

No. 19-15974 & 19-15979

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STATE OF CALIFORNIA,

Plaintiff-Appellee,

v.

ALEX M. AZAR II, in his official capacity as Secretary of the United States Department
of Health and Human Services; UNITED STATES DEPARTMENT
OF HEALTH AND HUMAN SERVICES,

Defendants-Appellants,

ESSENTIAL ACCESS HEALTH, INC., et al.,

Plaintiffs-Appellees,

v.

ALEX M. AZAR II, in his official capacity as Secretary of the United States Department
of Health and Human Services; UNITED STATES DEPARTMENT
OF HEALTH AND HUMAN SERVICES,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

**BRIEF OF AMICUS CURIAE SUSAN B. ANTHONY LIST
IN SUPPORT OF DEFENDANTS-APPELLANTS AND REVERSAL**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rules of Appellate Procedure 26.1 and 29(a)(4)(A), amicus curiae certifies that it has no parent corporations or any publicly held corporations owning 10% or more of its stock.

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RULE 29 STATEMENT OF INTEREST OF AMICUS CURIAE¹

Amicus Curiae Susan B. Anthony List (“SBA” or “SBA List”) is a “pro-life advocacy organization,” *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2339 (2014) (internal quotation marks omitted), dedicated to reducing and ultimately eliminating abortion by electing national leaders and advocating for laws that save lives, with a special calling to promote pro-life women leaders.

SBA List is deeply involved in the process of persuading fellow citizens of the rightness of its cause and effecting change through political processes. SBA List combines politics with policy, investing heavily in voter education to ensure that pro-life Americans know where their lawmakers stand on protecting the unborn, and in issue advocacy, advancing pro-life laws through direct lobbying and grassroots campaigns.

In particular, SBA List strongly supports private and public programs that assist women in avoiding abortion and protecting their own health and the health of their children. Fortified by its membership roster of 700,000 Americans, SBA List advocates policies that ensure that tax dollars are neither used to pay for abortions

¹ As required by Federal Rule of Appellate Procedure 29, counsel certifies this brief was not authored, in whole or in part, by counsel to a party, and further, that no person or entity other than amicus curiae, its members, or its counsel made any monetary contribution to the preparation or submission of this brief.

nor supplied to programs that provide or promote abortion as a method of family planning.

Pursuant to Federal Rule Procedure 29(a)(2), SBA List files this brief without an accompanying motion for leave to file, because all parties have consented to its filing.

INTRODUCTION

The United States Department of Health and Human Services (“HHS”) has acted prudently and properly in issuing its Final Rule revising the regulations governing the Title X family planning program. *See* 84 Fed. Reg. 7714 (May 3, 2019) (the “Final Rule”). The purpose of the Final Rule—i.e., to “ensure compliance with, and enhance implementation of, the statutory requirement that none of the funds appropriated for Title X may be used in programs where abortion is a method of family planning,” *id.* at 7715—is consonant with federal law and Supreme Court precedent.

This Court reviews “all legal interpretations underlying an injunction de novo.” *Aircraft Serv. Int’l, Inc. v. Int’l Bhd. of Teamsters*, 779 F.3d 1069, 1072 (9th Cir. 2015). Because the Final Rule’s provisions are amply justified by both historical facts and health care providers’ own admissions, this Court should reverse.

ARGUMENT

I. Federal law has long prohibited the use of taxpayer funds to provide abortions and protected healthcare providers that do not refer for abortions.

Since 1970, Section 1008 of Title X to the Public Health Service Act has clearly stated that “[n]one of the funds appropriated under this title shall be used in programs where abortion is a method of family planning.” 42 U.S.C. § 300a-6. This provision has not been altered since its adoption, though implementing regulations and enforcement efforts have varied. *See* 84 Fed. Reg. at 7720-21.

