AMERICAN ATHEISTS

July 30, 2018

Admiral Brett P. Giroir
United States Assistant Secretary for Health
Office of the Assistant Secretary for Health
Office of Population Affairs
Attention: Family Planning
U.S. Department of Health and Human Services
Hubert H. Humphrey Building
Room 716G
200 Independence Avenue SW
Washington, D.C. 20201

Re: Public Comments Regarding Proposed Rules on "Compliance with Statutory Program Integrity Requirements" for 42 CFR Part 59 (RIN 0937-ZA00, Docket HHS-OS-2018-0008)

Dear Admiral Giroir:

American Atheists writes in response to the request for public comments regarding the proposed rules entitled "Compliance with Statutory Program Integrity Requirements," published June 1, 2018. Title X funding is used by over 4,000 sites in all 50 states to "help men, women, and adolescents make healthy and fully informed decisions about starting a family and determine the number and spacing of children."[1] We are opposed to the proposed rules because they undermine religious freedom by giving preference to religious organizations in the distribution of federal funds, they unconstitutionally infringe on First Amendment freedom of speech, and they threaten the safety, health and well-being of millions of Americans. These proposed rules will undoubtedly lead to increased discrimination and denials of care for vulnerable people across our nation, and so we strongly urge you to withdraw them.

American Atheists is a national civil rights organization that works to achieve religious equality for all Americans by protecting what Thomas Jefferson called the "wall of separation" between government and religion created by the First Amendment. We strive to create an environment where atheism and atheists are accepted as members of our nation's communities and where casual bigotry against our community is seen as abhorrent and unacceptable. We promote understanding of atheists through education, outreach, and community-building and work to end the stigma associated with being an atheist in America. As advocates for the health, safety, and well-being of all Americans, American Atheists objects to efforts to subordinate medical care to the religious beliefs of providers and institutions.

These proposed rules undermine Title X's purpose by preventing patients from making fully informed decisions about the number and spacing of their children. Preventing providers from discussing abortion as an option or medically necessary procedure blocks access by low-income and minority women to reproductive care. Inhibiting the ability of providers to refer patients for this procedure and actively working to confuse them with referral lists that do not indicate whether a provider performs abortions—even when explicitly requested—only further complicates a woman's ability to make a fully-informed decision surrounding a pregnancy. In effect, these proposed rules will unconstitutionally impose religious

[1] Compliance with Statutory Program Integrity Requirements, 83 Fed. Reg. 25,502 (Health & Human Servs. Dep't proposed June 1, 2018) (to be codified at 42 C.F.R. pt. 59).

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refusals to refer patients to abortion providers on all Title X grant recipients. Additionally, if these rules are implemented, "Planned Parenthood, which serves 41 percent of the 4 million patients receiving Title X care, stands to lose as much as $60 million a year."[2] That means that at least 41% of the patients currently served by Title X will either have to find a new provider located in their area willing to follow their current family planning method or lose the Title X funding they rely on to receive vital services that they cannot afford.

1. The proposed rules unconstitutionally give preference to religious organizations for federal funding.

As a foundational matter, the First Amendment to the US Constitution provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." This provision establishes the separation of religion and government, which is the very bedrock of our religious liberty. Prioritizing federal funding to religious organizations undermines religious freedom by preferring religion over nonreligion in violation of the First Amendment Establishment and Free Exercise Clauses. The Supreme Court has held that the Establishment Clause affords protection against sponsorship and financial support of religious activity.[3] Additionally, the "principal or primary effect [of the government activity] must be one that neither advances nor inhibits religion."[4] In *Trinity Lutheran*, the Court confirmed that secular organizations must at least be considered on equal footing with religious organizations for the allocation of government funds.[5]

These proposed rules, if implemented, would unconstitutionally give an advantage to religious groups over secular groups in the apportionment of government funds. The second factor of the "competitive grant review process" in the proposed rules states that preference will be given "especially among a broad range of partners and diverse subrecipients and referral individuals and organizations, and among non-traditional Title X partnering organizations."[6] Who are these non-traditional partnering organizations? Religious entities that have previously been ineligible to receive Title X funds because they refuse to inform patients of their full range of medical options, or refuse to refer patients for requested, or even medically necessary, procedures. The proposed rules themselves confirm this by stating that the new rules "would also promote grantee diversity by expanding the number of qualified entities that would be willing and able to apply to provide Title X services, since potential grantees and subrecipients that refuse to provide abortion referrals may have been ineligible or discouraged from applying for Title X grants or seeking to provide family planning services under a Title X project by the requirements of the current regulations."[7] This proactive emphasis on religious organizations blatantly violates the "no preference"

