <https://www.kff.org/womens-health-policy/issue-brief/data-note-is-the-supplemental-title-x-funding-awarded-by-hhs-filling-in-the-gaps-in-the-program/>; *HHS Issues Supplemental Grant Awards to Title X Recipients*, U.S. Dep't of Health and Human Servs. (Sept. 30, 2019) <https://www.hhs.gov/about/news/2019/09/30/hhs-issues-supplemental-grant-awards-to-title-x-recipients.html>; *The Status of Participation in the Title X Federal Family Planning Program*, *supra* note 14.

planning clinics such as Planned Parenthood centers, primary care providers such as federally qualified health centers (FQHCs), and health departments, school-based, faith-based, and other private nonprofits.¹⁹ Since the Rule took effect, the Title X program lost around 1,000 clinics nationwide by September 2019, having devastating impacts, including in Amici States.²⁰

Grantees who have withdrawn from the program have publicly stated the Rule gave them “no option but to withdraw from the Title X program” because the Rule was “unethical and dangerous.”²¹ A New York grantee stated that it withdrew from Title X because compliance with the Rule would require it to replace its services with “inadequate and incomplete health care” because the Rule bars “Title X funding recipients from providing patients full information about family planning

¹⁹ *Id.*

²⁰ Brittini Frederiksen, et al., *Data Note: Impact of New Title X Regulations on Network Participation*, Kaiser Family Foundation (Sept. 20, 2019), <https://www.kff.org/womens-health-policy/issue-brief/data-note-impact-of-new-title-x-regulations-on-network-participation/>.

²¹ Sarah McCammon, *Planned Parenthood Withdraws From Title X Program Over Trump Abortion Rule*, NPR (Aug. 19, 2020), <https://www.npr.org/2019/08/19/752438119/planned-parenthood-out-of-title-x-over-trump-rule>; *Trump Administration Gag Rule Forces Planned Parenthood Out Of Title X National Program For Birth Control*, Planned Parenthood Federation of America (Aug. 19, 2019) <https://www.plannedparenthood.org/about-us/newsroom/press-releases/trump-administration-gag-rule-forces-planned-parenthood-out-of-title-x-national-program-for-birth-control-2>.

options and referring patients to abortion service.”²² A Colorado provider who withdrew stated that the Rule “undermin[ed] trust in the doctor-patient relationship” and that remaining in the Title X program would “compromise[] our commitment to our patients [and] our community.”²³

Since the Rule took effect, many Amici States have lost between 25 percent and *100 percent* of their Title X providers.²⁴ Hawaii, Oregon, Vermont, and Washington—as direct state grantees—have withdrawn from the Title X program, leaving them, along with Utah, as the five states with *no* federally funded Title X providers in the entire state.²⁵ And no new providers have subsequently joined the Title X program in those States.²⁶ In New York, Illinois, and Maryland, 90 percent

²² *Statement From PHS President & CEO Lisa M. David Rejecting Title X Funding*, Public Health Solutions (Aug. 2, 2019), <https://www.healthsolutions.org/blog/statement-from-phs-president-ceo-lisa-m-david-rejecting-title-x-funding/>.

²³ *Women’s Health Will Not Be Gagged*, Boulder Valley Women’s Health Center, <https://www.boulderwomenshealth.org/blog/womens-health-will-not-be-gagged>.

²⁴ *Data Note: Impact of New Title X Regulations on Network Participation*, *supra* note 20.

²⁵ The sole Title X grantee in Maine, Maine Family Planning, also withdrew from the Title X program. There are no providers accepting Title X funds in Maine. *Id.*

²⁶ See *HHS Issues Supplemental Grant Awards to Title X Recipients*, *supra* note 18.

of providers have withdrawn from the Title X program.²⁷ And the remaining grantees in those 3 states are small organizations with limited geographic coverage across the state.²⁸ In 13 states, including Massachusetts, Minnesota, and Connecticut, over 50 percent of providers have withdrawn from the Title X program.²⁹

In particular, among Title X-funded clinics, Planned Parenthood sites served 41 percent of all patient contraceptive needs nationwide.³⁰ Shortly after the Rule became effective, *all* Planned Parenthood providers withdrew from the Title X program.³¹ As a result of Planned Parenthood's withdrawal, Utah no longer has any Title X providers.³² Further, Planned Parenthood's withdrawal has had severe impacts on the Title X program in other states. Planned Parenthood had previously served 75 percent of Title X contraceptive clients in Connecticut, Utah,

²⁷ *Data Note: Is the Supplemental Title X Funding Awarded by HHS Filling in the Gaps in the Program?*, *supra* note 18.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Publicly Funded Contraceptive Services at U.S. Clinics 2015*, *supra* note 5.

