

From: [Spottswood, Eleanor](#)
To: [Diamond, Joshua](#); [Brynn Hare \(bhare@leg.state.vt.us\)](mailto:bhare@leg.state.vt.us); [Leriche, Lucy Rose](#); [Annex Conference Room](#); [Becca Balint](#); [McGill, Kelley](#)
Subject: constitutional amendment discussion

For those who need to call in:

██████████

Conference room number: ██████████

*Including Sen. Balint with the hope that she can join us on short notice.

From: [Diamond, Joshua](#)
To: [Donovan, Thomas \(Thomas.Donovan@vermont.gov\)](#)
Cc: [Clark, Charity](#); [Natalie Silver \(Natalie.Silver@vermont.gov\)](#); [Sudbay, William](#)
Subject: Roe v Wade Day, January 22 (Tuesday)
Date: Friday, January 18, 2019 3:40:00 PM

TJ,

I spoke to the folks at Planned Parenthood and you are set to speak sometime between 2:00 and 2:15 at the Cedar Creek Room.

You will be speaking to Planned Parenthood's activists and volunteers. The suggested topic is a rundown of the good work that the AGO has been doing to advance reproductive rights and freedoms.

I've asked Ella to get me a comprehensive list of the various activities our office has been involved, including multi-state letters, comments on Title X, amicus briefs, and other litigation. I should have a list to you over the weekend.

Happy to discuss at your convenience.

Best, Josh

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

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From: [Diamond, Joshua](#)
To: [Leriche, Lucy Rose](#)
Cc: [Natalie Silver \(Natalie.Silver@vermont.gov\)](#)
Subject: Roe v. Wade Day
Date: Friday, January 18, 2019 11:25:00 AM

Lucy,

Just following up on our visit earlier this week.

Are there any additional details that I can share with TJ about his participation...when you would like him to present or comment, who will be the audience, etc.?

Thanks. Josh

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

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From: [Diamond, Joshua](#)
To: [Spottswood, Eleanor](#)
Subject: RE: Actions in reproductive health
Date: Saturday, January 19, 2019 9:04:00 PM

Thank you...hoping you made the flight out to Texas.

Best, Josh

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

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From: Spottswood, Eleanor <Eleanor.Spottswood@vermont.gov>
Sent: Saturday, January 19, 2019 1:25 PM
To: Diamond, Joshua <Joshua.Diamond@vermont.gov>; Silver, Natalie <Natalie.Silver@vermont.gov>
Cc: Battles, Benjamin <Benjamin.Battles@vermont.gov>
Subject: RE: Actions in reproductive health

Hi Natalie and Josh,

Here is a quick list of repro health actions we've taken in the last year or so. I had meant to double-check this list against the one that Jessica Mishaan keeps of all our joined amicus briefs to make sure I wasn't missing anything, but I'm having trouble accessing that list from home. Natalie could probably do this on Tuesday.

Actions defending Title X funding for Planned Parenthood:

- Joined several amicus briefs in support of Planned Parenthood in litigation in DC over changes to the funding opportunity announcement for Title X grant applications. Briefs in DC District

Court and two in DC Circuit attached.

- Joined comment letter on interim rules. Letter attached.
- Will be joining multistate lawsuit against final rules, whenever they are issued (probably on hold due to government shutdown)

Actions against expanding religious and moral exemptions to the contraceptive mandate in the ACA:

- Joined lawsuit against final rules in Northern District of California, filed for PI, granted as to plaintiff states
- Joined amicus brief in support of Pennsylvania's motion for PI in its lawsuit against final rules. PI granted nationwide.
- Joined amicus briefs in 9th Circuit and Northern District of California (California case) and 1st Circuit (Massachusetts case) during litigation against the interim rules. Briefs attached.

Other amicus briefs joined:

- Supported Planned Parenthood in the 6th Circuit en banc in *Planned Parenthood v. Himes*, which challenged the constitutionality of an Ohio law that would preclude entities that perform or promote abortions, or affiliate with entities that do so, from receiving public funding for six specified health programs that are unrelated to the performance or promotion of abortions. Brief attached.
- Supported Planned Parenthood in the 6th Circuit in *Preterm-Cleveland v. Himes*, challenging a law that placed restrictions on the reasons for choosing abortion prior to viability. Brief attached.
- Amicus brief in *Hopkins v. Jegley* in the 8th Circuit, arguing against a ban on D&E abortions. Attached.
- Amicus brief in *NIFLA v. Becerra* at SCOTUS, arguing for upholding disclosures for crisis pregnancy centers. Attached.
- Amicus briefs in DC Circuit supporting right of immigrant minors in custody to access abortion, two attached.

Have a great week!

Ella

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

From: Silver, Natalie <Natalie.Silver@vermont.gov>

Sent: Friday, January 18, 2019 1:15 PM

To: Spottswood, Eleanor <Eleanor.Spottswood@vermont.gov>

Cc: Battles, Benjamin <Benjamin.Battles@vermont.gov>

Subject: Actions in reproductive health

Hi Ella,

I just heard you were going on vacation next week. Any chance if you could get me a full list of actions we have taken to protect women's reproductive healthcare (from our recent birth control amicus, to Title X etc)? Tj is participating in the anniversary celebration of Roe V Wade at the statehouse next week and I think it would be good to have a list. Let me know if we can get this before you leave on vacation.

Natalie

Get [Outlook for iOS](#)

From: [Spottswood, Eleanor](#)
To: [Diamond, Joshua](#)
Cc: [Silver, Natalie](#)
Subject: Fw: Building Equality forum
Date: Thursday, January 24, 2019 4:07:42 PM
Attachments: [Spottswood Resume JNB.pdf](#)

Hi Josh (cc Natalie for reproductive rights PR purposes),

I see from the below email that the League of Women Voters seems to have only partially replaced you with me as a panelist--quite the title bump I got! I also see that I/you am supposed to be speaking about the "current wording" of the amendment. Would you be willing to clarify for all involved to what extent I will be able to comment on the current wording, and perhaps set them straight on my role at the AG? I attach a recent version of my resume in case that's helpful for coming up with a short bio.

I am still in Texas, which is lovely, and still planning to be home in time for the panel.

Thanks!

Ella

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

From: Peter Schuyler [REDACTED]
Sent: Thursday, January 24, 2019 1:15 PM
To: Lucy.leriche [REDACTED]
Cc: Paige.Feese [REDACTED]; vlyons@leg.state.vt.us; Brown, Cary; 'Michelle N. Farkas'; Spottswood, Eleanor
Subject: Building Equality forum

Dear Lucy,

At this point we are hoping that someone from Planned Parenthood can be in the audience to participate in the discussion. It certainly would be appropriate to bring up the Right to Privacy amendment in the discussion. Here is the information that was sent to the confirmed panel

members:

Dear Ginny, Cary, Michelle, and Ella,

Thank you for participating in the forum on Inclusive Equal Rights Amendment(s) to the Vermont Constitution.

After discussing the program with Ginny Lyons, here are my thoughts on the format:

Introduction – League of Women Voters

Senator Virginia (Ginny) Lyons – The proposals for Constitutional Amendment and how amending the state Constitution works in Vermont

Cary Brown, Executive Director, Vermont Commission on Women – Why the Commission on Women came forward to call for passage of an Inclusive Equal Rights Amendment to the state Constitution

Michelle Farkas, Esq., Gravel and Shea – Why a state constitutional amendment and what other states are doing

Ella Spottswood, Esq., Deputy Attorney General, Vermont Attorney General's Office – the current wording of the amendment and how it would affect laws in Vermont

When I spoke with Ginny on Sunday, she said that the wording of the proposed amendment or amendments would be finalized this week. There may be two amendments: one dealing with equal rights and another one to guarantee a woman's right to abortion.

Michelle and Josh, I realize that your areas of expertise overlap. Since Michelle has been involved in this issue since last year and worked on the Resolution that was passed in 2018, I think she should address the initial question of why do an amendment to the state constitution. Ginny also suggested that Michelle can talk a bit about what is happening in other states. Josh, since you have been involved in drafting the proposed amendment or amendments, I think you should address the wording of the proposed amendments and the ramifications of these amendments for state laws.

Since the purpose of the forum is to educate the audience and provide an opportunity for questions and discussion, the formal presentations will be during the first hour and open Q and A and discussion in the remaining time. If each of you can plan on your remarks to be not more than 10 minutes, with opportunity for one or two audience questions, we should be able to provide ample time for questions and discussion afterward. If the group is large, we may need to ask that all people with questions have an opportunity to ask their question or make

their comment once, before recognizing a speaker again. If the group is not large, we can let the questions and comments flow.

Here are the meeting specifics:

Building Equality – Discussing an Inclusive Equal Rights Amendment for Vermont

Sunday, January 27, 2019 2 – 4 PM

The Gallery at Main Street Landing

Presented by Champlain Valley League of Women Voters

Hosted by Main Street Landing Performing Arts Center

Please let me know if you have any questions or suggestions about the format.

Sonja Schuyler

Champlain Valley League of Women Voters



ELEANOR LAUREL PULLIN SPOTTSWOOD

Burlington, Vermont

EDUCATION

NEW YORK UNIVERSITY SCHOOL OF LAW, New York, New York

J.D., May 2013

Honors: *New York University Law Review*, Senior Executive Editor
Pro Bono Service Award, 2013; Equal Justice Works Summer Fellowships, 2011 and 2012

Activities: Domestic Violence Advocacy Project, Co-Chair
ACLU and National Lawyers Guild, Treasurer and Board Member
Defender Collective and OUTLaw, Member

Note: Eleanor L.P. Spottswood, Note, *Reviewing Federal Sentencing Policy, One Guideline at a Time*, 89 N.Y.U. L. REV. 769 (2014)

HARVARD UNIVERSITY, Cambridge, Massachusetts

A.B. in Economics, High Honors in field, May 2006

Honors: *Magna cum laude* for senior thesis, *Trade Dynamics in the West African Union, 1980-2004*
George H. Handelman Prize, for Eliot House senior who will be “most missed”

Activities: Radcliffe Varsity Women’s Crew, NCAA Division I Champion in 2003
Eliot House Library, Head Librarian

Study Abroad: U of MN Studies in International Development, Dakar, Senegal, Fall 2004

EXPERIENCE

VERMONT ATTORNEY GENERAL’S OFFICE, Montpelier, Vermont

Assistant Attorney General, Appellate Unit, July 2017 – present

Litigate primarily in the Vermont Supreme Court on behalf of wide variety of state agencies, including civil and criminal matters. Caseload also includes matters in superior and federal courts. Edit appellate briefs and participate in moot courts. One of two attorneys in Appellate Unit. Assist in drafting and reviewing U.S. Supreme Court amicus briefs and multistate litigation requests. Testify before Vermont Legislature.

NEW HAMPSHIRE PUBLIC DEFENDER, Concord, New Hampshire

Staff Attorney, August 2015 – July 2017

Litigated caseload of 90, including felony, misdemeanor, parole, and juvenile cases. Prepared, argued and won trials, suppression motions, and bail hearings. Filed habeas petition. Worked independently and as co-counsel.

Law Clerk (admitted under student practice rule), May 2012 – August 2012

Argued and won misdemeanor jury trial as co-counsel. Helped prepare felony trials. Researched and wrote motions.

JUDGE BERLE SCHILLER, U.S. DISTRICT COURT, E.D. PA., Philadelphia, Pennsylvania

Judicial Clerk, August 2014 – August 2015

JUSTICE JOHN A. DOOLEY, VERMONT SUPREME COURT, Montpelier, Vermont

Judicial Clerk, August 2013 – August 2014

CIVIL RIGHTS CLINIC, NEW YORK CIVIL LIBERTIES UNION / NYU SCHOOL OF LAW, New York, New York

Student Advocate, August 2011 – May 2012

Litigated in federal court to defend clients’ right to not carry identification and right to take photographs in subway.

BAR ADMISSIONS

Vermont, New York, New Hampshire, District of Vermont

PERSONAL INFORMATION

Intrepid rock climber, cyclist, and Scrabble player. Dog training enthusiast. Travel writer, *Let’s Go: Scotland*, 2006.

My family moved to Norwich, Vermont when I was ten years old. I now live in Burlington with my wife, Emily Corwin, and rescue dog, Griffin. My sister, brother-in-law, and nieces live nearby. My parents are still in Norwich.

From: [Leriche, Lucy Rose](#)
To: [Diamond, Joshua](#); [Spottswood, Eleanor](#)
Cc: [Sullivan, Eileen](#); [Feeser, Paige](#)
Subject: Fwd: Final Title X Gag Rule Moves Forward — Preparing for Release Soon
Date: Thursday, February 7, 2019 2:09:23 PM

FYI,
Lucy

Sent from my iPhone

Begin forwarded message:

From: "Wilder, Aaron" <aaron.wilder>
Date: February 7, 2019 at 1:14:31 PM EST
To: "Rose Leriche, Lucy" <lucy.leriche>, "Sullivan, Eileen" <eileen.sullivan>
Subject: Fwd: Final Title X Gag Rule Moves Forward — Preparing for Release Soon

Hello everyone,

Making sure you see this important information! As the memo states below, we're expecting final text/timing in a matter of days so now is time to get final touches on your planning. Please let me and Keauna know what support you need getting prepared, don't hesitate.

Thank you!

--

Aaron Wilder (he/his)
Regional Campaigns Manager
Planned Parenthood Federation of America
Organizing, Engagement, and Campaigns
Planned Parenthood Action Fund
Organizing and Electoral Campaigns

E: aaron.wilder

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----- Forwarded message -----

From: **Singiser, Dana** <dana.singiser>
Date: Thu, Feb 7, 2019 at 12:32 PM
Subject: Final Title X Gag Rule Moves Forward — Preparing for Release Soon

TO: Affiliate CEOs; Affiliate COOs; Affil CDOs; Affiliate Public Affairs and

Media; Affiliate Education Directors, Affiliate Development; Affiliate Directors of Patient Services; Affiliate Medical Directors; PPGen; Affil Marketing; Affil Security; National All Staff

FROM: Dana Singiser, Senior Vice President, Policy, Campaigns, & Advocacy

DATE: February 7, 2019

Re: Final Title X Gag Rule Moves Forward — Preparing for Release Soon

Earlier today, the final Title X gag rule was officially submitted to the White House Office of Management and Budget (OMB) for final regulatory review before the rule text is released publicly. **We do not yet have final text or clear timing for the release of the rule, though we do expect it to be released in a matter of days. We do not have concrete intel on whether any provisions have changed substantively, but we do know the intent of this regulation is to deny people access to care and information at Planned Parenthood and other Title X providers.** Additional background on the proposed Title X rule can be found [HERE](#).

Given this is a highly technical procedural step in the process, we do not expect a lot of media or external attention on this development. However, we know this is a signal the rule is moving fast and coming soon. With that in mind, we recommend doing some baseline outreach to educate influential reporters, close allies, validators, and supporters ahead of the final rule so they are ready to engage as soon as the rule is released. We are preparing robust rapid response (high-intensity earned, paid, and social media) to drive awareness and engagement once a final rule is released.

We will share additional information, guidance, and resources as we learn more. In addition, we will schedule a Federation-wide call shortly after seeing a final rule.

For additional guidance or questions, please reach out to the following people:

- **General questions:** Contact your Regional Campaigns Director or [Stacy Berger](#), Policy Campaigns Director
- **Policy:** [Kashif Syed](#), Senior Policy Analyst
- **Litigation:** [Carrie Flaxman](#), Deputy Director of Policy, Litigation, & Law
- **Communications:** [Ben Halle](#), Press Secretary
- **Digital:** [Madeleine Ellis](#), Director, Digital Campaigns

- **Operational considerations:** [Regan Clawson](#), Director, Health Care Operations

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Dana E. Singiser
Senior Vice President, Policy, Campaigns, and Advocacy
Planned Parenthood Federation of America
Planned Parenthood Action Fund



she/her/hers

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Dear Committee Members.

Please read and consider my comments in Blue.

BILL AS INTRODUCED H.57 2019

Page 3

VT LEG #335334 v.7

entities from interfering with or restricting the right of an individual to terminate the individual's pregnancy.

An act relating to preserving the right to abortion

It is hereby enacted by the General Assembly of the State of Vermont:

Abortion is not a "Right" specified in our US Constitution and I believe infringes on the "Right to Life " of the unborn child and his or her liberty and pursuit of happiness. Rights given to each of us by God and protected by the US Constitution. God is the progenitor of life- not government. Cheapening any life puts all life at risk.

Sec. 1. LEGISLATIVE INTENT

The General Assembly intends this act to safeguard the right to abortion in Vermont by ensuring that right is not denied, restricted, or infringed by a governmental entity.

-This statement could also be construed as to impede the law making apparatus given to us in our Federal and state constitutions. A law can be presented, and at a later time a law could be repealed. This wording makes me think that this law will make due process of a government, by the people and for the people to none affect. It is too broad and can be turned as a weapon against those that disagree.

Sec. 2. 18 V.S.A. Chapter 223 is added to read:

CHAPTER 223: REPRODUCTIVE RIGHTS

Subchapter 1. Freedom of Choice Act

§ 9493. INDIVIDUAL REPRODUCTIVE RIGHTS

(a) Every individual has the fundamental right to choose or refuse contraception or sterilization.

I totally agree and because of this...

I totally DISAGREE with B and C below. It is FACT that life begins at conception. It is not a blob or mass of tissue. It is a developing human being! And as such is protected under the US Constitution for life, liberty and the pursuit of happiness.

(b) Every individual who becomes pregnant has the fundamental right to choose to carry a pregnancy to term, give birth to a child, or to have an abortion.

We have NO RIGHT to take another innocent human being's life. PERIOD.

(c) A fertilized egg, embryo, or fetus shall not have independent rights under Vermont law.

The unborn should have rights and someone should stand up for the most vulnerable of our society!!!

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§ 9494. INTERFERENCE WITH REPRODUCTIVE CHOICE PROHIBITED

(a) A public entity as defined in section 9496 of this title shall not, in the regulation or provision of benefits, facilities, services, or information, deny or interfere with an individual's fundamental rights to choose or refuse contraception or sterilization or to choose to carry a pregnancy to term, to give birth to a child, or to obtain an abortion.

-This statement could also be construed as to impede the law making apparatus given to us in our Federal and state constitutions. A law can be presented, and at

a later time a law could be repealed. This wording makes me think that this law will make due process of a government, by the people and for the people to none affect. It is too broad and can be turned as a weapon against those that disagree.

In the definitions that are listed below, the law making apparatus of this state (the Legislative, Executive, or Judicial Branch of State Government), If I am not mistaken- is trying to say that after this bill passes, these branches of government will be taken hostage by it and not be able to do their jobs of creating, modifying or repealing laws or the Governor's right to veto or the judicial branch's right to overturn by decisions based on constitutionality and can be sued if they try to.

(b) No State or local law enforcement shall prosecute any individual for inducing, performing, or attempting to induce or perform the individual's own abortion.

This is outrageous-So now we go back to one of the original arguments used "for " abortion – that so many women died in back alleys trying to perform their own abortions and in the hands of unscrupulous doctors. Now, pro-abortionists want the right to go back to those days with all its repercussions- even possible death? It should never be legal as a deterrent to such actions.

Also, this is trying to tie the hands of law enforcement. If it's legal- they can't press charges, if it's not- beware.

Subchapter 2. Prohibitions Relating to Access to Abortion

§ 9496. DEFINITIONS

As used in this subchapter:

(1) "Health care provider" means a person, partnership, or corporation, including a health care facility, that is licensed, certified, or otherwise authorized by law to provide professional health care services in this State to an individual during that individual's medical care, treatment, or confinement.

(2) "Public entity" means:

(A) the Legislative, Executive, or Judicial Branch of State

Government, or any agency, department, office, or other subdivision of State government, or any elective or appointive officer or employee within any of those branches; or

BILL AS INTRODUCED H.57 2019 Page 5 of 6

(B) any municipality, or any agency, department, office, or other subdivision of municipal government, or any elective or appointive officer or employee within municipal government.

§ 9497. ABORTION; RESTRICTING ACCESS PROHIBITED

A public entity shall not:

(1) deprive a consenting individual of the choice of terminating the individual's pregnancy;

In the definitions that are listed above, the law making apparatus of this state (the Legislative, Executive, or Judicial Branch of State Government), If I am not mistaken- is trying to say that after this bill passes, these branches of government will be taken hostage by it and not be able to do their jobs of creating, modifying or repealing laws or the Governor's right to veto or the judicial branch's right to overturn by decisions based on constitutionality and can be sued if they try to.
9498(a) below

Since at this moment in time –women ascertain legal abortions- A bill should be made that any woman seeking abortion must be educated with the growth and developmental stages of the fetus in utero from conception to birth and also shown videos of the abortion procedures used at the varying stages of development. Each woman should be going into it eyes wide open.

(2) interfere with or restrict, in the regulation or provision of benefits, facilities, services, or information, the choice of a consenting individual to terminate the individual's pregnancy;

The pre-abortion education I mentioned above could be viewed by some as 'interfering'.

Also, government would not be able to put any limitations on when a women could obtain an abortion- even though we know that the further along in the pregnancy, the greater the risk to the mother.

(3) prohibit a health care provider, acting within the scope of the health care provider's license, from terminating or assisting in the termination of a patient's pregnancy; or

(4) interfere with or restrict, in the regulation or provision of benefits, facilities, services, or information, the choice of a health care provider acting within the scope of the health care provider's license to terminate or assist in the termination of a patient's pregnancy.

I have a couple issues with this because I thought we were a nation of freedoms. But I see a disturbing trend of minority thinkers trying to control and take hostage anyone who thinks or speaks differently than they do.

This (4) along with 9498(a) below will undoubtedly infringe upon the religious and free speech rights of Christians, Catholics and Health-Care Corporations that have been run with their values written into their mission statements and who's beliefs will not allow them to participate in taking the life of the pre-born, as well as individual health-care workers who in all conscience cannot participate. This will leave them open to unfair litigation!

Secondly- I do not believe governmental monies should be used to fund abortions. If I have Medicaid and I want elective cosmetic surgery- it's not going to be covered- and it shouldn't, because it has nothing to do with a serious health condition.

There are other options to abortion- birth control, abstinence and putting a child up for adoption, we shouldn't pay and further encourage using abortion as a means of birth control.

Consider a scenario where due to fiscal budgetary shortfall, programs or services had to be curtailed. This Bill's provision would shackle you. You would not be allowed to touch 'Funding Abortions', without possible legal action coming against you.

§ 9498. ENFORCEMENT

(a) An individual injured as a result of a violation of this chapter shall have a private right of action in Superior Court against a public entity for injunctive relief arising from the violation.

See my comment above. Individual nurses, doctors and institutions who refuse to participate could be sued.

Injured how? Mental or emotional grounds for being denied?

BILL AS INTRODUCED H.57 2019 VT LEG #335334 v.7 Page 6 of 6

(b) In addition to any injunctive relief awarded, the court may award costs and reasonable attorney's fees to an injured person who substantially prevails in an action brought under this section.

Sec. 3. EFFECTIVE DATE 4

This act shall take effect on passage

It would be a serious mistake to pass this Bill. It has broad sweeping- (and I believe) unconstitutional footings. Too broad- too vague and (in my opinion) trying to constrict our legal constitutional rights of government as well as individual rights of freedom of religion and speech. It's a Pandora's Box.

I haven't even touched on statistics and facts concerning abortion. There have been 60 Million children "thrown away", discarded and let's be real, murdered since Roe vs Wade passed in 1973. I was 16 years old then. I've heard many stories and as someone said- Abortion does not end in the clinic. Eventually eyes are opened and they have to live with what they have done. Many could never have children afterwards- the collateral damage of having one or multiple abortions.

I've said enough. Thank-you, if you actually read this far.
Vermont is beautiful. We should stand for life not death!

Sincerely,
Wendy Bucchieri

From: [Maxine Grad](#)
To: [Brynn Hare](#); [Diamond, Joshua](#); [Leriche, Lucy Rose](#)
Subject: From Ann P
Date: Sunday, February 10, 2019 8:37:57 PM
Attachments: [Bill H.57 comments.docx](#)

Ann shared this with me as what we will hear on the floor. Some of these are worth thinking through.

Thanks, Maxine

Maxine Grad, Chair
House Judiciary Committee
Vermont House
115 State St.
Montpelier, VT 05609

From: [Diamond, Joshua](#)
To: [Spottswood, Eleanor](#)
Subject: Fwd: H.57 Questions
Date: Sunday, February 10, 2019 7:09:45 PM

Let's coordinate in the am.

Josh

Sent from my iPhone

Begin forwarded message:

From: "Leriche, Lucy Rose" <[Lucy.Leriche](#)>
Date: February 10, 2019 at 4:52:47 PM EST
To: "Spottswood, Eleanor" <Eleanor.Spottswood@vermont.gov>
Cc: "mgrad@leg.state.vt.us" <mgrad@leg.state.vt.us>, "Diamond, Joshua" <Joshua.Diamond@vermont.gov>
Subject: H.57 Questions

Hi Ella,

I just got off the phone with Maxine Grad, House Judiciary Chair, and she has some legal questions that I cannot answer about the bill. Among them, is wondering how this law might play out with the judiciary. Would someone actually sue the judiciary for a ruling that violated the law. She also wants to know generally the scenarios for how this would play out with public entities. The question of binding future legislatures came up in the Human Services Committee, and Brynn said the bill would not bind future legislatures but I don't know the mechanics of why that is so. Maxine was also wondering about Executive Immunity and how that all plays into the language of the bill as well.

I was hoping to get your thoughts on these questions, and others that Maxine has. Would it be possible for you to call her tomorrow? Her number is: [REDACTED].

Thanks!

Lucy

Lucy Leriche (she/her/hers)
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H. 57 Q&As.

Q1. The right to abortion is already protected by the United States Constitution, why do we need this bill?

A.1. Like abortion, freedom of speech is a fundamental right, currently protected by the U.S. Constitution. Freedom of speech is also protected by the Vermont Constitution. Unlike the fundamental right to abortion, the fundamental right of free speech has been robustly protected by the U.S. Supreme Court (and Vermont Supreme Court) in recent years. There have been no indications that the U.S. or Vermont Supreme Courts may reverse their decisions protecting freedom of speech.

However, given recent changes in the make-up of the United States Supreme Court, there is a concern that this long-standing right could be lost or seriously eroded. It is essential, that Vermont makes sure this fundamental right is expressly recognized under Vermont law in the event a change occurs to U.S. Supreme Court precedent.

Q2. The Vermont Supreme Court recognized the right to abortion in *Beecham v Leahy*, why is this bill needed?

A2: In *Beecham v. Leahy*, 130 Vt. 164 (1972), the Vermont Supreme Court held a law criminalizing the act of providing an abortion by health care providers could not be enforced. In doing so, the court determined that because the statute did not deny the right to receive an abortion, the legislature had implicitly recognized plaintiff's personal right to an abortion. Therefore, the legislature could not then prohibit the safe exercise of that personal right by criminalizing the act of providing an abortion.

Beecham is premised upon an implied right to abortion, which the court commented was consistent with the common law at time when the Vermont Constitution was drafted.

In these uncertain times, it is important that the right to access an abortion is based upon more than implied rights or commentary in a Supreme Court case. The right to abortion should be based upon a clear and unequivocal expression of Vermont law. This is exactly what H. 57 accomplishes.

Q.3. H. 57 declares that abortion is a fundamental right. Fundamental rights are typically recognized as constitutional rights, can the legislature create a fundamental right?

A3: H. 57 provides statutory recognition of a fundamental right. The right to abortion is fundamental to the individual liberty of woman to control her own body, make private decisions about health care, and make decisions about procreation, family relationships, and child rearing.

Recognition of a “fundamental” right typically signals that such a right cannot be deprived by the government unless there is a compelling governmental interest, and the infringement upon the fundamental right is narrowly tailored to achieve that compelling governmental interest.

This legislature and other legislative bodies have utilized statutes to recognize fundamental rights to protect important or fundamental liberty interests. Here are several examples:

- (i) Sportsman rights bill. (T.B.D.)
- (ii) Notice of right to counsel, when detained or charged with criminal matters, which is also a fundamental right under the U.S. Constitution. 13 V.S.A. § 5234.
- (iii) Patient bill of rights, and advanced directives. 18 V.S.A. § 9700 (“The State of Vermont recognizes the **fundamental right** of an adult to determine the extent of health care the individual will receive, including treatment provided during periods of incapacity and at the end of life. This chapter enables adults to retain control over their own health care through the use of advance directives, including appointment of an agent and directions regarding health care and disposition of remains.”)
- (iv) Religious Freedom and Restoration Act. Congress passed RFRA to insure that government action did not substantially burden religious exercise unless justified by strict scrutiny (compelling governmental interest achieved through least restrictive means). 42 U.S.C. §§ 2000bb, 2000bb-1.

Q.4 The current constitutional right to abortion precludes undue burdens. Does H. 57 go beyond the undue burdens test by preventing any interference or restriction upon an individual’s right to terminate an individual’s pregnancy?

A4: No. The current U.S. Supreme Court precedent prevents governments from creating an “undue burden.” But, nothing in that precedent requires a state to place any burden upon access to abortion.

Vermont currently does not restrict abortion, and this law will not change the current practice. This bill merely codifies the status quo. H. 57 is intended to ensure that the current practice remains the same.

Q. 5. What about partial birth abortions that are currently illegal under Vermont law?

A5: This particular type of medical procedure is illegal under federal law. H. 57 expressly states that it not be construed to contravene this federal law. There will be no change to the prohibition of this procedure.

Q. 6. What about late term abortions, can anyone get a late term abortion under this bill?

A6: Current Vermont law does not regulate the decision to have an abortion. H. 57 essentially codifies this long-standing practice. A decision to have a late term abortion is left to the judgment of the individual who is pregnant and her medical provider.

Based upon testimony/written comments from the Vermont Medical Society, “late term abortion” means an abortion that occurs after 20 weeks of pregnancy. Late term abortions in Vermont are extremely rare. According to a recent article from Vermont Digger citing 2015 gathered by the Centers for Disease Control, seven late term were conducted in Vermont after 21 weeks during that year.

The Vermont Medical Society also testified/provided written comments that late term abortions occur only by specially trained physicians in a hospital setting. Such procedures only occur in practice after a vetting by medical providers that the abortion is needed to address significant threats to maternal or fetal health. Currently, there are no providers in Vermont that provide abortion after the third trimester.

Q.7. Does H. 57 require health care professionals to provide an abortion?

A7: No. H. 57 only applies to public entities. No individual can be compelled to perform an abortion under H.57.

According to testimony/written comments from the Vermont Medical Society, facilities that offer abortion services provide opportunities for staff participation or refusal of participation to ensure that staff are able to opt out of participation in any medical care that may for a variety of reasons not be in alignment with their core values and beliefs. This bill will not change one’s right to opt-out. Federal statutes also protect health care provider conscience rights and prohibit recipients of certain federal funds from discriminating against health care providers who refuse to participate in these services based on moral objections or religious beliefs: <https://www.hhs.gov/conscience/conscience-protections/index.html>

A.8. Does this law effect the right of fetuses?

H.57 does not change current law as it pertains to a fetus.

For example, a viable fetus is not considered a person for purposes charging a crime related to death of a person arising from a motor vehicle accident. *State v. Oliver*, 151 Vt. 626 (1989).

In contrast, Vermont’s wrongful death statute recognizes a claim arising out of the loss of a viable fetus. *Vaillancourt v. Medical Center Hospital of Vermont, Inc.*, 139 Vt. 138 (1980).

Text from the original bill, which expressly stated that a fetus shall not have independent rights under Vermont law, was eliminated to insure there were no change to existing law.

Q.9. Does H. 57 address parental notification.

A.9. H. 57 is intended to codify current practice, and it leaves that the decision to have an abortion between a patient and her doctor.

Individuals under 18 years of age are minors under Vermont law. 1 V.S.A. § 173. Generally, a parent or guardian or representative appointed by a judge to make health care decisions for the minor may give informed consent to health care for a minor. However, there are a number of exceptions:

- (i) Under current law, minors 12 years of age or older may give informed consent to treatment for sexually transmitted infections, drug dependence, and alcoholism. 18 V.S.A. § 4226.
- (ii) Minors 14 years of age or older may also voluntarily admit themselves to a hospital for mental health related treatment, and minors under 14 may admit themselves to a hospital for mental health related treatment with a written application from a parent or guardian. 18 V.S.A. § 7503.
- (iii) While not addressed by Vermont courts, other states (such as Massachusetts) have recognized the legal doctrine of the “mature minor.” This doctrine gives providers guidance on circumstances in which unemancipated minors can make decisions; specifically, if a provider believes the minor is mature enough and able to give informed consent to the medical care, and it is in the best interest of the minor not to notify the parents, the physician may accept the minor's consent alone. It is believed that many health care providers in Vermont operate with this doctrine in mind when it comes to a minor and the issue of parental consent arises.

Q.10. H. 57 proscribes public entities, including the legislature, from interfering with the fundamental right to abortion. Does H. 57 prohibit the legislature from placing restrictions, such as parental consent, in the future?

A.10. While H. 57 applies to all branches of government, it does not alter the constitutional framework of separation of powers.

- Executive branches
 - Governor can't issue executive order to force any agency to interfere with the right to abortion as established by H.57.
- Judiciary: still can't sue a judge for issuing a decision
 - The Judiciary would be most affected in its other roles, e.g. its role as employer (or information provider)
- Future Legislatures could change H.57, the legislature cannot be bound without a constitutional amendment.

To this last point, the Legislature could expressly address parental notification at some later date to the extent it does not violate the existing constitutional framework protecting access to abortion (undue burden).

Q.11. What does this H. 57 prohibit?

A. 11. H. 57 protects against the government/executive branch creation of barriers for those who give or receive abortions. For example:

- New Secretary of Human Services can't impose onerous regulations on clinics, e.g.:
 - a. Requiring hospital admitting privileges for clinic doctors
 - b. Requiring multiple doctors to approve each abortion
 - c. Requiring doctor to prescribe and administer the abortion pill rather than a qualified NP
 - d. Requiring abortion to take place in a hospital when it can safely be performed in an outpatient clinic or private office
 - e. Requiring abortions (including medical abortions) be performed only by certified OB/GYN
 - f. Requiring clinics to meet surgical center standards, e.g. rooms/hallways of certain size
 - g. Imposing "gag order" on providers that counsel pregnant women
- No new onerous regulations on individuals, e.g.:
 - a. Restricting what insurance plans may cover for abortion care (Green Mountain Care Board)
 - b. Excessive waiting periods
 - c. Requirement of non-medically necessary procedures like an ultrasound or inaccurate counseling
 - d. Restricting abortion to only cases where the woman's life is in danger
 - e. Spousal consent requirement
- For doctors/clinics who provide abortions, state/municipality can't withhold license, zoning permit, emergency services, or healthcare reimbursement payments on the basis of abortion provision
- Any state/municipal employer trying to prevent employee from accessing abortion services, e.g.:
 - a. refusing to allow sick leave
 - b. providing health insurance that doesn't cover abortion care
- Any state/municipal agency withholding benefits from an individual on the basis of abortion choice:

- a. food stamps, police or emergency services, information about healthcare or other services

A.12. Does H. 57 prohibit any type of regulation upon medical providers who perform abortions?

A.12. We believe that any content-neutral government action that does not have a disparate impact on abortion providers and is not designed to restrict access to abortion would not give rise to a sustainable cause of action against the government under H.57.

Q.13. Will this law prohibit those who oppose abortion from protesting or speaking out against abortion?

A.13. No. Free speech is still a protected constitutional right. Any time two fundamental rights conflict with each other, it is the duty of the courts to balance the interests on both sides and reach a decision. That is what currently happens when the fundamental right to abortion and the fundamental right to free speech come into conflict, as they occasionally do. This bill will not change that process. This bill does not restrict the right to free speech; it only protects the right to abortion.

From: [Leriche, Lucy Rose](#)
To: [Spottswood, Eleanor](#)
Cc: [Maxine Grad](#); [Diamond, Joshua](#)
Subject: H.57 Questions
Date: Sunday, February 10, 2019 4:52:55 PM

Hi Ella,

I just got off the phone with Maxine Grad, House Judiciary Chair, and she has some legal questions that I cannot answer about the bill. Among them, is wondering how this law might play out with the judiciary. Would someone actually sue the judiciary for a ruling that violated the law. She also wants to know generally the scenarios for how this would play out with public entities. The question of binding future legislatures came up in the Human Services Committee, and Brynn said the bill would not bind future legislatures but I don't know the mechanics of why that is so. Maxine was also wondering about Executive Immunity and how that all plays into the language of the bill as well.

I was hoping to get your thoughts on these questions, and others that Maxine has. Would it be possible for you to call her tomorrow? Her number is: [REDACTED].

Thanks!

Lucy

Lucy Leriche(she/her/hers)
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www.ppnne.org<<http://www.ppnne.org/>>
[Lucy.Leriche](mailto:Lucy.Leriche@[REDACTED]) [REDACTED]

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From: [Spottswood, Eleanor](#)
To: [Leriché, Lucy Rose](#)
Cc: [Diamond, Joshua](#)
Subject: FW: H.57
Date: Friday, February 15, 2019 11:03:32 AM

Lucy—

FYI.

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

From: Spottswood, Eleanor
Sent: Friday, February 15, 2019 11:03 AM
To: 'Mgrad@leg.state.vt.us' <Mgrad@leg.state.vt.us>
Cc: Diamond, Joshua <Joshua.Diamond@vermont.gov>
Subject: H.57

Dear Rep. Grad,

Like abortion, freedom of speech is a fundamental right, currently protected by the U.S. Constitution. Freedom of speech is also protected by the Vermont Constitution. Unlike the fundamental right to abortion, the fundamental right of free speech has been robustly protected by the U.S. Supreme Court (and Vermont Supreme Court) in recent years. There have been no indications that the U.S. or Vermont Supreme Courts may reverse their decisions protecting freedom of speech.

Any time two fundamental rights are in conflict with each other, it is the duty of the courts to balance the interests on both sides and reach a decision. That is what currently happens when the fundamental right to abortion and the fundamental right to free speech come into conflict, as they occasionally do. This bill will not change that process. This bill does not restrict the right to free speech; it only protects the right to abortion.

In addition, we believe that any content-neutral government action that does not have a disparate impact on abortion providers and is not designed to restrict access to abortion would not give rise to a sustainable cause of action against the government under H.57.