[2] Ariana Eunjung Cha ET AL., *Trump Administration will Pull Funds from Groups that Perform Abortions or Provide Referrals*, WASHINGTON POST (May 18, 2018), https://www.washingtonpost.com/news/to-your-health/wp/2018/05/18/planned-parenthood-likely-to-lose-millions-under-trump-administrations-new-title-x-family-planning-rules/?utm_term=.c0ac592bf9b5

[3] *Walz v. Tax Commission*, 397 U.S. 664, 668 (1970).

[4] *Board of Education v. Allen*, 392 U.S. 236, 243 (1968).

[5] *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2022 (2017).

[6] Compliance with Statutory Program Integrity Requirements, 83 Fed. Reg. at 25,511.

[7] *Id.* at 25,518.

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rule the Supreme Court has already set out, and unconstitutionally gives preference to a particular religious viewpoint in the allocation of federal funding.

These proposed rules are clearly not intended to protect religious liberty in a broader sense. They do nothing, for example, to protect the health care provider or patient whose beliefs dictate that abortion services should be widely accessible, that all methods of contraception should be freely available to everyone, or that only the individuals involved should be able to determine if abortion is the best option for them. Why is the religious liberty of health care providers who share religious viewpoints with conservative Christians worth more than other health care providers' or patients' religious liberty? By seeking to impose these values into Title X funding for all providers, the Department undermines the separation of religion and government.

Not only is it impermissible for government to show a preference for religious organizations in the allocation of funding, it also "must not foster 'an excessive government entanglement with religion.'"[8] In *Lynch v. Donnelly*, the Supreme Court evaluated several factors to determine whether excessive entanglement had occurred, including the level of administrative entanglement and political divisiveness.[9] The Court also looked at whether any expenditures had been made, and the "ongoing, day-to-day interaction between church and state" that the entanglement at issue caused. In *Lynch*, the Court noted the absence of "comprehensive, discriminating, and continuing state surveillance" or "enduring entanglement."[10]

These proposed rules would foster excessive entanglement due to the amount of expenditures to religious groups, the political divisiveness of the issue along religious lines, and the "ongoing, day-to-day interaction" between the government and religious groups and "comprehensive, discriminating, and continuing state surveillance" that the proposed reporting requirements would foster.[11] Under Title X, religious groups are eligible to receive millions of taxpayer dollars to treat low-income and uninsured patients. If these proposed rules are implemented, without close and continuing oversight, religious groups will be able to use these government funds to proselytize to their patients and keep them uninformed of all of their healthcare options.[12] The political divisiveness of ideas concerning family planning, contraception, and abortion along religious lines are self-evident, and these proposed rules are not only divisive, but they unconstitutionally favor a specific, religious viewpoint regarding these issues. Lastly, the preference these religious groups are given for funding and the reporting requirements under these proposed rules constitutes "comprehensive, discriminating, and continuing state surveillance."[13] These factors clearly show that the proposed rules, if implemented, would establish an unconstitutional, excessive government entanglement with religion.

[8] *Lemon v. Kurtzman*, 403 U.S. 602, 613 (1971) (quoting *Waltz*, supra, at 674).
[9] 465 U.S. 668, 684 (1984).
[10] *Id.* (quoting *Lemon*, supra, at 619-22).
[11] *Id.*
[12] Nor is it a solution to exempt religious groups from reporting requirements. To do so would create a constitutionally inappropriate imbalance under the Equal Protection clause.
[13] *Lynch,* supra, at 684.

2. The proposed rules unconstitutionally abridge freedom of speech.

The proposed rules are an unconstitutional, content-based restriction on speech. "The government may not regulate use [of speech] based on hostility -- or favoritism -- towards the underlying message expressed."[14] As this is not an informed-consent requirement ("The notice does not facilitate informed consent to a medical procedure. In fact, it is not tied to a procedure at all. It applies to all interactions between a covered facility and its clients, regardless of whether a medical procedure is ever sought, offered, or performed"), it is not subject to a professional speech exemption and would be reviewed under strict scrutiny.[15] As such, the restriction must be narrowly tailored to serve a compelling government interest. While the Supreme Court held in *Rust v. Sullivan* that the government may "selectively fund a program to encourage certain activities it believes to be in the public interest," the Court did not hold that preventing providers "from counseling abortion or referring for abortion" was a compelling government interest.[16] The proposed rules also fail the narrow tailoring test because they apply to more than just the primary recipients of Title X funding; they also apply to every clinic and physician in their referral network. The proposed rules apply much more broadly than necessary to effectuate the statutory requirements in Title X concerning abortion funding, which is conclusively demonstrated by the existence of prior implementing regulation which were more narrowly tailored.