³¹ *Data Note: Impact of New Title X Regulations on Network Participation*, *supra* note 20.

³² *Id.*

Washington, and Wisconsin.³³ And in Alaska, Arizona, California, Iowa, Michigan, Minnesota, New Jersey, New York, and Ohio,³⁴ Planned Parenthood had served at least 50 percent of such clients.³⁵

Given the foregoing facts, HHS's assertion that most providers have remained in the program, HHS Supp. Br., ECF 108 at 30, is inconsistent with both Amici States' experience and expert predictions. The precipitous decline in the number of key reproductive healthcare providers that served large volumes of patients have left residents of many States unable to access Title X services, and in some instances, unable to access these services at all as a result.

* * *

³³ Rachel B. Gold & Lauren Cross, *The Title X Gag Rule is Wreaking Havoc – Just at Trump Intended*, Guttmacher Inst. (Aug. 29, 2019), <https://www.guttmacher.org/article/2019/08/title-x-gag-rule-wreaking-havoc-just-trump-intended>.

³⁴ While it's true that all of the State of Ohio's direct subgrantees remained in the program, Ohio, et al. Amicus Brief, ECF 112-1 at 9-10, Planned Parenthood clinics in Ohio had received Title X funding separately and withdrew from the program, resulting in the loss of 17 Planned Parenthood clinics in Ohio with 2 closing permanently. Gold, *supra* note 33; Nizquel T. Ellis, *'Teetering on a public health crisis.'* *New Title X policy forces Ohio Planned Parenthood clinics to close*, USA Today (Sept. 20, 2019), <https://www.usatoday.com/story/news/nation/2019/09/20/new-title-x-policy-funding-forces-ohio-planned-parenthood-clinics-close/2345553001/>.

³⁵ Gold, *supra* note 33.

California has experienced a significant loss of Title X providers—going from 366 health centers in 38 counties to 233 health centers in only 18 counties, leaving several rural counties with no Title X providers.³⁶ As a result of these withdrawals, the program served 365,000 fewer patients in 2019 as compared to 2018, a reduction of 38 percent.³⁷ In 2020, even before the onset of the COVID-19 pandemic, California’s Title X network was projected to see fewer than 275,000 patients this year, compared to 1 million in 2018, a reduction of almost 72 percent.³⁸

Other States have also been heavily impacted.³⁹

- In Alaska, there were 6 Title X clinics, and now only 2 clinics remain.⁴⁰
- In Connecticut, there were 24 Title X clinics. Now, only 7 clinics remain.⁴¹

³⁶ *California’s Statewide Title X Network Coverage Map 2018 vs. 2020*, Essential Access Health (Apr. 2020), <https://www.essentialaccess.org/sites/default/files/essential-access-health-california-title-x-network-comparison-april-2020.pdf>; *The Status of Participation in the Title X Federal Family Planning Program*, *supra* note 14.

³⁷ Declaration of J. Rabinovitz, *supra* note 13 at ¶ 10.

³⁸ *Id.*

³⁹ *The Status of Participation in the Title X Federal Family Planning Program*, *supra* note 14.

⁴⁰ *Id.*

⁴¹ *Id.*

- In Delaware, the Title X program has lost 3 clinics, impacting some 6,000 men and women in the state.⁴²
- In Illinois, there were 104 Title X clinics. Now, only 9 clinics remain.⁴³
- In Hawaii, the number of Title X funded contracts has gone from 9 clinics to 0,⁴⁴ causing a 70 percent reduction in statewide family planning services with at least 11,200 fewer clients served this year.
- In Maine, there were 52 Title X clinics. Now, there are *no* Title X providers in the entire state.⁴⁵
- In Maryland, there were 81 Title X clinics. Now, only 8 clinics remain.⁴⁶
- In Massachusetts, there were 94 Title X clinics. Now, only 45 clinics remain.⁴⁷

⁴² *Id.*; see also Veronica M. Jacobo, *Rules about abortion counseling prompt Delaware's Planned Parenthood to refuse federal money*, Delaware Online (Aug. 13, 2019) <https://www.delawareonline.com/story/news/2019/08/13/planned-parenthood-delaware-refuses-title-x-funding/1860219001/>.