Best,

Ella

Eleanor L.P. Spottswood
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eleanor.spottswood@vermont.gov

From: [Spottswood, Eleanor](#)
To: [Diamond, Joshua](#)
Subject: FW: TIME SENSITIVE Fwd: H.57 - RTL remarks request to testify
Date: Friday, February 15, 2019 10:22:31 AM
Attachments: [H.57 Judiciary.docx](#)
[ATT00001.htm](#)

Hi Josh,

My response to the attached would be:

Like abortion, freedom of speech is a fundamental right, currently protected by the U.S. Constitution. Freedom of speech is also protected by the Vermont Constitution. Unlike the fundamental right to abortion, the fundamental right of free speech has been robustly protected by the U.S. Supreme Court in recent years. There have been no indications that the U.S. Supreme Court may reverse its decisions protecting freedom of speech.

Any time two fundamental rights are in conflict with each other, it is the duty of the courts to balance the interests on both sides and reach a decision. That is what currently happens when the fundamental right to abortion and the fundamental right to free speech come into conflict, as they occasionally do. This bill will not change that process. This bill does not restrict the right to free speech; it only protects the right to abortion.

Lucy tells me that Maxine would really like to see something like this in writing, but I wanted to run it by you first. Feel free to edit and send it along under my name or yours/TJs—I will be leaving shortly to get to Franklin for the Act 46 hearing this afternoon.

Ella

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eleanor.spottswood@vermont.gov

From: Leriche, Lucy Rose <Lucy.Leriche [REDACTED]>
Sent: Friday, February 15, 2019 9:57 AM
To: Spottswood, Eleanor <Eleanor.Spottswood@vermont.gov>; Diamond, Joshua

<Joshua.Diamond@vermont.gov>

Subject: TIME SENSITIVE Fwd: H.57 - RTL remarks request to testify

Please, the Chair needs some clarification on some points made in the following RTL testimony attached ASAP. They are voting the bill this morning after floor.

Lucy

Sent from my iPhone

Begin forwarded message:

From: Maxine Grad <Mgrad@leg.state.vt.us>
Date: February 15, 2019 at 9:43:11 AM EST
To: "Leriche, Lucy Rose" <Lucy.Leriche [REDACTED]>
Subject: Fw: H.57 - RTL remarks request to testify

Maxine Grad, Chair
Vermont House Judiciary Committee

From: Sharon Toborg <[REDACTED]>
Sent: Friday, February 15, 2019 9:31 AM
To: Maxine Grad; Mike Bailey
Subject: Re: H.57 - request to testify

On 2/13/19 8:17 AM, Maxine Grad wrote:

Hello,

You are welcome to submit your comments in writing. Please send them to Mike Bailey and me.

Regards,

Maxine

Maxine Grad, Chair
House Judiciary Committee
Vermont House
115 State St.
Montpelier, VT 05609

From: Sharon Toborg <sharon@vermontrighttolife.org>
Sent: Tuesday, February 12, 2019 4:37 PM
To: Mike Bailey; Maxine Grad; Sharon Toborg
Subject: H.57 - request to testify

Dear Rep. Grad:

I was in your Committee today listening to the testimony on H.57. There are several points that were made that are inaccurate or would benefit from clarification. I would be happy to appear before your Committee to provide testimony. I submitted a request to testify to Mike Bailey, but I have not heard back. I plan to be at the State House tomorrow.

Sincerely,

Sharon Toborg

Vermont Right to Life

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Comments on H.57 for the House Judiciary Committee
By Sharon Toborg, Policy Analyst
Vermont Right to Life Committee
February 15, 2019

H.57 passed out of the Human Services Committee after being amended. Those two amendments made no substantive difference in the Bill. It still allows unrestricted abortion at any point in pregnancy.

Some Legislators have implied that the Federal Partial-Birth Abortion Ban Act prohibits abortions in the late stages of pregnancy. It does not. It prohibits one specific type of abortion procedure. There are other types of abortion procedures used to abort babies in the second and third trimesters of pregnancy – procedures used at the UVM Medical Center. Abortions after fetal viability are currently legal in Vermont and would remain legal under H.57.

While most of the attention on H.57 thus far has focused on the legal status of abortion, the testimony taken in the House Judiciary Committee confirms that H.57 will make significant changes to Vermont law. It will protect abortion above childbirth, and will restrict pro-life free speech.

Section 9497 prohibits a public entity from restricting access to abortion. It does not, however, prohibit restricting access to childbirth. Under H.57, individuals, including abortion providers could have a right of action against the state, should they for example be denied a Certificate of Need for an abortion facility, or an across-the-board reduction in funding for health care programs reduces tax-payer funding for abortion. Providers and recipients of other medical services would not have such a right.

Because many of the terms in the Bill are vague and undefined, it is unknown the full extent of the impact. Testimony in the House Judiciary Committee confirms that schools, as public entities, would be affected by this legislation. It appears pro-abortion messages in our schools would be protected, while anti-abortion messages would be subject to restriction.

H.57 is not just a codification of current abortion practice in Vermont, it is far-reaching Bill intended to promote and protect abortion above other alternatives in our State.

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From: [Leriche, Lucy Rose](#)
To: [Spottswood, Eleanor](#)
Cc: [Diamond, Joshua](#)
Subject: RE: H.57
Date: Friday, February 15, 2019 11:07:42 AM

Thank you!!!

Lucy

Lucy Leriche(she/her/hers)
Vice President of Public Policy Vermont
Planned Parenthood Northern New England

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[Lucy.Leriche](mailto:Lucy.Leriche@[REDACTED]) [REDACTED]

From: Spottswood, Eleanor <Eleanor.Spottswood@vermont.gov>
Sent: Friday, February 15, 2019 11:04 AM
To: Leriche, Lucy Rose <Lucy.Leriche@[REDACTED]>
Cc: Diamond, Joshua <Joshua.Diamond@vermont.gov>
Subject: FW: H.57

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FYI.

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To: Leriche, Lucy Rose <[Lucy@\[REDACTED\]](mailto:Lucy@[REDACTED])>
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To: [Spottswood, Eleanor](#); [Diamond, Joshua](#)
Subject: TIME SENSITIVE Fwd: H.57 - RTL remarks request to testify
Date: Friday, February 15, 2019 9:57:28 AM
Attachments: [H.57 Judiciary.docx](#)
[ATT00001.htm](#)

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Subject: Fw: H.57 - RTL remarks request to testify

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Vermont House Judiciary Committee

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To: Maxine Grad; Mike Bailey
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Sharon Toborg

Vermont Right to Life

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H. 57 Q&As.

Q1. The right to abortion is already protected by the United States Constitution, why do we need this bill?

A.1. Like abortion, freedom of speech is a fundamental right, currently protected by the U.S. Constitution. Freedom of speech is also protected by the Vermont Constitution. Unlike the fundamental right to abortion, the fundamental right of free speech has been robustly protected by the U.S. Supreme Court (and Vermont Supreme Court) in recent years. There have been no indications that the U.S. or Vermont Supreme Courts may reverse their decisions protecting freedom of speech.

However, given recent changes in the make-up of the United States Supreme Court, there is a concern that this long-standing right could be lost or seriously eroded. It is essential, that Vermont makes sure this fundamental right is expressly recognized under Vermont law in the event a change occurs to U.S. Supreme Court precedent.

Q2. The Vermont Supreme Court recognized the right to abortion in *Beecham v Leahy*, why is this bill needed?

A2: In *Beecham v. Leahy*, 130 Vt. 164 (1972), the Vermont Supreme Court held a law criminalizing the act of providing an abortion by health care providers could not be enforced. In doing so, the court determined that because the statute did not deny the right to receive an abortion, the legislature had implicitly recognized plaintiff's personal right to an abortion. Therefore, the legislature could not then prohibit the safe exercise of that personal right by criminalizing the act of providing an abortion.

Beecham is premised upon an implied right to abortion, which the court commented was consistent with the common law at time when the Vermont Constitution was drafted.

In these uncertain times, it is important that the right to access an abortion is based upon more than implied rights or commentary in a Supreme Court case. The right to abortion should be based upon a clear and unequivocal expression of Vermont law. This is exactly what H. 57 accomplishes.

Q.3. H. 57 declares that abortion is a fundamental right. Fundamental rights are typically recognized as constitutional rights, can the legislature create a fundamental right?

A3: H. 57 provides statutory recognition of a fundamental right. The right to abortion is fundamental to the individual liberty of woman to control her own body, make private decisions about health care, and make decisions about procreation, family relationships, and child rearing.

Recognition of a “fundamental” right typically signals that such a right cannot be deprived by the government unless there is a compelling governmental interest, and the infringement upon the fundamental right is narrowly tailored to achieve that compelling governmental interest.

This legislature and other legislative bodies have utilized statutes to recognize fundamental rights to protect important or fundamental liberty interests. Here are several examples:

- (i) Sportsman rights bill. (T.B.D.)
- (ii) Notice of right to counsel, when detained or charged with criminal matters, which is also a fundamental right under the U.S. Constitution. 13 V.S.A. § 5234.
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- (iv) Religious Freedom and Restoration Act. Congress passed RFRA to insure that government action did not substantially burden religious exercise unless justified by strict scrutiny (compelling governmental interest achieved through least restrictive means). 42 U.S.C. §§ 2000bb, 2000bb-1.

Q.4 The current constitutional right to abortion precludes undue burdens. Does H. 57 go beyond the undue burdens test by preventing any interference or restriction upon an individual’s right to terminate an individual’s pregnancy?

A4: No. The current U.S. Supreme Court precedent prevents governments from creating an “undue burden.” But, nothing in that precedent requires a state to place any burden upon access to abortion.

Vermont currently does not restrict abortion, and this law will not change the current practice. This bill merely codifies the status quo. H. 57 is intended to ensure that the current practice remains the same.

Q. 5. What about partial birth abortions that are currently illegal under Vermont law?

A5: This particular type of medical procedure is illegal under federal law. H. 57 expressly states that it not be construed to contravene this federal law. There will be no change to the prohibition of this procedure.

Q. 6. What about late term abortions, can anyone get a late term abortion under this bill?

A6: Current Vermont law does not regulate the decision to have an abortion. H. 57 essentially codifies this long-standing practice. A decision to have **an abortion later in pregnancy** is left to the judgment of the individual who is pregnant and her medical provider.

Based upon testimony/written comments from the Vermont Medical Society, “late term abortion” means an abortion that occurs after 20 weeks of pregnancy. Late term abortions in Vermont are extremely rare. According to a recent article from Vermont Digger citing 2015 gathered by the Centers for Disease Control, seven late term were conducted in Vermont after 21 weeks during that year.

The Vermont Medical Society also testified/provided written comments that late term abortions occur only by specially trained physicians in a hospital setting. Such procedures only occur in practice after a vetting by medical providers that the abortion is needed to address significant threats to maternal or fetal health. Currently, there are no providers in Vermont that provide abortion **in** the third trimester.

Q.7. Does H. 57 require health care professionals to provide an abortion?

A7: No. H. 57 only applies to public entities. No individual can be compelled to perform an abortion under H.57.

According to testimony/written comments from the Vermont Medical Society, facilities that offer abortion services provide opportunities for staff participation or refusal of participation to ensure that staff are able to opt out of participation in any medical care that may for a variety of reasons not be in alignment with their core values and beliefs. This bill will not change one’s right to opt-out. Federal statutes also protect health care provider conscience rights and prohibit recipients of certain federal funds from discriminating against health care providers who refuse to participate in these services based on moral objections or religious beliefs: <https://www.hhs.gov/conscience/conscience-protections/index.html>

A.8. Does this law effect the right of fetuses?

H.57 does not change current law as it pertains to a fetus.

For example, a viable fetus is not considered a person for purposes charging a crime related to death of a person arising from a motor vehicle accident. *State v. Oliver*, 151 Vt. 626 (1989).

In contrast, Vermont’s wrongful death statute recognizes a claim arising out of the loss of a viable fetus. *Vaillancourt v. Medical Center Hospital of Vermont, Inc.*, 139 Vt. 138 (1980).

Text from the original bill, which expressly stated that a fetus shall not have independent rights under Vermont law, was eliminated to insure there were no changes to existing law.

Q.9. Does H. 57 address parental notification.

A.9. H. 57 is intended to codify current practice, and it leaves that the decision to have an abortion between a patient and her doctor.

Individuals under 18 years of age are minors under Vermont law. 1 V.S.A. § 173. Generally, a parent or guardian or representative appointed by a judge to make health care decisions for the minor may give informed consent to health care for a minor. However, there a number of exceptions:

- (i) Under current law, minors 12 years of age or older may give informed consent to treatment for sexually transmitted infections, drug dependence, and alcoholism. 18 V.S.A. § 4226.
- (ii) Minors 14 years of age or older may also voluntarily admit themselves to a hospital for mental health related treatment, and minors under 14 may admit themselves to a hospital for mental health related treatment with a written application from a parent or guardian. 18 V.S.A. § 7503.
- (iii) While not addressed by Vermont courts, other states (such as Massachusetts) have recognized the legal doctrine of the “mature minor.” This doctrine gives providers guidance on circumstances in which unemancipated minors can make decisions; specifically, if a provider believes the minor is mature enough and able to give informed consent to the medical care, and it is in the best interest of the minor not to notify the parents, the physician may accept the minor's consent alone. It is believed that many health care providers in Vermont operate with this doctrine in mind when it comes to a minor and the issue of parental consent arises.

Q.10. H. 57 proscribes public entities, including the legislature, from interfering with the fundamental right to abortion. Does H. 57 prohibit the legislature from placing restrictions, such as parental consent, in the future?

A.10. While H. 57 applies to all branches of government, it does not alter the constitutional framework of separation of powers.

- Executive branches
 - Governor can't issue executive order to force any agency to interfere with the right to abortion as established by H.57.
- Judiciary: still can't sue a judge for issuing a decision
 - The Judiciary would be most affected in its other roles, e.g. its role as employer (or information provider)
- Future Legislatures could change H.57, the legislature cannot be bound without a constitutional amendment.

To this last point, the Legislature could expressly address parental notification at some later date to the extent it does not violate the existing constitutional framework protecting access to abortion (undue burden).

Q.11. What does this H. 57 prohibit?

A. 11. H. 57 protects against the government/executive branch creation of barriers for those who give or receive abortions. For example:

- New Secretary of Human Services can't impose onerous regulations on clinics, e.g.:
 - a. Requiring hospital admitting privileges for clinic doctors
 - b. Requiring multiple doctors to approve each abortion
 - c. Requiring doctor to prescribe and administer the abortion pill rather than a qualified NP
 - d. Requiring abortion to take place in a hospital when it can safely be performed in an outpatient clinic or private office
 - e. Requiring abortions (including medical abortions) be performed only by certified OB/GYN
 - f. Requiring clinics to meet surgical center standards, e.g. rooms/hallways of certain size
 - g. Imposing "gag order" on providers that counsel pregnant women
- No new onerous regulations on individuals, e.g.:
 - a. Restricting what insurance plans may cover for abortion care (Green Mountain Care Board)
 - b. Excessive waiting periods
 - c. Requirement of non-medically necessary procedures like an ultrasound or inaccurate counseling
 - d. Restricting abortion to only cases where the woman's life is in danger
 - e. Spousal consent requirement
- For doctors/clinics who provide abortions, state/municipality can't withhold license, zoning permit, emergency services, or healthcare reimbursement payments on the basis of abortion provision
- Any state/municipal employer trying to prevent employee from accessing abortion services, e.g.:
 - a. refusing to allow sick leave
 - b. providing health insurance that doesn't cover abortion care
- Any state/municipal agency withholding benefits from an individual on the basis of abortion choice:

- a. food stamps, police or emergency services, information about healthcare or other services

A.12. Does H. 57 prohibit any type of regulation upon medical providers who perform abortions?

A.12. We believe that any content-neutral government action that does not have a disparate impact on abortion providers and is not designed to restrict access to abortion would not give rise to a sustainable cause of action against the government under H.57.

Q.13. Will this law prohibit those who oppose abortion from protesting or speaking out against abortion?

A.13. No. Free speech is still a protected constitutional right. Any time two fundamental rights conflict with each other, it is the duty of the courts to balance the interests on both sides and reach a decision. That is what currently happens when the fundamental right to abortion and the fundamental right to free speech come into conflict, as they occasionally do. This bill will not change that process. This bill does not restrict the right to free speech; it only protects the right to abortion.

From: [Diamond, Joshua](#)
To: [Leriche, Lucy Rose](#)
Subject: RE: Q&As for Maxine
Date: Monday, February 18, 2019 11:42:00 AM
Attachments: [H. 57 QAs .docx](#)

Sorry.... Josh

Joshua R. Diamond, Deputy Attorney General
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From: Leriche, Lucy Rose <Lucy. [REDACTED]>
Sent: Monday, February 18, 2019 11:25 AM
To: Diamond, Joshua <Joshua.Diamond@vermont.gov>
Subject: RE: Q&As for Maxine

Thanks Josh! Could you please resend? The attachment didn't come through.
Lucy

Lucy Leriche (she/her/hers)
Vice President of Public Policy Vermont
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Colchester, Vermont 05446
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www.ppnne.org<<http://www.ppnne.org>>
[Lucy.Leriche \[REDACTED\]](mailto:Lucy.Leriche [REDACTED])

From: Diamond, Joshua <Joshua.Diamond@vermont.gov>

Sent: Monday, February 18, 2019 11:24 AM

To: Leriche, Lucy Rose <Lucy.Leriche>

Subject: Q&As for Maxine

Lucy,

Here is a rough draft....am I missing something?

Josh

Joshua R. Diamond, Deputy Attorney General

Vermont Attorney General's Office

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Date: Monday, February 18, 2019 11:25:22 AM

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To: [Diamond, Joshua](#)
Subject: RE: Q&As for Maxine
Date: Monday, February 18, 2019 1:30:29 PM
Attachments: [H. 57 AG Draft QAs .docx](#)

Hi Josh,

Thanks for doing this; These look great! The yellow highlighted areas include some minor editing. The blue highlight of the parental consent section is just meant to flag that I think this part gets a little murky. What specifically gives minors in Vermont the ability to obtain an abortion without parental consent? Otherwise, I think this is great! Thanks for doing this!

Lucy

Lucy Leriche(she/her/hers)
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[Lucy.Leriche](mailto:Lucy.Leriche@[REDACTED]) [REDACTED]

From: Diamond, Joshua <Joshua.Diamond@vermont.gov>
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To: Leriche, Lucy Rose <Lucy.Leriche@[REDACTED]>
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A2: In *Beecham v. Leahy*, 130 Vt. 164 (1972), the Vermont Supreme Court held a law criminalizing the act of providing an abortion by health care providers could not be enforced. In doing so, the court determined that because the statute did not deny the right to receive an abortion, the legislature had implicitly recognized plaintiff's personal right to an abortion. Therefore, the legislature could not then prohibit the safe exercise of that personal right by criminalizing the act of providing an abortion.

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Q.3. H. 57 declares that abortion is a fundamental right. Fundamental rights are typically recognized as constitutional rights, can the legislature create a fundamental right?

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Q.4 The Supreme Court has found that there is a constitutional right to abortion under the U.S. Constitution and that while states may impose restrictions, they cannot create an “undue burden” upon women. Does H. 57 go beyond this to prevent Vermont from imposing any restrictions on abortion providers? The current constitutional right to abortion precludes undue burdens. Does H. 57 go beyond the undue burdens test by preventing any interference or restriction upon an individual’s right to terminate an individual’s pregnancy?

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A4: No. Vermont has always been and will remain free to regulate healthcare providers, including those who offer abortion care. We all agree that medical procedures, including abortion, should be safe. All abortion providers in Vermont are licensed by the Vermont Board of Medical Practice. The law further requires that **FILL IN ANYTHING ELSE**. If there are questions about a provider’s services or facilities, the board is empowered to review and investigate such complaints, including complaints about quality of care and competency. Nothing in H. 57 changes this or prevents Vermont from making sure that healthcare services, including abortion, are provided safely. And it’s important to remember that abortion is an extremely safe procedure. Data, including from the CDC, shows that abortion has over a 99% safety record. Studies show women experience complications less than 1% of the time

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The current U.S. Supreme Court precedent prevents governments from creating an “undue burden.” But, nothing in that precedent requires a state to place any burden upon access to abortion.

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Q. 6. What about late ~~term~~ abortions; can anyone get a ~~late term~~ later abortion under this bill?

A6:

The Supreme Court was clear in *Roe v. Wade* that women need access to abortion post-viability if their health or life is endangered. States cannot ban abortion at any point in pregnancy when it is necessary to protect the woman's life or health. I support legislation that protects a woman's right to access abortion care and attempts to defend the protections enshrined in *Roe*.

H.57 protects the ability of doctors to make decisions about appropriate medical care, based on the individual facts of the woman's medical condition or a fetal diagnosis. Physicians must provide medical care in line with the standard of care for that type of procedure or treatment. Those who work in hospitals also are governed by hospital policies regarding treatments, decisions, and procedures provided

[If pressed:]

Again, this bill simply codifies a person's right to abortion no matter what happens in Washington. Nothing in this bill changes current laws. This is about ensuring people in Vermont can continue making personal medical decisions in the privacy of an exam room with their doctor, not their politicians.

~~Current Vermont law does not regulate the decision to have an abortion. H. 57 essentially codifies this long standing practice. A decision to have a late term abortion is left to the judgment of the individual who is pregnant and her medical provider.~~

~~Based upon testimony/written comments from the Vermont Medical Society, "late term abortion" means an abortion that occurs after 20 weeks of pregnancy. Late term abortions in Vermont are extremely rare. According to a recent article from Vermont Digger citing 2015 gathered by the Centers for Disease Control, seven late term were conducted in Vermont after 21 weeks during that year.~~

The Vermont Medical Society ~~also~~ testified/provided written comments that late ~~r-term~~ abortions occur only by specially trained physicians in a hospital setting. ~~Such procedures only occur in practice after a vetting by medical providers that the abortion is needed to address significant threats to maternal or fetal health.~~ Currently, there are no providers in Vermont that provide abortion after the third trimester.

Q.7. Does H. 57 require health care professionals to provide an abortion?

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Commented [11]: I removed the material about how rare it is in VT and pointing to the "good" reasons bc it could be stigmatizing. We also try to avoid repeating "late term" abortion since it's not a thing and it's surprising the VT Med Society was perpetuating its use!

Also, see table 7 here -

<https://www.cdc.gov/mmwr/volumes/67/ss/ss6713a1.htm>

CDC data from 2105 makes it look like 9 abortions at or after 21 weeks happed in VT

And this shows there were 14 in 2016

<http://www.healthvermont.gov/sites/default/files/documents/pdf/Vital%20Statistics%20Bulletin%202016.pdf> (see p. 146 of the pdf itself)

Just to say, you don't want to get into a battle of the facts here and corner yourself if number vary like this year to year. It's enough to say that the majority take place early in pregnancy.

A7: No. H. 57 only applies to public entities. No individual can be compelled to perform an abortion under H.57.

According to testimony/written comments from the Vermont Medical Society, facilities that offer abortion services [in Vermont](#) provide opportunities for staff participation or refusal of participation to ensure that staff are able to opt out of participation in any medical care that may for a variety of reasons not be in alignment with their core values and beliefs. [This bill will not make any changes to the law regarding an individual's to opt-out. This bill will not change one's right to opt out.](#) Federal statutes also protect health care provider conscience rights and prohibit recipients of certain federal funds from discriminating against health care providers who refuse to participate in these services based on moral objections or religious beliefs: <https://www.hhs.gov/conscience/conscience-protections/index.html>

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Text from the original bill, which expressly stated that a fetus shall not have independent rights under Vermont law, was eliminated to insure there were no change to existing law.

Q.9. Does H. 57 ~~address parental notification~~ allow minors to get abortions without involving their parents?

A.9. H. 57 ~~doesn't change anything in current law concerning minors' access to abortion. is intended to codify current practice, and it leaves that the decision to have an abortion between a patient and her doctor.~~
When faced with an unplanned pregnancy, most minors voluntarily disclose it to a parent or other trusted adult, like an adult family member or teacher. Young women who have a supportive relationship with parents are likely to consult them about an abortion decision but not all young people are fortunate to have a healthy relationship with parents. For those who do not share it with parents, there is usually a good reason. For young women living in abusive households, for example, disclosing sexual activity or pregnancy can trigger physical or emotional abuse, including direct physical or sexual violence, or being thrown out of the home.

Mandatory parental consent and notification laws are opposed by state and national medical experts, including the American Academy of Pediatrics, the American College of Obstetricians and Gynecologists, the American Medical Association, and the American Public Health Association because they do not achieve the intended benefit of promoting family communication but they do increase the risk of harm to the adolescents by delaying access to appropriate medical care. Research has shown they do not increase parental involvement and do not foster healthy communication. These laws actually threaten young women's health, safety and privacy, especially those who may be victims of abuse already.

While Vermont generally requires that parents or guardians provide informed consent for minors' healthcare treatment (under 18), see Individuals under 18 years of age are minors under Vermont law- 1 V.S.A. § 173. Generally, a parent or guardian or representative appointed by a judge to make health care decisions for the minor may give informed consent to health care for a minor. However, there are a number of exceptions:

- (i) Under current law, minors 12 years of age or older may give informed consent to treatment for sexually transmitted infections, drug dependence, and alcoholism. 18 V.S.A. § 4226.
- (ii) Minors 14 years of age or older may also voluntarily admit themselves to a hospital for mental health related treatment, and minors under 14 may admit themselves to a hospital for mental health related treatment with a written application from a parent or guardian. 18 V.S.A. § 7503.
- (iii) While not addressed by Vermont courts, other states (such as Massachusetts) have recognized the legal doctrine of the "mature minor." This doctrine gives providers guidance on circumstances in which unemancipated minors can make decisions; specifically, if a provider believes the minor is mature enough and able to give informed consent to the medical care, and it is in the best interest of the minor not to notify the parents, the physician may accept the minor's consent alone. It is believed that many health care providers in Vermont operate with this doctrine in mind when it comes to a minor and the issue of parental consent arises.

Formatted

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Commented [12]: I would cut this, I don't think it's that responsive.

Commented [13]: I'm not sure how this helps things and would either cut or make more clear why it's relevant here.. you don't have a parental involvement law and I think it's better to just stick to abortion and not get into all of these examples..

Q.10. H. 57 proscribes public entities, including the legislature, from interfering with the fundamental right to abortion. Does H. 57 prohibit the legislature from placing restrictions, such as parental consent, in the future?

A.10. While H. 57 applies to all branches of government, it does not alter the constitutional framework of separation of powers.

- Executive branches
 - Governor can't issue executive order to force any agency to interfere with the right to abortion as established by H.57.
- Judiciary: still can't sue a judge for issuing a decision

- The Judiciary would be most affected in its other roles, e.g. its role as employer (or information provider)
- Future Legislatures could change H.57, the legislature cannot be bound without a constitutional amendment.

To this last point, the Legislature could expressly address parental notification at some later date to the extent it does not violate the existing constitutional framework protecting access to abortion (undue burden).

Q.11. What does this H. 57 prohibit?

A. 11. H. 57 protects against the government/executive branch creation of barriers for those who give or receive abortions. For example:

- New Secretary of Human Services can't impose onerous regulations on clinics, e.g.:
 - a. Requiring hospital admitting privileges for clinic doctors
 - b. Requiring multiple doctors to approve each abortion
 - c. Requiring doctor to prescribe and administer the abortion pill rather than a qualified NP
 - d. Requiring abortion to take place in a hospital when it can safely be performed in an outpatient clinic or private office
 - e. Requiring abortions (including medical abortions) be performed only by certified OB/GYN
 - f. Requiring clinics to meet surgical center standards, e.g. rooms/hallways of certain size
 - g. Imposing "gag order" on providers that counsel pregnant women
- No new onerous regulations on individuals, e.g.:
 - a. Restricting what insurance plans may cover for abortion care (Green Mountain Care Board)
 - b. Excessive waiting periods
 - c. Requirement of non-medically necessary procedures like an ultrasound or inaccurate counseling
 - d. Restricting abortion to only cases where the woman's life is in danger
 - e. Spousal consent requirement
- For doctors/clinics who provide abortions, state/municipality can't withhold license, zoning permit, emergency services, or healthcare reimbursement payments on the basis of abortion provision
- Any state/municipal employer trying to prevent employee from accessing abortion services, e.g.:
 - a. refusing to allow sick leave
 - b. providing health insurance that doesn't cover abortion care

- Any state/municipal agency withholding benefits from an individual on the basis of abortion choice:
 - a. food stamps, police or emergency services, information about healthcare or other services

A.12. Does H. 57 prohibit any type of regulation upon medical providers who perform abortions?

A.12. We believe that any content-neutral government action that does not have a disparate impact on abortion providers and is not designed to restrict access to abortion would not give rise to a sustainable cause of action against the government under H.57.

Q.13. Will this law prohibit those who oppose abortion from protesting or speaking out against abortion?

A.13. No. Free speech is still a protected constitutional right. Any time two fundamental rights conflict with each other, it is the duty of the courts to balance the interests on both sides and reach a decision. That is what currently happens when the fundamental right to abortion and the fundamental right to free speech come into conflict, as they occasionally do. This bill will not change that process. This bill does not restrict the right to free speech; it only protects the right to abortion.

From: [Diamond, Joshua](#)
To: [Spottswood, Eleanor](#)
Subject: FW: Maxine's Q & A
Date: Tuesday, February 19, 2019 8:21:00 PM
Attachments: [AG Q & A.docx](#)

FYI. Josh

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

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From: Leriche, Lucy Rose <Lucy.Leriche [REDACTED]>
Sent: Tuesday, February 19, 2019 7:46 PM
To: Diamond, Joshua <Joshua.Diamond@vermont.gov>
Subject: Maxine's Q & A

Here is a revised draft for your review.
Lucy

Lucy Leriche(she/her/hers)
Vice President of Public Policy Vermont
Planned Parenthood Northern New England
[REDACTED]
Colchester, Vermont 05446
[REDACTED]
www.ppnne.org<<http://www.ppnne.org>>
[Lucy.Leriche \[REDACTED\]](mailto:Lucy.Leriche [REDACTED])

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From: [Leriche, Lucy Rose](#)
To: [Diamond, Joshua](#)
Subject: Maxine's Q & A
Date: Tuesday, February 19, 2019 7:46:06 PM
Attachments: [AG Q & A.docx](#)

Here is a revised draft for your review.

Lucy

Lucy Leriche(she/her/hers)
Vice President of Public Policy Vermont
Planned Parenthood Northern New England

[REDACTED]
Colchester, Vermont 05446

[REDACTED]
www.ppnne.org<<http://www.ppnne.org/>>

[Lucy.Leriche](#) [REDACTED]

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From: [Clark, Charity](#)
To: [Diamond, Joshua](#)
Subject: Re: Title X Litigation
Date: Monday, February 25, 2019 6:30:33 PM

Josh, does this mean I should reach out PPNNE and propose moving the press conference to D.C. on Monday?
Charity

Sent from my iPhone

> On Feb 25, 2019, at 6:24 PM, Diamond, Joshua <Joshua.Diamond@vermont.gov> wrote:

>

> Scott,

>

> It was a pleasure to connect this afternoon. Charity Clark is TJ's Chief of Staff and she handles press matters for the office.

>

> Charity has been "cc"d on this e-mail and her cell number is 802 917 1993.

>

> Best, Josh

>

>

>

> Joshua R. Diamond, Deputy Attorney General

> Vermont Attorney General's Office

> 109 State Street

> Montpelier, Vermont 05609

> 802-828-3175

> joshua.diamond@vermont.gov

>

>

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>

> -----Original Message-----

> From: Kaplan Scott <Scott.Kaplan@doj.state.or.us>

> Sent: Monday, February 25, 2019 3:56 PM

> To: Diamond, Joshua <Joshua.Diamond@vermont.gov>; Shugar Kamala H <kamala.h.shugar@doj.state.or.us>

> Subject: RE: Title X Litigation

>

> Yes, 971-673-5037.

>

> But we have call with PPFA and other plaintiffs groups starting in about 5 minutes. Would 5:30 or 6:00 EST work for you? Thanks.

>

> Scott

>

> -----Original Message-----

> From: Diamond, Joshua [<mailto:Joshua.Diamond@vermont.gov>]

> Sent: Monday, February 25, 2019 12:55 PM
> To: Shugar Kamala H
> Cc: Kaplan Scott
> Subject: RE: Title X Litigation

>
> Scott,

>
> Is there a convenient number where I can reach you?

>
> Regards, Josh

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

>
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>
> -----Original Message-----

> From: Shugar Kamala H <kamala.h.shugar@doj.state.or.us>
> Sent: Monday, February 25, 2019 3:08 PM
> To: Diamond, Joshua <Joshua.Diamond@vermont.gov>
> Cc: Kaplan Scott <Scott.Kaplan@doj.state.or.us>
> Subject: Re: Title X Litigation

>
> Josh, I'm not free today (I'm an airport) but Scott Kaplan copied here can speak with you.

>
> Kamala H. Shugar, Special Counsel
> Office of the Attorney General
> Oregon Department of Justice
> [REDACTED] Salem OR 97301

>
> On Feb 25, 2019, at 8:45 AM, Diamond, Joshua
<Joshua.Diamond@vermont.gov<<mailto:Joshua.Diamond@vermont.gov>>> wrote:

>
> Kamala,

>
> Are you free for a phone call today to discuss the pending Title X case?

>
> Please let me know.

>
> Regards, Josh

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

>
>
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>
> *****

From: [Clark, Charity](#)
To: [Donovan, Thomas](#); [Diamond, Joshua](#)
Cc: [Silver, Natalie](#)
Subject: Draft Title X lawsuit press release
Date: Monday, March 4, 2019 12:42:03 PM
Attachments: [Title X Lawsuit Press Release.docx](#)

Here is a draft release on the Title X lawsuit. We are still waiting for PPNNE's quote. In case you can't see my comments on your phones, I have two: 1) Should we list your location as Montpelier, even though you're in D.C.? 2) We are still waiting for the final state to get us to 21.

We haven't yet seen the draft national release from Oregon. As I mentioned in my text, the press embargo will be lifted at 11 Pacific/2 Eastern.

Thanks,
Charity

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

FOR IMMEDIATE RELEASE:
March 4, 2019

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

VERMONT TO JOIN LAWSUIT OVER TITLE X FUNDING

Vermont's Reproductive Health Clinics Jeopardized by New Federal Rule

WASHINGTON, D.C. – Attorney General T.J. Donovan today announced his intent to file a lawsuit against the federal government over a new Title X funding regulation. Title X is the only national federal grant program that is dedicated solely to providing comprehensive family planning and preventative health care. In Vermont, 10,000 people rely on Title X for their healthcare. The new rule includes a “gag rule” that limits providers’ ability to give neutral, factual information to their patients about abortion, and prohibits abortion referrals. The new rule also redirects funding priorities from the CDC’s birth control recommendations to only “natural family planning methods.” In Vermont, the only recipient of Title X funds are the 10 Planned Parenthood clinics located around the State.

“The new Title X rule is contrary to law,” Attorney General Donovan said. “And it will have a devastating impact on reproductive healthcare for low income Vermonters. No

Title X funds go toward abortion. Instead, the rule will deprive Vermonters of basic healthcare.” Title X funds basic healthcare services, including wellness exams, cervical and breast cancer screenings, birth control, contraception education, and testing for sexually transmitted diseases and HIV.

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

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

“[Quote from PPNNE],” said Meagan Gallagher, CEO and President of Planned Parenthood of Northern New England.

Vermont will be joined by Colorado, Connecticut, Delaware, District of Columbia, Hawaii, Illinois, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New Mexico, New York, Oregon, Pennsylvania, Rhode Island, Virginia, and Wisconsin. The basis for the anticipated lawsuit is that the new Title X rule is contrary to the U.S. Constitution and

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

#

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

From: [Silver, Natalie](#)
To: agopress@list.vermont.gov
Subject: FOR IMMEDIATE RELEASE: VERMONT TO JOIN LAWSUIT OVER TITLE X FUNDING
Date: Monday, March 4, 2019 2:18:27 PM
Attachments: [VERMONT TO JOIN LAWSUIT OVER TITLE X FUNDING.pdf](#)

FOR IMMEDIATE RELEASE: March 4, 2019

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

VERMONT TO JOIN LAWSUIT OVER TITLE X FUNDING

Vermont's Reproductive Health Clinics Jeopardized by New Federal Rule

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

“The new Title X rule is contrary to law,” Attorney General Donovan said. “And it will have a devastating impact on reproductive healthcare for low income Vermonters. No Title X funds go toward abortion. Instead, the rule will deprive Vermonters of basic healthcare.” Title X funds basic healthcare services, including wellness exams, cervical and breast cancer screenings, birth control, contraception education, and testing for sexually transmitted diseases and HIV.

As a result of the new regulations, Title X providers will be forced to give incomplete and misleading information to patients—a “gag rule” on providing services or information related to abortion, even to patients who affirmatively say that they want one. The gag rule would also apply to any “referral partners” of Title X health care centers. The new rule

stretches Title X funding to try to cover gaps in healthcare created by employers who opt out of providing insurance to cover contraception. The new rule also redefines “family planning” to promote “natural family planning methods” over more effective forms of birth control. The new rule never mentions the CDC’s evidence-based best practices guidelines, “[Providing Quality Family Planning Services](#),” which was the gold standard for healthcare under the old Title X regulations. In addition, the new rule requires Title X health care centers to be physically located in a separate facility from any abortion provider. Title X funding is not, and never has been, used for abortions.

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

“These changes are dangerous and unethical and could impact health care access for low-income Vermonters,” said Meagan Gallagher, President and CEO of Planned Parenthood of Northern New England. “Since taking office, the Trump administration has pushed policy after policy to take away basic rights and health care with incessant, hostile attacks on reproductive rights. We are grateful to Attorney General Donovan for fighting for Vermonters’ rights and access to health care.”

Vermont will be joined by Colorado, Connecticut, Delaware, District of Columbia, Hawaii, Illinois, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New Mexico, New York, North Carolina, Oregon, Pennsylvania, Rhode Island, Virginia, and Wisconsin. The basis for the anticipated lawsuit is that the new Title X rule is contrary to the U.S. Constitution and to governing statutes, including the Administrative Procedures Act. If the rule went into effect, it will harm Vermont by increasing health care costs as a result of an increase in unintended pregnancies, cancers not detected in early stages, and the spread of sexually transmitted infections.