Since Title X’s adoption, moreover, the Government has also enacted other provisions that give effect to the state’s legitimate preference for childbirth over abortion. Most directly, since 1976, the Hyde Amendment has barred the use of taxpayer funds to fund abortions through the Medicaid program. *See* Pub. L. No. 94-439, 90 Stat 1418 (1976).

At the same time, Congress has protected health care providers that do not refer for or provide abortions. Since 1996, with the adoption of the Coats-Snowe amendment, the law has protected from discrimination health care facilities and providers who decline to train or be trained in the performance of induced abortions. 42 U.S.C. § 238n. Since 2005, appropriations made through the Department of Health Human Services have been subject to the Weldon Amendment, which prohibits allocations of federal funds to agencies, programs

and governments that discriminate against health care entities who refuse to facilitate or provide abortions. *See* Consolidated Appropriations Act of 2012, Pub. L. No. 112–74, div. F, tit. V, § 507(d)(1), 125 Stat. 786, 1111 (2011).

These well-established provisions of federal law reflect a legitimate and laudable public policy favoring childbirth over abortion by disfavoring the use of federal funds or privileges to facilitate or provide abortion. The Final Rule seeking to give effect to Title X’s prohibition on the use of public funds to promote abortion as a method of family planning is of a piece with all of these legitimate exercises of federal power.

II. Well-established legal precedent supports the right of government to favor childbirth over abortion.

Considering these legislative measures and other questions, the United States Supreme Court has consistently found that all governments have a legitimate interest in protecting human life beginning in utero and in favoring childbirth over abortion, including by their use of public funds and facilities.

“The government may use its voice and its regulatory authority to show its profound respect for the life within the woman.” *Gonzales v. Carhart*, 550 U.S. 124, 157 (2007). *See also, e.g., Roe v. Wade*, 410 U.S. 113, 162 (1973) (“[T]he State...has legitimate interests in protecting...the potentiality of human life...”); *Planned Parenthood v. Casey*, 505 U.S. 833, 846 (1992) (recognizing the State’s “regulatory interest,” “from the inception of pregnancy,” “in protecting the life of

the fetus”). “[T]he Constitution does not forbid a State or city, pursuant to democratic processes, from expressing a preference for normal childbirth” *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 511 (1989) (quoting *Poelker v. Doe*, 432 U.S. 519, 521 (1977)).

Upholding the Hyde Amendment prohibiting Medicaid funds to pay for abortions, *Harris v. McRae* found that “incentives that make childbirth a more attractive alternative than abortion for persons eligible for Medicaid . . . bear a direct relationship to the legitimate congressional interest in protecting potential life.” *Harris v. McRae*, 448 U.S. 297, 325 (1980). The Court specifically approved the funding limitation’s “encourag[ing] alternative[s]” to abortion by means of “unequal subsidization of abortion and other medical services.” *Id.* at 315.

Consistent with these holdings and principles governing the judicial deference properly accorded to administrative actions, the United States Supreme Court—in precisely the administrative context presented in this case—affirmed the legitimate prerogative of the Secretary of Health and Human Services to adopt revised interpretations of the abortion-based restrictions on Title X funds that more firmly effect the intent of the statute and the state’s policy favoring childbirth over abortion. *See Rust v. Sullivan*, 500 U.S. 173, 184 (1991) (“substantial deference” must be accorded to the “Secretary’s construction of the statute,” which represented a shift toward stricter enforcement of the abortion-funding

prohibitions). The Court specifically approved the Secretary’s justifications for its new interpretation, which included a “shift in attitude against the ‘elimination of unborn children by abortion,’” as well as responding to non-compliance with earlier interpretations and better implementing the “original intent” of the statute. *Id.* at 187. Considering the constitutionality of new regulations requiring strict separation between Title X funds and abortion counseling, the Court reaffirmed the principles from *Webster* and *McRae* that the State has a legitimate interest in favoring childbirth over abortion and may commit its funds unequally to further that policy. *Id.* at 201.