⁴³ *The Status of Participation in the Title X Federal Family Planning Program*, *supra* note 14.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

- In Minnesota, there were 40 Title X clinics. Now, only 7 clinics remain.⁴⁸
- In New Jersey, the Title X program has gone from 47 clinics to 24 clinics.⁴⁹
- In New York, the Title X program has gone from 180 clinics to 2 clinics.⁵⁰
- In Ohio, the Title X program has lost 17 clinics, going from 82 clinics to 65 clinics.⁵¹
- In Oregon, there were 95 Title X clinics. Now, there are no Title X providers in the entire state.⁵²
- In Utah, there were 8 Title X clinics. Now, there are no Title X providers in the entire state.⁵³

⁴⁸ *Id.*

⁴⁹ *Id.*; *Title X Family Planning Directory supra* note 15.

⁵⁰ *The Status of Participation in the Title X Federal Family Planning Program, supra* note 14.

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

- In Vermont, there were 10 Title X clinics. Now, there are no Title X providers in the entire state.⁵⁴
- In Washington, the Title X program had 93 clinics. Now, there are no Title X providers in the entire state.⁵⁵

Loss of Title X clinics harms both the states and the states' residents who relied on these services. Further, contrary to HHS's predictions, insufficient providers have materialized to fill the provider loss listed above.⁵⁶ *See* HHS Supp. Br., ECF 108 at 9 (citing 84 Fed. Reg. 7714, 7744, 7780-83 (Mar. 4, 2019)).

B. As a Result of the Rule, Several States Have Had to Fill the Financial Gap to Ensure Access to Essential Healthcare Services

States have been left to pick up the pieces as providers across the country have left the Title X program due to the Rule. Several Amici States have made state or local funding available to replace some of the federal funds.⁵⁷ However, many of these supplemental funds are one-time grants. And in several states, no long-term funding sources have been identified. Forcing states to respond to the

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Data Note: Is the Supplemental Title X Funding Awarded by HHS Filling in the Gaps in the Program?*, *supra* note 18.

⁵⁷ *Data Note: Impact of New Title X Regulations on Network Participation*, *supra* note 20.

departure of so many Title X providers not only strains state budgets—an increasingly acute concern, in light of the economic fallout of the COVID-19 pandemic—but also places at risk the vulnerable patients who rely on Title X for family planning services.

Since the exit of well-established Title X providers, several states have provided funding to fill the gaps for providers.

- California provided \$348,488 in one-time grants to two health facilities and their affiliates.⁵⁸
- Delaware has spent \$156,000 in state funding to help its clinics, and it seeks to provide \$250,000 in additional funding for services, supplies, and long-acting reversible contraceptives.
- Hawaii made a one-time appropriation of \$750,000 in state funds to off-set the absence of Title X funds in July 2019.⁵⁹ The Hawaii Department of Health requested additional funds for 2020, but it is unclear whether the state

⁵⁸ *Treasurer Fiona Ma Encourages Health Facilities to Apply for Lifeline Grants Before Time Runs Out*, California State Treasurer (Oct. 2019), <https://www.treasurer.ca.gov/newsletter/2019/oct/lifeline-grants.html>.

⁵⁹ Amy Nakamura, *Hawaii Funds Women's Health Services To Address Trump Rule On Abortion Services*, Hawaii Public Radio (July 18, 2019) <https://www.hawaiipublicradio.org/post/hawaii-funds-womens-health-services-address-trump-rule-abortion-services#stream/0>.

can appropriate the funds in light of the economic impact of COVID-19 on Hawaii's state budget.

- Illinois was able to fill the financial gap to support the loss of \$3.7 million in federal funds.
- Maine's clinics remain open but are reliant on state and private funds, instead of Title X federal funds.
- Massachusetts made an emergency appropriation of \$8 million in state funds to fully replace lost Title X funds through June 30, 2020.⁶⁰
- New Jersey has made a fiscal year appropriation of \$9.5 million to the New Jersey Department of Health for family planning services to make up for the loss of Title X funds.⁶¹
- Vermont has dedicated around \$1.6 million for two fiscal years to fill the gap in funds, but has not identified a sustainable source of funds going forward.⁶²

⁶⁰ An Act Making Appropriations for the Fiscal Year 2019 to Provide for Supplementing Certain Existing Appropriations and for Certain Other Activities and Projects, 2019 Mass. Acts Chapter 6, <https://malegislature.gov/Laws/SessionLaws/Acts/2019/Chapter6>.