#

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



From: [Diamond, Joshua](mailto:Diamond.Joshua)
To: [Donovan, Thomas](mailto:Donovan.Thomas)
Subject: Fwd: Important: Title X media plan for next week
Date: Monday, March 4, 2019 7:48:51 AM

Let's discuss in the cab to the hotel. Josh

Sent from my iPhone

Begin forwarded message:

From: "Clark, Charity" <Charity.Clark@vermont.gov>
Date: March 4, 2019 at 7:30:14 AM EST
To: "Diamond, Joshua" <Joshua.Diamond@vermont.gov>, "Silver, Natalie" <Natalie.Silver@vermont.gov>
Subject: Re: Important: Title X media plan for next week

Today's the deadline for a quote on Title X. Josh, any embellishments on my suggestion below?

By the way, Kristina never responded to my voicemail message re a press conference today.

Charity

Sent from my iPhone

On Mar 1, 2019, at 3:09 PM, Clark, Charity <Charity.Clark@vermont.gov> wrote:

I've left a message with Kristina, planting the seed for a Monday press conference in D.C.

As to a quote from T.J., I'm inclined to defer to Josh or Ella who know more about the lawsuit. That said, here are some ideas:

"Vermont's Title X clinics provide critical health services, like cancer screenings and HIV testing. These clinics serve primarily poor people, and the new rule would deprive these people of needed health care."

Charity

Sent from my iPhone

On Mar 1, 2019, at 2:24 PM, Clark, Charity <Charity.Clark@vermont.gov> wrote:

FYI

Sent from my iPhone

Begin forwarded message:

From: Edmunson Kristina
<kristina.edmunson@doj.state.or.us>
Date: March 1, 2019 at 12:48:36 PM EST
To: "kdosreis@riag.ri.gov"
<kdosreis@riag.ri.gov>,
"bcollins@riag.ri.gov"
<bcollins@riag.ri.gov>,
"Lawrence.pacheco@coag.gov"
<Lawrence.pacheco@coag.gov>,
"drummondgl@doj.state.wi.us"
<drummondgl@doj.state.wi.us>,
"krishna.f.jayaram@hawaii.gov"
<krishna.f.jayaram@hawaii.gov>,
"Mat.Marshall@delaware.gov"
<Mat.Marshall@delaware.gov>,
"rcoombs@oag.state.md.us"
<rcoombs@oag.state.md.us>,
"Charity.Clark@vermont.gov"
<Charity.Clark@vermont.gov>, "Monica C.
Moazez" <MMoazez@ag.nv.gov>,
"Rossman-McKinney, Kelly (AG)"
<RossmanMcKinneyK@michigan.gov>,
"PThompson@atg.state.il.us"
<PThompson@atg.state.il.us>, "Kempner,
Delaney" <Delaney.Kempner@ag.ny.gov>,
"Benton, Elizabeth"
<Elizabeth.Benton@ct.gov>,
"mkelly@oag.state.va.us"
<mkelly@oag.state.va.us>,
"Margaret.Quackenbush@mass.gov"
<Margaret.Quackenbush@mass.gov>
**Subject: Important: Title X media plan
for next week**

Hi all,

I'm writing because your AG has signed off on the multi-state Title X lawsuit, which will most likely be filed the morning (PST) of Tuesday, March 5th. The exact time of the filing, and embargo, is still TBD, but the

lawsuit will be filed in Oregon. Currently, we have **17 states** who are joining our lawsuit (with the potential for more). Not for public release, but Planned Parenthood Federation of America and the AMA will also be filing a separate lawsuit at the same time as ours.

Our AG colleagues in California and Washington will be filing two separate lawsuits on Title X on Monday, March 4th. Because of this, there is some interest in a two-prong media strategy. Is everybody comfortable with this approach? Please write or call me today, if you have any concerns or questions. I know many of our AG's will be together next week at NAAG in DC as well.

Media plan:

<!--[if !supportLists]-->• <!--[endif]--
>Monday, March 4th : exact time TBD, but issue a group release saying there is a coalition of AG's who have been working on a lawsuit, and we will be filing the next day, Tuesday, March 5th. In the release, we can include a short (2-3 sentence) statement from every AG who wants to participate. If your AG would like to include a statement in the group release, please send me something by TOMORROW (Saturday, March 2nd). I will work on the template and send it to everybody by Sunday evening, with the exact time the statement can be released. Each office will be able to share the release with their press lists. In this release, unfortunately, we will not be able to say that Planned Parenthood is filing a similar lawsuit.

<!--[if !supportLists]-->• <!--[endif]--
>Tuesday, March 5th: exact time TBD, but once we have the filing time we will be able to issue our own press releases saying that the lawsuit

has been filed, and that Planned Parenthood has also filed a similar lawsuit. I will send a template release by Monday.

Again, please email or call me if you have any questions/concerns with this media approach. We want to make sure we make the media cycle on Monday when the other two lawsuits are filed, so that is why we are doing a two-pronged approach.

My cell is [REDACTED] if you have any questions. Also, don't forget to send me a short statement from your AG to include in the Monday release.

Thank you!
Kristina

Kristina Edmunson
Communications Director
Attorney General Ellen Rosenblum
Oregon Department of Justice
Kristina.edmunson@state.or.us

[REDACTED]
[REDACTED]

-

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From: [Silver, Natalie](#)
To: [Donovan, Thomas](#); [Clark, Charity](#); [Diamond, Joshua](#)
Subject: RE: Draft Title X lawsuit press release
Date: Monday, March 4, 2019 1:12:18 PM

Ok. I will plan to put out after embargo is lifted at 2, followed by social media.

Natalie Silver
Community Outreach and Policy Coordinator
Vermont Attorney General's Office
Natalie.Silver@vermont.gov
[REDACTED]

From: Donovan, Thomas <Thomas.Donovan@vermont.gov>
Sent: Monday, March 4, 2019 1:07 PM
To: Clark, Charity <Charity.Clark@vermont.gov>; Diamond, Joshua <Joshua.Diamond@vermont.gov>
Cc: Silver, Natalie <Natalie.Silver@vermont.gov>
Subject: Re: Draft Title X lawsuit press release

Looks good . Montpelier fine
Thanks
Tjd

Get [Outlook for iOS](#)

From: Clark, Charity
Sent: Monday, March 4, 2019 12:42:00 PM
To: Donovan, Thomas; Diamond, Joshua
Cc: Silver, Natalie
Subject: Draft Title X lawsuit press release

Here is a draft release on the Title X lawsuit. We are still waiting for PPNNE's quote. In case you can't see my comments on your phones, I have two: 1) Should we list your location as Montpelier, even though you're in D.C.? 2) We are still waiting for the final state to get us to 21.

We haven't yet seen the draft national release from Oregon. As I mentioned in my text, the press embargo will be lifted at 11 Pacific/2 Eastern.

Thanks,
Charity

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

FOR IMMEDIATE RELEASE:
March 4, 2019

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

VERMONT TO JOIN LAWSUIT OVER TITLE X FUNDING

Vermont's Reproductive Health Clinics Jeopardized by New Federal Rule

WASHINGTON, D.C. – Attorney General T.J. Donovan today announced his intent to file a lawsuit against the federal government over a new Title X funding regulation. Title X is the only national federal grant program that is dedicated solely to providing comprehensive family planning and preventative health care. In Vermont, 10,000 people rely on Title X for their healthcare. The new rule includes a “gag rule” that limits providers’ ability to give neutral, factual information to their patients about abortion, and prohibits abortion referrals. The new rule also redirects funding priorities from the CDC’s birth control recommendations to only “natural family planning methods.” In Vermont, the only recipient of Title X funds are the 10 Planned Parenthood clinics located around the State.

“The new Title X rule is contrary to law,” Attorney General Donovan said. “And it will have a devastating impact on reproductive healthcare for low income Vermonters. No Title X funds go toward abortion. Instead, the rule will deprive Vermonters of basic healthcare.” Title X funds basic healthcare services, including wellness exams, cervical and breast cancer screenings, birth control, contraception education, and testing for sexually transmitted diseases and HIV.

As a result of the new regulations, Title X providers will be forced to give incomplete and misleading information to patients—a “gag rule” on providing services or information related to abortion, even to patients who affirmatively say that they want one. The gag rule would also apply to any “referral partners” of Title X clinics. The new rules stretch Title X funding to try to cover gaps in healthcare created by employers who opt out of providing insurance to cover contraception. The new rule also redefines “family planning” to promote “natural family planning methods” over more effective forms of birth control. The new rule never mentions the CDC’s evidence-based best practices guidelines, “[Providing Quality](#)

[Family Planning Services](#),” which was the gold standard for healthcare under the old Title X regulations. In addition, the new rule requires Title X clinics to be physically located in a separate facility from any abortion provider. Title X funding is not, and never has been, used for abortions.

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

“[Quote from PPNNE],” said Meagan Gallagher, CEO and President of Planned Parenthood of Northern New England.

Vermont will be joined by Colorado, Connecticut, Delaware, District of Columbia, Hawaii, Illinois, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New Mexico, New York, Oregon, Pennsylvania, Rhode Island, Virginia, and Wisconsin. The basis for the anticipated lawsuit is that the new Title X rule is contrary to the U.S. Constitution and to governing statutes, including the Administrative Procedures Act. If the rule went into effect, it will harm Vermont by increasing health care costs as a result of an increase in unintended pregnancies, cancers not detected in early stages, and the spread of sexually transmitted infections.

###

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VERMONT TO JOIN LAWSUIT OVER TITLE X FUNDING

Vermont's Reproductive Health Clinics Jeopardized By New Federal Rule

~~MONTPELIER-WASHINGTON, D.C.~~ – Attorney General T.J. Donovan today announced his intent to file a lawsuit against the federal government ~~for over a new Title X funding regulation violating X~~. Title X is the only national federal grant program that is dedicated solely to providing comprehensive family planning and preventative health care. ~~The purpose of the Title X program is to ensure equal access to high quality family planning services, regardless of a person's economic condition. Title X has been providing high quality preventative health care to millions of Americans and XXX Vermonters for decades. In Vermont, 10,000 people rely on Title X for their healthcare.~~ The new rule includes a “gag rule” that limits providers’ ability to give neutral, factual information to their patients about abortion, and prohibits abortion referrals. The new rule ~~also~~ redirects funding priorities from the CDC’s birth control recommendations to only “natural family planning methods.” In Vermont, the only recipient of Title X funds are the 10 Planned Parenthood clinics located around the State.

~~“The new Title X rule is contrary to law,”~~ Attorney General Donovan said. ~~“And it will have a devastating impact on reproductive healthcare for low income Vermonters I will oppose any infringement to a Vermonter’s right to an abortion as long as I am Attorney General. No Title X funds go toward abortion. Instead, the rule will deprive Vermonters of basic healthcare.”~~

Commented [CC1]: Should we just say Montpelier?

~~Vermont has relied on funding from Title X for decades.~~ Title X funds basic health care services, including wellness exams, cervical and breast cancer screenings, birth control, contraception education, and testing for sexually transmitted diseases and HIV.

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

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

~~“[For decades, people in Vermont have benefited from affordable reproductive health care through Title X, and new rule changes from the Trump administration threaten to take that away]Quote from PPNNE,”~~ said Meagan Gallagher, CEO and President of Planned Parenthood of Northern New England. ~~“We are incredibly grateful to Attorney General Donovan for his~~

ongoing support for access to high-quality health care for all Vermonters.” Planned Parenthood of Northern New England is the only Title X provider in Vermont.

Vermont ~~will be~~ joined by ~~Oregon, New York,~~ Colorado, Connecticut, Delaware, District of Columbia, Hawaii, Illinois, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New Mexico, ~~New York, Oregon,~~ Pennsylvania, Rhode Island, Virginia, and Wisconsin. ~~The basis for the anticipated lawsuit is that the new Title X rule States seek an order vacating the Final Rule as~~ ~~is~~ contrary to the U.S. Constitution, ~~contrary and~~ ~~to the~~ governing statutes, ~~including the Administrative Procedures Act, and arbitrary and capricious as well as an injunction against the implementation of the Final Rule to prevent irreparable injury to the States and their residents. If the~~ ~~The rule went into effect, it will harm Vermont by increasing States argue that their residents are harmed by the Final Rule, because it is contrary to their laws, policies, and sovereign and quasi-sovereign interests, and would cause them financial injury from increased~~ health care costs as a result of an increase in unintended pregnancies, cancers not detected in early stages, and the spread of sexually transmitted infections, (“STIs”). ~~These costs —and significant public health impacts— will be caused by the Final Rule’s restriction of access to the high-quality family planning and related preventive services for low-income individuals that Title X has funded for decades.~~

###

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Commented [CC2]: We will add whatever state we are missing once we get the draft of the national press release. There are 21 states total.

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“The new Title X rule is contrary to law,” Attorney General Donovan said. “And it will have a devastating impact on reproductive healthcare for low income Vermonters. No Title X funds go toward abortion. Instead, the rule will deprive Vermonters of basic healthcare.” Title X funds basic healthcare services, including wellness exams, cervical and breast cancer screenings, birth control, contraception education, and testing for sexually transmitted diseases and HIV.

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would also apply to any “referral partners” of Title X health care centers. The new rule stretches Title X funding to try to cover gaps in healthcare created by employers who opt out of providing insurance to cover contraception. The new rule also redefines “family planning” to promote “natural family planning methods” over more effective forms of birth control. The new rule never mentions the CDC’s evidence-based best practices guidelines, “[Providing Quality Family Planning Services](#),” which was the gold standard for healthcare under the old Title X regulations. In addition, the new rule requires Title X health care centers to be physically located in a separate facility from any abortion provider. Title X funding is not, and never has been, used for abortions.

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

“These changes are dangerous and unethical and could impact health care access for low-income Vermonters,” said Meagan Gallagher, President and CEO of Planned Parenthood of Northern New England. “Since taking office, the Trump administration has pushed policy after policy to take away basic rights and health care with incessant, hostile attacks on reproductive rights. We are grateful to Attorney General Donovan for fighting for Vermonters’ rights and access to health care.”

Vermont will be joined by Colorado, Connecticut, Delaware, District of Columbia, Hawaii, Illinois, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New Mexico, New York, North Carolina, Oregon, Pennsylvania, Rhode Island, Virginia, and Wisconsin. The basis for the anticipated lawsuit is that the new Title X rule is contrary to the

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

#

From: [Virginia Lyons](#)
To: [Spottswood, Eleanor](#)
Cc: [Diamond, Joshua](#); [Brynn Hare](#)
Subject: Re: Prop 5 meeting Thursday - update
Date: Wednesday, March 6, 2019 6:30:11 PM

Thank you.

Sent from my iPhone

> On Mar 6, 2019, at 4:36 PM, Spottswood, Eleanor <Eleanor.Spottswood@vermont.gov> wrote:

>

> Sen. Lyons,

>

> I just heard from Mike Fisher. He apologizes that he needs to be in Burlington tomorrow and asks if he can attend by phone from 9-10. He is best reached via his cell phone, [REDACTED].

>

> See you tomorrow.

>

> Ella

>

> Eleanor L.P. Spottswood

> Assistant Attorney General

> Vermont Attorney General's Office

> 109 State Street

> Montpelier, Vermont 05609

> 802-828-3178

> eleanor.spottswood@vermont.gov

>

> -----Original Message-----

> From: Virginia Lyons <VLyons@leg.state.vt.us>

> Sent: Wednesday, March 6, 2019 1:14 PM

> To: Spottswood, Eleanor <Eleanor.Spottswood@vermont.gov>

> Cc: Diamond, Joshua <Joshua.Diamond@vermont.gov>; Brynn Hare <bhare@leg.state.vt.us>

> Subject: Re: Prop 5 meeting Thursday - update

>

> Ella-

>

> Thank you for your help and complete reply! I look forward to our meeting tomorrow,

>

> Best -

>

> Ginny

> Senator Ginny Lyons

> Chair, Health and Welfare Committee

>

>

>

>> On Mar 6, 2019, at 11:52 AM, Spottswood, Eleanor <Eleanor.Spottswood@vermont.gov> wrote:

>>

>> Sen. Lyons,

>>

>> I have confirmation that the following people, in addition to myself, will attend our meeting tomorrow in room 17 at the statehouse at 9am.

>>

>> ACLU: Chloe White, cwhite [REDACTED]
>> VCW: Hannah Lane, Hannah.Lane@vermont.gov
>> PPNNE: Lucy Leriche, Lucy.Leriche [REDACTED]
>> VMS: either Stephanie Winters or Jill Sudhoff-Guerin, swinters@vtmd.org (probable not the MD who will testify, though they will try)
>>
>> The only person I'm still waiting to hear from is Mike Fisher at Legal Aid. I will let you know if/when I do.
>>
>> Looking forward to seeing you tomorrow.
>>
>> Ella
>>
>> Eleanor L.P. Spottswood
>> Assistant Attorney General
>> Vermont Attorney General's Office
>> 109 State Street
>> Montpelier, Vermont 05609
>> 802-828-3178
>> eleanor.spottswood@vermont.gov
>>
>> -----Original Message-----
>> From: Virginia Lyons <VLyons@leg.state.vt.us>
>> Sent: Sunday, March 3, 2019 8:20 PM
>> To: Diamond, Joshua <Joshua.Diamond@vermont.gov>; Spottswood, Eleanor <Eleanor.Spottswood@vermont.gov>
>> Cc: Brynn Hare <bhare@leg.state.vt.us>
>> Subject: Prop 5 meeting Thursday - update
>>
>> Josh and Ella-
>>
>> It was good to meet with you on Friday. Thank you for your interest in and support of Prop 5. As we discussed, you volunteered to invite people to a meeting this Thursday. Josh and I agree that we should meet in the State House room 17 - Senate Health and Welfare. The time is 9AM rather than 10 AM - originally discussed. Ella, Josh thought this would work with your schedule
>>
>> The people you volunteered to contact: (please ensure that those attending are those who will testify on Mar. 13. The exception may be the VMS MD.)
>>
>> Planned Parenthood- contact Lucy Leriche or to invite person who will testify Mar.13 Health Care advocate legal Aid - Mike Fisher or....
>> Comm. On Women Cary Brown or to invite person who will testify Mar. 13 ACLU representative who will testify on Mar. 13. You had a suggestion.
>> VT Medical Soc. Stephanie Winters (possibly MD who will testify on Mar 13)
>>
>> I will be talking with others. Please contact me by Wed. noon to let me know who will attend. Also please send contact info. you have for each.
>>
>> The meeting: Thursday 9am - 11:00am State House room 17 Senate Health and Welfare.
>> Goal: To review prop 5 testimony issues and related issues.
>> Context: This meeting is by my invitation with my state house Attorney and should be considered confidential/private.
>>
>> I am available by email or phone in between town meeting events and other meetings Mon.- Wed.
>>
>> Thank you for everything!
>> Best-
>>

>> Ginny
>> Senator Ginny Lyons
>> Chair, Health and Welfare Committee
>> [REDACTED]
>> [REDACTED]
>>

From: [Clark, Charity](#)
To: [Diamond, Joshua](#)
Cc: [Spottswood, Eleanor](#); [Silver, Natalie](#); [Sudbay, William](#)
Subject: Re: Title X PI motion timing
Date: Thursday, March 14, 2019 2:34:21 PM

I suggest a press conference with PPNNE Friday 3/22 morning. Will, can you please see if T.J. is available?

Charity

Sent from my iPhone

On Mar 14, 2019, at 2:24 PM, Diamond, Joshua <Joshua.Diamond@vermont.gov> wrote:

Thanks for the update.

Josh

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

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From: Spottswood, Eleanor <Eleanor.Spottswood@vermont.gov>
Sent: Thursday, March 14, 2019 2:23 PM
To: Diamond, Joshua <Joshua.Diamond@vermont.gov>
Cc: Clark, Charity <Charity.Clark@vermont.gov>
Subject: Title X PI motion timing

Josh,

It sounds like the current plan is to file the PI motion next Thursday, 3/21. I will let you know if that changes.

Ella

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

From: [Diamond, Joshua](#)
To: [Spottswood, Eleanor](#)
Subject: FW:
Date: Tuesday, March 19, 2019 10:33:00 AM
Attachments: [2019-03-19-Planned Parenthood v. HHS State Amicus.pdf](#)
[TEMPLATE 19.03.19 Coalition of 21 Attorneys General File Amicus Brief in Support of Evidence.docx](#)

FYI

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

Good morning all,

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

Thank you and have a great rest of your day.

Karissa Hand
Deputy Press Secretary
Office of Pennsylvania Attorney General Josh Shapiro
Email: khand@attorneygeneral.gov
[REDACTED]

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No. 18-35920

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

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

Plaintiffs-Appellants,

v.

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

Defendants-Appellees.

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

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

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AMBER SIZEMORE
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INTEREST OF AMICI STATES

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

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

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

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

² *Vital Signs*, *supra* note 1.

³ *Negative Impacts*, *supra* note 1.

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

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

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

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

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

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

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

ARGUMENT

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

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

Since its creation in 2009, the TPP Program has provided nearly \$1 billion⁷ for medically accurate, evidence-based teenage pregnancy prevention, awarding grants to 186 state, local, and community programs.⁸ Those programs reached half a million teens from FY2010–FY2014, and are anticipated to reach 1.2 million more from FY2015–FY2019, with a focus on high-need communities and vulnerable youth, including those of color, in foster care, or in rural areas.⁹

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

¹⁶ *Vital Signs*, *supra* note 1.

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

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

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

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

¹⁹ Teen Pregnancy Prevention, *supra* note 9.

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

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

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

²³ *Teen Pregnancy Prevention, supra* note 9.

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

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

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

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

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

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

the first year of infancies averaged \$19,000 per teen birth in 2015.²⁸ In fact, Pennsylvania is estimated to have saved \$145 million in 2015 alone due to the declining teenage birth rate.²⁹ But Pennsylvania still spends an additional \$68 million per year on costs associated with teenage pregnancies, which could be further reduced through additional educational efforts like those funded by the TPP Program.³⁰

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

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

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

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

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

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

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

These projects funded by the TPP Program are an essential component of efforts to continue reducing the teenage pregnancy rate. Nationwide, the teenage birth rate has been cut almost in half from 37.9 per 1,000 in 2009 to 20.3 births per 1,000 in 2016.³³ In Pennsylvania, the number of teenage pregnancies decreased by more than 50% from 2013 to 2016, down from 14,680 to 6,385.³⁴ In California, the teen birth rate declined 66% between 2000 to 2016.³⁵ Efforts to prevent teenage pregnancy in Pennsylvania averted approximately 12,000 teenage births in 2015

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

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

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

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

alone, based on the decline in the state's teenage birth rate since 1991.³⁶ Effective, medically accurate projects such as those funded by the TPP Program are essential to the States' efforts to continue reducing teenage pregnancies.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

⁴⁶ SMARTool, *supra* note 44 .

⁴⁷ TAC, *supra* note 45.

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 8. Certificate of Compliance for Briefs

Instructions for this form: <http://www.ca9.uscourts.gov/forms/form08instructions.pdf>

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

I am the attorney or self-represented party.

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

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

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

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

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

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

complies with the longer length limit permitted by Cir. R. 32-2(b) because (*select only one*):

it is a joint brief submitted by separately represented parties;

a party or parties are filing a single brief in response to multiple briefs; or

a party or parties are filing a single brief in response to a longer joint brief.

complies with the length limit designated by court order dated _____.

is accompanied by a motion to file a longer brief pursuant to Cir. R. 32-2(a).

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

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

CERTIFICATE OF SERVICE

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

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

Dated: March 18, 2019

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

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

FOR IMMEDIATE RELEASE — March 19, 2019

CONTACT:

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

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

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

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

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

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

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

###

From: [Clark, Charity](#)
To: [Donovan, Thomas](#); [Diamond, Joshua](#)
Cc: [Silver, Natalie](#); [Spottswood, Eleanor](#)
Subject: Draft press release: Title X lawsuit motion
Date: Thursday, March 21, 2019 10:08:56 AM
Attachments: [Presser VERMONT MOVES TO PROTECT FUNDING IN TITLE X LAWSUIT -elps and nat edits + CRC edits.docx](#)

Hi, T.J.,

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

Also, fyi, Natalie and I will have a draft press release on the Purdue decision to you this morning.

Charity

VERMONT MOVES TO PROTECT FUNDING IN TITLE X LAWSUIT

Preliminary Injunction Would Stay New Federal Rule

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

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

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

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

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

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

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

#

Charity R. Clark
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**STATE OF VERMONT
OFFICE OF THE ATTORNEY GENERAL
109 STATE STREET
MONTPELIER, VT 05609-1001**

FOR IMMEDIATE RELEASE:
March 21, 2019

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

VERMONT MOVES TO PROTECT FUNDING IN TITLE X LAWSUIT

Preliminary Injunction Would Stay New Federal Rule

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

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

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###

From: [Silver, Natalie](#)
To: [Donovan, Thomas](#); [Clark, Charity](#); [Diamond, Joshua](#)
Cc: [Spottswood, Eleanor](#)
Subject: RE: Draft press release: Title X lawsuit motion
Date: Thursday, March 21, 2019 10:48:00 AM

Great. Will do.

Natalie Silver
Community Outreach and Policy Coordinator
Vermont Attorney General's Office
Natalie.Silver@vermont.gov
[REDACTED]

From: Donovan, Thomas <Thomas.Donovan@vermont.gov>
Sent: Thursday, March 21, 2019 10:33 AM
To: Clark, Charity <Charity.Clark@vermont.gov>; Diamond, Joshua <Joshua.Diamond@vermont.gov>
Cc: Silver, Natalie <Natalie.Silver@vermont.gov>; Spottswood, Eleanor <Eleanor.Spottswood@vermont.gov>
Subject: Re: Draft press release: Title X lawsuit motion

Looks good
Please do sm as well

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Sent: Thursday, March 21, 2019 7:08:54 AM
To: Donovan, Thomas; Diamond, Joshua
Cc: Silver, Natalie; Spottswood, Eleanor
Subject: Draft press release: Title X lawsuit motion

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###

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

From: [Leriche, Lucy Rose](#)
To: [Feeser, Paige](#); [Keauna Gregory](#); [Sullivan, Eileen](#); [aaron.wilder](#); [Gallagher, Meagan](#); [Gitomer, Ellen](#); [McGeary, Meghan](#); [cwhite](#); [Necrason, Adam](#); [Ramos, Rebecca](#); [MacLean, Alex](#); [Oski, Jessica](#); [maggie](#); [jkrowinski@leg.state.vt.us](#); [APUGH@leg.state.vt.us](#); [Maxine Grad](#); [bethany.sousa](#); [Diamond, Joshua](#)
Subject: Constitutional Amendment
Date: Friday, March 22, 2019 11:12:22 AM

The Senate Health and Welfare Committee just voted unanimously in favor of the reproductive liberty Vermont constitutional amendment. From here, it goes on the Senate Action calendar for 5 legislative days before it is voted on by the full Senate.

Lucy

Sent from my iPhone

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

From: [Silver, Natalie](#)
To: agopress@list.vermont.gov
Subject: FOR IMMEDIATE RELEASE: VERMONT MOVES TO PROTECT FUNDING IN TITLE X LAWSUIT
Date: Friday, March 22, 2019 10:38:36 AM
Attachments: [VERMONT MOVES TO PROTECT FUNDING IN TITLE X LAWSUIT .pdf](#)

FOR IMMEDIATE RELEASE: March 22, 2019

CONTACT: Eleanor Spottswood

Assistant Attorney General

802-828-3171

VERMONT MOVES TO PROTECT FUNDING IN TITLE X LAWSUIT
Preliminary Injunction Would Stay New Federal Rule

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

A copy of the motion can be found [here](#).

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

###

Natalie Silver
Community Outreach and Policy Coordinator
Vermont Attorney General's Office
109 State Street, Montpelier Vermont 05609-1001
natalie.silver@vermont.gov



From: [Wilder, Aaron](#)
To: [Leriche, Lucy Rose](#)
Cc: [Feeser, Paige](#); [Keauna Gregory](#); [Sullivan, Eileen](#); [Gallagher, Meagan](#); [Gitomer, Ellen](#); [McGeary, Meghan](#); [cwwhite](#); [Necrason, Adam](#); [Ramos, Rebecca](#); [MacLean, Alex](#); [Oski, Jessica](#); [maggie](#); [jkrowinski@leg.state.vt.us](#); [APUGH@leg.state.vt.us](#); [Maxine Grad](#); [bethany.sousa](#); [Diamond, Joshua](#)
Subject: Re: Constitutional Amendment
Date: Friday, March 22, 2019 11:43:49 AM

Great news! Congrats, Team Vermont!

--
Aaron Wilder (he/his)
Regional Campaigns Manager
Planned Parenthood Federation of America
Organizing, Engagement, and Campaigns
Planned Parenthood Action Fund
Organizing and Electoral Campaigns

On Fri, Mar 22, 2019 at 10:12 AM Leriche, Lucy Rose <[Lucy.Leriche](#)> wrote:

The Senate Health and Welfare Committee just voted unanimously in favor of the reproductive liberty Vermont constitutional amendment. From here, it goes on the Senate Action calendar for 5 legislative days before it is voted on by the full Senate.

Lucy

Sent from my iPhone

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From: [Spottswood, Eleanor](#)
To: [Silver, Natalie](#); [Diamond, Joshua](#); [Clark, Charity](#)
Cc: [Donovan, Thomas](#)
Subject: RE: Title X update
Date: Friday, March 22, 2019 9:38:39 AM
Attachments: [Title X Motion for Preliminary Injunction.pdf](#)

Hi Natalie,

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

Ella

Eleanor L.P. Spottswood
Assistant Attorney General
Vermont Attorney General's Office
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eleanor.spottswood@vermont.gov

-----Original Message-----

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

Hi all,

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

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

Natalie

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Scott.Kaplan@doj.state.or.us

Additional counsel listed on signature page

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON
EUGENE DIVISION

STATE OF OREGON, et al.,

Plaintiffs,

v.

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

Defendants.

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

PLAINTIFF STATES' MOTION FOR
PRELIMINARY INJUNCTION

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

Request for Oral Argument

**EXPEDITED HEARING
REQUESTED**

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LOCAL RULE 7-1 CERTIFICATION

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

MOTION FOR PRELIMINARY INJUNCTION

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

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

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

MEMORANDUM OF LAW

I. Introduction

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

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

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

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

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

II. Background

A. Statutory and regulatory framework

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

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

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

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

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

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

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

Notwithstanding any other provision of this Act, the Secretary of Health and Human Services shall not promulgate any regulation that—

- (1) creates any unreasonable barriers to the ability of individuals to obtain appropriate medical care;
- (2) impedes timely access to health care services;
- (3) interferes with communications regarding a full range of treatment options between the patient and the provider;
- (4) restricts the ability of health care providers to provide full disclosure of all relevant information to patients making health care decisions;
- (5) violates the principles of informed consent and the ethical standards of health care professionals; or
- (6) limits the availability of health care treatment for the full duration of a patient’s medical needs.

[42 U.S.C. § 18114.](#)

B. The challenged rulemaking

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

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

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

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

Moreover, the gag requirement prohibits direct referrals for abortion care: “A Title X project may not perform, promote, refer for, or support abortion as a method of family planning, nor take any other affirmative action to assist a patient to secure such an abortion.” [Id. at 7788-](#)

[Diversity to Office of the Asst. Sec’y for Health, U.S. Dep’t of Health & Human Servs. \(July 10, 2018\) \(“CBD Ltr.”\)](#).

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

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

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

C. Harms to the States

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

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

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

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

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

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

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

III. Argument

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

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

A. Plaintiffs are likely to succeed on the merits.

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

procedural requirements of the APA.

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

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

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

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

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

nondirective.” [2019 Health & Human Servs. Appropriations Act, 132 Stat. at 3070-71.](#)

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

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

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

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

¹¹ [Id. at 14](#).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

¹⁴ [ACOG Ltr. 5-6](#).

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

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

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

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

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

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

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

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

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

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

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

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

²⁰ [AMA Ltr. 5](#).

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

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

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

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

²¹ [CBD Ltr. 2](#); accord [ACOG Ltr. 11](#).

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

²³ [Guttmacher Ltr. 15](#).

planning method or service.” [84 Fed. Reg. at 7787 \(to be codified at 42 C.F.R. § 59.2\)](#)).

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

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

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

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

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

²⁴ See, e.g., [AMA Ltr. 3-4](#); [ACOG Ltr. 8-11](#); [AAFP Ltr. 2](#); [Guttmacher Ltr. 1-3](#).

²⁵ [QFP at 7](#).

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

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

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

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

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

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

b. The gag requirement is arbitrary and capricious.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

c. The physical separation requirements are arbitrary and capricious.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

³⁸ [PPFA Ltr. 32](#).

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

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

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

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

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

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

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

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

⁴¹ [Guttmacher Ltr. 15](#).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

⁴⁴ See Kost Decl. ¶ 69.

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

⁴⁶ Holmes Decl. (VT) ¶¶ 6, 19.

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

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

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

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

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

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

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

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

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

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

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

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

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

2. Irreparable harm to the States' proprietary interests

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

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

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

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

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

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

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

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

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

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

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

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

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

⁶¹ Handler Decl. (NV) ¶ 9.

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

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

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

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

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

D. Scope of provisional relief

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

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

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

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

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

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

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

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

IV. Conclusion

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

DATED: March 21, 2019

Respectfully submitted,

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	Short Title	State	Full Title
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3	Anderson Decl. (HI)	Hawaii	Declaration of Bruce S. Anderson, PH.D. in Support of States' Motion for Preliminary Injunction
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6	Camp Decl. (CO)	Colorado	Declaration of Jody Camp in Support of States' Motion for Preliminary Injunction
7	Charest Decl. (MI)	Michigan	Declaration of Deanna Charest
8	Childs-Roshak Decl. (MA)	Massachusetts	Declaration of Dr. Jennifer Childs-Roshak, MD, MBA
9	Cooke Decl. (MA)	Massachusetts	Declaration of Margret R. Cooke, Esquire
10	Darney Decl.		Declaration of Dr. Blair Darney in Support of States' Motion for Preliminary Injunction
11	David Decl. (NY)	New York	Declaration of Lisa M. David in Support of States' Motion for Preliminary Injunction
12	Drew Decl. (MA)	Massachusetts	Declaration of John J. Drew, MBA
13	Gallagher Decl. (VT)	Vermont	Declaration of Meagan Gallagher in Support of States' Motion for Preliminary Injunction
14	Gillespie Decl. (WI)	Wisconsin	Declaration of Katie Gillespie in Support of States' Motion for Preliminary Injunction
15	Handler Decl. (NV)	Nevada	Declaration of Beth Handler in Support of

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17	Keenan Decl. (CT)	Connecticut	Declaration of Mark Keenan in Support of States’ Motion for Preliminary Injunction
18	Kost Decl.		Declaration of Kathryn Kost in Support of Plaintiffs’ Motion for Preliminary Injunction <i>AMA v Azar</i> , Case No. 6:19 cv 00318-MC
19	Kunkel Decl. (NM)	New Mexico	Declaration of Kathyleen Kunkel in Support of States’ Motion for Preliminary Injunction
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25	Rattay Decl. (DE)	Delaware	Declaration of Karyl T. Rattay, M.D., M.S.
26	Reece Decl. (CO)	Colorado	Declaration of Melanie S. Reece, PH.D. in Support of States’ Motion for Preliminary Injunction
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28	Ross Decl. (MA)	Massachusetts	Declaration of Dr. Gabrielle Ross, PhD, MPH, MIA
29	Schaler-Haynes Decl. (NJ)	New Jersey	Declaration of Magda Schaler-Haynes in Support of States’ Motion for Preliminary Injunction
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32	Tobias Decl. (NY)	New York	Declaration of Lauren Tobias in Support of States' Motion for Preliminary Injunction
33	Walker-Harris Decl. (VA)	Virginia	Declaration of Vanessa Walker Harris, MD in Support of States' Motion for Preliminary Injunction
34	Wilson Decl. (NC)	North Carolina	Declaration of Walker Wilson in Support of States' Motion for Preliminary Injunction
35	Zoll Decl. (MA)	Massachusetts	Declaration of Dr. Cheryl Zoll, PhD

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FOR IMMEDIATE RELEASE:
March 22, 2019

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VERMONT MOVES TO PROTECT FUNDING IN TITLE X LAWSUIT

Preliminary Injunction Would Stay New Federal Rule

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

A copy of the motion can be found [here](#).

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

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

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

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

Funding for all of Vermont’s Title X healthcare centers is jeopardized by the new rule. And, there is not yet any other organization capable of providing Title X services statewide. Vermont has 10 healthcare centers supported by Title X funds, located in Barre, Bennington, Brattleboro, Hyde Park, Rutland, Middlebury, Newport, St. Albans, St. Johnsbury, and White

River Junction. All provide crucial basic health care to underserved populations. Title X has been providing high quality preventative health care to millions of Americans for decades.

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

#

From: [Diamond, Joshua](#)
To: [Leriche, Lucy Rose](#)
Cc: [Spottswood, Eleanor](#)
Subject: RE: Constitutional Amendment
Date: Saturday, March 23, 2019 9:59:00 PM

Lucy,

Thanks for sharing the good news! I know this endeavor is far from over, but it has been such a pleasure to work with you on this project.

Best, Josh

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-----Original Message-----

From: Leriche, Lucy Rose <Lucy.Leriche [REDACTED]>
Sent: Friday, March 22, 2019 11:12 AM
To: Feeser, Paige <Paige.Feeser [REDACTED]>; Keauna Gregory <keauna.gregory [REDACTED]>; Sullivan, Eileen <Eileen.Sullivan [REDACTED]>; aaron.wilder [REDACTED]; Gallagher, Meagan <Meagan.Gallagher [REDACTED]>; Gitomer, Ellen <Ellen.Gitomer [REDACTED]>; McGeary, Meghan <Meghan.McGeary [REDACTED]>; cwhite@aclvt.org; Necrason, Adam < [REDACTED]>; Ramos, Rebecca <rebecca [REDACTED]>; MacLean, Alex < [REDACTED]>; Oski, Jessica < [REDACTED]>; [REDACTED]; jkrowinski@leg.state.vt.us; APUGH@leg.state.vt.us; Maxine Grad <mgrad@leg.state.vt.us>; bethany.sousa [REDACTED]; Diamond, Joshua <Joshua.Diamond@vermont.gov>
Subject: Constitutional Amendment

The Senate Health and Welfare Committee just voted unanimously in favor of the reproductive liberty Vermont constitutional amendment. From here, it goes on the Senate Action calendar for 5 legislative days before it is voted on by the full Senate.

