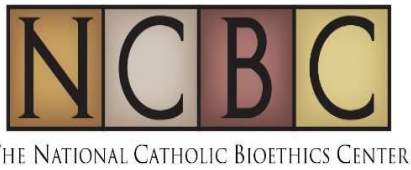

THE ETHICS & RELIGIOUS LIBERTY COMMISSION
OF THE SOUTHERN BAPTIST CONVENTION

Submitted Electronically

May 4, 2021

Office of Population Affairs
Office of the Assistant Secretary for Health
Attention: Title X Rulemaking
U.S. Department of Health and Human Services
200 Independence Avenue SW
Washington, DC 20201

Subj: Ensuring Access to Family Planning Services (Title X), RIN 0937-AA11

Dear Sir or Madam:

On behalf of the United States Conference of Catholic Bishops (USCCB), Southern Baptist Ethics & Religious Liberty Commission, Catholic Medical Association, National Association of Catholic Nurses, USA, and The National Catholic Bioethics Center, we submit the following comments on the proposed rule, published at 86 Fed. Reg. 19812 (Apr. 15, 2021), on ensuring access to family planning services under Title X of the Public Health Service Act.

In our view, the proposed rule fails to faithfully carry out Congress's command that the Title X program not provide or promote abortion or engage in abortion-related activities. Although the USCCB continues to have grave reservations about government promotion of contraceptives,[1] we have long supported enforcement of the abortion funding restrictions in Title

[1] *See*, *e.g.*, the USCCB's Comments on Religious Exemptions and Accommodations for Coverage of Certain Preventive Services under the Affordable Care Act, at 2-8 (Nov. 21, 2017) (noting that contraceptives do not cure or prevent disease and are associated with adverse health outcomes), http://www.usccb.org/about/general-

X, and we believe it critical that HHS fulfill its obligation to fully enforce those restrictions. We object to the proposed rule's failure to do so. Second, we ask that the regulations expressly mention the right of individuals and grantees not to counsel or refer for abortion, a statutory right recognized in the preamble to the proposed rule. Lastly, we ask that the regulations expressly incorporate the existing requirement that Title X projects encourage family (including parental) participation in the decision to seek family planning services, a statutory requirement also recognized in the preamble.

Analysis

Section 1008 of the Public Health Service Act provides 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. This provision has been part of Title X since its inception in 1970. In addition to being codified in permanent law, Congress has regularly reiterated the funding prohibition in appropriations for Title X. *E.g.*, Consolidated Appropriations Act, 2018, Pub. L. 115-141, Div. H., tit. II, 132 Stat. 349, 369 (2018) (stating that amounts provided to voluntary family planning projects under Title X "shall not be expended for abortions"). Thus, both Title X and the appropriations enactments that fund it draw a sharp distinction between family planning and abortion. The text and purpose of Title X, as the Department has previously acknowledged, make clear that Congress intended to create "a wall of separation" between family planning and abortion by broadly prohibiting abortion-related activities. 83 Fed. Reg. 22502, 25505 (June 1, 2018), quoting 53 Fed. Reg. 2922, 2922 (Feb. 2, 1988).[2]

If there were any ambiguity (there is none, in our opinion), legislative history resolves it in favor of a broad reading of the funding ban in Title X. As HHS correctly notes (86 Fed. Reg. at 19812-13), the Conference Report accompanying the original Title X legislation makes clear that "funds authorized under this legislation" would be—

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counsel/rulemaking/upload/Comments-Religious-Exemptions-From-Contraceptive-Mandate.pdf. The USCCB has expressed similar reservations about government promotion of contraceptives in previous comments and amicus filings. *See* USCCB Comments on Interim Final Rules on Coverage of Certain Preventive Services Under the Affordable Care Act (Oct. 8, 2014), http://www.usccb.org/about/general-counsel/rulemaking/upload/2014-hhs-comments-on-interim-final-rules-10-8.pdf; USCCB Comments on Notice of Proposed Rulemaking on Preventive Services (Mar. 20, 2013), http://www.usccb.org/about/general-counsel/rulemaking/upload/2013-NPRM-Comments-3-20-final.pdf; USCCB Comments on Advance Notice of Proposed Rulemaking on Preventive Services (May 15, 2012), http://www.usccb.org/about/general-counsel/rulemaking/upload/comments-on-advance-notice-of-proposed-rulemaking-on-preventive-services-12-05-15.pdf; USCCB Comments on Interim Final Rules on Preventive Services (Aug. 31, 2011), comments-to-hhs-on-preventive-services-2011-08-2.pdf (usccb.org); USCCB Comments on Interim Final Rules Relating to Coverage of Preventive Services (Sept. 17, 2010) (discussing why contraceptives should not be included in the list of mandated preventive services under ACA), comments-to-hhs-on-preventive-services-2010-09.pdf (usccb.org); *see also* Brief Amicus Curiae of USCCB et al., at p. 7 n.10, *Zubik v. Burwell*, 136 S. Ct. 1557 (2016) (Nos. 14-1418, 14-1453, 14-1505, 15-35, 15-105, 15-119 & 15-191) (noting health risks and successful tort litigation arising out contraceptive use), http://www.usccb.org/about/general-counsel/amicus-briefs/upload/Zubik-v-Burwell.pdf.