⁶¹ *Governor Murphy Signs Legislation Appropriating \$9.5 Million for Family Planning Services*, Governor Phil Murphy, State of New Jersey (Jan. 1, 2020), <https://www.nj.gov/governor/news/news/562019/approved/20200102a.shtml>.

⁶² *State Opts Out Of Title X Funding That Would Limit Family Planning Services: State will use its own funds to ensure Vermonters can access full services*, Vermont Dep't of Health (Aug. 19, 2019),

In light of the recent pandemic, family planning is more important than ever, and clinic withdrawals from the Title X program place an additional strain on health systems nationwide, including in the Amici States. Due to COVID-19, many individuals are seeking to postpone pregnancy for a variety of reasons, including health concerns and financial instability due to unemployment.⁶³ Further, as a result of lost insurance coverage or a loss of income, more people need Title X's low cost services.⁶⁴ But the Rule has resulted in *fewer* clinics, at a time when Amici States need *more* clinics and *more* funding. Reduced access to reproductive health services harm our residents, our health systems, and our public fiscs.

CONCLUSION

The judgment of the district court should be affirmed.

<https://www.healthvermont.gov/sites/default/files/documents/pdf/Title%20X%20news%20release%208-19-2019.pdf>.

⁶³ Alan Yuhas, *Don't Expect a Quarantine Baby Boom*, New York Times (Apr. 8, 2020), <https://www.nytimes.com/2020/04/08/us/coronavirus-baby-boom.html>.

⁶⁴ Taylor Riley, et al., *Estimates of the Potential Impact of the COVID-19 Pandemic on Sexual and Reproductive Health in Low- and Middle-Income Countries*, Guttmacher Inst. (Apr. 16, 2020), <https://www.guttmacher.org/journals/ipsrh/2020/04/estimates-potential-impact-covid-19-pandemic-sexual-and-reproductive-health#>. The Guttmacher Institute estimates that reduced access to reproductive care as a result of COVID-19 disruptions will result in a decline in contraception usage and a concomitant increase in unintended pregnancies.

Dated: May 1, 2020

Respectfully submitted,

/s/Ketakee Kane

AARON D. FORD
Attorney General of Nevada
HEIDI PARRY STERN
Solicitor General
JEFFREY M. CONNER
Deputy Solicitor General
NEVADA OFFICE OF THE ATTORNEY
GENERAL
555 East Washington Ave., Suite 3900
Las Vegas, Nevada 89101
(702) 486-3420
hstern@ag.nv.gov
Attorneys for the State of Nevada

XAVIER BECERRA
Attorney General of California
RENU R. GEORGE
Senior Assistant Attorney General
KATHLEEN BOERGERS
Supervising Deputy Attorney General
KARLI EISENBERG
KETAKEE KANE
Deputy Attorneys General
CALIFORNIA DEPARTMENT OF JUSTICE
1515 Clay Street, 20th Floor
Oakland, CA 94612-0550
(510) 879-1519
Ketakee.Kane@doj.ca.gov
Attorneys for the State of California

(Counsel listing continues on next page)

PHIL WEISER
Attorney General
State of Colorado

KEITH ELLISON
Attorney General
State of Minnesota

WILLIAM TONG
Attorney General
State of Connecticut

GURBIR S. GREWAL
Attorney General
State of New Jersey

KATHLEEN JENNINGS
Attorney General
State of Delaware

HECTOR BALDERAS
Attorney General
State of New Mexico

KARL A. RACINE
Attorney General
District of Columbia

LETITIA JAMES
Attorney General
State of New York

CLARE E. CONNORS
Attorney General
State of Hawaii

JOSHUA H. STEIN
Attorney General
State of North Carolina

KWAME RAOUL
Attorney General
State of Illinois

ELLEN F. ROSENBLUM
Attorney General
State of Oregon

AARON M. FREY
Attorney General
State of Maine

JOSH SHAPIRO
Attorney General
Commonwealth of Pennsylvania

BRIAN E. FROSH
Attorney General
State of Maryland

PETER F. NERONHA
Attorney General
State of Rhode Island

MAURA HEALEY
Attorney General
Commonwealth of Massachusetts

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

DANA NESSEL
Attorney General
State of Michigan

MARK R. HERRING
Attorney General
Commonwealth of Virginia

ROBERT W. FERGUSON
Attorney General
State of Washington

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
Effective 12/01/2016

No. 19-1614 **Caption:** Mayor & City Council of Baltimore v. Azar

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT
Type-Volume Limit, Typeface Requirements, and Type-Style Requirements