Lucy

Sent from my iPhone

This email and any files transmitted with it are confidential and intended solely for the use of the individual or entity to whom they are addressed. If you have received this email in error please notify the system manager. Please note that any views or opinions presented in this email are solely those of the author and do not necessarily represent

those of the company. Finally, the recipient should check this email and any attachments for the presence of viruses. The company accepts no liability for any damage caused by any virus transmitted by this email.

From: [Leriche, Lucy Rose](#)
To: [Gregory, Keana](#)
Cc: [Wilder, Aaron](#); [Feeser, Paige](#); [Sullivan, Eileen](#); [Gallagher, Meagan](#); [Gitomer, Ellen](#); [McGeary, Meghan](#); [cwwhite](#); [Necrason, Adam](#); [Ramos, Rebecca](#); [MacLean, Alex](#); [Oski, Jessica](#); [maggie](#); [jkrowinski@leg.state.vt.us](#); [APUGH@leg.state.vt.us](#); [Maxine Grad](#); [bethany.sousa](#); [Diamond, Joshua](#)
Subject: Re: Constitutional Amendment
Date: Saturday, March 23, 2019 10:07:18 PM

Likewise!
Lucy

Sent from my iPhone

On Mar 22, 2019, at 11:54 AM, Gregory, Keana <keana.gregory> wrote:

WOW, WOW, WOW! Congratulations :-)

I can't think of better news to send us into the weekend. Job really well done team VT.

On Fri, Mar 22, 2019 at 11:43 AM Wilder, Aaron <aaron.wilder> wrote:

Great news! Congrats, Team Vermont!

--

Aaron Wilder (he/his)
Regional Campaigns Manager
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Organizing, Engagement, and Campaigns
Planned Parenthood Action Fund
Organizing and Electoral Campaigns

On Fri, Mar 22, 2019 at 10:12 AM Leriche, Lucy Rose <Lucy.Leriche> wrote:

The Senate Health and Welfare Committee just voted unanimously in favor of the reproductive liberty Vermont constitutional amendment. From here, it goes on the Senate Action calendar for 5 legislative days before it is voted on by the full Senate.

Lucy

Sent from my iPhone

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--

Keauna Gregory

Regional Campaigns Director

Planned Parenthood Federation of America

Planned Parenthood Action Fund

Organizing, Engagement, and Campaigns



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From: [Katherine Levasseur](#)
To: [Spottswood, Eleanor](#); [Leriche, Lucy Rose](#); [cwhite \[REDACTED\]](#); [jlyal \[REDACTED\]](#); [Diamond, Joshua](#); [Jill Krowinski](#); [Ann Pugh](#); [Ramos, Rebecca](#)
Subject: RE: PR.5 Meeting w/House Leadership
Date: Tuesday, April 2, 2019 4:06:18 PM

Hi All,

Sounds like noon on Friday in the Speaker's Office can work for everyone – thank you for your prompt responses. We will try to break House floor as close to noon as possible.

Katherine

From: Spottswood, Eleanor [mailto:Eleanor.Spottswood@vermont.gov]
Sent: Tuesday, April 02, 2019 1:42 PM
To: Leriche, Lucy Rose; Katherine Levasseur
Cc: [cwhite \[REDACTED\]](#); [jlyal \[REDACTED\]](#); Diamond, Joshua; Jill Krowinski; Ann Pugh
Subject: RE: PR.5 Meeting w/House Leadership

Noon on Friday works for me as well.

Ella

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

From: Leriche, Lucy Rose <[Lucy.Leriche \[REDACTED\]](mailto:Lucy.Leriche [REDACTED])>
Sent: Tuesday, April 2, 2019 10:05 AM
To: Levasseur, Katherine <klevasseur@leg.state.vt.us>
Cc: Spottswood, Eleanor <Eleanor.Spottswood@vermont.gov>; [cwhite \[REDACTED\]](#); [jlyal \[REDACTED\]](#); Diamond, Joshua <Joshua.Diamond@vermont.gov>; Jill Krowinski <JKrowinski@leg.state.vt.us>; Ann Pugh <APUGH@leg.state.vt.us>
Subject: Re: PR.5 Meeting w/House Leadership

Noon on Friday works for me. Thank you Katherine!
Lucy

Sent from my iPhone

On Apr 2, 2019, at 8:16 AM, Katherine Levasseur <KLevasseur@leg.state.vt.us> wrote:

Good Morning,

House Leadership would like to schedule time with this group to check in on PR.5 and discuss next steps. Might Friday during lunch work for this group? While we expect a busy House floor that day, we'll likely break at or around 12pm and could meet in the Speaker's Office then.

Thank you,

-Katherine

Katherine Levasseur

Chief of Staff, Office of the Speaker

115 State St., Montpelier, VT 05633

KLevasseur@leg.state.vt.us



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From: [Diamond, Joshua](#)
To: [Katherine Levasseur](#)
Subject: RE: PR.5 Meeting w/House Leadership
Date: Tuesday, April 2, 2019 8:42:00 AM

Yes, I need to move something around, but can make it.

Please let me know.

Josh

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

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From: Katherine Levasseur <KLevasseur[REDACTED]>
Sent: Tuesday, April 2, 2019 8:17 AM
To: Leriche, Lucy Rose <Lucy.Leriche[REDACTED]>; Spottswood, Eleanor <Eleanor.Spottswood@vermont.gov>; cwhite[REDACTED]; jlyal[REDACTED]; Diamond, Joshua <Joshua.Diamond@vermont.gov>
Cc: Jill Krowinski <JKrowinski@leg.state.vt.us>; Ann Pugh <APUGH@leg.state.vt.us>
Subject: PR.5 Meeting w/House Leadership

Good Morning,

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Thank you,

-Katherine

Katherine Levasseur

Chief of Staff, Office of the Speaker

115 State St., Montpelier, VT 05633

KLevasseur@leg.state.vt.us



From: [Donovan, Thomas](#)
To: [Clark, Charity](#); [Diamond, Joshua](#); [Spottswood, Eleanor](#)
Cc: [Silver, Natalie](#)
Subject: Re: Title X Lawsuit PI Decision.docx
Date: Monday, April 29, 2019 5:25:54 PM

Looks good

Get [Outlook for iOS](#)

From: Clark, Charity
Sent: Monday, April 29, 2019 5:02:01 PM
To: Donovan, Thomas; Diamond, Joshua; Spottswood, Eleanor
Cc: Silver, Natalie
Subject: Title X Lawsuit PI Decision.docx

Hi, T.J.,

I have attached a draft press release regarding the Oregon decision in our Title X lawsuit. As with past Title X press releases, I have reached out to PPNNE to inquire whether they would like to include a quote. I told them we plan to issue our release tomorrow. In the meantime, please let me know if you have any changes and if your quote is ok.

Ella, can you let me know how many days the federal government has to appeal? (And let me know if you have any other edits.)

Thanks,
Charity

FEDERAL JUDGE GRANTS INJUNCTION IN TITLE X LAWSUIT

Judge: Final Rule “Recklessly” Disregards Health Outcomes

MONTPELIER – Vermont Attorney General T.J. Donovan announced that an Oregon court has enjoined the federal government from implementing a new Title X funding regulation. Vermont joined the lawsuit to protect the basic healthcare needs of 10,000 Vermonters. Title X is the only national federal grant program that is dedicated solely to providing comprehensive family planning and preventative health care, such as cancer screenings. In Vermont, the only recipient of Title X funds are the 10 Planned Parenthood health care centers located around the State.

In [the decision](#), Judge Michael J. McShane said, “At best, the Final Rule is a solution in search of a problem. At worst, it is a ham-fisted approach to health policy that recklessly

disregards the health outcomes of women, families, and communities.”

Attorney General Donovan explained, “What this ruling means is that 10,000 Vermonters still have access to affordable healthcare.”

Department of Health Commissioner Mark Levine, MD greeted the judge’s order with cautious hope for the long-term prospects of Title X: “The administration’s efforts to undercut public health care services is misguided and jeopardizes the very health and lives of women in Vermont and across the country. We will continue working to ensure that any future such actions will not diminish access to affordable, quality care in Vermont.”

“Quote from PPNNE,” said Meagan Gallagher, President and CEO of Planned Parenthood of Northern New England.

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

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

decades. Title X funds basic healthcare services, including wellness exams, cervical and breast cancer screenings, birth control, contraception education, and testing for sexually transmitted diseases and HIV.

The court's decisions can be found [here](#). The federal government has days to appeal the ruling.

#

From: [Clark, Charity](#)
To: [Donovan, Thomas](#); [Diamond, Joshua](#); [Spottswood, Eleanor](#)
Cc: [Silver, Natalie](#)
Subject: Title X Lawsuit PI Decision.docx
Date: Monday, April 29, 2019 5:02:04 PM
Attachments: [Title X Lawsuit PI Decision.docx](#)

Hi, T.J.,

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Ella, can you let me know how many days the federal government has to appeal? (And let me know if you have any other edits.)

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Charity

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Department of Health Commissioner Mark Levine, MD greeted the judge’s order with cautious hope for the long-term prospects of Title X: “The administration’s efforts to undercut

public health care services is misguided and jeopardizes the very health and lives of women in Vermont and across the country. We will continue working to ensure that any future such actions will not diminish access to affordable, quality care in Vermont.”

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The court’s decisions can be found [here](#). The federal government has [\[x\]](#) days to appeal the ruling.


###

From: [Silver, Natalie](#)
To: [Clark, Charity](#); [Donovan, Thomas](#); [Diamond, Joshua](#); [Spottswood, Eleanor](#); [Battles, Benjamin](#)
Subject: Final press release
Date: Tuesday, April 30, 2019 9:56:14 AM
Attachments: [FEDERAL JUDGE GRANTS INJUNCTION IN TITLE X LAWSUIT.docx](#)

Attached is the final draft. I will plan to put this out at 10:20 unless I hear otherwise. I have incorporated the quote from PPNNE.

I will tweet and post on social media once it is released.

Natalie

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


From: [Clark, Charity](#)
To: [Diamond, Joshua](#); [Spottswood, Eleanor](#); [Donovan, Thomas](#)
Subject: FW: Title X comments from the public to date?
Date: Wednesday, July 25, 2018 12:24:21 PM

FYI.

-----Original Message-----

From: Sullivan, Eileen [<mailto:Eileen.Sullivan>]]
Sent: Wednesday, July 25, 2018 12:16 PM
To: Wemple, Doug <Doug.Wemple@partner.vermont.gov>
Cc: Clark, Charity <Charity.Clark@vermont.gov>
Subject: Re: Title X comments from the public to date?

Hi Doug! 860 clicks is amazing! Thank you, thank you!!
Eileen

Sent from my iPhone

On Jul 25, 2018, at 11:55 AM, Wemple, Doug
<Doug.Wemple@partner.vermont.gov<<mailto:Doug.Wemple@partner.vermont.gov>>> wrote:

Hi Eileen,

Per our IT department, 860 clicks have been made to the page on our website!

I just looked on the comment page and almost 100,000 comments have been submitted.

Thanks!

Doug

Doug Wemple
Executive Assistant
Vermont Attorney General's Office
109 State Street - Montpelier, VT
[REDACTED]

From: Sullivan, Eileen [<mailto:Eileen.Sullivan>]]
Sent: Wednesday, July 25, 2018 11:13 AM
To: Clark, Charity <Charity.Clark@vermont.gov<<mailto:Charity.Clark@vermont.gov>>>; Wemple, Doug
<Doug.Wemple@partner.vermont.gov<<mailto:Doug.Wemple@partner.vermont.gov>>>
Subject: Title X comments from the public to date?

Hello Charity and Doug!

I hope you're both doing well! I'm checking in to see if you know how many people have visited the AG's site to submit their comments about Title X?

This is NOT for publication, just for me to get a sense of how many people in Vermont have commented to date. On our end, it's just over 1,200 people.

Many thanks!

Eileen

Eileen Sullivan (She/Her/Hers)
Communications Director, Vermont
Planned Parenthood of Northern New England

[REDACTED]
Colchester, Vermont 05446

[REDACTED]
www.ppnne.org<<http://www.ppnne.org/>> | Eileen.Sullivan@ppnne.org<<mailto:Eileen.Sullivan@ppnne.org>>



Bob Ferguson
ATTORNEY GENERAL OF WASHINGTON

Administration Division
PO Box 40100 • Olympia, WA 98504-0100 • [REDACTED]

July 31, 2018

VIA FEDERAL eRULEMAKING PORTAL

Secretary Alex M. Azar II
Assistant Secretary ADM Brett P. Giroir, M.D.
Deputy Assistant Secretary Diane Foley, M.D., FAAP
Attention: Family Planning
U.S. Department of Health and Human Services
Hubert H. Humphrey Building, Room 716G
200 Independence Avenue SW
Washington, DC 20201

RE: HHS-OS-2018-0008, Comments on Proposed Rule: *Compliance With Statutory Program Integrity Requirements*, Docket No.: HHS-OS-2018-0008

Dear Secretary Azar, Assistant Secretary Giroir, and Deputy Assistant Secretary Foley:

The undersigned, Attorneys General for the States of Washington, Oregon, and Vermont and the Commonwealth of Massachusetts, respectfully urge the Department of Health and Human Services (the Department) to withdraw its Proposed Rule: *Compliance with Statutory Program Integrity Requirements*, 83 Fed. Reg. 25,502 (June 1, 2018). We have grave concerns with the legality of the proposed rule, and do not believe it would survive judicial review in its current form.

The Title X family planning program was created to provide access to high-quality family planning and related preventive health care for low-income and underserved individuals. The proposed rule has a host of legal flaws. In some states, if implemented, it will eliminate from the Title X program many Title X providers and leave thousands of residents without reasonable options for critical family planning services. In other states, it will frustrate the ability of providers to deliver high-quality and complete care to their patients and will undermine the efficacy of the network as a whole. The proposed rule thus frustrates rather than promotes the purposes of Title X. The proposed rule shifts the burden and costs to the states, including myriad reproductive health services related to unintended pregnancies, treatment of sexually transmitted infections (STIs), cervical and breast cancer screening and treatment, and other public health

Secretary Alex M. Azar II
Assistant Secretary ADM Brett P. Giroir, M.D.
Deputy Assistant Secretary Diane Foley, M.D., FAAP
July 31, 2018
Page 2

services that the Title X program currently covers. The public health impact will fall the heaviest on our States' most vulnerable populations – including low-income and rural women and families, immigrants and people of color that the program is intended to help.

Further, the proposed rule requires directive counseling, which is in violation of a federal statute governing Title X.¹ It illegally injects the government into the Title X medical examination room, and it violates the constitutional rights of providers and patients under the First and Fifth Amendments. The proposed rule also violates the Department's current statutory interpretation of "acceptable and effective family planning methods and services" without mentioning the current interpretation or the evidence justifying it. Various parts of the rule are unsupported by any evidence and are thus arbitrary and capricious. Finally, the proposed rule violates Executive Orders 12866 and 13562.

A. Relevant Background of Title X to the Public Health Service Act, 42 U.S.C. §§ 300-300a-6

The Family Planning and Services Population Research Act of 1970, which added Title X to the Public Health Service Act, authorizes the Secretary of Health and Human Services:

to make grants to and enter into contracts with public or nonprofit private entities to assist in the establishment and operation of voluntary family planning projects which shall offer a broad range of acceptable and effective family planning methods and services

42 U.S.C. § 300(a).

Title X projects serve an estimated four million women annually.² In 2015, 64 percent of U.S. counties had at least one safety-net family planning center supported by Title X, and 90 percent of women in need of publicly funded family planning care lived in those counties.³ Title X clients are among the nation's most vulnerable populations: two-thirds have incomes at or below the Federal Poverty Level (FPL)(\$20,090 for a family of three in 2015), nearly half are uninsured—even after implementation of the Affordable Care Act's (ACA) major insurance

¹ Public Law No. 115-141, § 118, <https://www.congress.gov/bill/115th-congress/house-bill/1625/text>.

² Fowler CI et al., Family Planning Annual Report: 2015 National Summary, Research Triangle Park, NC: RTI International, 2016, <http://www.hhs.gov/opa/sites/default/files/title-x-fpar-2015.pdf> (last accessed 7/17/18).

³ Frost JJ and Zolna MR, Response to inquiry concerning the availability of publicly funded contraceptive care to U.S. women, memo to U.S. Senator Patty Murray, Senate Health, Education, Labor and Pensions Committee, New York: Guttmacher Institute, May 3, 2017, <https://www.guttmacher.org/article/2017/05/guttmacher-murray-memo-2017> (last accessed 7/17/18).

Secretary Alex M. Azar II
Assistant Secretary ADM Brett P. Giroir, M.D.
Deputy Assistant Secretary Diane Foley, M.D., FAAP
July 31, 2018
Page 3

expansions—and another 35 percent have coverage through Medicaid and other public programs.⁴

In 2015, the contraceptive care delivered by Title X–funded providers helped women avoid 822,000 unintended pregnancies, which would have resulted in 387,000 unplanned births and 278,000 abortions.⁵ Without the contraceptive care provided by these health centers, the U.S. rates of unintended pregnancy and abortion would have been 31 percent higher, and the teen unintended pregnancy rate would have been 44 percent higher.⁶ Title X is a vital program, especially for low-income women and teens as:

access to and consistent use of the most effective contraceptive methods are not enjoyed equally by all U.S. women. Disparities in contraceptive use are a major reason why half of U.S. pregnancies—3.2 million each year—are unplanned. . . . [U]nplanned and teen pregnancies occur disproportionately to poor women (those with incomes below the federal poverty level), whose unplanned pregnancy rate is five times that of higher income women.⁷

Concern for low-income women led President Nixon to push for national family planning assistance in the 1960s, stating that “unwanted or untimely childbearing is one of the several forces which are driving many families into poverty or keeping them in that condition.”⁸ That remains a driving concern today. Studies have shown that access to family planning assistance makes it more likely that a teen will graduate high school, that a woman will achieve her educational and career goals, and that a woman will earn more money (positively impacting not only her life, but the lives of her family).⁹ Access to family planning also leads to healthier

⁴ Fowler CI et al., *Family Planning Annual Report: 2015 National Summary*, Research Triangle Park, NC: RTI International, 2016, <http://www.hhs.gov/opa/sites/default/files/title-x-fpar-2015.pdf> (last accessed 7/17/18).

⁵ Frost JJ, et al., *Publicly Funded Contraceptive Services at U.S. Clinics, 2015*, New York: Guttmacher Institute, 2017, <https://www.guttmacher.org/report/publicly-funded-contraceptive-services-us-clinics-2015> (last accessed 7/17/18).

⁶ Hasstedt K, *Why We Cannot Afford to Undercut the Title X National Family Planning Program*, Guttmacher Institute, Jan. 30, 2017, <https://www.guttmacher.org/gpr/2017/01/why-we-cannot-afford-undercut-title-x-national-family-planning-program> (last accessed 7/17/18).

⁷ Adam Sonfield, *What Women Already Know: Documenting the Social and Economic Benefits of Family Planning*, Guttmacher Institute (Mar. 2013), available at <https://www.guttmacher.org/gpr/2013/03/what-women-already-know-documenting-social-and-economic-benefits-family-planning>.

⁸ Special Message to the Congress on Problems of Population Growth (Jul. 18, 1969), available at <http://www.presidency.ucsb.edu/ws/?pid=2132>.

⁹ Adam Sonfield et al., *The Social and Economic Benefits of Women’s Ability To Determine Whether and When to Have Children*, Guttmacher Institute, available at <https://www.guttmacher.org/report/social-and-economic-benefits-womens-ability-determine-whether-and-when-have-children>, and *Staff of J. Economic Comm., 114th Cong. The Economic Benefits of Access to Family Planning*, available at

Secretary Alex M. Azar II
Assistant Secretary ADM Brett P. Giroir, M.D.
Deputy Assistant Secretary Diane Foley, M.D., FAAP
July 31, 2018
Page 4

relationships, better health outcomes, and better parenting.¹⁰ Title X is critical in assuring that teens and low-income women can achieve these same positive outcomes.

For many women, a visit to a family planning provider is about far more than birth control. During a visit for contraceptive services at a Title X site, women commonly receive other preventive sexual and reproductive health services, including preconception health care and counseling, STI testing and treatment, human papillomavirus (HPV) vaccinations, cancer screening, Pap tests for early detection of cervical cancer, and referrals for mammograms. Title X providers also screen for a host of other potential health issues, such as high blood pressure, diabetes, and depression, connecting clients to further care when needed.¹¹ For four in 10 women who obtain their contraceptive care from a safety-net family planning center that focuses on reproductive health, that provider is their only source of care.

Title X improves the health of our States' residents beyond helping them plan for their pregnancies. In 2010, the services provided within the Title X network prevented 87,000 preterm or low-weight births, 63,000 STIs and 2,000 cases of cervical cancer.¹²

B. Title X Is a Critical Program That Provides High-Quality Care To Thousands of Residents of Washington, Massachusetts, Oregon, and Vermont Every Year.

1. Washington

The Washington State Department of Health (DOH) is the sole grantee of Title X funds in Washington State and runs the program. Washington's current grant project period is one year and six months and ends August 31, 2018.

Washington's Title X expenditure for 2017 was approximately \$13 million. The state-funded amount was approximately \$9 million, and the federally funded amount was approximately \$4 million.

https://www.jec.senate.gov/public/_cache/files/d0a67745-74ff-439c-a75a-aacc47e0abc1/jec-fact-sheet---economic-benefits-of-access-to-family-planning.pdf.

¹⁰ *Id.*

¹¹ Frost JJ, Gold RB and Bucek A, Specialized family planning clinics in the United States: why women choose them and their role in meeting women's health care needs, *Women's Health Issues*, 2012, 22(6):e519–e525, [http://www.whijournal.com/article/S1049-3867\(12\)00073-4/pdf](http://www.whijournal.com/article/S1049-3867(12)00073-4/pdf) (last accessed 7/17/18).

¹² Sonfield A, Beyond preventing unplanned pregnancy: the broader benefits of publicly funded family planning services, *Guttmacher Policy Review*, 2014, 17(4):2–6, <http://www.guttmacher.org/gpr/2014/12/beyond-preventing-unplanned-pregnancy-broader-benefits-publicly-funded-family-planning> (last accessed 7/17/18). 2010 is the most recent year for which these data are available.

Secretary Alex M. Azar II
Assistant Secretary ADM Brett P. Giroir, M.D.
Deputy Assistant Secretary Diane Foley, M.D., FAAP
July 31, 2018
Page 5

Washington served 91,284 patients through Title X in 2017, with 128,296 patient visits. In 2017, 57 percent of Washington's Title X-funded patients were at or below the FPL, and 81 percent had incomes below 200 percent of the FPL. Sixteen percent of Title X clients were women of color. Nine percent of patients were under the age of 18. The DOH projects that Title X services prevented 16,233 unintended pregnancies in 2017; the resulting cost savings for Title X services (including STI, HIV, HPV, and Pap tests) was \$113,434,910.

DOH distributes Washington's Title X funds by an approved allocation process. DOH broadly distributes information about an upcoming competition for Title X funds toward the end of the project period. It conducts a formal Request for Proposals process to select providers. After the due date for proposals is past, they are reviewed by objective reviewers and scored on criteria that includes choosing the entities that can best utilize the available funding to carry out Title X requirements.

In addition to Title X funds, Washington separately funds contracted Title X health care providers for Title X-allowable services. Further, some Medicaid providers in Washington offer Title X-allowable services but are not Title X projects. The funding from Title X and Medicaid is separate and distinct. However, if an entity receives Title X funding, all clients that have received services according to Title X guidelines are counted as Title X clients in the data system regardless of their funding source.

There are 12 Title X sub-grantee agencies with 70 clinic sites across Washington State. Five of the 12 agencies that receive Title X funds in Washington perform abortions outside of the Title X project. There are several counties in Washington that only have one Title X provider, including Clallam, Grays Harbor, Pacific, Kitsap, Wahkiakum, Lewis, Thurston, Mason, Jefferson, Whatcom, Skagit, Clark, Skamania, Kittitas, Chelan, Ferry, Pend Oreille, Whitman, and Walla Walla. All sites have physicians on staff as medical directors, but nurse practitioners primarily provide care to patients. All sites have nurse practitioners accessible during all business hours.

Washington subjects Title X providers to numerous contractual requirements. These include: (1) they must be non-profit agencies; (2) they must be able to meet reporting requirements (including the ability to extract data from their Electronic Medical Records system to report to the contracted data vendor); (3) they must follow all regulations; (4) they must be able to separate abortion activities from Title X funding; and (5) they must have qualified personnel and licensed providers.

2. *Massachusetts*

Approximately \$6,155,000 in Title X funding flows into Massachusetts annually. These funds support, either directly or indirectly, 90 family planning providers. In 2016 alone, Title X

providers in Massachusetts served 66,072 people.¹³ Data from fiscal year 2017 shows that 88 percent of all Title X visits were made by female patients, 50 percent of all patients were between 18 and 29 years old, and 88 percent of all patients were at or below 200 percent of the FPL.

Title X providers in Massachusetts offer a wide range of services and care, including pregnancy testing and options counseling; contraceptive services and supplies; pelvic exams; screenings for cervical and breast cancer; screenings for high blood pressure, anemia, and diabetes; screenings and treatment for STIs; infertility services; health education; and referrals for other health and social services. These services not only have a profound and positive impact on patients' lives, but also save Massachusetts and the federal government money. In fact, according to one estimate, Title X services save Massachusetts and the federal government approximately \$140 million per year in Massachusetts alone.¹⁴ Beyond the significant fiscal impact, the services provided have a real and profound impact on the lives of Massachusetts women and their families. In 2014, Title X-funded centers met 15 percent of all contraceptive needs in Massachusetts¹⁵ and helped avert 13,600 unintended pregnancies.¹⁶

Title X funds are crucial and must be spent wisely. Programs that currently receive these funds do so in a culturally competent and welcoming manner. They offer an array of services. They understand the health needs of their patients. The proposed rule does not advance Title X's purpose and undermines the ability of its recipients to do the important work that they do every day on behalf of some of Massachusetts' most vulnerable patients.

3. *Oregon*

The state of Oregon has been the umbrella grantee for Title X services throughout Oregon since 1970. The Oregon Health Authority's Reproductive Health Program administers the state's Title X grant. In fiscal year 2018, Oregon's Title X award was \$3,076,000. This funding provides direct support to a network of 35 agencies with 106 clinic sites and is comprised of local public

¹³ *Title X in Massachusetts: Improving Public Health and Saving Taxpayer Dollars*, National Family Planning & Reproductive Health Association, at 1 (Dec. 2017), available at <https://www.nationalfamilyplanning.org/file/state-snapshots-2017/Massachusetts.pdf>.

¹⁴ *Contraception, Cost Savings at Title X-Funded Centers: From Contraceptive Services*, Guttmacher Institute Data Center, <https://data.guttmacher.org/states/table?state=MA&dataset=data&topics=96> (last visited July 30, 2018).

¹⁵ *Contraception, Title X-Funded Centers: Percentage of Need Met By Title X-Funded Centers*, Guttmacher Institute Data Center, <https://data.guttmacher.org/states/table?state=MA&dataset=data&topics=257> (last visited July 30, 2018).

¹⁶ *Contraception, Outcomes Averted By Title X-Funded Centers: From Contraceptive Services*, Guttmacher Institute Data Center, <https://data.guttmacher.org/states/table?state=MA&topics=120&dataset=data> (last visited July 30, 2018).

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health authorities, federally qualified health centers (FQHCs), Planned Parenthood clinics, rural health centers, and other community health centers. Almost every county has at least one Title X Program provider, often with multiple clinic sites per provider.

A total of 37,012 unduplicated clients were served by Title X sub-recipient clinics in 2017. Of these clients, 15,225 (41 percent) were uninsured, meaning they have limited options for accessing affordable reproductive health services.

Oregon's Title X clinics provide essential, high-quality preventive reproductive health services to underserved individuals. Data from 2017 show that of the 37,012 clients served by Oregon's Title X clinics:

- 93 percent were female;
- 47 percent were females between the ages of 18 and 29;
- 95 percent were at or below 250 percent of the FPL and 66 percent were at or below 100 percent of the FPL; and
- 60,647 clinic visits were provided, including:
 - 6,511 cervical cancer screenings
 - 49,366 STI screenings
 - 12,649 annual/well-woman exams

Further evidence of the high quality of care in Oregon's Title X clinics comes from clients themselves. According to Oregon's 2015 Reproductive Health Client Satisfaction Survey, 99 percent of clients reported the following: that medical staff respected their values, they trust the medical staff to help them make decisions, and they would recommend the clinic to friends or family.

In addition to offering high quality care, Oregon's Title X program is also cost effective. In 2017, over 6,000 unintended pregnancies were averted through the provision of effective contraceptive methods and high-quality counseling services in Oregon's Title X clinics. Using a conservative estimate of \$16,000 for an average delivery and the first year of infant health care under Oregon's Medicaid program, even if less than half of these 6,000 unintended pregnancies resulted in births, the savings to the state were in excess of \$40 million in taxpayer funds in Oregon alone in 2017.

4. *Vermont*

The Vermont Department of Health, the sole grantee for Vermont, has relied on Title X grant funding for decades. The Vermont Department of Health receives about \$775,000 annually from Title X, of which the majority is passed on directly to the sole sub-grantee, Planned Parenthood of Northern New England (PPNNE). With these funds, PPNNE provides reproductive health

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services at 10 different clinics located throughout Vermont. These clinics serve a largely rural population—none are located in Chittenden County, the most populous county of Vermont.

Through these clinics, Title X provided family planning services to 9,808 Vermonters in 2016. Of these, 44 percent reported income of less than 100 percent of the FPL, and 76 percent had income less than 250 percent of the FPL. Vermont’s Title X patients were 11 percent male, and 20 percent were under age 20. And 22 percent had no health insurance.¹⁷

Services provided by Title X funds in Vermont include “a broad range of family planning and related preventive health services for Vermont women, men, and their partners.”¹⁸ As required in 42 C.F.R. Part 59, all pregnancy counseling at Title X clinics in Vermont is nondirective.¹⁹ In addition, Title X funds provided “patient education and counseling; breast and pelvic examinations; breast and cervical cancer screening according to nationally recognized standards of care; STI and Human Immunodeficiency Virus (HIV) prevention education, counseling, testing and referral; and pregnancy diagnosis and counseling.”²⁰

Title X funding has been an essential part of the success that Vermont has seen in reproductive health outcomes over time. For example, while the current Title X rules and program have been in place, the number of teen pregnancies in Vermont has steadily declined.²¹ And, the number of teen abortions occurring in Vermont has steadily declined.²² This is consistent with the overall drop in abortion rates in Vermont and nationwide.²³ Title X-specific analyses show that these trends over time are at least partly attributable to Title X funding. One estimate shows that approximately 1900 unintended pregnancies were averted by Title X-funded clinics in Vermont

¹⁷ Office of Population Affairs, Title X Family Planning Annual Report: Vermont (April 2017) (on file with Vermont Attorney General’s Office).

¹⁸ Office of Population Affairs, Program Review: Title X Family Planning Project: Vermont Department of Health, 1, 33 (May 2017) (on file with Vermont Attorney General’s Office).

¹⁹ *Id.* at 34-35.

²⁰ *Id.* at 1.

²¹ Kathryn Kost et al., *Pregnancies, Births and Abortions Among Adolescents and Young Women in the United States, 2013: National and State Trends by Age, Race and Ethnicity*, 36 (Guttmacher Inst. Aug. 2017) (data going back to 1988), available at https://www.guttmacher.org/sites/default/files/report_pdf/us-adolescent-pregnancy-trends-2013.pdf

²² *Id.* at 40.

²³ Vt. Dept. of Health, “Fig. 11: Vermont and U.S. Abortion Ratios 1980 – 2016,” *2016 Vital Statistics: 132nd Report Relating to the Registry and Return of Births, Deaths, Marriages, Divorces, and Dissolutions*, 129 (Agency of Human Servs. 2016) (data going back to 1980), available at <http://www.healthvermont.gov/sites/default/files/documents/pdf/Vital%20Statistics%20Bulletin%202016.pdf>

in 2014.²⁴ Of those, 400 would have been teen pregnancies.²⁵ In addition, Title X's successes have not been limited to pregnancy outcomes. Although Title X is not the only public health program addressing these issues, cervical cancer rates²⁶ and new HIV/AIDS diagnoses²⁷ in Vermont have been generally declining as well. In 2016, Title X clinics screened 1,344 clients for cervical cancer and 2,834 clients for HIV.²⁸

The successes of the Title X program translate from public health to the public fisc. By one estimate, Title X services in Vermont saved the state and federal governments \$7,868,000 in 2010.²⁹ Of that money, the majority (\$7,520,000) was saved in annual maternity and birth-related costs as a result of contraceptive services.³⁰ An additional \$215,000 was saved in annual miscarriage and ectopic pregnancy costs.³¹ Tens of thousands of dollars in public health costs were saved from STI and cancer screening at Title X clinics.³²

C. The Fatal Deficiencies in the Proposed Rule

²⁴ *Number of Unintended Pregnancies Averted by Title X-Funded Centers*, Data Ctr., Guttmacher Inst., <https://data.guttmacher.org/states/table?state=VT&topics=114> (last visited July 30, 2018).

²⁵ *Number of Unintended Pregnancies Averted to Clients Aged <20 by Title X-Funded Centers*, Data Ctr., Guttmacher Inst., <https://data.guttmacher.org/states/table?state=VT&topics=114> (last visited July 30, 2018).

²⁶ Vermont Cancer Registry, *HPV Associated Cancers—Data Brief*, 1 (Vt. Dept. of Health May 2018) (data going back to 1994), available at http://www.healthvermont.gov/sites/default/files/documents/pdf/stat_cancer HPV_Assoc_Ca_Data_Brief.pdf.

²⁷ Decrease seen since the height of the epidemic, and the introduction of the first effective treatments, in the early 1990s. Vt. Dept. of Health, "History of the HIV/AIDS epidemic, Vermont residents at diagnoses 1984 – 2014," *Vermont HIV/AIDS Annual Report*, 2 (May 2015), available at http://www.healthvermont.gov/sites/default/files/documents/pdf/ID_HIV_surveillance_Vt%20HIV%20Annual%20Rep%202014.pdf; see also Vt. Dept. of Health, *2016 Vermont HIV Annual Report*, 2-3 (May 2018), available at http://www.healthvermont.gov/sites/default/files/documents/pdf/ID_HIV_VermontHIVAnnualReport2016.pdf.

²⁸ Office of Population Affairs, *Title X Family Planning Annual Report: Vermont*, 10, 13 (April 2017) (on file with Vermont Attorney General's Office).

²⁹ *Total Annual Gross Savings from Services Provided During Family Planning Visits at Title X-Funded Centers*, Guttmacher Institute Data Center, <https://data.guttmacher.org/states/table?state=VT&topics=98> (last visited July 30, 2018).

³⁰ *Annual Maternity and Birth Related Costs (Through 60 Months) Saved from Contraceptive Services*, Guttmacher Institute Data Center, <https://data.guttmacher.org/states/table?state=VT&topics=96> (last visited July 30, 2018).

³¹ *Annual Miscarriage and Ectopic Pregnancy Costs Saved from Contraceptive Services*, Guttmacher Institute Data Center, <https://data.guttmacher.org/states/table?state=VT&topics=96> (last visited July 30, 2018).

³² *Annual Costs Saved From Chlamydia, Gonorrhea and HIV Testing at Title X-Funded Centers; Annual Costs Saved from Pap and HPV Testing at Title X-Funded Centers*, Guttmacher Institute Data Center, <https://data.guttmacher.org/states/table?state=VT&topics=97> (last visited July 30, 2018).

1. *The proposed rule requires directive counseling in violation of the Consolidated Appropriations Act, 2018.*

In numerous ways, the proposed rule imposes unethical requirements to provide directive, mandatory patient counseling. This is contrary to the Consolidated Appropriations Act, 2018, which states that, with respect to the amounts appropriated “for carrying out the program under title X of the PHS Act to provide for voluntary family planning projects, . . . all pregnancy counseling shall be nondirective.”³³ While Congress is free to “make a value judgment favoring childbirth over abortion,”³⁴ once Congress makes a policy choice executive agencies are not at liberty to ignore it. Here Congress has required that counseling of patients using Title X funds may not be slanted, and HHS may not direct Title X providers to disregard Congress’s directive.

The proposed rule requires Title X funds be used for directive counseling in several ways. First, the rule prohibits Title X providers from referring a patient who discovers she is pregnant to abortion providers, except in the narrow circumstances where the patient “clearly states” that she has “already decided” she will have an abortion.³⁵ Of course, such a “clear decision” for someone who learned minutes earlier that she was pregnant would be unlikely, meaning the vast majority of patients will be referred away from abortion providers. Second, providers are prohibited from even “present[ing]” the option of abortion. Third, providers must refer patients for “appropriate prenatal and/or social services (such as prenatal care and delivery, infant care, foster care, or adoption)” whether or not the patient desires such referrals.³⁶ Fourth, providers are required to assist in setting up these referral appointments—unless the patient wants an abortion.³⁷ In short, if a pregnant patient says that she wants advice on birth or adoption options the provider is unencumbered, but if she wants to discuss the option of abortion, the provider may not assist her. Only if the patient states she wants an abortion may the provider offer her a list that includes abortion providers, but that list must obfuscate which clinics offer what she seeks and which do not.³⁸

These provisions are intended to, and do, slant Title X counseling against termination and in favor of childbirth, in violation of Congress’s directive otherwise. Indeed, the text of the proposed rule says nothing about nondirective counseling, instead eliminating the former

³³ Pub. L. No. 115-141, div. H, tit. II, 132 Stat. 348, 716 (2018), <https://www.congress.gov/bill/115th-congress/house-bill/1625/text>.

³⁴ *Rust v. Sullivan*, 500 U.S. 173, 192 (1991) (quoting *Maher v. Roe*, 432 U.S. 464, 474 (1977)).

³⁵ 83 Fed. Reg. 25,531 (proposed § 59.14(a), (c)).

³⁶ 83 Fed. Reg. 25,531 (proposed § 59.14(b)).

³⁷ *Id.*

³⁸ 83 Fed. Reg. 25,531 (proposed § 59.14(c)).

requirement to provide “neutral, factual information and nondirective counseling . . .” 42 C.F.R. 59.5(a)(5)(ii). Through the repeal of the nondirective counseling requirement and the addition of severe restrictions on referrals, the proposed rule seeks to replace what has been a patient-guided, provider-informed approach to care with a system that jeopardizes both providers’ ethical obligations and patients’ health.