[2] Congress's decision not to fund or promote abortion in Title X is consistent with its decision not to fund or promote abortion in federal programs generally (Medicaid being the primary, but not sole, example).

> used only to support preventive family planning services…. The conferees have adopted the language contained in section 1008, which prohibits the use of such funds for abortion, in order to make clear this intent.

H.R. Rep. No. 91-1667, at 8-9 (1970), *reprinted in* Cong. Rec. H39871, 39873 (Dec. 3, 1970).

Congressman Dingell, a principal sponsor of section 1008, stated: "With the 'prohibition of abortion' amendment—Title X, Section 1008—the committee members clearly intend that abortion is not to be encouraged or promoted in any way through this legislation. Programs which include abortion as a method of family planning are not eligible for funds allocated through this act." 116 Cong. Rec. 37375 (1970). This was Congress's stated understanding in 1970, and it remained Congress's stated understanding in subsequent years. In 1978, for example, during debate on possible amendments to Title X, Congressman Dornan proposed amending the statute for the claimed purpose of strengthening the abortion funding restriction, as follows:

> No grant or contract authorized by this Title may be made or entered into with an entity which directly or indirectly provides abortion, abortion counseling, or any abortion referral services.

124 Cong. Rec. 37045 (1978). The House rejected the amendment on the ground that section 1008 *already* encompassed the proffered prohibitions. Congressman Rogers, a member of the Public Health & Welfare Subcommittee at the time Title X was enacted, stated:

> Abortion is not a method of family planning. Abortion comes after pregnancy—after pregnancy. And the gentleman misses the point of what we are doing in Title X. It's before—before. It is to let people know how to avoid pregnancy. We cannot use any funds for abortion. The amendment is not needed.

Id. at 37046.

Regrettably, the proposed regulations would eliminate the "wall of separation" between the Title X program and abortion that Congress intended. The existing regulations—those that the proposed regulations would replace—faithfully carry out Congress's directive to keep abortion out of Title X by stating that a Title X project shall "[n]ot provide, promote, refer for, or support abortion as a method of family planning." 42 C.FR. § 59.5; *accord* 42 C.F.R. 59.14(a) (providing that a Title X project "may not perform, promote, refer for, or support abortion … nor take any other affirmative action to assist a patient to secure such an abortion"). The proposed regulations would not only eliminate this existing restriction, but would *require* Title X projects to provide information, counseling, and referrals for abortion. 86 Fed. Reg. at 19830 [proposed 42 C.F.R. § 59.5(a)(5)] (stating that a project "*must* … [o]ffer pregnant clients the opportunity to be provided information and counseling regarding … [p]regnancy termination" and "referral upon request") (emphasis added). This is a serious breach in the firewall between the funding of family planning and abortion that Congress created. 84 Fed. Reg. 7714, 7716 (Mar. 4, 2019) (concluding that the requirement that a Title X project refer for abortion violates section 1008).

At the same time, the Department acknowledges in the preamble to the proposed rule, as it has in prior rulemaking, that a *requirement* to provide information, counseling, and referral for abortion in the context of Title X runs afoul of federal conscience statutes. 86 Fed. Reg. at 19817 ("Under these [cited] statutes, objecting providers or Title X grantees are not required to counsel or refer for abortions."); *id*. at 19818 (noting that "individuals and grantees with conscience objections will not be required to follow the proposed rule's requirements regarding abortion counseling and referral."); *see* 84 Fed. Reg. at 7716 (making a similar concession); 83 Fed. Reg. at 25506 (same); 73 Fed. Reg. 78072, 78087 (Dec. 19, 2008) (same). This is an important concession, but we believe it should be stated *in the regulation*, not relegated to the preamble. A person reading *only* the regulation (and not the preamble) may otherwise conclude, mistakenly, that the requirement to counsel and refer for abortion is without exception (insofar as none is stated in the regulatory text). Hence, though we think *no* Title X project should be allowed, let alone required, to counsel or refer for abortion given Congress's directive that abortion not be part of Title X,[3] at a minimum there should be some clarification in the text of the regulations themselves that no Title X project is required to do so over its objection.[4] *See* 84 Fed. Reg. at 7716 ("The Department believes that it is appropriate and *necessary* to revise the Title X *regulatory text* to eliminate the provisions which are inconsistent with the health care conscience statutory provisions.") (emphasis added). The Department identifies no reason to omit this important qualification from the regulations, and the omission from the regulatory text may deter providers from applying to receive grants under Title X. *See* 86 Fed. Reg. at 19815-16 (expressing a concern that an insufficient number of providers are applying to receive grants under Title X).[5] The omission could also be misunderstood by others who read the regulations but may not fully attend to the preamble.