Additionally, the government has no legitimate interest in preventing women from being apprised of their current medical condition or being informed of their full range of medical options. Even if a court found that the government has an interest in preventing abortion in some circumstances, this interest is certainly not narrowly tailored when it violates the doctor-patient relationship, prevents providers from apprising patients of their full range of medical options, and requires providers to set aside their medical judgment concerning the best course of action for the patient.

In fact, the Supreme Court has found that suppression of discussion between patients and their providers regarding family planning options is indeed a content-based restriction on speech and can be extremely dangerous, especially for minorities: "Throughout history, governments have 'manipulat[ed] the content of doctor-patient discourse' to increase state power and suppress minorities":

> For example, during the Cultural Revolution, Chinese physicians were dispatched to the countryside to convince peasants to use contraception...Recently, Nicolae Ceausescu's strategy to increase the Romanian birth rate included prohibitions against giving advice to patients about the use of birth control devices and disseminating information about the use of condoms as a means of preventing the transmission of AIDS.[17]

As discussed below, this proposed rule would disproportionately affect women of color, directly suppressing minorities in a way the Court just cautioned against in *Becerra*. "Professionals might have a host of good-faith disagreements, both with each other and with the government, on many topics in their respective fields. Doctors and nurses might disagree about the ethics of assisted suicide or the benefits of

[14] *R. A. V. v. St. Paul*, 505 U.S. 377, 386 (1992).
[15] *Nat'l Inst. of Family & Life Advocates v. Becerra*, No. 16-1140, 2018 U.S. LEXIS 4025, at *20 (June 26, 2018).
[16] 500 U.S. 173, 193-4 (1991).
[17] *Id.* at *22-23 (quoting Berg, *Toward a First Amendment Theory of Doctor-Patient Discourse and the Right To Receive Unbiased Medical Advice*, 74 B. U. L. Rev. 201, 201-202 (1994)).

medical marijuana…the people lose when the government is the one deciding which ideas should prevail."[18]

3. The proposed rules are dangerous and will limit the ability of vulnerable populations to access healthcare.

Four million women rely on Title X funding to access hospitals, clinics, physicians, and medical care they would not otherwise be able to afford.[19] It is imperative that physicians and clinic staff are able to speak freely with patients about all medical options and the patient's best interest. Stifling speech of medical professionals or counselors to prevent them from speaking about accepted medical procedures with their patients, or from referring them to physicians and clinics that can perform these procedures, violates the First Amendment freedom of speech and the civil rights of patients and physicians. This proposed rule is not only unconstitutional, but it is dangerous. When it is in the patient's best interests for their health and well-being not to carry a child to term, a physician must be able to follow medical standards of care and ethical obligations by informing the patient and referring them for further care.

This danger will also disproportionately affect women of color, who represent more than half of Title X patients.[20] Women of color are at "increased risk for pregnancy complications, and higher rates of unintended pregnancy, which increase their need for comprehensive reproductive health treatment."[21] A study conducted by the CDC found that African American women are 3.5 times "more likely to die from pregnancy- or childbirth-related causes. Not only are black women several times more likely to die from pregnancy-related causes than white patients, they are also more likely to die from preventable causes. One study found that while 33% of maternal deaths among white women were preventable, 46% of maternal deaths among black women could have been prevented."[22]

Some institutions, including many Catholic hospitals, already have policies similar to these proposed rules, which prohibit staff from counseling or referring patients for an abortion even if an abortion is the best course of action for the patient's health and well-being. In practice, these rules have literally endangered lives:

> The [Ethical and Religious Directives] forbid hospitals owned by or affiliated with the Catholic Church…from providing many forms of reproductive health care, including contraception, sterilization, many infertility treatments, and abortion, even when a patient's life or health is jeopardized by a pregnancy…the ERDs prohibit health care workers from providing contraceptives, emergency contraception, sterilization, some treatments for ectopic pregnancy, abortion, and fertility services. These services are prohibited regardless of patients' wishes, the urgency of a patient's medical condition,