2. *The proposed rule illegally injects the government into the provider-patient relationship.*

We are deeply troubled by the Department’s proposed government interference in the relationship between a medical provider and a patient, and not only because it violates a federal law. The proposed rule purports to tell providers paid with Title X funds what they can and cannot say when a patient discovers she is pregnant. The government should have no role telling a health care provider what to say to a patient. Here, the proposed rule prohibits nurses and nurse practitioners, who see the majority of Title X patients, from mentioning abortion, and doctors may do so only in the very limited circumstances permitted in proposed section 59.14(c) and (d).³⁹ Under the proposed rule, Title X providers could not simply take off their “Title X hats” and offer the same nondirective advice that they currently offer because the rule would require Title X providers to comply with Title X requirements, whether or not Title X funds a particular patient’s service.

As America’s women’s health providers have jointly stated in opposing the proposed rule, “[p]oliticians have no role in picking and choosing among qualified providers.”⁴⁰ This government script for providers when addressing their Title X patients violates the American Medical Association’s Code of Ethics, which states that “withholding information without the patients’ knowledge or consent is ethically unacceptable.”⁴¹ Similarly, the Code of Ethics for Nursing requires nurses to give complete – not slanted – information to patients.⁴²

³⁹ 83 Fed. Reg. 25,531.

⁴⁰ “America’s Women’s Health Providers Oppose Efforts to Exclude Qualified Providers from Federally-Funded Programs,” Join Statement of the American College of Obstetricians and Gynecologists, the American Academy of Pediatrics, the American College of Nurse-Midwives, the American College of Physicians, the Association for Physician Assistants in Obstetrics and Gynecology, the National Association of Nurse Practitioners in Women’s Health, Nurses for Sexual and Reproductive Health, and the Society for Adolescent Health and Medicine (May 23, 2018), <https://www.acog.org/About-ACOG/News-Room/Statements/2018/Health-Providers-Oppose-Efforts-to-Exclude-Qualified-Providers-from-Federally-Funded-Programs> (last accessed on July 17, 2018).

⁴¹ American Medical Association, Code of Medicaid Ethics Opinion 2.1.3, Withholding Information from Patients, available at <https://www.ama-assn.org/delivering-care/withholding-information-patients> (last accessed on July 17, 2018).

⁴² Code of Ethics for Nursing, Provision 1.4, www.bc.edu/content/dam/files/schools/son/pdf2/ANA_code_of_ethics.pdf (last accessed on July 17, 2018) (patients must be given “accurate, complete, and understandable information in a manner that facilitates an informed decision”).

Further, the proposed rule is arbitrary and capricious because it only permits “a medical doctor” to provide the very limited referral for abortion the proposed rule allows.⁴³ In our States, this severely restricts the nondirective counseling Title X patients would receive. In Oregon, for example, over 93 percent of visits to Title X clinics in 2017 were conducted by non-physician caregivers such as nurse practitioners and physician assistants. The preamble to the proposed rule itself recognizes that only 22 percent of clinical service FTEs delivered to Title X patients were provided by medical doctors.⁴⁴ As a result, the proposed rule would prevent 78 percent of the medical professionals who see patients at Title X providers from providing even the limited and intentionally obfuscated abortion referral it claims to authorize. The Department does not explain why prohibiting such a large percentage of Title X caregivers from providing any kind of counseling on the legally available option of abortion comports with the statutory requirement that Title X funds be used only for nondirective counseling, and we request such an explanation.

The proposed rule’s roadblocks for a patient seeking complete and accurate health information also are arbitrary and capricious. First, the patient must already know that she wants an abortion. This precludes the patient from engaging in an important conversation with her health care provider about the pros and cons of abortion. The Department fails to address the fact that many women do not ask directly about abortions immediately upon learning they are pregnant, and instead consider it as one of many medical options. We ask that the Department explain how its proposed restrictions can be reconciled with this experience of clinicians. Second, only a doctor can give the patient the referral list. This appears designed to undermine the provision of healthcare. Moreover, it is not clear what, if any, counseling a physician is entitled to provide to a woman who has decided to have an abortion given that the proposed rules prohibit providers from “promot[ing]” and “support[ing]” abortion as a method of family planning. Limiting the medical information that physicians can offer their patients unreasonably intrudes upon the physician-patient relationship and undermines ethical standards of care.

The preamble to the proposed rule relies on “Federal conscience statutes” to justify its diverging from the requirement in the Consolidated Appropriations Act that Title X-funded counseling must be nondirective.⁴⁵ This reliance is misplaced. The proposed rule does not merely create an exception to nondirective counseling for conscience objectors. Instead, it allows conscience objectors to dictate what all Title X providers may say. Purportedly to uphold conscience protections, the proposed rule prohibits nearly 80 percent of the medical professionals who treat patients at Title X clinics from saying anything about abortion, regardless of their religious or moral beliefs. Likewise, it severely restricts the information medical doctors can impart, again regardless of their religious or moral convictions. In doing so, it makes no accommodation for providers who have religious or moral convictions contrary to the proposed rule, for instance

⁴³ 83 Fed. Reg. 25,531 (§ 59.14(a); *see also*, § 59.14(c)).

⁴⁴ 83 Fed. Reg. 25,523.

⁴⁵ 83 Fed. Reg. 25,506-507.

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those whose convictions align more closely with professional ethics rules. These prohibitions go substantially further than necessary to vindicate a select number of providers' conscience objections, and we ask the Department to better explain its reasoning.

3. *The proposed rule is contrary to, and ignores, the Department's authoritative recommendations for evidence-based "family planning methods and services" without reason or explanation.*

A federal agency cannot simply ignore its prior statutory interpretations. This is especially true where, as here, the prior interpretation is based on factual findings or cited evidence, and the new interpretation fails to consider that evidence. "[T]he consistency of an agency's position is a factor in assessing the weight that position is due." *Good Samaritan Hospital v. Shalala*, 508 U.S. 402, 417 (1993). "To be sure, the requirement that an agency provide reasoned explanation for its action would ordinarily demand that it display awareness that it is changing position." *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).

In 2014, the Department's Centers for Disease Control and Prevention (CDC) issued a Recommendations and Report entitled "Providing Quality Family Planning Services: Recommendations of CDC and the U.S. Office of Population Affairs."⁴⁶ The report provided the agency's view on what are "acceptable and effective family planning methods and services."⁴⁷ The CDC stated:

This report provides recommendations developed collaboratively by CDC and the Office of Population Affairs (OPA) of the U.S. Department of Health and Human Services (HHS). The recommendations outline how to provide quality family planning services, which include contraceptive services, pregnancy testing and counseling, helping clients achieve pregnancy, basic infertility services, preconception health services, and sexually transmitted disease services. The primary audience for this report is all current or potential providers of family planning services, including those working in service sites that are dedicated to family planning service delivery as well as private and public providers of more comprehensive primary care.⁴⁸

⁴⁶ Gavin, L, Moskosky, S, Carter, M, Curtis, K, Glass, E, Godfrey, E, Marcell, A, Mautone-Smith, N, Pazol, K, Zapata, L, "Providing Quality Family Planning Services: Recommendations of CDC and the U.S. Office of Population Affairs." *Morbidity and Mortality Weekly Report*, 63 Recommendations and Reports No. 4 (April 25, 2014), available at <https://www.cdc.gov/mmwr/pdf/rr/rr6304.pdf> (last accessed July 19, 2018) (hereinafter "CDC Report and Recommendations").

⁴⁷ 42 U.S.C. § 300(a).

⁴⁸ CDC Report and Recommendations at 1.

The report provided “recommendations for how to help prevent and achieve pregnancy, emphasize[d] offering a full range of contraceptive methods for persons seeking to prevent pregnancy, highlight[ed] the special needs of adolescent clients, and encourage[d] the use of the family planning visit to provide selected preventive health services for women, in accordance with the recommendations for women issued by the Institute of Medicine and adopted by HHS.”⁴⁹ In other words, it was a careful, evidence-based description of the best practices for family planning in the United States.

Without explanation, the proposed rule contradicts this report in numerous ways, and it does so without mentioning the report. The CDC report’s “recommendations support offering a full range of Food and Drug Administration (FDA)-approved contraceptive methods,”⁵⁰ while the proposed rule eliminates “medically approved” from the requirement that projects provide a broad range of family planning methods.⁵¹ The CDC report advocates a “[c]lient-centered approach” where the patient is offered a “broad range of contraceptive methods so that clients can make a selection based on their individual needs and preferences,”⁵² while the proposed rule offers Title X funds to a clinic that chooses to offer only a single method of family planning.⁵³ The CDC report states that a provider, after administering a pregnancy test, should present “options counseling” and “appropriate referrals,”⁵⁴ while the proposed rule mandates concealing the full range of options available to the patient, including abortion, and directs omitting abortion providers from referral lists.⁵⁵ These changes undermine long-held, evidence-based standards of care.

The Department fails to explain why it is rejecting its own recommendations expressly “based on scientific knowledge.”⁵⁶ Indeed, it fails even to acknowledge the existence of those

⁴⁹ *Id.*

⁵⁰ CDC Report and Recommendations at 2.

⁵¹ 83 Fed. Reg. 25,530 (proposed § 59.5).

⁵² CDC Report and Recommendations at 2.

⁵³ 83 Fed. Reg. 25,530 (proposed § 59.5). Without doubt, the proposed regulations’ emphasis on fertility awareness-based methods of family planning over all other forms of contraception will result in increased numbers of unintended pregnancies, including teen pregnancies. Table 3-2, Contraceptive Technology, <http://www.contraceptivetechnology.org/wp-content/uploads/2013/09/CTFailureTable.pdf> (last visited July 30, 2018) (listing a 24% failure rate for typical use of fertility awareness-based methods, compared to a less than 10% failure rate for typical use of hormonal contraceptives and less than 1% failure rate for long-acting reversible contraceptives).

⁵⁴ CDC Report and Recommendations at 14.

⁵⁵ 83 Fed. Reg. 25,531 (proposed § 59.14).

⁵⁶ CDC Report and Recommendations at 4.

recommendations. The proposed rule lacks the “reasoned analysis” the Department concedes is required.⁵⁷

4. *The financial separation requirement reverses a prior agency interpretation and is unsupported by any evidence.*

The proposed rule imposes a new requirement of physical separation between Title X projects and the abortion activities of the Title X grantee/sub-recipient.⁵⁸ This requirement reverses the Department’s prior interpretation, is imposed without supporting evidence, and does not reflect agency consideration of substantial evidence contradicting the Department’s conclusion.

The proposed rule reverses the Department’s longstanding interpretation that, “[i]f a Title X grantee can demonstrate [separation] by its financial records, counseling and service protocols, administrative procedures, and other means. . . ., then it is hard to see what additional statutory protection is afforded by the imposition of a requirement for ‘physical’ separation.”⁵⁹ The Department states that this reversal is necessary to avoid the risk of (i) intentional or unintentional use of Title X funds for impermissible purposes or the commingling of funds, and (ii) public confusion that Title X funds being used by a family planning organization may be supporting the program’s abortion activities.⁶⁰

Despite the need for *evidence* to justify an agency’s reversal of course, the preamble to the proposed rule cites no evidence of commingled funds or public confusion. The preamble states that the Department’s concerns are “acute” because, according to a Guttmacher Institute report, the percentage of “nonspecialized clinics” such as doctors’ offices accounting for abortions performed in the United States inched up 6 percent from 2008 to 2014, which may increase the risk of confusion and misuse of Title X funds.⁶¹ However, the Department has no evidence that any of these nonspecialized clinics receive Title X funds. The Guttmacher Institute itself noted that the data its report relied on included inaccuracies and out-of-date information.⁶² This is the only evidence the Department cites of potential public confusion and commingling of funds, yet

⁵⁷ 83 Fed. Reg. 25,505.

⁵⁸ 83 Fed. Reg. 25,532 (proposed § 59.15).

⁵⁹ Standards of Compliance for Abortion Related Services in Family Planning Services Projects, 65 Fed. Reg. 41,270, 41,276 (Jul. 3, 2000).

⁶⁰ 83 Fed. Reg. 25,507.

⁶¹ *Id.*

⁶² Jones, RK, Jerman, J, Abortion Incidence and Service Availability In the United States, 2014, Guttmacher Institute Perspectives on Sexual and Reproductive Health (March 2017) (“Limitations”), <https://www.guttmacher.org/journals/psrh/2017/01/abortion-incidence-and-service-availability-united-states-2014> (last accessed July 18, 2018).

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it evinces no actual *use* of Title X funds.⁶³ In fact, unlike the Title X regulations proposed in 1988—which relied in part on two reports, one from the Department’s Office of Inspector General (OIG) and the other from The General Accounting Office—the Department currently points to no reports or relevant evidence as justification for the proposed rule.

The Department fails to cite its own safeguards it already has in place to ensure that Title X funds are kept separate from abortion-related services. “According to [the Office of Population Affairs], family planning projects that receive Title X funds are closely monitored to ensure that federal funds are used appropriately and that funds are not used for prohibited activities, such as abortion.”⁶⁴ These “[s]afeguards to maintain this separation include (1) careful review of grant applications to ensure that the applicant understands the requirements and has the capacity to comply with all requirements; (2) independent financial audits to examine whether there is a system to account for program-funded activities and non-allowable program activities; (3) yearly comprehensive reviews of the grantees’ financial status and budget report; and (4) periodic and comprehensive program reviews and site visits by OPA regional offices.”⁶⁵ Despite this thorough monitoring, the Department fails to provide any evidence of actual threats to Title X funding and instead relies on reports from the 1980s, old Medicaid audits, and unsupported assertions.

The Department’s monitoring has been thorough. For example, the 2017 OPA Program Review Report for the Vermont Department of Health found the following:

Financial documentation at service sites demonstrates that Title X funds are not being used for abortion services and adequate separation exists between Title X and non-Title X activities. (42 C.F.R. § 59.5(a)(5))

REVIEW OF EVIDENCE

The grantee does not provide abortion services. However, the sub-recipient does provide these services. The sub-recipient has established policies, procedures, and practices to ensure the adequate separation of Title X activities from non-Title X activities. Staff separates their time, after the fact, into clearly defined cost centers in the TimeForce system. This is done each day, is checked by the site supervisor,

⁶³ In a separate part of the preamble addressing the purported need for monitoring of the use of Title X funds, the Department cites a Washington Medicaid Fraud Control Unit investigation. 83 Fed. Reg. 25,509. The Medicaid Fraud Control Unit is part of the Washington Attorney General’s Office. Our investigation found that the individuals reporting the alleged violations relied only a newsletter sent out by American Life League and had no additional information or any firsthand knowledge, the state Medicaid agency auditor did not see any indication of fraudulent billing, and there was no pattern of intentional billing misconduct.

⁶⁴ Angela Napili, Cong. Research Serv., R45181, *Family Planning Program Under Title X of the Public Health Service Act* 16 (2018), available at <https://fas.org/sgp/crs/misc/R45181.pdf>.

⁶⁵ *Id.*

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and is further checked through an analysis of the number and type of services provided each day in the clinic setting by administrative staff.

The sub-recipient demonstrated that no abortion-related activities were provided as part of the Title X project. This included policies and procedures and the actual practices in the clinic setting, counseling and service protocols, intake and referral procedures, and fiscal and other administrative procedures.

This requirement [compliance with Section 1008] was MET.⁶⁶

No evidence indicates that the Vermont Department of Health has ever had any issues complying with Section 1008.

In addition, the Department does not address the steps states like ours take to ensure sub-recipients' separation of Title X funds from any abortion-related activities. In Washington, the State Department of Health Family Planning Program ensures the separation of Title X funds from abortion services through contract language, desk reviews, and on-site monitoring. The goal of monitoring is to document the extent of sub-recipient agencies' compliance with state and federal laws and regulations. Monitoring helps the Family Planning Program assist local agencies with compliance with Federal Title X and state rules related to funding. This ensures accountability.

The Washington Department of Health (DOH) does three types of monitoring: Administrative, Clinical, and Fiscal. As federal grant funds flow through the Family Planning Program to a sub-recipient, the Family Planning Program maintains primary responsibility for ensuring enforcement of federal and state requirements. Those requirements pertain to sub-recipients as they receive state and federal funds. When a sub-recipient signs the Family Planning Program contract with the DOH, they agree to enforce those same certifications, assurances, cost principles, and administrative rules. All of these requirements are incorporated in contract language. Title X sub-recipient contract standard clauses include that the Contractor does "not provide abortion as a method of family planning within the Title X Project. (42 CFR 59.5(5))," and "[t]he Title X Project must not include sterilizations, abortions, or any flat rated service (for instance some STD or HIV testing) or income/revenue generated from them."

Furthermore, the DOH Fiscal Monitoring and Review Guide and On-site Monitoring Tool is used by site consultants and agency fiscal experts to perform on-site reviews every three years or more often if needed. They monitor for documentation that:

⁶⁶ Office of Population Affairs, Program Review: Title X Family Planning Project: Vermont Department of Health, 21 (May 2017) (on file with Vermont Attorney General's Office).

- i. The financial system provides for financial separation of Title X family planning service dollars and abortion service dollars;
- ii. Agency personnel must be informed that they could be prosecuted, under Federal law, if they coerce, or try to coerce, anyone to undergo abortion or a sterilization procedure, and the agency has a policy in place to this end;
- iii. The agency has written policies that clearly state that no Title X funds will be used in programs where abortion is a method of family planning;
- iv. The agency is in compliance with Title X, specifically calling out Section 1008; and
- v. Staff members have been trained about separating Title X family planning services and abortion services.

The site consultant verifies this onsite through the sub-recipients' policies and procedures, personnel records, and a review of the accounting system.

In addition, the Washington State Family Planning Manual⁶⁷ advises about separating Title X services from abortion, including that Contractors must be in full compliance with Section 1008 prohibiting the use of Title X funds for abortion as a method of family planning.

Oregon's Reproductive Health Program maintains a robust process for monitoring compliance among its Title X agencies. Ongoing and routine compliance reviews ensure that Title X agencies adhere to administrative, clinical, and fiscal requirements. The monitoring process includes:

- i. Annual recertification of agencies;
- ii. Onsite compliance reviews of consent forms, policies, procedures and protocols; chart audits; onsite clinical observation; and onsite observation of patient and physical environment; and
- iii. Regular billing, client enrollment, and quality assurance reviews.

Like Washington's DOH, Oregon's Reproductive Health Program uses a comprehensive Program Certification Verification Tool to monitor its Title X agencies. Specific policies relating to abortion, including the requirement that no federal funds are used for abortion services and that abortion is not provided as a birth control method, are reviewed and verified.

In Massachusetts, the Department of Public Health's robust oversight of sub-recipients providing abortion services ensures compliance with current Title X requirements. The Department of Public Health requires that these sub-recipients establish and follow written policies that clearly indicate that Title X funds will not be used for abortion services, clearly segregate Title X funds to prevent allocation of Title X funding to abortion services; maintain separate inventory for

⁶⁷ *Family Planning Manual*, Washington State Department of Health, September 2016, available at <https://www.doh.wa.gov/portals/1/Documents/Pubs/930-122-FPRHManualComplete.pdf> (last visited July 30, 2018)

abortion and non-abortion services; and implement fiscal review and oversight procedures to assure that no Title X funds are used for abortion services. The Massachusetts Department of Public Health also engages in regular monitoring, and requires all providers to inform them of any changes in their practice.

In Vermont, in addition to the safeguards noted above, PPNNE undergoes an annual financial audit, which specifically examines its Title X expenditures. PPNNE passes its audit every year, including its accounting of Title X funds.⁶⁸

The Department has not explained why these thorough guidance, monitoring, and auditing steps taken by our state agencies and by the Department itself are insufficient to prevent commingling of funds, and we ask the Department to provide this explanation.

5. *The proposed rule would violate the constitutional rights of Title X providers and their patients.*

The proposed rule imposes government restrictions on speech and denies women freedom from government interference in their most intimate and personal decisions that courts will find fatal under the First and Fifth Amendments. It should be withdrawn for these reasons.

In *Rust v. Sullivan*, the Supreme Court recognized that “funding by the government, even when coupled with the freedom of the fund recipients to speak outside of the scope of the Government-funded project,” is not “invariably sufficient to justify Government control over the content of expression.” 500 U.S. at 199. In some areas, particularly rural areas, the proposed rule is likely to drive all Title X providers from the program, leaving patients without reasonable access to any Title X services. And for those Title X providers remaining in the program, the Department’s restriction on speech will extend beyond the Title X program to every patient encounter by every Title X provider, whether or not Title X funds are used. As a consequence, the proposed rule will force all Title X grantees to give up neutral abortion-related speech, whether or not they are wearing a “Title X hat.” These facts are different from those presented in *Rust v. Sullivan*, which makes that decision distinguishable.

The massive contraction of the Title X program that would occur under the proposed rule, and is shown herein as to our States, results in a violation of the unconstitutional conditions doctrine and the vagueness and overbreadth doctrines of the First Amendment. The proposed rule interferes with a doctor’s ability to provide, and a woman’s right to receive, information concerning abortion and abortion-related services, both within and outside of the Title X program. This violates women’s Fifth Amendment rights to be free of government interference

⁶⁸ Financial audits for 2015 – 2017 may be downloaded at the Federal Audit Clearinghouse, <https://harvester.census.gov/facdissem/Main.aspx>. Financial audits for 2013 and 2014 on file with the Vermont Attorney General’s Office. Financial audits older than five years were not readily available.

in their decisions whether to continue pregnancies to term. It is also contrary to the First Amendment, especially given the Supreme Court’s recent recognition that “[a]s with other kinds of speech, regulating the content of professionals’ speech ‘pose[s] the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information.’” *National Institute of Family and Life Advocates v. Becerra*, 138 S. Ct. 2361, 2374 (2018) (quoting *Turner Broadcasting System v. FCC*, 512 U.S. 622, 641 (1994)). And it contravenes Supreme Court cases that reject “confin[ing] the attending physician in an undesired and uncomfortable straitjacket in the practice of his profession.” *Planned Parenthood of Central Mo. v. Danforth*, 428 U.S. 52, 67 n.8 (1976). Finally, it interferes in the states’ rights to design and implement health care programs in their states by causing the Title X regulations to be applicable outside the Title X program.

If the Department does not voluntarily withdraw the proposed rule, we ask it to explain, in light of these facts, how the proposed rule is consistent with the Constitution.

6. *The proposed rule includes many requirements that are unsupported by any evidence and, if not abandoned, will be found to be arbitrary and capricious.*

a. *The primary care requirement is unsupported and arbitrary.*

The proposed rule requires that Title X providers “should offer either comprehensive primary health services onsite or have a robust referral linkage with primary health providers who are in close physical proximity to the Title X site.”⁶⁹ This requirement is supposedly meant to “promote holistic health and provide seamless care.”⁷⁰ This call for holistic and seamless care rings hollow considering that the Department is simultaneously proposing specific steps to limit the provision of complete health information and seamless care to patients through abortion counseling and referral restrictions. Instead, the primary care requirement appears intended to push out long-standing Title X providers who have specialized in family planning services and rural Title X providers who may not have “robust referral linkage[s] . . . in close physical proximity.”⁷¹

This requirement alone could dramatically reduce the scope of the Title X program in our States depending upon how the Department defines “close physical proximity.” This requirement is not stated in the statute. The Department must explain how it can be reconciled with the goals of the Title X program.

⁶⁹ 83 Fed. Reg. 25,530.

⁷⁰ *Id.*

⁷¹ *Id.*

- b. *The provisions requiring reporting on minors are unsupported and irrational.*

Currently, Title X providers must attempt to encourage a minor to involve her or his family in the decision-making process when the minor seeks contraceptive services. Under the proposed rule, this “encouragement” would be replaced with undue pressure on both the provider and the minor. The proposed rule requires that a Title X provider document “in the minor’s medical records the specific actions taken by the provider to encourage the minor to involve her/his family (including her/his parents or guardian) in her/his decision to seek family planning services.”⁷² The only exception to this requirement, which must be documented in the minor’s medical record, is if the provider “suspects the minor to be the victim of child abuse or incest” and this has been reported in compliance with state or local law.

Today, if a minor explains to a Title X provider that she wishes not to involve her family, that wish is respected. Minors may choose not to involve their families in their health care decisions due to differences of religious belief, fear of violence, fear of abandonment, lack of a suitable adult to involve, or simply a desire for confidential care. By requiring that the providers’ efforts to encourage family involvement be recorded in the medical record, the proposed rule could force providers to apply pressure on minor patients to involve their families even when doing so is not in the minor’s best interests. The proposed rule could ultimately have a chilling effect on honest and open conversations between providers and minor patients. Further, the proposed rule imperils patient confidentiality to such a degree that minors could be discouraged from seeking care altogether.⁷³ This will serve neither the purposes of the Title X program nor patients.

- c. *The other reporting requirements are unsupported, vague, and beyond the Department’s legal authority.*

The proposed rule would bury Title X projects and sub-recipients in overly burdensome reporting requirements. For example, a Title X project would need to report for each sub-recipient and referral agency not only the exact services provided, but also a “[d]etailed description of the extent of the collaboration” even down to the individuals involved and inclusive of undefined “less formal partners within the community.”⁷⁴

Along with the inclusion of the “less formal partners,” the proposed rule’s definition of “referral agency” makes the reporting requirements overly broad. The proposed rule suggests that even if a referral agency does not receive Title X funds, it may still be “subject to the same reporting

⁷² *Id.*

⁷³ See, e.g., *Planned Parenthood Fed’n of Am. v. Heckler*, 712 F.2d 650, 659-61 (D.C. Cir. 1983) (describing Congress’s decision not to mandate family involvement in Title X care for minors).

⁷⁴ 83 Fed. Reg. 25,530.

requirements as a grantee or sub-recipient.”⁷⁵ These requirements improperly overreach into relationships not otherwise governed by Title X regulations and burden projects, sub-recipients, and referral agencies. Rather than achieving the stated goal of creating a robust referral system, these requirements will cause projects and sub-recipients to limit their referral networks in order to control the amount of reporting.

These changes will have significant impacts. For example, the proposed regulations’ applicability to “referral agencies”⁷⁶ of Title X clinics would impact a significant number of Vermont’s health care providers. As a small and rural state, Vermont’s pool of available health care referral partners is also small. PPNNE maintains a “comprehensive referral data base” of other local health care providers.⁷⁷ But the proposed regulations would be unnecessarily and prohibitively restrictive on those health care providers that do not receive Title X funds, interfering with those providers’ and their patients’ rights and their ability to provide ethical and professional care.

7. *The proposed rule does not comply with Executive Orders 12866 and 13562.*

Executive Orders 12866 and 13562 require agencies to “assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits.” 83 Fed. Reg. 25521. Executive Order 12866 requires that a “significant regulatory action” comply with additional regulatory requirements. This proposed rule meets all the definitions of a “significant regulatory action” because it would (1) have an annual effect on the economy of \$100 million or more and will “adversely and materially affect” the health sector of the economy, public health, and state and local governments; (2) create a serious inconsistency and interfere with an action taken or planned by another agency; (3) materially alter budgetary impacts of entitlement grants or the right and obligations of recipients thereof; and (4) raise novel legal or policy issues arising out of legal mandates.

The restrictive requirements of the proposed rule disqualify many current Title X grantees from the program across the country. Some Title X patients currently served by these providers will lose access altogether to family planning services, particularly among the uninsured and those residing in rural areas. In 2017, Title X services saved our four States alone many millions of dollars in costs for health care services. Extrapolating those cost savings across all states, the fiscal impact of the proposed rule on the economy will exceed \$100 million and will adversely affect public health, the health care sector, and state treasuries. Additionally, the proposed rule materially changes the outflow of entitlement grants and the rights and obligations of grant

⁷⁵ 83 Fed. Reg. 25,514.

⁷⁶ 83 Fed. Reg. 25514.

⁷⁷ Office of Population Affairs, Program Review: Title X Family Planning Project: Vermont Department of Health, 11 (May 2017) (on file with Vermont Attorney General’s Office).

applicants and recipients. It also raises novel legal and policy issues because of new restrictions on speech. The preamble wrongly concludes that the proposed rule is not economically significant and fails to address these considerations.

8. *The proposed rule is contrary to Congress's intent because it would exclude qualified and experienced Title X providers from the program and reduce access to essential preventive health services.*

The impact of the proposed rule is contrary to the Title X statute. The proposed rule appears to be designed to deny Title X funds to many of the current Title X providers in our States and nationwide, and it does not address the impact this rule will have on our States' residents and budgets. The proposed rule, if implemented, will leave many counties without a Title X provider. Because the proposed rule will undermine the quality of health care provided and impose burdensome and counterproductive separation and reporting requirements, many providers in our States will be unable or unwilling to comply. Further, the proposed rule falls particularly hard on uninsured patients and those in rural areas, who in some cases will have no other reasonable option for obtaining family planning services. As a result, thousands of people who rely on Title X providers for contraception and other family planning services will lose access to those services. The proposed rule thus frustrates, rather than promotes, the purpose of Title X.

It is no secret that the Department wants to expel Planned Parenthood from the network of Title X providers. As then-candidate Donald Trump stated, "We're not going to allow, and we're not going to fund, as long as you have the abortion going on at Planned Parenthood."⁷⁸ More recently, when introducing the proposed rule, President Trump stated: "For decades American taxpayers have been wrongfully forced to subsidize the abortion industry through Title X federal funding so today, we have kept another promise. My administration has proposed a new rule to prohibit Title X funding from going to any clinic that performs abortions."⁷⁹ The proposed rule would certainly achieve the President's goal, but as described herein, it would go much further than that.

For some Title X providers, creating a separate corporate entity with complete physical and financial separation will be prohibitively expensive. In Massachusetts, at least one Title X provider, if forced to create a separate corporate entity to continue providing abortion care, will have to stop participating in Title X at one of its locations, resulting in the loss of a geographically important Title X clinic. In Oregon, two major Title X agencies with 12 clinic sites would likely be unable to continue as Title X providers due to the onerous physical

⁷⁸ Danielle Paquette, "Donald Trump's Incredibly Bizarre Relationship with Planned Parenthood," *Washington Post* (Mar. 2, 2016), https://www.washingtonpost.com/news/wonk/wp/2016/03/02/donald-trumps-incredibly-bizarre-relationship-with-planned-parenthood/?utm_term=.db131f627e96 (last accessed 7/13/18).

⁷⁹ <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-susan-b-anthony-list-11th-annual-campaign-life-gala/> (last accessed 7/13/18).

separation requirements set forth in the rules. The same is true in Washington and Massachusetts. All of Vermont's Title X clinics would be ineligible to continue under the program. A wide range of Title X provider types will have no choice but to forgo Title X funds, thus reducing their capacity to provide much needed family planning services. For example, it is unclear whether a hospital that runs a Title X clinic (on or off site) that also provides abortion would be able to comply with the requirement to have "separate, accurate accounting records" or "separate personnel, electronic or paper-based health care records."⁸⁰ Would funds attributed to the clinic also be attributable to the hospital as a whole? In addition to the practical issues created by the proposed rule's separation requirement, it also creates serious risk to patient safety by requiring separate medical record systems and further stigmatizes legal medical procedures.

In 2017, in Washington, over 14,000 Title X-funded patients received their Title X services at Planned Parenthood or other clinics that provided abortions outside the Title X project. In fact, in 20 of Washington's 39 counties, the only Title X provider is one that performs abortions outside the Title X project.⁸¹ If these Title X providers no longer could offer Title X-funded family planning services due to the separation and other requirements, these patients would need to either locate new Title X providers for their contraception and other family planning services, or forego the benefits of the Title X program. In all of eastern Washington, which is comprised of 20 counties, only four of those counties would have any Title X provider at all. In western Washington, the proposed rule would drive out the Title X providers in 10 additional counties. This includes six of the 10 most populous counties in Washington.

If the proposed regulations take effect, for the first time in the history of Title X, the Vermont Department of Health's Title X funding will be jeopardized. None of the current Title X clinics in Vermont will be eligible for Title X funds. Nor does Vermont have the health care infrastructure to make up for the anticipated loss in funding. Although Vermont has several FQHCs and rural health centers, they are not equipped to absorb all the family planning patients currently served by Title X clinics. Vermont FQHCs saw a total of 4,047 patients for contraceptive management in 2016.⁸² By comparison, Vermont's Title X clinics served 9,808 family planning patients in 2016. The FQHCs would have to more than double their family planning patient services in rural areas to absorb the needs of all Title X patients. FQHCs in Vermont are not equipped to do this.

In the Department's zeal to punish providers that perform abortions *outside* of the Title X project, the Department is harming many recipients of Title X services in our States. The

⁸⁰ 83 Fed. Reg. 25,519.

⁸¹ See Attachment 1 (map of Washington counties without Title X services if organizations that also provide abortions are removed from Title X).

⁸² 2016 Health Center Data: Vermont Data, Health Resources & Servs. Admin., <https://bphc.hrsa.gov/uds/datacenter.aspx?q=tall&year=2016&state=VT> (last visited July 30, 2018).

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Department has not explained why issuing a rule to govern Title X that requires thousands of Title X-funded patients to search for a new Title X family planning provider—or go without one entirely—is consistent with Congress’s intent in establishing the Title X program, and we ask the Department to provide this explanation.

The harmful consequences of the proposed rule uniquely impact rural and uninsured patients. In five Washington counties, for example, one quarter or more of Title X patients are uninsured, and the only Title X providers are ones that perform abortions outside the Title X project.⁸³ And in five other counties in rural Washington, Title X patients are served by small Title X clinics associated with providers that perform abortions outside the Title X project. These clinics are in Ellensburg (in Kittitas County), Walla Walla (in Walla Walla County), Wenatchee (in Chelan County), Pullman (in Whitman County), and Moses Lake (in Grant County). We are advised that, because they are so small and a significant amount of their work involves Title X-funded services, at least some of these clinics would not survive the loss of Title X funds. If these current Title X providers are driven from the Title X program, many of these patients will not be able to shift to another provider.⁸⁴ Even if some current Title X providers remain in the program, the distance these patients would have to travel to another Title X provider is impracticable. We ask that the Department explain how it reconciles the significant impact the proposed rule will have on rural and uninsured patients with the mission of the Title X program.

In Oregon, significant portions of the state, primarily the rural and frontier areas, are designated as Medically Underserved Areas because they have a shortage of primary health care providers and facilities coupled with high levels of need. The proposed rule will likely cause providers to decline Title X funds in order to maintain their quality of care, further straining access to reproductive health care for Oregonians in these areas. For the 40 percent of Oregon’s Title X clients who are uninsured, this burden is heightened because the high quality of care at Title X clinics may not be available to them at other clinics. Title X clinics currently are required to provide the same high quality of care to all clients regardless of ability to pay, whereas other clinics may limit services for patients without coverage sources.

A remarkably broad coalition of Vermont health care providers has joined the nationwide medical community’s condemnation of the proposed rule.⁸⁵ This Vermont coalition “strongly

⁸³ These counties are Mason (24 percent of Title X patients were uninsured in 2017), San Juan (30 percent), Skagit (29 percent), Douglas (28 percent), and Whitman (27 percent). These counties do not have local health jurisdictions providing family planning services.

⁸⁴ In addition, under the proposed rule, eliminating Planned Parenthood and other abortion providers from Title X will cause the following colleges and universities in Washington to lose their Title X providers: Washington State University, Western Washington University, Central Washington University, Eastern Washington University, Big Bend Community College, Columbia Basin College, and Yakima Valley Community College.

⁸⁵ *Vermont Health Care Coalition Title X Statement*, Vt. Ass’n of Hosps. and Health Sys. (June 15, 2018), <https://vahhs.org/title-x-statement.html> (endorsing, among other things, a statement from the American Nurses Association stating, “The Code of Ethics for Nurses outlines that the nurse’s primary commitment is to the patient,

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opposes” the proposed regulations and warns that those regulations “will significantly restrict access to necessary care for both women and men particularly in rural, hard to serve areas of Vermont.”⁸⁶ Vermont is a small state, and the Vermont coalition represents a significant majority of all health care providers in Vermont. It is therefore unlikely that the number of Vermont medical professionals who would consent to work in a clinic governed by the proposed regulations would be sufficient to replace the current robust number of Title X-funded providers statewide.

9. *The proposed rule would impose tens of millions of dollars of costs on the treasuries in Washington, Massachusetts, Oregon, and Vermont.*

The costs imposed on our States, along with all other states, by the proposed rule will be well over \$100 million. Because the cost or burdens of compliance with the proposed rule will be prohibitively high for many providers, the network of Title X providers will shrink in our States and around the country. Further, some Title X patients will lose all access to family planning services as a result of the proposed rule. As mentioned, in Oregon 41 percent of Title X patients were uninsured in 2017, and in Washington there are counties where upwards of 30 percent of Title X patients are uninsured.

Yet the Department fails to analyze either the significant public health impact or the fiscal impact to states. The Department fails to grapple with the fact that, unless it is expecting the states to step in to plug the fiscal hole created by the loss of Title X funding, unplanned pregnancies and births will occur, cervical cancers will not be diagnosed in early stages, and complications will occur due to untreated STIs, among other things, all resulting in significant increased health care costs for states that Title X is meant to address.

The Department provides no analysis explaining why these impacts are consistent with the fundamental mission of the Title X program. In fact, they are not. Analyses show that significant cost savings are achieved by funding family planning services. Nationally, an estimated \$7.09 is saved for every dollar spent.⁸⁷ In short, a significant portion of the cost savings created by

whether an individual, family, group, community, or population. This proposed rule interferes with that relationship and violates the basic ethics of the profession.”); *see also* Mike Faher, *Vermont health care coalition protests Title X change*, VTDigger.com (June 12, 2018), <https://vtdigger.org/2018/06/12/vermont-health-care-coalition-protests-title-x-change/> (calling the Vermont Health Care Coalition opposing the proposed regulations “an unlikely group of allies in Vermont”).

⁸⁶ *Vermont Health Care Coalition Title X Statement*, Vt. Ass’n of Hosps. and Health Sys. (June 15, 2018), <https://vahhs.org/title-x-statement.html>

⁸⁷ Jennifer J. Frost, *Return on Investment: A Fuller Assessment of the Benefits and Cost Savings of the US Publicly Funded Family Planning Program*, *Milbank Quarterly*, Vol. 92, No. 4, p. 668 (2014) (available at https://www.guttmacher.org/sites/default/files/pdfs/pubs/journals/MQ-Frost_1468-0009.12080.pdf).