The often-recognized State interest in life in utero, as well as the State’s firmly established right to commit its funds in order to favor childbirth over abortion, and the Secretary’s discretion in interpreting Title X’s abortion restrictions, all reinforce HHS’s decision to adopt the Final Rule to ensure federal funds do not go to organizations that facilitate or provide abortions.

III. HHS’s concerns that Title X recipients are improperly using federal funds to subsidize abortion are well-founded.

HHS has historical grounds to be concerned about the possibility that abortion providers might misuse taxpayer funds. If that history were not enough, this lawsuit and others challenging the Final Rule reinforce concerns that, wittingly or unwittingly, there has been widespread violation of Section 1008’s prohibition

on using Title X funds to subsidize programs in which abortion is a method of family planning.

A. Abortion providers have a documented history of fraudulent use of taxpayer funds.

Plaintiffs-Appellees argue that the Final Rule is insufficiently justified because HHS did not “identify *any* evidence showing that funds appropriated for Title X were, in fact, being illegally used by recipients of those funds,” ER169 ¶ 84; *see also* Dkt. 26, Case No. 3:19-cv-01184, at 16:2-4—and the district court relies heavily on that claim. *See* ER10, 58, 61. But neither Plaintiffs-Appellees nor the district court can deny that abortion providers have a history of misusing taxpayer funds. *See, e.g.*, ER58. The instances of such abuse are widespread, well-documented, and involve many millions of dollars. *See* Catherine Glenn Foster, Charlotte Lozier Institute & Alliance Defending Freedom, *Profit. No Matter What, 2017 Report on Publicly Available Audits of Planned Parenthood Affiliates and State Family Planning Programs*, <https://s27589.pcdn.co/wp-content/uploads/2017/01/plannedparenthood-profit-no-matter-what.pdf> (“Abuse of Funds Report”); Foster, Charlotte Lozier Institute & Alliance Defending Freedom, *Planned Parenthood: Profit. No Matter What*, <https://lozierinstitute.org/profit-no-matter-what/> (summarizing and linking to Abuse of Funds Report; cited in the Final Rule, 84 Fed. Reg. at 7725 n.33).

In one lawsuit, a major abortion provider paid at least \$4.3 million dollars to settle claims of abuse of federal funds—and that case related to only certain claims in Texas. Abuse of Funds Report at 8, 28. While audits and investigations to date have been limited, due largely to successful political efforts by abortion providers,² they have nevertheless uncovered instances of federal-funds abuse of at least \$12.8 million. *Id.* at 4, 8, 46 n.5. Former employees of abortion providers and others allege abuse of many more millions of dollars. *Id.* at 4-5, 8, 28-31.

Any assertion that abortion providers' well-documented abuse of taxpayer funds in the Medicaid context does not support increased accountability in the Title X context is meritless. *See, e.g.*, ER58, 169 ¶ 84; Dkt. 25, Case No. 3:19-cv-01195, at 16. HHS notes that, while abortion providers' documented abuses of other federal program funds do not definitively prove the existence of similar abuses of Title X, they do help illustrate the need for appropriate accountability. 84 Fed. Reg. at 7725.

In fact, as HHS also notes, it is even easier to abuse Title X funds than it is to abuse certain other forms of public funding (e.g., Medicaid funds), because Title X funds are disbursed as grants *before* services are rendered. *See* 84 Fed. Reg. at

² For example, in 2002, as in other years, Planned Parenthood “spent millions of dollars to elect politicians who support abortion and who defend and shield Planned Parenthood from any serious audit or investigation or other congressional oversight.” Abuse of Funds Report at 46 at n.5.

7773 (“Title X funds go to centers up front as grants, rather than after the fact as reimbursement for services centers have provided to individual enrollees.”). That “increas[es] the possibility of intentional or unintentional misuse of funds,” making “[a]ppropriate accountability standards . . . particularly appropriate in the case of grant programs such as Title X.” *Id.* at 7725.