Along the same lines, we disagree with the Department's proposal to eliminate the requirement that a Title X project be organized so as to ensure complete physical and financial separation between a grantee's Title X activities and its abortion activities. The requirement of physical and financial separation finds ample support in the text and legislative history of Title X, and would help ensure that Title X funds are not used for abortion. The proposed regulations, regrettably, would eliminate that important requirement. *See Rust v. Sullivan*, 500 U.S. 173, 190 (1991) ("if one thing is clear from the legislative history, it is that Congress intended that Title X

[3] *See*, *e.g*., 84 Fed. Reg. at 7717 (stating that the Department views abortion referrals by a Title X project "as a violation of Section 1008"); 83 Fed. Reg. at 25506 (concluding that a referral for abortion "necessarily treats abortion as a method of family planning" and therefore "runs afoul of the statute); *id*. (a requirement that a Title X project provide abortion counseling and referrals "is inconsistent with section 1008"); *id*. ("Section 1008 prohibits a Title X grantee, within the scope of the Title X project, from referring for abortion").

[4] HHS should also acknowledge that not *all* federal statutes that provide an accommodation with respect to abortion counseling and referral operate as "conscientious" exemptions. The Weldon amendment, for example, forbids the federal government to discriminate against an entity based on its decision not to refer for abortion even if the entity has no religious or moral objection to doing so. *See* 83 Fed. Reg. at 25506 ("The abortion referral and counseling requirements … cannot be enforced against objecting grantees or applicants, and such requirements cannot be used to deny participation in the Title X program or a Title X project of objecting family planning providers.").

[5] An organization that for religious reasons only offers natural family planning (NFP) would find problematic any requirement that it refer for abortion *or for non-NFP forms of family planning*. *See* 86 Fed. Reg. at 19830 [proposed section 59.5(a)(1)] (stating that referrals must be made to the client's method of choice). The imposition of such a requirement could end up driving NFP-only organizations out of the Title X program altogether.

funds be kept *separate and distinct* from abortion-related activities") (emphasis added); 83 Fed. Reg. at 25505 ("the Department interprets section 1008 to establish a broad prohibition on funding, directly or indirectly, activities related to abortion…. Thus, the Department believes that section 1008's mandate is most clearly met where there is a *clear separation* between Title X programs and programs in which abortion is presented or provided") (emphasis added).

The Department cites the departure of a number of abortion providers, including Planned Parenthood, from participation in Title X as a reason to eliminate abortion restrictions in Title X. 86 Fed. Reg. at 19815. Such reasoning seem to us backwards. The departure of providers such as Planned Parenthood from the Title X program is not a reason to *eliminate* abortion restrictions from Title X. It is, instead, a reason to ensure that Title X grants will be made only to those providers who will *respect* the separation that Congress mandated between abortion and Title X. Put another way, Planned Parenthood's departure from the Title X program is no reason to attempt by regulation to revise Title X, but simply underscores why Planned Parenthood's insistence on the integration of abortion into family planning services makes it an unsuitable provider of Title X services.

Finally, in the preamble to the proposed rule, the Department recognizes the statutory obligation that grantees encourage family participation in Title X projects and in the decision of minors to seek family planning services under Title X.[6] This requirement, imposed by Congress, reflects the common sense notion that, as the primary teachers and caregivers of their children, parents should be involved in any decision regarding their children's own health and care. For some reason, however, this requirement was omitted from the proposed rule. *Compare* 42 C.F.R. § 59.5 (current text) (stating that each Title X project "must … [e]ncourage family participation in the decision to seek family planning services"), *with id.* (proposed text), 86 Fed. Reg. at 19830-31 (omitting this requirement). The omission may have been inadvertent, as the Department provides no mention of it, let alone any reason for it, in the preamble. We urge the Department to restore this language to the regulations.

Conclusion

To summarize:

- We oppose the proposed rule's failure to faithfully carry out Congress's intention that the Title X program not provide, fund, promote, encourage, or refer for abortion or abortion-related activities.

[6] 86 Fed. Reg. at 19813 ("The Act was … amended in 1981 to provide that '[t]o the extent practicable, entities which receive grants or contracts under this subsection shall encourage family participation in projects under this subsection,'" quoting 42 U.S.C. § 300(a)); 86 Fed. Reg. at 19813 ("Congress has included a rider in HHS's annual appropriations act that provides that '[n]one of the funds appropriated in this Act may be made available to any entity under Title X … unless the applicant for the award certifies to the Secretary that it encourages family participation in the decision of minors to seek family participation in the decision of minors to seek family planning services,'" quoting Consolidated Appropriations Act, 2021, Pub. L. 116-260, Div. H, § 207, 134 Stat. 1182, 1590. This statutory requirement is also noted in prior rulemaking. *See*, *e.g.*, 83 Fed. Reg. at 25503, 25525.

• We oppose the proposed rule's elimination of the requirement that a Title X project be organized to ensure the physical and financial separation of Title X activities from abortion.

• We request that the final regulations expressly mention the right of individuals and grantees not to counsel or refer for abortion, a statutory right acknowledged in the preamble to the proposed rule.

• We request that the final regulations retain the requirement that Title X projects encourage family (including parental) participation in the decision to seek family planning services, a statutory requirement acknowledged in the preamble to the proposed rule.

Thank you for the opportunity to comment.

Sincerely,

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