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Deputy Assistant Secretary Diane Foley, M.D., FAAP
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funding family planning services is jeopardized by the proposed rule and would fall on our States, among others.

D. Conclusion

The proposed rule will drive many family planning providers from the Title X program. As a result, thousands of patients will lose reasonable access to family planning services and other critical reproductive health services. The Title X providers that remain will be prevented from delivering the high-quality and complete medical care that they have always provided. This frustrates rather than achieves the purposes of Title X, and the courts will strike down the proposed rule, if implemented, accordingly. The proposed rule would limit health care services to vulnerable populations that Congress intended to help. It also would shift the costs of reproductive health care, including services for unintended pregnancies, breast and cervical cancer diagnoses, spread of STIs, and other serious health conditions to our states. For these and the other reasons stated in our comments, we urge the Department to withdraw the proposed rule.

Thank you for considering our views.

Sincerely,



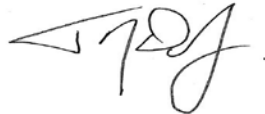
Bob Ferguson
Washington Attorney General



Maura Healey
Massachusetts Attorney General



Ellen Rosenblum
Oregon Attorney General



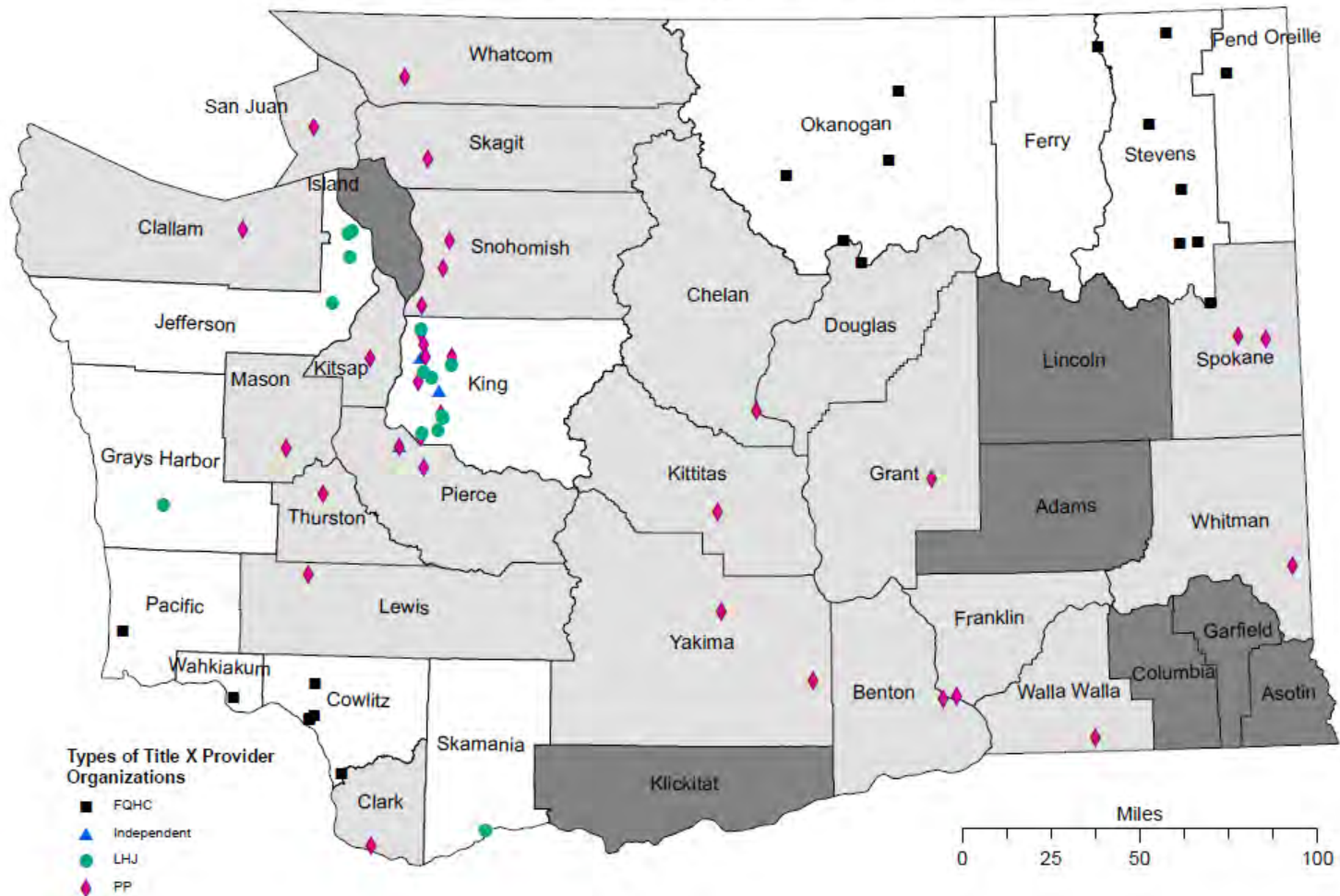
Thomas J. Donovan, Jr.
Vermont Attorney General

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Assistant Secretary ADM Brett P. Giroir, M.D.
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Attachment 1

Washington State Counties Without Title X Services if Organizations that also Provide Abortions are Removed from Title X

Dark shaded counties currently have no Title X provider,
Light shaded counties would have no provider if organizations that also provide abortions were removed from Title X





Bob Ferguson
ATTORNEY GENERAL OF WASHINGTON

Administration Division
PO Box 40100 • Olympia, WA 98504-0100 • [REDACTED]

July 31, 2018

VIA FEDERAL eRULEMAKING PORTAL

Secretary Alex M. Azar II
Assistant Secretary ADM Brett P. Giroir, M.D.
Deputy Assistant Secretary Diane Foley, M.D., FAAP
Attention: Family Planning
U.S. Department of Health and Human Services
Hubert H. Humphrey Building, Room 716G
200 Independence Avenue SW
Washington, DC 20201

RE: HHS-OS-2018-0008, Comments on Proposed Rule: *Compliance With Statutory Program Integrity Requirements*, Docket No.: HHS-OS-2018-0008

Dear Secretary Azar, Assistant Secretary Giroir, and Deputy Assistant Secretary Foley:

The undersigned, Attorneys General for the States of Washington, Oregon, and Vermont and the Commonwealth of Massachusetts, respectfully urge the Department of Health and Human Services (the Department) to withdraw its Proposed Rule: *Compliance with Statutory Program Integrity Requirements*, 83 Fed. Reg. 25,502 (June 1, 2018). We have grave concerns with the legality of the proposed rule, and do not believe it would survive judicial review in its current form.

The Title X family planning program was created to provide access to high-quality family planning and related preventive health care for low-income and underserved individuals. The proposed rule has a host of legal flaws. In some states, if implemented, it will eliminate from the Title X program many Title X providers and leave thousands of residents without reasonable options for critical family planning services. In other states, it will frustrate the ability of providers to deliver high-quality and complete care to their patients and will undermine the efficacy of the network as a whole. The proposed rule thus frustrates rather than promotes the purposes of Title X. The proposed rule shifts the burden and costs to the states, including myriad reproductive health services related to unintended pregnancies, treatment of sexually transmitted infections (STIs), cervical and breast cancer screening and treatment, and other public health

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services that the Title X program currently covers. The public health impact will fall the heaviest on our States' most vulnerable populations – including low-income and rural women and families, immigrants and people of color that the program is intended to help.

Further, the proposed rule requires directive counseling, which is in violation of a federal statute governing Title X.¹ It illegally injects the government into the Title X medical examination room, and it violates the constitutional rights of providers and patients under the First and Fifth Amendments. The proposed rule also violates the Department's current statutory interpretation of "acceptable and effective family planning methods and services" without mentioning the current interpretation or the evidence justifying it. Various parts of the rule are unsupported by any evidence and are thus arbitrary and capricious. Finally, the proposed rule violates Executive Orders 12866 and 13562.

A. Relevant Background of Title X to the Public Health Service Act, 42 U.S.C. §§ 300-300a-6

The Family Planning and Services Population Research Act of 1970, which added Title X to the Public Health Service Act, authorizes the Secretary of Health and Human Services:

to make grants to and enter into contracts with public or nonprofit private entities to assist in the establishment and operation of voluntary family planning projects which shall offer a broad range of acceptable and effective family planning methods and services

42 U.S.C. § 300(a).

Title X projects serve an estimated four million women annually.² In 2015, 64 percent of U.S. counties had at least one safety-net family planning center supported by Title X, and 90 percent of women in need of publicly funded family planning care lived in those counties.³ Title X clients are among the nation's most vulnerable populations: two-thirds have incomes at or below the Federal Poverty Level (FPL)(\$20,090 for a family of three in 2015), nearly half are uninsured—even after implementation of the Affordable Care Act's (ACA) major insurance

¹ Public Law No. 115-141, § 118, <https://www.congress.gov/bill/115th-congress/house-bill/1625/text>.

² Fowler CI et al., Family Planning Annual Report: 2015 National Summary, Research Triangle Park, NC: RTI International, 2016, <http://www.hhs.gov/opa/sites/default/files/title-x-fpar-2015.pdf> (last accessed 7/17/18).

³ Frost JJ and Zolna MR, Response to inquiry concerning the availability of publicly funded contraceptive care to U.S. women, memo to U.S. Senator Patty Murray, Senate Health, Education, Labor and Pensions Committee, New York: Guttmacher Institute, May 3, 2017, <https://www.guttmacher.org/article/2017/05/guttmacher-murray-memo-2017> (last accessed 7/17/18).

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expansions—and another 35 percent have coverage through Medicaid and other public programs.⁴

In 2015, the contraceptive care delivered by Title X–funded providers helped women avoid 822,000 unintended pregnancies, which would have resulted in 387,000 unplanned births and 278,000 abortions.⁵ Without the contraceptive care provided by these health centers, the U.S. rates of unintended pregnancy and abortion would have been 31 percent higher, and the teen unintended pregnancy rate would have been 44 percent higher.⁶ Title X is a vital program, especially for low-income women and teens as:

access to and consistent use of the most effective contraceptive methods are not enjoyed equally by all U.S. women. Disparities in contraceptive use are a major reason why half of U.S. pregnancies—3.2 million each year—are unplanned. . . . [U]nplanned and teen pregnancies occur disproportionately to poor women (those with incomes below the federal poverty level), whose unplanned pregnancy rate is five times that of higher income women.⁷

Concern for low-income women led President Nixon to push for national family planning assistance in the 1960s, stating that “unwanted or untimely childbearing is one of the several forces which are driving many families into poverty or keeping them in that condition.”⁸ That remains a driving concern today. Studies have shown that access to family planning assistance makes it more likely that a teen will graduate high school, that a woman will achieve her educational and career goals, and that a woman will earn more money (positively impacting not only her life, but the lives of her family).⁹ Access to family planning also leads to healthier

⁴ Fowler CI et al., Family Planning Annual Report: 2015 National Summary, Research Triangle Park, NC: RTI International, 2016, <http://www.hhs.gov/opa/sites/default/files/title-x-fpar-2015.pdf> (last accessed 7/17/18).

⁵ Frost JJ, et al., Publicly Funded Contraceptive Services at U.S. Clinics, 2015, New York: Guttmacher Institute, 2017, <https://www.guttmacher.org/report/publicly-funded-contraceptive-services-us-clinics-2015> (last accessed 7/17/18).

⁶ Hasstedt K, Why We Cannot Afford to Undercut the Title X National Family Planning Program, Guttmacher Institute, Jan. 30, 2017, <https://www.guttmacher.org/gpr/2017/01/why-we-cannot-afford-undercut-title-x-national-family-planning-program> (last accessed 7/17/18).

⁷ Adam Sonfield, *What Women Already Know: Documenting the Social and Economic Benefits of Family Planning*, Guttmacher Institute (Mar. 2013), available at <https://www.guttmacher.org/gpr/2013/03/what-women-already-know-documenting-social-and-economic-benefits-family-planning>.

⁸ Special Message to the Congress on Problems of Population Growth (Jul. 18, 1969), available at <http://www.presidency.ucsb.edu/ws/?pid=2132>.

⁹ Adam Sonfield et al., *The Social and Economic Benefits of Women’s Ability To Determine Whether and When to Have Children*, Guttmacher Institute, available at <https://www.guttmacher.org/report/social-and-economic-benefits-womens-ability-determine-whether-and-when-have-children>, and Staff of J. Economic Comm., 114th Cong. *The Economic Benefits of Access to Family Planning*, available at

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relationships, better health outcomes, and better parenting.¹⁰ Title X is critical in assuring that teens and low-income women can achieve these same positive outcomes.

For many women, a visit to a family planning provider is about far more than birth control. During a visit for contraceptive services at a Title X site, women commonly receive other preventive sexual and reproductive health services, including preconception health care and counseling, STI testing and treatment, human papillomavirus (HPV) vaccinations, cancer screening, Pap tests for early detection of cervical cancer, and referrals for mammograms. Title X providers also screen for a host of other potential health issues, such as high blood pressure, diabetes, and depression, connecting clients to further care when needed.¹¹ For four in 10 women who obtain their contraceptive care from a safety-net family planning center that focuses on reproductive health, that provider is their only source of care.

Title X improves the health of our States' residents beyond helping them plan for their pregnancies. In 2010, the services provided within the Title X network prevented 87,000 preterm or low-weight births, 63,000 STIs and 2,000 cases of cervical cancer.¹²

B. Title X Is a Critical Program That Provides High-Quality Care To Thousands of Residents of Washington, Massachusetts, Oregon, and Vermont Every Year.

1. Washington

The Washington State Department of Health (DOH) is the sole grantee of Title X funds in Washington State and runs the program. Washington's current grant project period is one year and six months and ends August 31, 2018.

Washington's Title X expenditure for 2017 was approximately \$13 million. The state-funded amount was approximately \$9 million, and the federally funded amount was approximately \$4 million.

https://www.jec.senate.gov/public/_cache/files/d0a67745-74ff-439c-a75a-aacc47e0abc1/jec-fact-sheet---economic-benefits-of-access-to-family-planning.pdf.

¹⁰ *Id.*

¹¹ Frost JJ, Gold RB and Bucek A, Specialized family planning clinics in the United States: why women choose them and their role in meeting women's health care needs, *Women's Health Issues*, 2012, 22(6):e519–e525, [http://www.whijournal.com/article/S1049-3867\(12\)00073-4/pdf](http://www.whijournal.com/article/S1049-3867(12)00073-4/pdf) (last accessed 7/17/18).

¹² Sonfield A, Beyond preventing unplanned pregnancy: the broader benefits of publicly funded family planning services, *Guttmacher Policy Review*, 2014, 17(4):2–6, <http://www.guttmacher.org/gpr/2014/12/beyond-preventing-unplanned-pregnancy-broader-benefits-publicly-funded-family-planning> (last accessed 7/17/18). 2010 is the most recent year for which these data are available.

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Washington served 91,284 patients through Title X in 2017, with 128,296 patient visits. In 2017, 57 percent of Washington's Title X-funded patients were at or below the FPL, and 81 percent had incomes below 200 percent of the FPL. Sixteen percent of Title X clients were women of color. Nine percent of patients were under the age of 18. The DOH projects that Title X services prevented 16,233 unintended pregnancies in 2017; the resulting cost savings for Title X services (including STI, HIV, HPV, and Pap tests) was \$113,434,910.

DOH distributes Washington's Title X funds by an approved allocation process. DOH broadly distributes information about an upcoming competition for Title X funds toward the end of the project period. It conducts a formal Request for Proposals process to select providers. After the due date for proposals is past, they are reviewed by objective reviewers and scored on criteria that includes choosing the entities that can best utilize the available funding to carry out Title X requirements.

In addition to Title X funds, Washington separately funds contracted Title X health care providers for Title X-allowable services. Further, some Medicaid providers in Washington offer Title X-allowable services but are not Title X projects. The funding from Title X and Medicaid is separate and distinct. However, if an entity receives Title X funding, all clients that have received services according to Title X guidelines are counted as Title X clients in the data system regardless of their funding source.

There are 12 Title X sub-grantee agencies with 70 clinic sites across Washington State. Five of the 12 agencies that receive Title X funds in Washington perform abortions outside of the Title X project. There are several counties in Washington that only have one Title X provider, including Clallam, Grays Harbor, Pacific, Kitsap, Wahkiakum, Lewis, Thurston, Mason, Jefferson, Whatcom, Skagit, Clark, Skamania, Kittitas, Chelan, Ferry, Pend Oreille, Whitman, and Walla Walla. All sites have physicians on staff as medical directors, but nurse practitioners primarily provide care to patients. All sites have nurse practitioners accessible during all business hours.

Washington subjects Title X providers to numerous contractual requirements. These include: (1) they must be non-profit agencies; (2) they must be able to meet reporting requirements (including the ability to extract data from their Electronic Medical Records system to report to the contracted data vendor); (3) they must follow all regulations; (4) they must be able to separate abortion activities from Title X funding; and (5) they must have qualified personnel and licensed providers.

2. *Massachusetts*

Approximately \$6,155,000 in Title X funding flows into Massachusetts annually. These funds support, either directly or indirectly, 90 family planning providers. In 2016 alone, Title X

providers in Massachusetts served 66,072 people.¹³ Data from fiscal year 2017 shows that 88 percent of all Title X visits were made by female patients, 50 percent of all patients were between 18 and 29 years old, and 88 percent of all patients were at or below 200 percent of the FPL.

Title X providers in Massachusetts offer a wide range of services and care, including pregnancy testing and options counseling; contraceptive services and supplies; pelvic exams; screenings for cervical and breast cancer; screenings for high blood pressure, anemia, and diabetes; screenings and treatment for STIs; infertility services; health education; and referrals for other health and social services. These services not only have a profound and positive impact on patients' lives, but also save Massachusetts and the federal government money. In fact, according to one estimate, Title X services save Massachusetts and the federal government approximately \$140 million per year in Massachusetts alone.¹⁴ Beyond the significant fiscal impact, the services provided have a real and profound impact on the lives of Massachusetts women and their families. In 2014, Title X-funded centers met 15 percent of all contraceptive needs in Massachusetts¹⁵ and helped avert 13,600 unintended pregnancies.¹⁶

Title X funds are crucial and must be spent wisely. Programs that currently receive these funds do so in a culturally competent and welcoming manner. They offer an array of services. They understand the health needs of their patients. The proposed rule does not advance Title X's purpose and undermines the ability of its recipients to do the important work that they do every day on behalf of some of Massachusetts' most vulnerable patients.

3. *Oregon*

The state of Oregon has been the umbrella grantee for Title X services throughout Oregon since 1970. The Oregon Health Authority's Reproductive Health Program administers the state's Title X grant. In fiscal year 2018, Oregon's Title X award was \$3,076,000. This funding provides direct support to a network of 35 agencies with 106 clinic sites and is comprised of local public

¹³ *Title X in Massachusetts: Improving Public Health and Saving Taxpayer Dollars*, National Family Planning & Reproductive Health Association, at 1 (Dec. 2017), available at <https://www.nationalfamilyplanning.org/file/state-snapshots-2017/Massachusetts.pdf>.

¹⁴ *Contraception, Cost Savings at Title X-Funded Centers: From Contraceptive Services*, Guttmacher Institute Data Center, <https://data.guttmacher.org/states/table?state=MA&dataset=data&topics=96> (last visited July 30, 2018).

¹⁵ *Contraception, Title X-Funded Centers: Percentage of Need Met By Title X-Funded Centers*, Guttmacher Institute Data Center, <https://data.guttmacher.org/states/table?state=MA&dataset=data&topics=257> (last visited July 30, 2018).

¹⁶ *Contraception, Outcomes Averted By Title X-Funded Centers: From Contraceptive Services*, Guttmacher Institute Data Center, <https://data.guttmacher.org/states/table?state=MA&topics=120&dataset=data> (last visited July 30, 2018).

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health authorities, federally qualified health centers (FQHCs), Planned Parenthood clinics, rural health centers, and other community health centers. Almost every county has at least one Title X Program provider, often with multiple clinic sites per provider.

A total of 37,012 unduplicated clients were served by Title X sub-recipient clinics in 2017. Of these clients, 15,225 (41 percent) were uninsured, meaning they have limited options for accessing affordable reproductive health services.

Oregon's Title X clinics provide essential, high-quality preventive reproductive health services to underserved individuals. Data from 2017 show that of the 37,012 clients served by Oregon's Title X clinics:

- 93 percent were female;
- 47 percent were females between the ages of 18 and 29;
- 95 percent were at or below 250 percent of the FPL and 66 percent were at or below 100 percent of the FPL; and
- 60,647 clinic visits were provided, including:
 - 6,511 cervical cancer screenings
 - 49,366 STI screenings
 - 12,649 annual/well-woman exams

Further evidence of the high quality of care in Oregon's Title X clinics comes from clients themselves. According to Oregon's 2015 Reproductive Health Client Satisfaction Survey, 99 percent of clients reported the following: that medical staff respected their values, they trust the medical staff to help them make decisions, and they would recommend the clinic to friends or family.

In addition to offering high quality care, Oregon's Title X program is also cost effective. In 2017, over 6,000 unintended pregnancies were averted through the provision of effective contraceptive methods and high-quality counseling services in Oregon's Title X clinics. Using a conservative estimate of \$16,000 for an average delivery and the first year of infant health care under Oregon's Medicaid program, even if less than half of these 6,000 unintended pregnancies resulted in births, the savings to the state were in excess of \$40 million in taxpayer funds in Oregon alone in 2017.

4. *Vermont*

The Vermont Department of Health, the sole grantee for Vermont, has relied on Title X grant funding for decades. The Vermont Department of Health receives about \$775,000 annually from Title X, of which the majority is passed on directly to the sole sub-grantee, Planned Parenthood of Northern New England (PPNNE). With these funds, PPNNE provides reproductive health

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services at 10 different clinics located throughout Vermont. These clinics serve a largely rural population—none are located in Chittenden County, the most populous county of Vermont.

Through these clinics, Title X provided family planning services to 9,808 Vermonters in 2016. Of these, 44 percent reported income of less than 100 percent of the FPL, and 76 percent had income less than 250 percent of the FPL. Vermont’s Title X patients were 11 percent male, and 20 percent were under age 20. And 22 percent had no health insurance.¹⁷

Services provided by Title X funds in Vermont include “a broad range of family planning and related preventive health services for Vermont women, men, and their partners.”¹⁸ As required in 42 C.F.R. Part 59, all pregnancy counseling at Title X clinics in Vermont is nondirective.¹⁹ In addition, Title X funds provided “patient education and counseling; breast and pelvic examinations; breast and cervical cancer screening according to nationally recognized standards of care; STI and Human Immunodeficiency Virus (HIV) prevention education, counseling, testing and referral; and pregnancy diagnosis and counseling.”²⁰

Title X funding has been an essential part of the success that Vermont has seen in reproductive health outcomes over time. For example, while the current Title X rules and program have been in place, the number of teen pregnancies in Vermont has steadily declined.²¹ And, the number of teen abortions occurring in Vermont has steadily declined.²² This is consistent with the overall drop in abortion rates in Vermont and nationwide.²³ Title X-specific analyses show that these trends over time are at least partly attributable to Title X funding. One estimate shows that approximately 1900 unintended pregnancies were averted by Title X-funded clinics in Vermont

¹⁷ Office of Population Affairs, Title X Family Planning Annual Report: Vermont (April 2017) (on file with Vermont Attorney General’s Office).

¹⁸ Office of Population Affairs, Program Review: Title X Family Planning Project: Vermont Department of Health, 1, 33 (May 2017) (on file with Vermont Attorney General’s Office).

¹⁹ *Id.* at 34-35.

²⁰ *Id.* at 1.

²¹ Kathryn Kost et al., *Pregnancies, Births and Abortions Among Adolescents and Young Women in the United States, 2013: National and State Trends by Age, Race and Ethnicity*, 36 (Guttmacher Inst. Aug. 2017) (data going back to 1988), available at https://www.guttmacher.org/sites/default/files/report_pdf/us-adolescent-pregnancy-trends-2013.pdf

²² *Id.* at 40.

²³ Vt. Dept. of Health, “Fig. 11: Vermont and U.S. Abortion Ratios 1980 – 2016,” *2016 Vital Statistics: 132nd Report Relating to the Registry and Return of Births, Deaths, Marriages, Divorces, and Dissolutions*, 129 (Agency of Human Servs. 2016) (data going back to 1980), available at <http://www.healthvermont.gov/sites/default/files/documents/pdf/Vital%20Statistics%20Bulletin%202016.pdf>

in 2014.²⁴ Of those, 400 would have been teen pregnancies.²⁵ In addition, Title X's successes have not been limited to pregnancy outcomes. Although Title X is not the only public health program addressing these issues, cervical cancer rates²⁶ and new HIV/AIDS diagnoses²⁷ in Vermont have been generally declining as well. In 2016, Title X clinics screened 1,344 clients for cervical cancer and 2,834 clients for HIV.²⁸

The successes of the Title X program translate from public health to the public fisc. By one estimate, Title X services in Vermont saved the state and federal governments \$7,868,000 in 2010.²⁹ Of that money, the majority (\$7,520,000) was saved in annual maternity and birth-related costs as a result of contraceptive services.³⁰ An additional \$215,000 was saved in annual miscarriage and ectopic pregnancy costs.³¹ Tens of thousands of dollars in public health costs were saved from STI and cancer screening at Title X clinics.³²

C. The Fatal Deficiencies in the Proposed Rule

²⁴ *Number of Unintended Pregnancies Averted by Title X-Funded Centers*, Data Ctr., Guttmacher Inst., <https://data.guttmacher.org/states/table?state=VT&topics=114> (last visited July 30, 2018).

²⁵ *Number of Unintended Pregnancies Averted to Clients Aged <20 by Title X-Funded Centers*, Data Ctr., Guttmacher Inst., <https://data.guttmacher.org/states/table?state=VT&topics=114> (last visited July 30, 2018).

²⁶ Vermont Cancer Registry, *HPV Associated Cancers—Data Brief*, 1 (Vt. Dept. of Health May 2018) (data going back to 1994), available at http://www.healthvermont.gov/sites/default/files/documents/pdf/stat_cancer HPV_Assoc_Ca_Data_Brief.pdf.

²⁷ Decrease seen since the height of the epidemic, and the introduction of the first effective treatments, in the early 1990s. Vt. Dept. of Health, "History of the HIV/AIDS epidemic, Vermont residents at diagnoses 1984 – 2014," *Vermont HIV/AIDS Annual Report*, 2 (May 2015), available at http://www.healthvermont.gov/sites/default/files/documents/pdf/ID_HIV_surveillance_Vt%20HIV%20Annual%20Rep%202014.pdf; see also Vt. Dept. of Health, *2016 Vermont HIV Annual Report*, 2-3 (May 2018), available at http://www.healthvermont.gov/sites/default/files/documents/pdf/ID_HIV_VermontHIVAnnualReport2016.pdf.

²⁸ Office of Population Affairs, *Title X Family Planning Annual Report: Vermont*, 10, 13 (April 2017) (on file with Vermont Attorney General's Office).

²⁹ *Total Annual Gross Savings from Services Provided During Family Planning Visits at Title X-Funded Centers*, Guttmacher Institute Data Center, <https://data.guttmacher.org/states/table?state=VT&topics=98> (last visited July 30, 2018).

³⁰ *Annual Maternity and Birth Related Costs (Through 60 Months) Saved from Contraceptive Services*, Guttmacher Institute Data Center, <https://data.guttmacher.org/states/table?state=VT&topics=96> (last visited July 30, 2018).

³¹ *Annual Miscarriage and Ectopic Pregnancy Costs Saved from Contraceptive Services*, Guttmacher Institute Data Center, <https://data.guttmacher.org/states/table?state=VT&topics=96> (last visited July 30, 2018).

³² *Annual Costs Saved From Chlamydia, Gonorrhea and HIV Testing at Title X-Funded Centers; Annual Costs Saved from Pap and HPV Testing at Title X-Funded Centers*, Guttmacher Institute Data Center, <https://data.guttmacher.org/states/table?state=VT&topics=97> (last visited July 30, 2018).

1. *The proposed rule requires directive counseling in violation of the Consolidated Appropriations Act, 2018.*

In numerous ways, the proposed rule imposes unethical requirements to provide directive, mandatory patient counseling. This is contrary to the Consolidated Appropriations Act, 2018, which states that, with respect to the amounts appropriated “for carrying out the program under title X of the PHS Act to provide for voluntary family planning projects, . . . all pregnancy counseling shall be nondirective.”³³ While Congress is free to “make a value judgment favoring childbirth over abortion,”³⁴ once Congress makes a policy choice executive agencies are not at liberty to ignore it. Here Congress has required that counseling of patients using Title X funds may not be slanted, and HHS may not direct Title X providers to disregard Congress’s directive.

The proposed rule requires Title X funds be used for directive counseling in several ways. First, the rule prohibits Title X providers from referring a patient who discovers she is pregnant to abortion providers, except in the narrow circumstances where the patient “clearly states” that she has “already decided” she will have an abortion.³⁵ Of course, such a “clear decision” for someone who learned minutes earlier that she was pregnant would be unlikely, meaning the vast majority of patients will be referred away from abortion providers. Second, providers are prohibited from even “present[ing]” the option of abortion. Third, providers must refer patients for “appropriate prenatal and/or social services (such as prenatal care and delivery, infant care, foster care, or adoption)” whether or not the patient desires such referrals.³⁶ Fourth, providers are required to assist in setting up these referral appointments—unless the patient wants an abortion.³⁷ In short, if a pregnant patient says that she wants advice on birth or adoption options the provider is unencumbered, but if she wants to discuss the option of abortion, the provider may not assist her. Only if the patient states she wants an abortion may the provider offer her a list that includes abortion providers, but that list must obfuscate which clinics offer what she seeks and which do not.³⁸

These provisions are intended to, and do, slant Title X counseling against termination and in favor of childbirth, in violation of Congress’s directive otherwise. Indeed, the text of the proposed rule says nothing about nondirective counseling, instead eliminating the former

³³ Pub. L. No. 115-141, div. H, tit. II, 132 Stat. 348, 716 (2018), <https://www.congress.gov/bill/115th-congress/house-bill/1625/text>.

³⁴ *Rust v. Sullivan*, 500 U.S. 173, 192 (1991) (quoting *Maher v. Roe*, 432 U.S. 464, 474 (1977)).

³⁵ 83 Fed. Reg. 25,531 (proposed § 59.14(a), (c)).

³⁶ 83 Fed. Reg. 25,531 (proposed § 59.14(b)).

³⁷ *Id.*

³⁸ 83 Fed. Reg. 25,531 (proposed § 59.14(c)).

requirement to provide “neutral, factual information and nondirective counseling” 42 C.F.R. 59.5(a)(5)(ii). Through the repeal of the nondirective counseling requirement and the addition of severe restrictions on referrals, the proposed rule seeks to replace what has been a patient-guided, provider-informed approach to care with a system that jeopardizes both providers’ ethical obligations and patients’ health.

2. *The proposed rule illegally injects the government into the provider-patient relationship.*

We are deeply troubled by the Department’s proposed government interference in the relationship between a medical provider and a patient, and not only because it violates a federal law. The proposed rule purports to tell providers paid with Title X funds what they can and cannot say when a patient discovers she is pregnant. The government should have no role telling a health care provider what to say to a patient. Here, the proposed rule prohibits nurses and nurse practitioners, who see the majority of Title X patients, from mentioning abortion, and doctors may do so only in the very limited circumstances permitted in proposed section 59.14(c) and (d).³⁹ Under the proposed rule, Title X providers could not simply take off their “Title X hats” and offer the same nondirective advice that they currently offer because the rule would require Title X providers to comply with Title X requirements, whether or not Title X funds a particular patient’s service.

As America’s women’s health providers have jointly stated in opposing the proposed rule, “[p]oliticians have no role in picking and choosing among qualified providers.”⁴⁰ This government script for providers when addressing their Title X patients violates the American Medical Association’s Code of Ethics, which states that “withholding information without the patients’ knowledge or consent is ethically unacceptable.”⁴¹ Similarly, the Code of Ethics for Nursing requires nurses to give complete – not slanted – information to patients.⁴²

³⁹ 83 Fed. Reg. 25,531.

⁴⁰ “America’s Women’s Health Providers Oppose Efforts to Exclude Qualified Providers from Federally-Funded Programs,” Join Statement of the American College of Obstetricians and Gynecologists, the American Academy of Pediatrics, the American College of Nurse-Midwives, the American College of Physicians, the Association for Physician Assistants in Obstetrics and Gynecology, the National Association of Nurse Practitioners in Women’s Health, Nurses for Sexual and Reproductive Health, and the Society for Adolescent Health and Medicine (May 23, 2018), <https://www.acog.org/About-ACOG/News-Room/Statements/2018/Health-Providers-Oppose-Efforts-to-Exclude-Qualified-Providers-from-Federally-Funded-Programs> (last accessed on July 17, 2018).

⁴¹ American Medical Association, Code of Medicaid Ethics Opinion 2.1.3, Withholding Information from Patients, available at <https://www.ama-assn.org/delivering-care/withholding-information-patients> (last accessed on July 17, 2018).

⁴² Code of Ethics for Nursing, Provision 1.4, www.bc.edu/content/dam/files/schools/son/pdf2/ANA_code_of_ethics.pdf (last accessed on July 17, 2018) (patients must be given “accurate, complete, and understandable information in a manner that facilitates an informed decision”).

Further, the proposed rule is arbitrary and capricious because it only permits “a medical doctor” to provide the very limited referral for abortion the proposed rule allows.⁴³ In our States, this severely restricts the nondirective counseling Title X patients would receive. In Oregon, for example, over 93 percent of visits to Title X clinics in 2017 were conducted by non-physician caregivers such as nurse practitioners and physician assistants. The preamble to the proposed rule itself recognizes that only 22 percent of clinical service FTEs delivered to Title X patients were provided by medical doctors.⁴⁴ As a result, the proposed rule would prevent 78 percent of the medical professionals who see patients at Title X providers from providing even the limited and intentionally obfuscated abortion referral it claims to authorize. The Department does not explain why prohibiting such a large percentage of Title X caregivers from providing any kind of counseling on the legally available option of abortion comports with the statutory requirement that Title X funds be used only for nondirective counseling, and we request such an explanation.

The proposed rule’s roadblocks for a patient seeking complete and accurate health information also are arbitrary and capricious. First, the patient must already know that she wants an abortion. This precludes the patient from engaging in an important conversation with her health care provider about the pros and cons of abortion. The Department fails to address the fact that many women do not ask directly about abortions immediately upon learning they are pregnant, and instead consider it as one of many medical options. We ask that the Department explain how its proposed restrictions can be reconciled with this experience of clinicians. Second, only a doctor can give the patient the referral list. This appears designed to undermine the provision of healthcare. Moreover, it is not clear what, if any, counseling a physician is entitled to provide to a woman who has decided to have an abortion given that the proposed rules prohibit providers from “promot[ing]” and “support[ing]” abortion as a method of family planning. Limiting the medical information that physicians can offer their patients unreasonably intrudes upon the physician-patient relationship and undermines ethical standards of care.

The preamble to the proposed rule relies on “Federal conscience statutes” to justify its diverging from the requirement in the Consolidated Appropriations Act that Title X-funded counseling must be nondirective.⁴⁵ This reliance is misplaced. The proposed rule does not merely create an exception to nondirective counseling for conscience objectors. Instead, it allows conscience objectors to dictate what all Title X providers may say. Purportedly to uphold conscience protections, the proposed rule prohibits nearly 80 percent of the medical professionals who treat patients at Title X clinics from saying anything about abortion, regardless of their religious or moral beliefs. Likewise, it severely restricts the information medical doctors can impart, again regardless of their religious or moral convictions. In doing so, it makes no accommodation for providers who have religious or moral convictions contrary to the proposed rule, for instance

⁴³ 83 Fed. Reg. 25,531 (§ 59.14(a); *see also*, § 59.14(c)).

⁴⁴ 83 Fed. Reg. 25,523.

⁴⁵ 83 Fed. Reg. 25,506-507.

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those whose convictions align more closely with professional ethics rules. These prohibitions go substantially further than necessary to vindicate a select number of providers' conscience objections, and we ask the Department to better explain its reasoning.

3. *The proposed rule is contrary to, and ignores, the Department's authoritative recommendations for evidence-based "family planning methods and services" without reason or explanation.*

A federal agency cannot simply ignore its prior statutory interpretations. This is especially true where, as here, the prior interpretation is based on factual findings or cited evidence, and the new interpretation fails to consider that evidence. "[T]he consistency of an agency's position is a factor in assessing the weight that position is due." *Good Samaritan Hospital v. Shalala*, 508 U.S. 402, 417 (1993). "To be sure, the requirement that an agency provide reasoned explanation for its action would ordinarily demand that it display awareness that it is changing position." *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).

In 2014, the Department's Centers for Disease Control and Prevention (CDC) issued a Recommendations and Report entitled "Providing Quality Family Planning Services: Recommendations of CDC and the U.S. Office of Population Affairs."⁴⁶ The report provided the agency's view on what are "acceptable and effective family planning methods and services."⁴⁷ The CDC stated:

This report provides recommendations developed collaboratively by CDC and the Office of Population Affairs (OPA) of the U.S. Department of Health and Human Services (HHS). The recommendations outline how to provide quality family planning services, which include contraceptive services, pregnancy testing and counseling, helping clients achieve pregnancy, basic infertility services, preconception health services, and sexually transmitted disease services. The primary audience for this report is all current or potential providers of family planning services, including those working in service sites that are dedicated to family planning service delivery as well as private and public providers of more comprehensive primary care.⁴⁸

⁴⁶ Gavin, L, Moskosky, S, Carter, M, Curtis, K, Glass, E, Godfrey, E, Marcell, A, Mautone-Smith, N, Pazol, K, Zapata, L, "Providing Quality Family Planning Services: Recommendations of CDC and the U.S. Office of Population Affairs." *Morbidity and Mortality Weekly Report*, 63 Recommendations and Reports No. 4 (April 25, 2014), available at <https://www.cdc.gov/mmwr/pdf/rr/rr6304.pdf> (last accessed July 19, 2018) (hereinafter "CDC Report and Recommendations").

⁴⁷ 42 U.S.C. § 300(a).

⁴⁸ CDC Report and Recommendations at 1.