Concerns about abuse of Title X funds are particularly warranted where abortion providers who receive Title X funds have demonstrably abused federal funds in the past. Where abortion providers have abused one type of federal funds, it is more than reasonable—and certainly not arbitrary and capricious—to seek accountability for those same entities with respect to other types of federal funds that are even easier to abuse. *See Nat’l Cable & Telecom. Ass’n v. F.C.C.*, 555 F.3d 996, 1002-03 (D.C. Cir. 2009) (noting that agencies have to “present evidence of the *kinds* of abuses that could occur,” not evidence of the exact abuse targeted, to justify a rule change (emphasis in original)). Here, evidence of abortion providers’ Medicaid-funds abuse is more than sufficient evidence of the kind of abuse that could occur with respect to Title X funds. Therefore, the Final Rule is neither arbitrary nor capricious.

B. Plaintiffs-Appellees’ own arguments reinforce concerns that abortion providers have been misusing Title X funds to subsidize their abortion businesses.

In addition to abortion providers’ past misuse of public funds, Plaintiffs-Appellees’ own arguments and admissions demonstrate the need for the Final Rule. Plaintiffs-Appellees argue, *inter alia*, that the Final Rule should not be permitted to take effect because it would be too costly for health care providers to separate their abortion-related activities from their Title X-eligible services. *See, e.g.*, Dkt. 25, Case No. 3:19-cv-01195, at 2:7-9 (“Essential Access itself will be forced to cease critical *non*-Title X-funded education, training, and advocacy that discusses abortion, or else duplicate its facilities, staff, and electronic systems in a costly “mirror” organization.”); *id.* at 12:15-17, 27: 2-5; Dkt. 26, Case No. 3:19-cv-01184, at 8:10-13, 20:9-11. The district court relies heavily on these predictions of high compliance costs in finding the physical separation requirement arbitrary and capricious. ER65-70.

What Plaintiffs-Appellees present as an argument in favor of the status quo is in fact an indictment of it. Title X states plainly that “[n]one of the funds appropriated under this subchapter shall be used in programs where abortion is a method of family planning.” 42 U.S.C. § 300a-6. In other words, Title X funds were never supposed to have been used to subsidize or facilitate the provision of “non-Title X-funded activity” that treats abortion as a method of family planning.

If Plaintiff-Appellees cannot logistically or financially sustain those activities separately from the provision of Title X-eligible health care, then their programs are in violation of the plain terms of Title X.

The provision of *Title X-eligible services* will not be rendered costlier by the Final Rule. To the extent that the Final Rule will jeopardize or increase the cost of non-Title X-eligible services (e.g., abortion), it should go without saying that the Federal Government is under no obligation to underwrite any such activities. And more than that, where the “activities” in question are referral for and provision of abortion as a method of family planning, such underwriting is statutorily prohibited. *See* 42 U.S.C. § 300a-6. Thus, the fact that the Final Rule would make it more costly for Title X-funded programs to provide abortion services only proves that the Rule is warranted and well-justified. *See* 84 Fed. Reg. at 7766 (“Commenters’ insistence that requiring physical and financial separation would increase the cost for doing business only confirms the need for such separation.”).

CONCLUSION

Plaintiffs-Appellees have come into federal court to insist on the prerogative of abortion providers to continue commingling their abortion businesses with their provision of Title X-eligible health care services, despite the fact that such commingling is plainly prohibited by federal law. The past misconduct of abortion providers, combined with their own arguments and admissions, provide ample

proof that the Final Rule is neither arbitrary nor capricious, and that it is in fact a much-needed response to widespread violation of federal law.

Respectfully submitted,

Dated: June 10, 2019

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), I certify that the foregoing amicus curiae brief is proportionally spaced, has a typeface of 14 point Times New Roman, and contains 2484 words, excluding those sections identified in Fed. R. App. P. 32(f).

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CERTIFICATE OF SERVICE

I certify that on June 10, 2019, the foregoing amicus curiae brief was served on all parties or their counsel of record through the CM/ECF system.

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