[18] *Id*. at *23-24.
[19] Compliance with Statutory Program Integrity Requirements, 83 Fed. Reg. at 25,525.
[20] National Family Planning and Reproductive Health Association, *Title X Fact Sheet*, available at https://www.nationalfamilyplanning.org/file/Title-X-101-February-2017-final.pdf.
[21] Public Right, Private Conscience Project, *Bearing Faith: The Limits of Catholic Healthcare for Women of Color*, January 2018, p. 8, available at https://www.law.columbia.edu/sites/default/files/microsites/gender-sexuality/PRPCP/bearingfaith.pdf.
[22] *Id.* at 36.

> the provider's own medical judgment, or the standard of care in the medical profession. In some instances, Catholic hospitals do not provide referrals or even information about these services. Often, patients are not informed that the care they are receiving is governed by the ERDs, and it is not obvious that the hospital is affiliated with the Catholic Church.[23]

When Tamesha Means was rushed to a Catholic hospital in 2010, the only hospital in her county, she was not informed by staff that her fetus had almost no chance of survival and that she had a life-threatening infection, before being discharged without receiving adequate care.[24] In 2016, a report leaked that that same hospital had forced women to "undergo dangerous miscarriages when they could have been offered other options or transferred to another hospital to prevent delivery. All of the incidents involved pre-viable fetuses, and some women suffered infection or unnecessary surgery." The Catholic Directives mandate that physicians wait until cessation of the fetal heartbeat until they can help a woman having a miscarriage. One woman in Ireland "died of septic shock and *E. coli* one week after her admission" because doctors failed to intervene. "Some doctors at Catholic hospitals have reported being required to deny medically-indicated uterine evacuations or abortion care even during emergencies, either transferring patients to another hospital while they are unstable or waiting until their medical condition becomes critical."[25] Another woman in Washington almost died, with doctors waiting to grant her an abortion until she needed a blood transfusion.[26] Applying a prohibition on abortion referrals to Title X recipients violates medical standards of care and will put the lives of the four million women who rely on its funding at risk due to the religious beliefs of others.

Many recipients of Title X funding are hospitals which must be able to perform abortions in emergency situations and cannot afford separate infrastructure. Additionally, in emergency situations, it dangerous and inappropriate to expect that a patient will have to transfer facilities and engage with different physicians before receiving necessary care. If hospitals providing these services lose Title X funding, it will greatly reduce the reach and effectiveness of this funding, impacting the ability of hundreds of thousands of women to receive family planning services.

These proposed rules are archaic and dangerous. The United States already has the highest maternal death rate in the developed world and these proposed rules will only exacerbate this issue.[27] When women and families are uninsured, locked into managed care plans that do not meet their needs, or when they cannot afford to pay out of pocket for services or travel to another location, refusals and bars on referrals prevent access to necessary care. In rural areas there may be no other providers of life-preserving medical care. Rules that prevent physicians from fully informing their patients of their condition and options intensify the danger these women may face.

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[23] *Id.* at 8-11.
[24] Catholics for Choice, *How the Catholic Directives Make for Unhealthy Choices*, p. 9, available at http://issuu.com/catholicsforchoice/docs/2017_catholic_healthcare_report?e=31036955/53427854.
[25] *Bearing Faith*, supra, at 23.
[26] *Catholics for Choice*, supra, at 10.
[27] See NPR, *U.S. Has The Worst Rate Of Maternal Deaths In The Developed World*, May 12, 2017, available at https://www.npr.org/2017/05/12/528098789/u-s-has-the-worst-rate-of-maternal-deaths-in-the-developed-world

Conclusion

The proposed rules are unconstitutional and dangerous - we strongly urge you to withdraw them. The rules would undermine the ability of patients to receive medically necessary health care and to receive complete and medically accurate information about their treatment options. In defiance of statutory authority and the US Constitution, these rules put a specific religious viewpoint above the safety, well-being, and very lives of patients. If you should have any questions regarding American Atheists' opposition to these proposed rules, please contact me at 908.276.7300 x9 or by email at agill@atheists.org.

Sincerely,

Alison Gill, Esq.
Legal and Policy Director
American Atheists