The report provided “recommendations for how to help prevent and achieve pregnancy, emphasize[d] offering a full range of contraceptive methods for persons seeking to prevent pregnancy, highlight[ed] the special needs of adolescent clients, and encourage[d] the use of the family planning visit to provide selected preventive health services for women, in accordance with the recommendations for women issued by the Institute of Medicine and adopted by HHS.”⁴⁹ In other words, it was a careful, evidence-based description of the best practices for family planning in the United States.

Without explanation, the proposed rule contradicts this report in numerous ways, and it does so without mentioning the report. The CDC report’s “recommendations support offering a full range of Food and Drug Administration (FDA)-approved contraceptive methods,”⁵⁰ while the proposed rule eliminates “medically approved” from the requirement that projects provide a broad range of family planning methods.⁵¹ The CDC report advocates a “[c]lient-centered approach” where the patient is offered a “broad range of contraceptive methods so that clients can make a selection based on their individual needs and preferences,”⁵² while the proposed rule offers Title X funds to a clinic that chooses to offer only a single method of family planning.⁵³ The CDC report states that a provider, after administering a pregnancy test, should present “options counseling” and “appropriate referrals,”⁵⁴ while the proposed rule mandates concealing the full range of options available to the patient, including abortion, and directs omitting abortion providers from referral lists.⁵⁵ These changes undermine long-held, evidence-based standards of care.

The Department fails to explain why it is rejecting its own recommendations expressly “based on scientific knowledge.”⁵⁶ Indeed, it fails even to acknowledge the existence of those

⁴⁹ *Id.*

⁵⁰ CDC Report and Recommendations at 2.

⁵¹ 83 Fed. Reg. 25,530 (proposed § 59.5).

⁵² CDC Report and Recommendations at 2.

⁵³ 83 Fed. Reg. 25,530 (proposed § 59.5). Without doubt, the proposed regulations’ emphasis on fertility awareness-based methods of family planning over all other forms of contraception will result in increased numbers of unintended pregnancies, including teen pregnancies. Table 3-2, Contraceptive Technology, <http://www.contraceptivetechnology.org/wp-content/uploads/2013/09/CTFailureTable.pdf> (last visited July 30, 2018) (listing a 24% failure rate for typical use of fertility awareness-based methods, compared to a less than 10% failure rate for typical use of hormonal contraceptives and less than 1% failure rate for long-acting reversible contraceptives).

⁵⁴ CDC Report and Recommendations at 14.

⁵⁵ 83 Fed. Reg. 25,531 (proposed § 59.14).

⁵⁶ CDC Report and Recommendations at 4.

recommendations. The proposed rule lacks the “reasoned analysis” the Department concedes is required.⁵⁷

4. *The financial separation requirement reverses a prior agency interpretation and is unsupported by any evidence.*

The proposed rule imposes a new requirement of physical separation between Title X projects and the abortion activities of the Title X grantee/sub-recipient.⁵⁸ This requirement reverses the Department’s prior interpretation, is imposed without supporting evidence, and does not reflect agency consideration of substantial evidence contradicting the Department’s conclusion.

The proposed rule reverses the Department’s longstanding interpretation that, “[i]f a Title X grantee can demonstrate [separation] by its financial records, counseling and service protocols, administrative procedures, and other means. . . ., then it is hard to see what additional statutory protection is afforded by the imposition of a requirement for ‘physical’ separation.”⁵⁹ The Department states that this reversal is necessary to avoid the risk of (i) intentional or unintentional use of Title X funds for impermissible purposes or the commingling of funds, and (ii) public confusion that Title X funds being used by a family planning organization may be supporting the program’s abortion activities.⁶⁰

Despite the need for *evidence* to justify an agency’s reversal of course, the preamble to the proposed rule cites no evidence of commingled funds or public confusion. The preamble states that the Department’s concerns are “acute” because, according to a Guttmacher Institute report, the percentage of “nonspecialized clinics” such as doctors’ offices accounting for abortions performed in the United States inched up 6 percent from 2008 to 2014, which may increase the risk of confusion and misuse of Title X funds.⁶¹ However, the Department has no evidence that any of these nonspecialized clinics receive Title X funds. The Guttmacher Institute itself noted that the data its report relied on included inaccuracies and out-of-date information.⁶² This is the only evidence the Department cites of potential public confusion and commingling of funds, yet

⁵⁷ 83 Fed. Reg. 25,505.

⁵⁸ 83 Fed. Reg. 25,532 (proposed § 59.15).

⁵⁹ Standards of Compliance for Abortion Related Services in Family Planning Services Projects, 65 Fed. Reg. 41,270, 41,276 (Jul. 3, 2000).

⁶⁰ 83 Fed. Reg. 25,507.

⁶¹ *Id.*

⁶² Jones, RK, Jerman, J, Abortion Incidence and Service Availability In the United States, 2014, Guttmacher Institute Perspectives on Sexual and Reproductive Health (March 2017) (“Limitations”), <https://www.guttmacher.org/journals/psrh/2017/01/abortion-incidence-and-service-availability-united-states-2014> (last accessed July 18, 2018).

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it evinces no actual *use* of Title X funds.⁶³ In fact, unlike the Title X regulations proposed in 1988—which relied in part on two reports, one from the Department’s Office of Inspector General (OIG) and the other from The General Accounting Office—the Department currently points to no reports or relevant evidence as justification for the proposed rule.

The Department fails to cite its own safeguards it already has in place to ensure that Title X funds are kept separate from abortion-related services. “According to [the Office of Population Affairs], family planning projects that receive Title X funds are closely monitored to ensure that federal funds are used appropriately and that funds are not used for prohibited activities, such as abortion.”⁶⁴ These “[s]afeguards to maintain this separation include (1) careful review of grant applications to ensure that the applicant understands the requirements and has the capacity to comply with all requirements; (2) independent financial audits to examine whether there is a system to account for program-funded activities and non-allowable program activities; (3) yearly comprehensive reviews of the grantees’ financial status and budget report; and (4) periodic and comprehensive program reviews and site visits by OPA regional offices.”⁶⁵ Despite this thorough monitoring, the Department fails to provide any evidence of actual threats to Title X funding and instead relies on reports from the 1980s, old Medicaid audits, and unsupported assertions.

The Department’s monitoring has been thorough. For example, the 2017 OPA Program Review Report for the Vermont Department of Health found the following:

Financial documentation at service sites demonstrates that Title X funds are not being used for abortion services and adequate separation exists between Title X and non-Title X activities. (42 C.F.R. § 59.5(a)(5))

REVIEW OF EVIDENCE

The grantee does not provide abortion services. However, the sub-recipient does provide these services. The sub-recipient has established policies, procedures, and practices to ensure the adequate separation of Title X activities from non-Title X activities. Staff separates their time, after the fact, into clearly defined cost centers in the TimeForce system. This is done each day, is checked by the site supervisor,

⁶³ In a separate part of the preamble addressing the purported need for monitoring of the use of Title X funds, the Department cites a Washington Medicaid Fraud Control Unit investigation. 83 Fed. Reg. 25,509. The Medicaid Fraud Control Unit is part of the Washington Attorney General’s Office. Our investigation found that the individuals reporting the alleged violations relied only a newsletter sent out by American Life League and had no additional information or any firsthand knowledge, the state Medicaid agency auditor did not see any indication of fraudulent billing, and there was no pattern of intentional billing misconduct.

⁶⁴ Angela Napili, Cong. Research Serv., R45181, *Family Planning Program Under Title X of the Public Health Service Act* 16 (2018), available at <https://fas.org/sgp/crs/misc/R45181.pdf>.

⁶⁵ *Id.*

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and is further checked through an analysis of the number and type of services provided each day in the clinic setting by administrative staff.

The sub-recipient demonstrated that no abortion-related activities were provided as part of the Title X project. This included policies and procedures and the actual practices in the clinic setting, counseling and service protocols, intake and referral procedures, and fiscal and other administrative procedures.

This requirement [compliance with Section 1008] was MET.⁶⁶

No evidence indicates that the Vermont Department of Health has ever had any issues complying with Section 1008.

In addition, the Department does not address the steps states like ours take to ensure sub-recipients' separation of Title X funds from any abortion-related activities. In Washington, the State Department of Health Family Planning Program ensures the separation of Title X funds from abortion services through contract language, desk reviews, and on-site monitoring. The goal of monitoring is to document the extent of sub-recipient agencies' compliance with state and federal laws and regulations. Monitoring helps the Family Planning Program assist local agencies with compliance with Federal Title X and state rules related to funding. This ensures accountability.

The Washington Department of Health (DOH) does three types of monitoring: Administrative, Clinical, and Fiscal. As federal grant funds flow through the Family Planning Program to a sub-recipient, the Family Planning Program maintains primary responsibility for ensuring enforcement of federal and state requirements. Those requirements pertain to sub-recipients as they receive state and federal funds. When a sub-recipient signs the Family Planning Program contract with the DOH, they agree to enforce those same certifications, assurances, cost principles, and administrative rules. All of these requirements are incorporated in contract language. Title X sub-recipient contract standard clauses include that the Contractor does "not provide abortion as a method of family planning within the Title X Project. (42 CFR 59.5(5))," and "[t]he Title X Project must not include sterilizations, abortions, or any flat rated service (for instance some STD or HIV testing) or income/revenue generated from them."

Furthermore, the DOH Fiscal Monitoring and Review Guide and On-site Monitoring Tool is used by site consultants and agency fiscal experts to perform on-site reviews every three years or more often if needed. They monitor for documentation that:

⁶⁶ Office of Population Affairs, Program Review: Title X Family Planning Project: Vermont Department of Health, 21 (May 2017) (on file with Vermont Attorney General's Office).

- i. The financial system provides for financial separation of Title X family planning service dollars and abortion service dollars;
- ii. Agency personnel must be informed that they could be prosecuted, under Federal law, if they coerce, or try to coerce, anyone to undergo abortion or a sterilization procedure, and the agency has a policy in place to this end;
- iii. The agency has written policies that clearly state that no Title X funds will be used in programs where abortion is a method of family planning;
- iv. The agency is in compliance with Title X, specifically calling out Section 1008; and
- v. Staff members have been trained about separating Title X family planning services and abortion services.

The site consultant verifies this onsite through the sub-recipients' policies and procedures, personnel records, and a review of the accounting system.

In addition, the Washington State Family Planning Manual⁶⁷ advises about separating Title X services from abortion, including that Contractors must be in full compliance with Section 1008 prohibiting the use of Title X funds for abortion as a method of family planning.

Oregon's Reproductive Health Program maintains a robust process for monitoring compliance among its Title X agencies. Ongoing and routine compliance reviews ensure that Title X agencies adhere to administrative, clinical, and fiscal requirements. The monitoring process includes:

- i. Annual recertification of agencies;
- ii. Onsite compliance reviews of consent forms, policies, procedures and protocols; chart audits; onsite clinical observation; and onsite observation of patient and physical environment; and
- iii. Regular billing, client enrollment, and quality assurance reviews.

Like Washington's DOH, Oregon's Reproductive Health Program uses a comprehensive Program Certification Verification Tool to monitor its Title X agencies. Specific policies relating to abortion, including the requirement that no federal funds are used for abortion services and that abortion is not provided as a birth control method, are reviewed and verified.

In Massachusetts, the Department of Public Health's robust oversight of sub-recipients providing abortion services ensures compliance with current Title X requirements. The Department of Public Health requires that these sub-recipients establish and follow written policies that clearly indicate that Title X funds will not be used for abortion services, clearly segregate Title X funds to prevent allocation of Title X funding to abortion services; maintain separate inventory for

⁶⁷ *Family Planning Manual*, Washington State Department of Health, September 2016, available at <https://www.doh.wa.gov/portals/1/Documents/Pubs/930-122-FPRHManualComplete.pdf> (last visited July 30, 2018)

abortion and non-abortion services; and implement fiscal review and oversight procedures to assure that no Title X funds are used for abortion services. The Massachusetts Department of Public Health also engages in regular monitoring, and requires all providers to inform them of any changes in their practice.

In Vermont, in addition to the safeguards noted above, PPNNE undergoes an annual financial audit, which specifically examines its Title X expenditures. PPNNE passes its audit every year, including its accounting of Title X funds.⁶⁸

The Department has not explained why these thorough guidance, monitoring, and auditing steps taken by our state agencies and by the Department itself are insufficient to prevent commingling of funds, and we ask the Department to provide this explanation.

5. *The proposed rule would violate the constitutional rights of Title X providers and their patients.*

The proposed rule imposes government restrictions on speech and denies women freedom from government interference in their most intimate and personal decisions that courts will find fatal under the First and Fifth Amendments. It should be withdrawn for these reasons.

In *Rust v. Sullivan*, the Supreme Court recognized that “funding by the government, even when coupled with the freedom of the fund recipients to speak outside of the scope of the Government-funded project,” is not “invariably sufficient to justify Government control over the content of expression.” 500 U.S. at 199. In some areas, particularly rural areas, the proposed rule is likely to drive all Title X providers from the program, leaving patients without reasonable access to any Title X services. And for those Title X providers remaining in the program, the Department’s restriction on speech will extend beyond the Title X program to every patient encounter by every Title X provider, whether or not Title X funds are used. As a consequence, the proposed rule will force all Title X grantees to give up neutral abortion-related speech, whether or not they are wearing a “Title X hat.” These facts are different from those presented in *Rust v. Sullivan*, which makes that decision distinguishable.

The massive contraction of the Title X program that would occur under the proposed rule, and is shown herein as to our States, results in a violation of the unconstitutional conditions doctrine and the vagueness and overbreadth doctrines of the First Amendment. The proposed rule interferes with a doctor’s ability to provide, and a woman’s right to receive, information concerning abortion and abortion-related services, both within and outside of the Title X program. This violates women’s Fifth Amendment rights to be free of government interference

⁶⁸ Financial audits for 2015 – 2017 may be downloaded at the Federal Audit Clearinghouse, <https://harvester.census.gov/facdissem/Main.aspx>. Financial audits for 2013 and 2014 on file with the Vermont Attorney General’s Office. Financial audits older than five years were not readily available.

in their decisions whether to continue pregnancies to term. It is also contrary to the First Amendment, especially given the Supreme Court’s recent recognition that “[a]s with other kinds of speech, regulating the content of professionals’ speech ‘pose[s] the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information.’” *National Institute of Family and Life Advocates v. Becerra*, 138 S. Ct. 2361, 2374 (2018) (quoting *Turner Broadcasting System v. FCC*, 512 U.S. 622, 641 (1994)). And it contravenes Supreme Court cases that reject “confin[ing] the attending physician in an undesired and uncomfortable straitjacket in the practice of his profession.” *Planned Parenthood of Central Mo. v. Danforth*, 428 U.S. 52, 67 n.8 (1976). Finally, it interferes in the states’ rights to design and implement health care programs in their states by causing the Title X regulations to be applicable outside the Title X program.

If the Department does not voluntarily withdraw the proposed rule, we ask it to explain, in light of these facts, how the proposed rule is consistent with the Constitution.

6. *The proposed rule includes many requirements that are unsupported by any evidence and, if not abandoned, will be found to be arbitrary and capricious.*

a. *The primary care requirement is unsupported and arbitrary.*

The proposed rule requires that Title X providers “should offer either comprehensive primary health services onsite or have a robust referral linkage with primary health providers who are in close physical proximity to the Title X site.”⁶⁹ This requirement is supposedly meant to “promote holistic health and provide seamless care.”⁷⁰ This call for holistic and seamless care rings hollow considering that the Department is simultaneously proposing specific steps to limit the provision of complete health information and seamless care to patients through abortion counseling and referral restrictions. Instead, the primary care requirement appears intended to push out long-standing Title X providers who have specialized in family planning services and rural Title X providers who may not have “robust referral linkage[s] . . . in close physical proximity.”⁷¹

This requirement alone could dramatically reduce the scope of the Title X program in our States depending upon how the Department defines “close physical proximity.” This requirement is not stated in the statute. The Department must explain how it can be reconciled with the goals of the Title X program.

⁶⁹ 83 Fed. Reg. 25,530.

⁷⁰ *Id.*

⁷¹ *Id.*

- b. *The provisions requiring reporting on minors are unsupported and irrational.*

Currently, Title X providers must attempt to encourage a minor to involve her or his family in the decision-making process when the minor seeks contraceptive services. Under the proposed rule, this “encouragement” would be replaced with undue pressure on both the provider and the minor. The proposed rule requires that a Title X provider document “in the minor’s medical records the specific actions taken by the provider to encourage the minor to involve her/his family (including her/his parents or guardian) in her/his decision to seek family planning services.”⁷² The only exception to this requirement, which must be documented in the minor’s medical record, is if the provider “suspects the minor to be the victim of child abuse or incest” and this has been reported in compliance with state or local law.

Today, if a minor explains to a Title X provider that she wishes not to involve her family, that wish is respected. Minors may choose not to involve their families in their health care decisions due to differences of religious belief, fear of violence, fear of abandonment, lack of a suitable adult to involve, or simply a desire for confidential care. By requiring that the providers’ efforts to encourage family involvement be recorded in the medical record, the proposed rule could force providers to apply pressure on minor patients to involve their families even when doing so is not in the minor’s best interests. The proposed rule could ultimately have a chilling effect on honest and open conversations between providers and minor patients. Further, the proposed rule imperils patient confidentiality to such a degree that minors could be discouraged from seeking care altogether.⁷³ This will serve neither the purposes of the Title X program nor patients.

- c. *The other reporting requirements are unsupported, vague, and beyond the Department’s legal authority.*

The proposed rule would bury Title X projects and sub-recipients in overly burdensome reporting requirements. For example, a Title X project would need to report for each sub-recipient and referral agency not only the exact services provided, but also a “[d]etailed description of the extent of the collaboration” even down to the individuals involved and inclusive of undefined “less formal partners within the community.”⁷⁴

Along with the inclusion of the “less formal partners,” the proposed rule’s definition of “referral agency” makes the reporting requirements overly broad. The proposed rule suggests that even if a referral agency does not receive Title X funds, it may still be “subject to the same reporting

⁷² *Id.*

⁷³ See, e.g., *Planned Parenthood Fed’n of Am. v. Heckler*, 712 F.2d 650, 659-61 (D.C. Cir. 1983) (describing Congress’s decision not to mandate family involvement in Title X care for minors).

⁷⁴ 83 Fed. Reg. 25,530.

requirements as a grantee or sub-recipient.”⁷⁵ These requirements improperly overreach into relationships not otherwise governed by Title X regulations and burden projects, sub-recipients, and referral agencies. Rather than achieving the stated goal of creating a robust referral system, these requirements will cause projects and sub-recipients to limit their referral networks in order to control the amount of reporting.

These changes will have significant impacts. For example, the proposed regulations’ applicability to “referral agencies”⁷⁶ of Title X clinics would impact a significant number of Vermont’s health care providers. As a small and rural state, Vermont’s pool of available health care referral partners is also small. PPNNE maintains a “comprehensive referral data base” of other local health care providers.⁷⁷ But the proposed regulations would be unnecessarily and prohibitively restrictive on those health care providers that do not receive Title X funds, interfering with those providers’ and their patients’ rights and their ability to provide ethical and professional care.

7. *The proposed rule does not comply with Executive Orders 12866 and 13562.*

Executive Orders 12866 and 13562 require agencies to “assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits.” 83 Fed. Reg. 25521. Executive Order 12866 requires that a “significant regulatory action” comply with additional regulatory requirements. This proposed rule meets all the definitions of a “significant regulatory action” because it would (1) have an annual effect on the economy of \$100 million or more and will “adversely and materially affect” the health sector of the economy, public health, and state and local governments; (2) create a serious inconsistency and interfere with an action taken or planned by another agency; (3) materially alter budgetary impacts of entitlement grants or the right and obligations of recipients thereof; and (4) raise novel legal or policy issues arising out of legal mandates.

The restrictive requirements of the proposed rule disqualify many current Title X grantees from the program across the country. Some Title X patients currently served by these providers will lose access altogether to family planning services, particularly among the uninsured and those residing in rural areas. In 2017, Title X services saved our four States alone many millions of dollars in costs for health care services. Extrapolating those cost savings across all states, the fiscal impact of the proposed rule on the economy will exceed \$100 million and will adversely affect public health, the health care sector, and state treasuries. Additionally, the proposed rule materially changes the outflow of entitlement grants and the rights and obligations of grant

⁷⁵ 83 Fed. Reg. 25,514.

⁷⁶ 83 Fed. Reg. 25514.

⁷⁷ Office of Population Affairs, Program Review: Title X Family Planning Project: Vermont Department of Health, 11 (May 2017) (on file with Vermont Attorney General’s Office).

applicants and recipients. It also raises novel legal and policy issues because of new restrictions on speech. The preamble wrongly concludes that the proposed rule is not economically significant and fails to address these considerations.

8. *The proposed rule is contrary to Congress's intent because it would exclude qualified and experienced Title X providers from the program and reduce access to essential preventive health services.*

The impact of the proposed rule is contrary to the Title X statute. The proposed rule appears to be designed to deny Title X funds to many of the current Title X providers in our States and nationwide, and it does not address the impact this rule will have on our States' residents and budgets. The proposed rule, if implemented, will leave many counties without a Title X provider. Because the proposed rule will undermine the quality of health care provided and impose burdensome and counterproductive separation and reporting requirements, many providers in our States will be unable or unwilling to comply. Further, the proposed rule falls particularly hard on uninsured patients and those in rural areas, who in some cases will have no other reasonable option for obtaining family planning services. As a result, thousands of people who rely on Title X providers for contraception and other family planning services will lose access to those services. The proposed rule thus frustrates, rather than promotes, the purpose of Title X.

It is no secret that the Department wants to expel Planned Parenthood from the network of Title X providers. As then-candidate Donald Trump stated, "We're not going to allow, and we're not going to fund, as long as you have the abortion going on at Planned Parenthood."⁷⁸ More recently, when introducing the proposed rule, President Trump stated: "For decades American taxpayers have been wrongfully forced to subsidize the abortion industry through Title X federal funding so today, we have kept another promise. My administration has proposed a new rule to prohibit Title X funding from going to any clinic that performs abortions."⁷⁹ The proposed rule would certainly achieve the President's goal, but as described herein, it would go much further than that.

For some Title X providers, creating a separate corporate entity with complete physical and financial separation will be prohibitively expensive. In Massachusetts, at least one Title X provider, if forced to create a separate corporate entity to continue providing abortion care, will have to stop participating in Title X at one of its locations, resulting in the loss of a geographically important Title X clinic. In Oregon, two major Title X agencies with 12 clinic sites would likely be unable to continue as Title X providers due to the onerous physical

⁷⁸ Danielle Paquette, "Donald Trump's Incredibly Bizarre Relationship with Planned Parenthood," *Washington Post* (Mar. 2, 2016), https://www.washingtonpost.com/news/wonk/wp/2016/03/02/donald-trumps-incredibly-bizarre-relationship-with-planned-parenthood/?utm_term=.db131f627e96 (last accessed 7/13/18).

⁷⁹ <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-susan-b-anthony-list-11th-annual-campaign-life-gala/> (last accessed 7/13/18).

separation requirements set forth in the rules. The same is true in Washington and Massachusetts. All of Vermont's Title X clinics would be ineligible to continue under the program. A wide range of Title X provider types will have no choice but to forgo Title X funds, thus reducing their capacity to provide much needed family planning services. For example, it is unclear whether a hospital that runs a Title X clinic (on or off site) that also provides abortion would be able to comply with the requirement to have "separate, accurate accounting records" or "separate personnel, electronic or paper-based health care records."⁸⁰ Would funds attributed to the clinic also be attributable to the hospital as a whole? In addition to the practical issues created by the proposed rule's separation requirement, it also creates serious risk to patient safety by requiring separate medical record systems and further stigmatizes legal medical procedures.

In 2017, in Washington, over 14,000 Title X-funded patients received their Title X services at Planned Parenthood or other clinics that provided abortions outside the Title X project. In fact, in 20 of Washington's 39 counties, the only Title X provider is one that performs abortions outside the Title X project.⁸¹ If these Title X providers no longer could offer Title X-funded family planning services due to the separation and other requirements, these patients would need to either locate new Title X providers for their contraception and other family planning services, or forego the benefits of the Title X program. In all of eastern Washington, which is comprised of 20 counties, only four of those counties would have any Title X provider at all. In western Washington, the proposed rule would drive out the Title X providers in 10 additional counties. This includes six of the 10 most populous counties in Washington.

If the proposed regulations take effect, for the first time in the history of Title X, the Vermont Department of Health's Title X funding will be jeopardized. None of the current Title X clinics in Vermont will be eligible for Title X funds. Nor does Vermont have the health care infrastructure to make up for the anticipated loss in funding. Although Vermont has several FQHCs and rural health centers, they are not equipped to absorb all the family planning patients currently served by Title X clinics. Vermont FQHCs saw a total of 4,047 patients for contraceptive management in 2016.⁸² By comparison, Vermont's Title X clinics served 9,808 family planning patients in 2016. The FQHCs would have to more than double their family planning patient services in rural areas to absorb the needs of all Title X patients. FQHCs in Vermont are not equipped to do this.

In the Department's zeal to punish providers that perform abortions *outside* of the Title X project, the Department is harming many recipients of Title X services in our States. The

⁸⁰ 83 Fed. Reg. 25,519.

⁸¹ See Attachment 1 (map of Washington counties without Title X services if organizations that also provide abortions are removed from Title X).

⁸² 2016 Health Center Data: Vermont Data, Health Resources & Servs. Admin., <https://bphc.hrsa.gov/uds/datacenter.aspx?q=tall&year=2016&state=VT> (last visited July 30, 2018).

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Department has not explained why issuing a rule to govern Title X that requires thousands of Title X-funded patients to search for a new Title X family planning provider—or go without one entirely—is consistent with Congress’s intent in establishing the Title X program, and we ask the Department to provide this explanation.

The harmful consequences of the proposed rule uniquely impact rural and uninsured patients. In five Washington counties, for example, one quarter or more of Title X patients are uninsured, and the only Title X providers are ones that perform abortions outside the Title X project.⁸³ And in five other counties in rural Washington, Title X patients are served by small Title X clinics associated with providers that perform abortions outside the Title X project. These clinics are in Ellensburg (in Kittitas County), Walla Walla (in Walla Walla County), Wenatchee (in Chelan County), Pullman (in Whitman County), and Moses Lake (in Grant County). We are advised that, because they are so small and a significant amount of their work involves Title X-funded services, at least some of these clinics would not survive the loss of Title X funds. If these current Title X providers are driven from the Title X program, many of these patients will not be able to shift to another provider.⁸⁴ Even if some current Title X providers remain in the program, the distance these patients would have to travel to another Title X provider is impracticable. We ask that the Department explain how it reconciles the significant impact the proposed rule will have on rural and uninsured patients with the mission of the Title X program.

In Oregon, significant portions of the state, primarily the rural and frontier areas, are designated as Medically Underserved Areas because they have a shortage of primary health care providers and facilities coupled with high levels of need. The proposed rule will likely cause providers to decline Title X funds in order to maintain their quality of care, further straining access to reproductive health care for Oregonians in these areas. For the 40 percent of Oregon’s Title X clients who are uninsured, this burden is heightened because the high quality of care at Title X clinics may not be available to them at other clinics. Title X clinics currently are required to provide the same high quality of care to all clients regardless of ability to pay, whereas other clinics may limit services for patients without coverage sources.

A remarkably broad coalition of Vermont health care providers has joined the nationwide medical community’s condemnation of the proposed rule.⁸⁵ This Vermont coalition “strongly

⁸³ These counties are Mason (24 percent of Title X patients were uninsured in 2017), San Juan (30 percent), Skagit (29 percent), Douglas (28 percent), and Whitman (27 percent). These counties do not have local health jurisdictions providing family planning services.

⁸⁴ In addition, under the proposed rule, eliminating Planned Parenthood and other abortion providers from Title X will cause the following colleges and universities in Washington to lose their Title X providers: Washington State University, Western Washington University, Central Washington University, Eastern Washington University, Big Bend Community College, Columbia Basin College, and Yakima Valley Community College.

⁸⁵ *Vermont Health Care Coalition Title X Statement*, Vt. Ass’n of Hosps. and Health Sys. (June 15, 2018), <https://vahhs.org/title-x-statement.html> (endorsing, among other things, a statement from the American Nurses Association stating, “The Code of Ethics for Nurses outlines that the nurse’s primary commitment is to the patient,

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opposes” the proposed regulations and warns that those regulations “will significantly restrict access to necessary care for both women and men particularly in rural, hard to serve areas of Vermont.”⁸⁶ Vermont is a small state, and the Vermont coalition represents a significant majority of all health care providers in Vermont. It is therefore unlikely that the number of Vermont medical professionals who would consent to work in a clinic governed by the proposed regulations would be sufficient to replace the current robust number of Title X-funded providers statewide.

9. *The proposed rule would impose tens of millions of dollars of costs on the treasuries in Washington, Massachusetts, Oregon, and Vermont.*

The costs imposed on our States, along with all other states, by the proposed rule will be well over \$100 million. Because the cost or burdens of compliance with the proposed rule will be prohibitively high for many providers, the network of Title X providers will shrink in our States and around the country. Further, some Title X patients will lose all access to family planning services as a result of the proposed rule. As mentioned, in Oregon 41 percent of Title X patients were uninsured in 2017, and in Washington there are counties where upwards of 30 percent of Title X patients are uninsured.

Yet the Department fails to analyze either the significant public health impact or the fiscal impact to states. The Department fails to grapple with the fact that, unless it is expecting the states to step in to plug the fiscal hole created by the loss of Title X funding, unplanned pregnancies and births will occur, cervical cancers will not be diagnosed in early stages, and complications will occur due to untreated STIs, among other things, all resulting in significant increased health care costs for states that Title X is meant to address.

The Department provides no analysis explaining why these impacts are consistent with the fundamental mission of the Title X program. In fact, they are not. Analyses show that significant cost savings are achieved by funding family planning services. Nationally, an estimated \$7.09 is saved for every dollar spent.⁸⁷ In short, a significant portion of the cost savings created by

whether an individual, family, group, community, or population. This proposed rule interferes with that relationship and violates the basic ethics of the profession.”); *see also* Mike Faher, *Vermont health care coalition protests Title X change*, VTDigger.com (June 12, 2018), <https://vtdigger.org/2018/06/12/vermont-health-care-coalition-protests-title-x-change/> (calling the Vermont Health Care Coalition opposing the proposed regulations “an unlikely group of allies in Vermont”).

⁸⁶ *Vermont Health Care Coalition Title X Statement*, Vt. Ass’n of Hosps. and Health Sys. (June 15, 2018), <https://vahhs.org/title-x-statement.html>

⁸⁷ Jennifer J. Frost, *Return on Investment: A Fuller Assessment of the Benefits and Cost Savings of the US Publicly Funded Family Planning Program*, *Milbank Quarterly*, Vol. 92, No. 4, p. 668 (2014) (available at https://www.guttmacher.org/sites/default/files/pdfs/pubs/journals/MQ-Frost_1468-0009.12080.pdf).

Secretary Alex M. Azar II
Assistant Secretary ADM Brett P. Giroir, M.D.
Deputy Assistant Secretary Diane Foley, M.D., FAAP
July 31, 2018
Page 27

funding family planning services is jeopardized by the proposed rule and would fall on our States, among others.

D. Conclusion

The proposed rule will drive many family planning providers from the Title X program. As a result, thousands of patients will lose reasonable access to family planning services and other critical reproductive health services. The Title X providers that remain will be prevented from delivering the high-quality and complete medical care that they have always provided. This frustrates rather than achieves the purposes of Title X, and the courts will strike down the proposed rule, if implemented, accordingly. The proposed rule would limit health care services to vulnerable populations that Congress intended to help. It also would shift the costs of reproductive health care, including services for unintended pregnancies, breast and cervical cancer diagnoses, spread of STIs, and other serious health conditions to our states. For these and the other reasons stated in our comments, we urge the Department to withdraw the proposed rule.

Thank you for considering our views.

Sincerely,



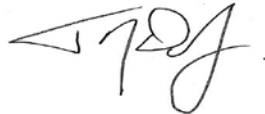
Bob Ferguson
Washington Attorney General



Maura Healey
Massachusetts Attorney General



Ellen Rosenblum
Oregon Attorney General



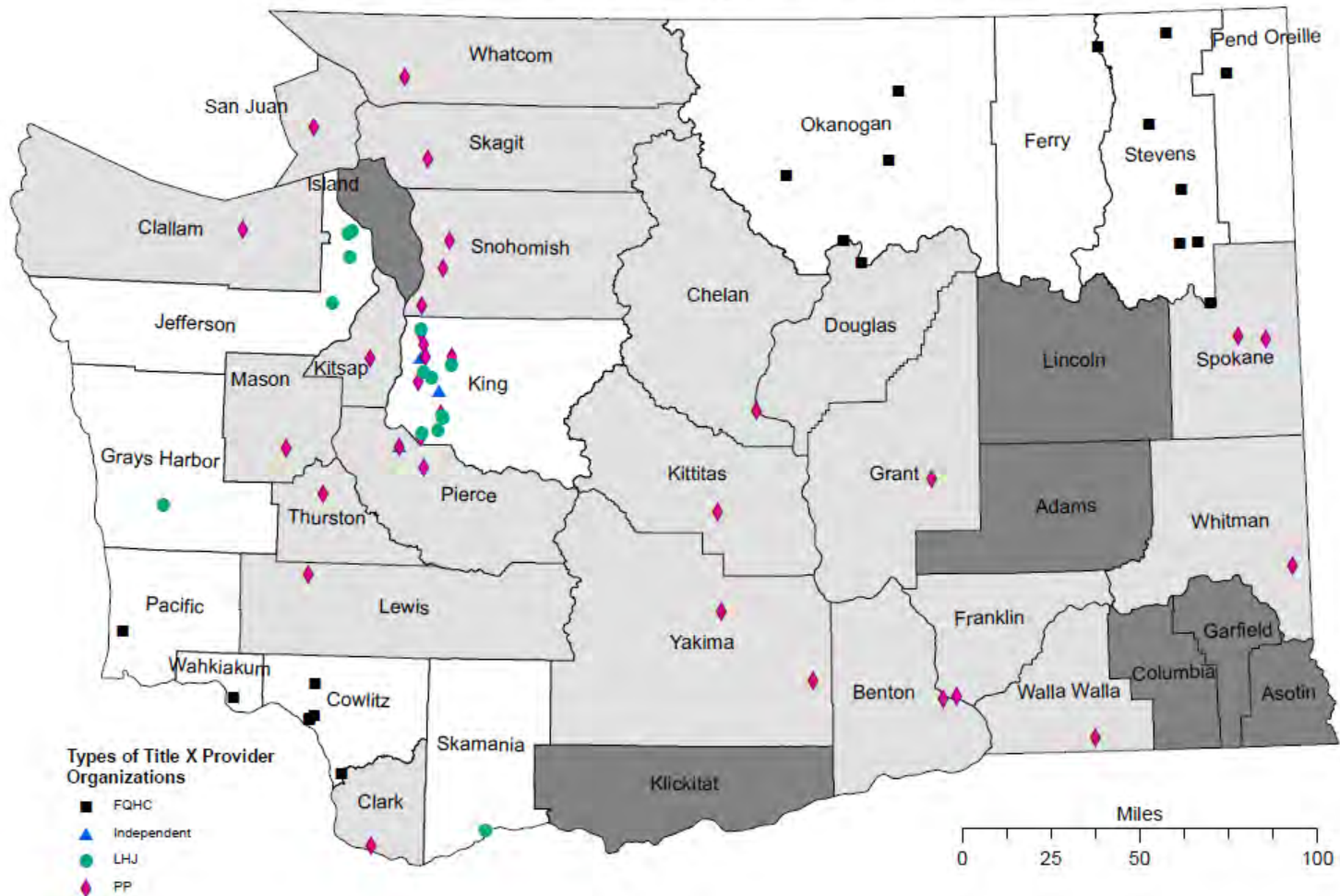
Thomas J. Donovan, Jr.
Vermont Attorney General

Secretary Alex M. Azar II
 Assistant Secretary ADM Brett P. Giroir, M.D.
 Deputy Assistant Secretary Diane Foley, M.D., FAAP
 July 31, 2018
 Page 28

Attachment 1

Washington State Counties Without Title X Services if Organizations that also Provide Abortions are Removed from Title X

Dark shaded counties currently have no Title X provider,
 Light shaded counties would have no provider if organizations that also provide abortions were removed from Title X



From: [Diamond, Joshua](#)
To: [Leriche, Lucy Rose](#)
Subject: Final_Title_X_Comment_Letter_7.31.18 WAMAORVT.PDF
Date: Tuesday, July 31, 2018 2:13:00 PM
Attachments: [Final Title X Comment Letter 7.31.18 WAMAORVT.PDF](#)

FYI. Josh

From: [Diamond, Joshua](#)
To: [Spottswood, Eleanor](#)
Cc: [Clark, Charity](#)
Subject: FW: 12:30PM PT Embargo - Title X Amicus Brief
Date: Tuesday, July 31, 2018 2:08:00 PM

Ella,

I vaguely recall we were on this? Please confirm.

Josh

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

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From: Jennifer Molina <Jennifer.Molina@doj.ca.gov>
Sent: Tuesday, July 31, 2018 1:52 PM
To: Jaclyn.Severance@ct.gov; Carl.Kanefsky@state.de.us; James.W.Walther@hawaii.gov; eboyce@atg.state.il.us; lynn.hicks@ag.iowa.gov; melissa.oneal@maine.gov; ctobar@oag.state.md.us; Chloe.gotsis@state.ma.us; Jillian.Fennimore@state.ma.us; benjamin.wogsland@ag.state.mn.us; Laura.Fredrick@njoag.gov; dcarl@nmag.gov; Amy.Spitalnick@ag.ny.gov; kristina.edmunson@doj.state.or.us; csimpson@attorneygeneral.gov; akempe@riag.ri.gov; Diamond, Joshua <Joshua.Diamond@vermont.gov>; MaureenS@atg.wa.gov; BrionnaF@ATG.WA.GOV; Robert.marus@dc.gov
Subject: 12:30PM PT Embargo - Title X Amicus Brief

Hi there,

Your state signed on to an amicus brief that we will be filing today at 12:30PM PT. The brief supports an emergency injunction sought by Planned Parenthood of Wisconsin, Planned Parenthood of

Greater Ohio, Planned Parenthood Association of Utah, and the National Family Planning and Reproductive Health Association are seeking the injunction. The injunction will prevent the Trump-Pence Administration's unlawful changes to the Title X family planning program from taking effect.