Type-Volume Limit for Briefs: Appellant's Opening Brief, Appellee's Response Brief, and Appellant's Response/Reply Brief may not exceed 13,000 words or 1,300 lines. Appellee's Opening/Response Brief may not exceed 15,300 words or 1,500 lines. A Reply or Amicus Brief may not exceed 6,500 words or 650 lines. Amicus Brief in support of an Opening/Response Brief may not exceed 7,650 words. Amicus Brief filed during consideration of petition for rehearing may not exceed 2,600 words. Counsel may rely on the word or line count of the word processing program used to prepare the document. The word-processing program must be set to include headings, footnotes, and quotes in the count. Line count is used only with monospaced type. See Fed. R. App. P. 28.1(e), 29(a)(5), 32(a)(7)(B) & 32(f).

Type-Volume Limit for Other Documents if Produced Using a Computer: Petition for permission to appeal and a motion or response thereto may not exceed 5,200 words. Reply to a motion may not exceed 2,600 words. Petition for writ of mandamus or prohibition or other extraordinary writ may not exceed 7,800 words. Petition for rehearing or rehearing en banc may not exceed 3,900 words. Fed. R. App. P. 5(c)(1), 21(d), 27(d)(2), 35(b)(2) & 40(b)(1).

Typeface and Type Style Requirements: A proportionally spaced typeface (such as Times New Roman) must include serifs and must be 14-point or larger. A monospaced typeface (such as Courier New) must be 12-point or larger (at least 10½ characters per inch). Fed. R. App. P. 32(a)(5), 32(a)(6).

This brief or other document complies with type-volume limits because, excluding the parts of the document exempted by Fed. R. App. P. 32(f) (cover page, disclosure statement, table of contents, table of citations, statement regarding oral argument, signature block, certificates of counsel, addendum, attachments):

- this brief or other document contains 3955 [*state number of*] words
- this brief uses monospaced type and contains _____ [*state number of*] lines

This brief or other document complies with the typeface and type style requirements because:

- this brief or other document has been prepared in a proportionally spaced typeface using Microsoft Word _____ [*identify word processing program*] in Times New Roman, 14 pt _____ [*identify font size and type style*]; **or**
- this brief or other document has been prepared in a monospaced typeface using _____ [*identify word processing program*] in _____ [*identify font size and type style*].

(s) /s/ Ketakee R. Kane

Party Name California, et al.

Dated: May 1, 2020

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
APPEARANCE OF COUNSEL FORM

BAR ADMISSION & ECF REGISTRATION: If you have not been admitted to practice before the Fourth Circuit, you must complete and return an [Application for Admission](#) before filing this form. If you were admitted to practice under a different name than you are now using, you must include your former name when completing this form so that we can locate you on the attorney roll. Electronic filing by counsel is required in all Fourth Circuit cases. If you have not registered as a Fourth Circuit ECF Filer, please complete the required steps at [Register for eFiling](#).

THE CLERK WILL ENTER MY APPEARANCE IN APPEAL NO. 19-1614, 20-1215 as

- Retained
 Court-appointed(CJA)
 CJA associate
 Court-assigned(non-CJA)
 Federal Defender
 Pro Bono
 Government

COUNSEL FOR: California and 22 Amici States supporting Plaintiff-Appellee

_____ as the
(party name)

- appellant(s)
 appellee(s)
 petitioner(s)
 respondent(s)
 amicus curiae
 intervenor(s)
 movant(s)

/s/ Ketakee R. Kane
(signature)

Please compare your information below with your information on PACER. Any updates or changes must be made through PACER's [Manage My Account](#).

Ketakee Kane
Name (printed or typed)

510-879-1519
Voice Phone

California Office of the Attorney General
Firm Name (if applicable)

Fax Number

1515 Clay Street, 20th Floor

Oakland, CA 94612
Address

ketakee.kane@doj.ca.gov
E-mail address (print or type)

CERTIFICATE OF SERVICE (required for parties served outside CM/ECF): I certify that this document was served on _____ by personal delivery; mail; third-party commercial carrier; or email (with written consent) on the following persons at the addresses or email addresses shown:

Signature

Date