We will not be issuing a press release for today's action – just sticking with social media. If you are planning to do press around it, **please hold until 12:30pm PT.**

I'll be sure to circle back with a copy of the brief. Feel free to reach out with any questions.

Best,

Jen

Jennifer Molina | Press Secretary

California Department of Justice

Office of Attorney General Xavier Becerra

E: Jennifer.Molina@doj.ca.gov | [REDACTED]

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From: [Diamond, Joshua](#)
To: [Donovan, Thomas](#); [Clark, Charity](#); [Spottswood, Eleanor](#)
Subject: FW: Title X letter
Date: Tuesday, July 31, 2018 2:09:00 PM
Attachments: [Final Title X Comment Letter 7.31.18 WAMAORVT.PDF](#)

FYI. Josh

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

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From: Aho, Brionna (ATG) <BrionnaF@ATG.WA.GOV>
Sent: Tuesday, July 31, 2018 2:06 PM
To: Gotsis, Chloe (AGO) <chloe.gotsis@state.ma.us>; kristina.edmunson@doj.state.or.us; Clark, Charity <Charity.Clark@vermont.gov>; Diamond, Joshua <Joshua.Diamond@vermont.gov>
Subject: RE: Title X letter

In case you don't have the final from your teams:

From: Aho, Brionna (ATG)
Sent: Tuesday, July 31, 2018 10:24 AM
To: 'Gotsis, Chloe (AGO)' <chloe.gotsis@state.ma.us>; 'kristina.edmunson@doj.state.or.us' <kristina.edmunson@doj.state.or.us>; 'Charity.Clark@vermont.gov' <Charity.Clark@vermont.gov>; 'Joshua.Diamond@vermont.gov' <Joshua.Diamond@vermont.gov>
Subject: Title X letter

Hi all,

Just wanted to update you, our plan is to send the letter at 11 a.m. Pacific/2 p.m. Eastern. Let me know if you have any questions.

Best regards,

Brionna

Brionna Aho

Communications Director | Office of State Attorney General Bob Ferguson

██████████ | ██████████ | Email: brionna.aho@atg.wa.gov

1125 Washington Street SE, Mailstop 40100 | Olympia | WA | 98504

For the latest news from the AG's office, visit our website at www.atg.wa.gov or follow us on [Twitter](#) and [Facebook](#)!

From: [Leriche, Lucy Rose](#)
To: [Diamond, Joshua](#); [Jill Krowinski](#); [Spottswood, Eleanor](#)
Subject: Protecting Abortion Rights Working Group
Date: Wednesday, August 1, 2018 12:38:32 PM

Hello Josh, Ella, and Jill. I am writing to see if we can all meet in the next week or two to start plotting the path forward. I currently have next Thursday and Friday the 9th and 10th of August wide open for a meeting in Montpelier as a place to start. Would either of those days work for you all?

Lucy

Lucy Leriche(she/her/hers)
Vice President of Public Policy Vermont
Planned Parenthood Northern New England

[REDACTED]
Colchester, Vermont 05446

[REDACTED]
www.ppnne.org<<http://www.ppnne.org/>>

[Lucy.Leriche](mailto:Lucy.Leriche@[REDACTED]) [REDACTED]

From: [Diamond, Joshua](#)
To: [Leriche, Lucy Rose](#)
Cc: [Sullivan, Eileen](#)
Subject: RE: Final_Title_X_Comment_Letter_7.31.18 WAMAORVT.PDF
Date: Wednesday, August 1, 2018 1:45:00 PM

Absolutely!

Josh

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

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From: Leriche, Lucy Rose <Lucy.Leriche [REDACTED]>
Sent: Wednesday, August 1, 2018 12:08 PM
To: Diamond, Joshua <Joshua.Diamond@vermont.gov>
Cc: Sullivan, Eileen <Eileen.Sullivan [REDACTED]>
Subject: RE: Final_Title_X_Comment_Letter_7.31.18 WAMAORVT.PDF

This is so awesome, Josh! Thank you for all your support and for sending this along. May I share this, or excerpts on social media?

Lucy

Lucy Leriche(she/her/hers)
Vice President of Public Policy Vermont
Planned Parenthood Northern New England
[REDACTED]
Colchester, Vermont 05446
[REDACTED]
www.ppnne.org<<http://www.ppnne.org>>

Lucy.Leriche@ppne.org

From: Diamond, Joshua <Joshua.Diamond@vermont.gov>

Sent: Tuesday, July 31, 2018 2:14 PM

To: Leriche, Lucy Rose <Lucy.Leriche [REDACTED]>

Subject: Final_Title_X_Comment_Letter_7.31.18 WAMAORVT.PDF

FYI. Josh

From: [Leriche, Lucy Rose](#)
To: [Diamond, Joshua](#)
Cc: [Sullivan, Eileen](#)
Subject: RE: Final_Title_X_Comment_Letter_7.31.18 WAMAORVT.PDF
Date: Wednesday, August 1, 2018 12:07:44 PM

This is so awesome, Josh! Thank you for all your support and for sending this along. May I share this, or excerpts on social media?
Lucy

Lucy Leriche(she/her/hers)
Vice President of Public Policy Vermont
Planned Parenthood Northern New England
[REDACTED]
Colchester, Vermont 05446
[REDACTED]
www.ppnne.org<<http://www.ppnne.org>>
[Lucy.Leriche](#) [REDACTED]

From: Diamond, Joshua <Joshua.Diamond@vermont.gov>
Sent: Tuesday, July 31, 2018 2:14 PM
To: Leriche, Lucy Rose <Lucy.Leriche [REDACTED]>
Subject: Final_Title_X_Comment_Letter_7.31.18 WAMAORVT.PDF

FYI. Josh

From: [Leriche, Lucy Rose](#)
To: [Diamond, Joshua](#); [Spottswood, Eleanor](#); [Jill Krowinski](#)
Subject: Abortion Access

From: [Diamond, Joshua](#)
To: [Leriche, Lucy Rose](#)
Subject: Accepted: Abortion Access

From: [Leriche, Lucy Rose](#)
To: [Diamond, Joshua](#); [Jill Krowinski](#)
Cc: [Spottswood, Eleanor](#)
Subject: RE: Protecting Abortion Rights Working Group
Date: Thursday, August 2, 2018 3:27:25 PM

That would be great if you could host, Josh. Thanks for the offer!
I will send out a meeting invite for Friday, the 10th of August at 10:00am. Thanks!
Lucy

Lucy Leriche(she/her/hers)
Vice President of Public Policy Vermont
Planned Parenthood Northern New England
[REDACTED]
Colchester, Vermont 05446
[REDACTED]
www.ppnne.org<<http://www.ppnne.org/>>
[Lucy.Leriche](#) [REDACTED]

From: Diamond, Joshua <Joshua.Diamond@vermont.gov>
Sent: Thursday, August 02, 2018 2:51 PM
To: Leriche, Lucy Rose <Lucy.Leriche [REDACTED]>; Jill Krowinski <JKrowinski@leg.state.vt.us>
Cc: Spottswood, Eleanor <Eleanor.Spottswood@vermont.gov>
Subject: RE: Protecting Abortion Rights Working Group

Works for me too.

Where do you want to meet. We can host if that is convenient.

Josh

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

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From: Leriche, Lucy Rose <Lucy.Leriche <[REDACTED]> >
Sent: Thursday, August 2, 2018 10:33 AM
To: Jill Krowinski <JKrowinski@leg.state.vt.us>
Cc: Spottswood, Eleanor <Eleanor.Spottswood@vermont.gov>; Diamond, Joshua <Joshua.Diamond@vermont.gov>
Subject: Re: Protecting Abortion Rights Working Group

10am works for me.
Lucy

Sent from my iPhone

On Aug 2, 2018, at 9:20 AM, Jill Krowinski <JKrowinski@leg.state.vt.us> wrote:

Hello,

Thanks, Lucy for starting this conversation. I can make the 10th work. Are folks available at 10am?

Thank you,
Jill

Sent from my iPhone

On Aug 1, 2018, at 5:49 PM, Spottswood, Eleanor <Eleanor.Spottswood@vermont.gov> wrote:

The 10th works for me as well.

Ella

From: Diamond, Joshua
Sent: Wednesday, August 1, 2018 5:47 PM
To: Leriche, Lucy Rose <Lucy.Leriche <[REDACTED]> >; Jill Krowinski <JKrowinski@leg.state.vt.us>; Spottswood, Eleanor <Eleanor.Spottswood@vermont.gov>
Subject: RE: Protecting Abortion Rights Working Group

The 10th works best for me.

Josh

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

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From: Leriche, Lucy Rose <Lucy.Leriche [REDACTED]>
Sent: Wednesday, August 1, 2018 12:38 PM
To: Diamond, Joshua <Joshua.Diamond@vermont.gov>; Jill Krowinski <JKrowinski@leg.state.vt.us>; Spottswood, Eleanor <Eleanor.Spottswood@vermont.gov>
Subject: Protecting Abortion Rights Working Group

Hello Josh, Ella, and Jill. I am writing to see if we can all meet in the next week or two to start plotting the path forward. I currently have next Thursday and Friday the 9th and 10th of August wide open for a meeting in Montpelier as a place to start. Would either of those days work for you all?

Lucy

Lucy Leriche(she/her/hers)
Vice President of Public Policy Vermont
Planned Parenthood Northern New England
[REDACTED]
Colchester, Vermont 05446
[REDACTED]

www.ppnne.org<<http://www.ppnne.org>>
Lucy.Leriché [REDACTED]

From: [Leriche, Lucy Rose](#)
To: [Jill Krowinski](#); [Diamond, Joshua](#); [Spottswood, Eleanor](#)
Subject: FW: FOCA examples for VT
Date: Thursday, August 9, 2018 3:21:33 PM
Attachments: [Statutory Abortion Protections 2018.docx](#)

For our conversation tomorrow, please see attached.

Lucy

Lucy Leriche(she/her/hers)
Vice President of Public Policy Vermont
Planned Parenthood Northern New England

[REDACTED]
Colchester, Vermont 05446

[REDACTED]
www.ppnne.org<<http://www.ppnne.org>>

Lucy.Leriche [REDACTED]

From: Sousa, Bethany <bethany.sousa [REDACTED]>
Sent: Monday, July 23, 2018 4:12 PM
To: Leriche, Lucy Rose <Lucy.Leriche [REDACTED]>
Cc: Keauna Gregory <keauna.gregory [REDACTED]>
Subject: FOCA examples for VT

Hi Lucy,

I think it's worth thinking about what else could go into a FOCA that hasn't yet, but here is a document with links and language of those that exist. I like CA's b/c it is a little broader.

I asked someone to do some research into VT law so will try to get back to you asap with more info.

Best,
Beth

--

Bethany Sousa
Senior Policy Counsel
Public Policy, Litigation and Law
Planned Parenthood Federation of America
[REDACTED] NYNY 10038

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Statutory Abortion Protections

CALIFORNIA

Citation: [CA Health & Safety Code § 123462 \(through 2012 Leg Sess\)](#)

Text:

The Legislature finds and declares that every individual possesses a fundamental right of privacy with respect to personal reproductive decisions. Accordingly, it is the public policy of the State of California that:

- (a) Every individual has the fundamental right to choose or refuse birth control.
- (b) Every woman has the fundamental right to choose to bear a child or to choose and to obtain an abortion, except as specifically limited by this article.
- (c) The state shall not deny or interfere with a woman s fundamental right to choose to bear a child or to choose to obtain an abortion, except as specifically permitted by this article.

(Added by Stats. 2002, Ch. 385, Sec. 8. Effective January 1, 2003.)

CONNECTICUT

Citation: [Conn. Gen. Stat. Ann. § 19a-602\(a\) \(Enacted 1990\)](#).

Text:

2012 Connecticut General Statutes

Title 19a - Public Health and Well-Being

Chapter 368y - Abortion

Section 19a-602 - Termination of pregnancy prior to viability. Abortion after viability prohibited; exception.

- (a) The decision to terminate a pregnancy prior to the viability of the fetus shall be solely that of the pregnant woman in consultation with her physician.
- (b) No abortion may be performed upon a pregnant woman after viability of the fetus except when necessary to preserve the life or health of the pregnant woman.
(P.A. 90-113, S. 3.)

DELAWARE

Universal Citation: *Medical Practice Act*, [24 Del. C. §§ 1790, 1793, 1794](#)

Text:

2017 Delaware Code

Title 24 - Professions and Occupations

CHAPTER 17. MEDICAL PRACTICE ACT

Subchapter IX Termination of Human Pregnancy

§ 1790. Termination of pregnancy before viability not prohibited; termination of pregnancy after viability limited.

(a) A physician may terminate, assist in the termination of, or attempt the termination of a human pregnancy before viability.

(b) A physician may not terminate, attempt to terminate, or assist in the termination or attempt at termination of a human pregnancy otherwise than by birth after viability, unless, in the good faith medical judgment of the physician, the termination is necessary for the protection of the woman's life or health or in the event of a fetal anomaly for which there is not a reasonable likelihood of the fetus's sustained survival outside the uterus without extraordinary medical measures.

24 Del. C. 1953, § 1790; 57 Del. Laws, c. 145, § 2; 57 Del. Laws, c. 235, §§ 1, 2; 58 Del. Laws, c. 511, § 55; 66 Del. Laws, c. 269, § 16; 70 Del. Laws, c. 149, § 211; 70 Del. Laws, c. 186, § 1; 81 Del. Laws, c. 35, § 2.;

HAWAII

Citation: [HI Rev Stat § 453-16 \(2013\)](#)

Text:

§453-16 Intentional termination of pregnancy; penalties; refusal to perform.

(a) No abortion shall be performed in this State unless:

(1) The abortion is performed by a licensed physician or surgeon, or by a licensed osteopathic physician and surgeon; and

(2) The abortion is performed in a hospital licensed by the department of health or operated by the federal government or an agency thereof, or in a clinic or physician's or osteopathic physician's office.

(b) Abortion shall mean an operation to intentionally terminate the pregnancy of a nonviable fetus. The termination of a pregnancy of a viable fetus is not included in this section.

(c) The State shall not deny or interfere with a female's right to choose or obtain an abortion of a nonviable fetus or an abortion that is necessary to protect the life or health of the female.

(d) Any person who knowingly violates subsection (a) shall be fined not more than \$1,000 or imprisoned not more than five years, or both.

(e) Nothing in this section shall require any hospital or any person to participate in an abortion nor shall any hospital or any person be liable for a refusal. [L 1970, c 1, §2; am L 2006, c 35, §2; am L 2008, c 5, §18]

MAINE

Citation: [Me. Rev. Stat. Ann. tit. 22, § 1598\(1\) \(Enacted 1979; Last Amended 1993\).](#)

Text:

§1598. Abortions

1. Policy. It is the public policy of the State that the State not restrict a woman's exercise of her private decision to terminate a pregnancy before viability except as provided in section 1597-A. After viability an abortion may be performed only when it is necessary to preserve the life or health of the mother. It is also the public policy of the State that all abortions may be performed only by a physician.

[1993, c. 61, §2 (AMD) .]

2. Definitions. As used in this section, unless the context otherwise indicates, the following terms shall have the following meanings.

A. "Abortion" means the intentional interruption of a pregnancy by the application of external agents, whether chemical or physical or by the ingestion of chemical agents with an intention other than to produce a live birth or to remove a dead fetus. [1979, c. 405, §2 (NEW).]

B. "Viability" means the state of fetal development when the life of the fetus may be continued indefinitely outside the womb by natural or artificial life-supportive systems. [1979, c. 405, §2 (NEW).]

[1979, c. 405, §2 (NEW) .]

3. Persons who may perform abortions; penalties.

A. Only a person licensed under Title 32, chapter 36 or chapter 48, to practice medicine in Maine as a medical or osteopathic physician, may perform an abortion on another person. [1979, c. 405, §2 (NEW).]

B. Any person not so licensed who knowingly performs an abortion on another person or any person who knowingly assists a nonlicensed person to perform an abortion on another person is guilty of a Class C crime.[1979, c. 405, §2 (NEW).]

[1979, c. 405, §2 (NEW) .]

4. Abortions after viability; criminal liability. A person who performs an abortion after viability is guilty of a Class D crime if:

A. He knowingly disregarded the viability of the fetus; and [1979, c. 405, §2 (NEW).]

B. He knew that the abortion was not necessary for the preservation of the life or health of the mother

MARYLAND

Citation: [Md. Code Ann., Health-Gen. § 20-209 \(Enacted 1991\).](#)

Text:

§ 20-209.

(a) In this section, "viable" means that stage when, in the best medical judgment of the attending physician based on the particular facts of the case before the physician, there is a reasonable likelihood of the fetus's sustained survival outside the womb.

(b) Except as otherwise provided in this subtitle, the State may not interfere with the decision of a woman to terminate a pregnancy:

- (1) Before the fetus is viable; or
- (2) At any time during the woman's pregnancy, if:
 - (i) The termination procedure is necessary to protect the life or health of the woman; or
 - (ii) The fetus is affected by genetic defect or serious deformity or abnormality.

(c) The Department may adopt regulations that:

- (1) Are both necessary and the least intrusive method to protect the life or health of the woman; and
- (2) Are not inconsistent with established medical practice.

(d) The physician is not liable for civil damages or subject to a criminal penalty for a decision to perform an abortion under this section made in good faith and in the physician's best medical judgment in accordance with accepted standards of medical practice.

Oregon

Citation: [ORS § 721](#)

Text:

SECTION 8. A public body as defined in ORS 174.109 or, except as provided in ORS 435.225, an officer, employee or agent of a public body may not:

- (1) Deprive a consenting individual of the choice of terminating the individual's pregnancy;
- (2) Interfere with or restrict, in the regulation or provision of benefits, facilities, services or information, the choice of a consenting individual to terminate the individual's pregnancy;
- (3) Prohibit a health care provider, who is acting within the scope of the health care provider's license, from terminating or assisting in the termination of a patient's pregnancy; or
- (4) Interfere with or restrict, in the regulation or provision of benefits, facilities, services or information, the choice of a health care provider, who is acting within the scope of the health care provider's license, to terminate or assist in the termination of a patient's pregnancy.

Washington

Citation: [1992 c 1 § 1 \(Initiative Measure No. 120, approved November 5, 1991\).](#)

Text:

RCW 9.02.100

Reproductive privacy — Public policy.

The sovereign people hereby declare that every individual possesses a fundamental right of privacy with respect to personal reproductive decisions.

Accordingly, it is the public policy of the state of Washington that:

- (1) Every individual has the fundamental right to choose or refuse birth control;
- (2) Every woman has the fundamental right to choose or refuse to have an abortion, except as specifically limited by RCW [9.02.100](#) through [9.02.170](#) and [9.02.900](#) through [9.02.902](#);
- (3) Except as specifically permitted by RCW [9.02.100](#) through [9.02.170](#) and [9.02.900](#) through [9.02.902](#), the state shall not deny or interfere with a woman's fundamental right to choose or refuse to have an abortion; and
- (4) The state shall not discriminate against the exercise of these rights in the regulation or provision of benefits, facilities, services, or information.

[1992 c 1 § 1 (Initiative Measure No. 120, approved November 5, 1991).

RCW 9.02.110

Right to have and provide.

The state may not deny or interfere with a woman's right to choose to have an abortion prior to viability of the fetus, or to protect her life or health.

A physician may terminate and a health care provider may assist a physician in terminating a pregnancy as permitted by this section.

[1992 c 1 § 2 (Initiative Measure No. 120, approved November 5, 1991).]

RCW 9.02.140

State regulation.

Any regulation promulgated by the state relating to abortion shall be valid only if:

- (1) The regulation is medically necessary to protect the life or health of the woman terminating her pregnancy,
- (2) The regulation is consistent with established medical practice, and
- (3) Of the available alternatives, the regulation imposes the least restrictions on the woman's right to have an abortion as defined by RCW [9.02.100](#) through [9.02.170](#) and [9.02.900](#) through [9.02.902](#).

[1992 c 1 § 5 (Initiative Measure No. 120, approved November 5, 1991).]

From: [Leriche, Lucy Rose](#)
To: [Diamond, Joshua](#); [Spottswood, Eleanor](#)
Subject: Title X Comments
Date: Wednesday, August 22, 2018 11:16:18 AM

Hi Josh and Ella,
I keep forgetting to ask: how many Title X comments were submitted through your website?
Lucy

Lucy Leriche(she/her/hers)
Vice President of Public Policy Vermont
Planned Parenthood Northern New England

[REDACTED]
Colchester, Vermont 05446

[REDACTED]
www.ppnne.org<<http://www.ppnne.org>>
[REDACTED]

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From: [Spottswood, Eleanor](#)
To: [Leriche, Lucy Rose](#); [Diamond, Joshua](#)
Subject: RE: Title X Comments
Date: Wednesday, August 22, 2018 1:15:49 PM

Hi Lucy,

Unfortunately we don't have a way of tracking actual comments submitted. The only metric we have is that the page was visited 1031 times by 761 unique viewers.

Ella

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

From: Leriche, Lucy Rose <Lucy.Leriche [REDACTED]>
Sent: Wednesday, August 22, 2018 11:16 AM
To: Diamond, Joshua <Joshua.Diamond@vermont.gov>; Spottswood, Eleanor <Eleanor.Spottswood@vermont.gov>
Subject: Title X Comments

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I keep forgetting to ask: how many Title X comments were submitted through your website?
Lucy

Lucy Leriche(she/her/hers)
Vice President of Public Policy Vermont
Planned Parenthood Northern New England
[REDACTED]
Colchester, Vermont 05446
[REDACTED]
www.ppnne.org<<http://www.ppnne.org>>
[Lucy.Leriche \[REDACTED\]](mailto:Lucy.Leriche [REDACTED])

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damage caused by any virus transmitted by this email.

From: [Leriche, Lucy Rose](#)
To: JKrowinski@leg.state.vt.us; [Diamond, Joshua](#); [Spottswood, Eleanor](#)
Subject: Fwd: Roe?
Date: Thursday, August 23, 2018 11:12:19 AM
Attachments: [image001.png](#)
[image002.png](#)
[image003.png](#)

So word is getting out. Please see message from Chloé below.
Lucy

Sent from my iPhone

Begin forwarded message:

From: "[cwhite](#) [REDACTED]" <[cwhite](#) [REDACTED]>
Date: August 23, 2018 at 11:04:24 AM EDT
To: "[Lucy.Leriche](#) [REDACTED]" <[Lucy.Leriche](#) [REDACTED]>
Subject: Roe?

Hi Lucy,

How are you? Hope all is well.

I heard from someone at ACLU National who heard that PPVT may be thinking about pushing to codify protections for abortion rights this next legislative session. True? If so, we'd love to provide any support we can. If not, also totally cool, and we'll provide support on your other work as much as we can! Basically a win-win situation here

All the best,

Chloé

—

Chloé White



Pronouns: she/her

Policy Director

American Civil Liberties Union of Vermont

PO Box 277, Montpelier, VT 05601

[\[REDACTED\]](#) [cwhite](#) [REDACTED]

acluvt.org  



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From: [Spottswood, Eleanor](#)
To: [Diamond, Joshua](#); [REDACTED]; [Leriche, Lucy Rose](#); [Jill Krowinski](#); [cwhite](#) [REDACTED]
Subject: RE: Abortion Access
Date: Monday, September 10, 2018 7:28:03 PM
Attachments: [image001.png](#)
[image002.png](#)
[image003.png](#)

Hello all,

I am free on the 21st.

Ella

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

From: Diamond, Joshua
Sent: Monday, September 10, 2018 6:24 PM
To: jlyall@aclvt.org; [Leriche, Lucy Rose](#) <Lucy.Leriche [REDACTED]>; [Jill Krowinski](#) <JKrowinski@leg.state.vt.us>; [Spottswood, Eleanor](#) <Eleanor.Spottswood@vermont.gov>; [cwhite](#) [REDACTED]
Subject: RE: Abortion Access

Folks,

I'm free anytime on the 21st until 2:00. Unfortunately, I'm booked up on the 25th and 26th.

Best, Josh

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

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From: [jlyal](#) <[jlyal](#)>
Sent: Monday, September 10, 2018 3:21 PM
To: Leriche, Lucy Rose <[Lucy.Leriche](#)>; Jill Krowinski <[JKrowinski@leg.state.vt.us](#)>; Diamond, Joshua <[Joshua.Diamond@vermont.gov](#)>; Spottswood, Eleanor <[Eleanor.Spottswood@vermont.gov](#)>; [cwhite](#)
Subject: RE: Abortion Access

Thanks Lucy,

Chloe is out today but I think any of those could work for us, with a slight preference for Weds the 26th, or Tuesday the 25th after 3pm.

We're happy to host here if that's helpful.

Talk soon.

James Duff Lyall
Executive Director
American Civil Liberties Union of Vermont
Montpelier, VT 05601
[jlyal](#)
acluvt.org  

Get involved: [Become a Member](#)
[Donate](#)



From: Leriche, Lucy Rose <[Lucy.Leriche](#)>
Sent: Monday, September 10, 2018 2:57 PM
To: Jill Krowinski <[JKrowinski@leg.state.vt.us](#)>; Diamond, Joshua <[Joshua.Diamond@vermont.gov](#)>; Spottswood, Eleanor <[Eleanor.Spottswood@vermont.gov](#)>; [jlyal](#); [cwhite](#)
Subject: Abortion Access

Hello everyone,

It's time to get together and talk next steps and strategy. I am throwing out some dates for your consideration. I am thinking a Montpelier location probably works best for most.

So what about Friday the 21st anytime, or Tuesday the 25th anytime in the morning until 10, or anytime in the afternoon. I am also free on Wednesday the 25th from 11am-2pm. Hoping there might be an hour in there that will work for everyone?

Lucy

Lucy Leriche (she/her/hers)
Vice President of Public Policy Vermont
Planned Parenthood Northern New England

[REDACTED]

Colchester, Vermont 05446

[REDACTED]

www.ppnne.org<<http://www.ppnne.org/>>

[Lucy.Leriche](mailto:Lucy.Leriche@[REDACTED]) [REDACTED]

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From: [cwhite](#)
To: [Spottswood, Eleanor](#); [Diamond, Joshua](#); [jlyal](#); [Leriche, Lucy Rose](#); [Jill Krowinski](#)
Subject: RE: Abortion Access
Date: Wednesday, September 12, 2018 10:21:24 AM
Attachments: [image001.png](#)
[image002.png](#)
[image003.png](#)

Hello all,

I'm free the 21st after 11ish and am free the 26th. I'm booked up the 25th.

Looking forward to speaking with you all on this important issue!

Chloé

From: Spottswood, Eleanor <Eleanor.Spottswood@vermont.gov>
Sent: Monday, September 10, 2018 7:28 PM
To: Diamond, Joshua <Joshua.Diamond@vermont.gov>; [jlyal](#); Leriche, Lucy Rose <Lucy.Leriche>; Jill Krowinski <JKrowinski@leg.state.vt.us>; [cwhite](#)
Subject: RE: Abortion Access

Hello all,

I am free on the 21st.

Ella

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

From: Diamond, Joshua
Sent: Monday, September 10, 2018 6:24 PM
To: [jlyal](#); Leriche, Lucy Rose <Lucy.Leriche>; Jill Krowinski <JKrowinski@leg.state.vt.us>; Spottswood, Eleanor <Eleanor.Spottswood@vermont.gov>; [cwhite](#)
Subject: RE: Abortion Access

Folks,

I'm free anytime on the 21st until 2:00. Unfortunately, I'm booked up on the 25th and 26th.

Best, Josh

Joshua R. Diamond, Deputy Attorney General
Vermont Attorney General's Office
109 State Street
Montpelier, Vermont 05609
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From: [REDACTED] <jlyal@vermont.gov>
Sent: Monday, September 10, 2018 3:21 PM
To: Leriche, Lucy Rose <Lucy.Leriche@vermont.gov>; Jill Krowinski <JKrowinski@leg.state.vt.us>;
Diamond, Joshua <Joshua.Diamond@vermont.gov>; Spottswood, Eleanor
<Eleanor.Spottswood@vermont.gov>; cwhite@vermont.gov>
Subject: RE: Abortion Access

Thanks Lucy,

Chloe is out today but I think any of those could work for us, with a slight preference for Weds the 26th, or Tuesday the 25th after 3pm.

We're happy to host here if that's helpful.

Talk soon.

James Duff Lyall
Executive Director
American Civil Liberties Union of Vermont
[REDACTED], Montpelier, VT 05601
[REDACTED] | jlyal@vermont.gov

acluvt.org  

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[Donate](#)



From: Leriche, Lucy Rose <Lucy.Leriche [REDACTED]>

Sent: Monday, September 10, 2018 2:57 PM

To: Jill Krowinski <JKrowinski@leg.state.vt.us>; Diamond, Joshua <Joshua.Diamond@vermont.gov>; Spottswood, Eleanor <Eleanor.Spottswood@vermont.gov>; jlyal [REDACTED]; cwhite [REDACTED]

Subject: Abortion Access

Hello everyone,

It's time to get together and talk next steps and strategy. I am throwing out some dates for your consideration. I am thinking a Montpelier location probably works best for most.

So what about Friday the 21st anytime, or Tuesday the 25th anytime in the morning until 10, or anytime in the afternoon. I am also free on Wednesday the 25th from 11am-2pm. Hoping there might be an hour in there that will work for everyone?

Lucy

Lucy Leriche (she/her/hers)

Vice President of Public Policy Vermont

Planned Parenthood Northern New England

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Colchester, Vermont 05446

[REDACTED]

www.ppnne.org<<http://www.ppnne.org/>>

Lucy.Leriche [REDACTED]

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From: [Curtis, Christopher](#)
To: [Clark, Charity](#)
Cc: [Diamond, Joshua](#)
Subject: Fwd: Request from the AGs office
Date: Thursday, September 13, 2018 1:48:38 PM

FYI... hope this helps.

CC

Sent from my iPhone

Begin forwarded message:

From: Peter Sterling <PSterling@leg.state.vt.us>
Date: September 13, 2018 at 1:36:08 PM EDT
To: "Christopher.Curtis@vermont.gov" <Christopher.Curtis@vermont.gov>
Subject: FW: Request from the AGs office

You say jump, I say how high

Peter Sterling, Chief of Staff
Office of the Senate Pro Tempore

(802) 828-3806

From: Stephanie Barrett <SBARRETT@leg.state.vt.us>
Sent: Thursday, September 13, 2018 2:39 PM
To: Stephen Klein; Peter Sterling
Subject: RE: Request from the AGs office

Peter

A lot of the tobacco onetime money is dedicated (not out the door yet but reserved specifically for SUD related needs)

This doc summarizes all the uses of both Tob Funds and GF.

http://www.leg.state.vt.us/jfo/appropriations/fy_2019/Spec_Session_-_Onetime_summary.pdf

[GF - 2018 ONETIME APPROPRIATIONS FY18 TOBACCO FUNDS ...](#)

www.leg.state.vt.us

Contingent Funds General Fund FY 2018 Revenue is currently tracking over Jan'18

forecast by 63.8 May official forecast update amount 44.2 Cumulative
collection over new forecast by end of May 19.6 Contigent onetime

On the right hand side is the tobacco money - the \$14.5m multi year investments are all SUD/Opioid related

CHINS is the kids in state custody/need of supervision cases impacts on the courts/states atty/def gen/child welfare systems for the severely impacted (mostly by opioid use) families.

There is also a part of the DOC MAT funding further down etc out these tobacco funds

Some of the Tob money was moved to the GF on the left hand side - in this list is \$7.1m for Medicaid since this was not needed to close the FY18 year these funds are available for other investments.

The allowed uses are not exclusively SUD/opioid but it does include more DOC MAT funding and safe recovery related programs (planned parenthood funding help will come from the pot with a chunk yet TBD - Hep C in DOC is one thing being considered)

At the JFC meeting on the 27th AHS will be presenting plans for the \$2.5m SUD and the \$7.1m amounts. We may get some heads on the SUD workforce investment planning as well.

Let me know if there is more I can help with.

Stephanie

From: Stephen Klein
Sent: Thursday, September 13, 2018 10:14 AM
To: Peter Sterling
Cc: Stephanie Barrett
Subject: RE: Request from the AGs office

Yes I can have Stephanie detail that for you

Stephen Klein

From: Peter Sterling [<mailto:peter.sterling@hotmail.com>]

Sent: Thursday, September 13, 2018 10:13 AM

To: Stephen Klein

Subject: Request from the AGs office

Howdy Steve:

AGs office would like to know what opiate programs the legislature ended up dedicating the money to resulting from the tobacco settlement we jointly announced last spring.

Can you help me figure this out?

From: [Leriche, Lucy Rose](#)
To: [Diamond, Joshua](#)
Cc: [cwhite](#); [Jill Krowinski](#); [Spottswood, Eleanor](#)
Subject: Re: Legislative Meeting
Date: Thursday, September 13, 2018 8:16:06 PM

As soon as we hear back from Jill.
Lucy

Sent from my iPhone

On Sep 13, 2018, at 6:47 PM, Diamond, Joshua <Joshua.Diamond@vermont.gov> wrote:

Folks, do we have a time for the 21st?

My calendar is beginning to fill in.

Best, Josh

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

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From: [Jill Krowinski](#)
To: [Diamond, Joshua](#)
Cc: [cwhite](#); [Leriche, Lucy Rose](#); [Spottswood, Eleanor](#)
Subject: Re: Legislative Meeting
Date: Thursday, September 13, 2018 8:08:49 PM

Hi all,

The 21st works for me. The earlier in the day the better.

Thanks,
Jill

Sent from my iPhone

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Best, Josh

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From: [cwhite](#) [REDACTED]
To: [Diamond, Joshua](#); [Leriche, Lucy Rose](#); [Jill Krowinski](#)
Cc: [Spottswood, Eleanor](#)
Subject: RE: Legislative Meeting
Date: Friday, September 14, 2018 10:03:16 AM

I could only make it for the first 30 minutes if we did it at 9:30, but happy to attend.

From: Diamond, Joshua <Joshua.Diamond@vermont.gov>
Sent: Friday, September 14, 2018 6:47 AM
To: Leriche, Lucy Rose <Lucy.Leriche [REDACTED]>; Jill Krowinski <JKrowinski@leg.state.vt.us>
Cc: cwhite@aclvt.org; Spottswood, Eleanor <Eleanor.Spottswood@vermont.gov>
Subject: RE: Legislative Meeting

Yes, would you like us to host?

Josh

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

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From: Leriche, Lucy Rose <Lucy.Leriche [REDACTED]>
Sent: Thursday, September 13, 2018 8:17 PM
To: Jill Krowinski <JKrowinski@leg.state.vt.us>
Cc: Diamond, Joshua <Joshua.Diamond@vermont.gov>; cwhite [REDACTED]; Spottswood, Eleanor <Eleanor.Spottswood@vermont.gov>
Subject: Re: Legislative Meeting

Oh, sorry Jill! Early in the day ok with everyone? How about 9:30?
Lucy

Lucy

Sent from my iPhone

On Sep 13, 2018, at 8:08 PM, Jill Krowinski <JKrowinski@leg.state.vt.us> wrote:

Hi all,

The 21st works for me. The earlier in the day the better.

Thanks,
Jill

Sent from my iPhone

On Sep 13, 2018, at 6:47 PM, Diamond, Joshua <Joshua.Diamond@vermont.gov> wrote:

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Joshua R. Diamond, Deputy Attorney General
Vermont Attorney General's Office
109 State Street
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From: [Leriche, Lucy Rose](#)
To: [Diamond, Joshua](#)
Cc: cwhite@acluvt.org; [Jill Krowinski](#); [Spottswood, Eleanor](#)
Subject: Re: Legislative Meeting
Date: Friday, September 14, 2018 4:17:16 PM

Let's go with 9am at the AG's offices in Montpelier on Friday the 21st then.
Lucy

Sent from my iPhone

On Sep 14, 2018, at 11:48 AM, Diamond, Joshua <Joshua.Diamond@vermont.gov> wrote:

Yes, works for me.

Josh

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

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From: Leriche, Lucy Rose <Lucy.Leriche [REDACTED]>
Sent: Friday, September 14, 2018 11:24 AM
To: cwhite [REDACTED]; Diamond, Joshua <Joshua.Diamond@vermont.gov>; Jill Krowinski <JKrowinski@leg.state.vt.us>
Cc: Spottswood, Eleanor <Eleanor.Spottswood@vermont.gov>
Subject: RE: Legislative Meeting

Would 9 work better for folks?

Lucy

Lucy Leriche(she/her/hers)
Vice President of Public Policy Vermont
Planned Parenthood Northern New England

[REDACTED]
Colchester, Vermont 05446

[REDACTED]
www.ppnne.org<<http://www.ppnne.org>>
[Lucy.Leriche](mailto:Lucy.Leriche@[REDACTED]) [REDACTED]

From: [REDACTED] <[cwhite@\[REDACTED\]](mailto:cwhite@[REDACTED])>
Sent: Friday, September 14, 2018 10:03 AM
To: Diamond, Joshua <Joshua.Diamond@vermont.gov>; Leriche, Lucy Rose <[Lucy.Leriche](mailto:Lucy.Leriche@[REDACTED]) [REDACTED]>; Jill Krowinski <JKrowinski@leg.state.vt.us>
Cc: Spottswood, Eleanor <Eleanor.Spottswood@vermont.gov>
Subject: RE: Legislative Meeting

I could only make it for the first 30 minutes if we did it at 9:30, but happy to attend.

From: Diamond, Joshua <Joshua.Diamond@vermont.gov>
Sent: Friday, September 14, 2018 6:47 AM
To: Leriche, Lucy Rose <[Lucy.Leriche](mailto:Lucy.Leriche@[REDACTED]) [REDACTED]>; Jill Krowinski <JKrowinski@leg.state.vt.us>
Cc: [cwhite](mailto:cwhite@[REDACTED]) [REDACTED]; Spottswood, Eleanor <Eleanor.Spottswood@vermont.gov>
Subject: RE: Legislative Meeting

Yes, would you like us to host?

Josh

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

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From: Leriche, Lucy Rose <Lucy.Leriche <[REDACTED]> >
Sent: Thursday, September 13, 2018 8:17 PM
To: Jill Krowinski <JKrowinski@leg.state.vt.us>
Cc: Diamond, Joshua <Joshua.Diamond@vermont.gov>; cwhite <[REDACTED]>;
Spottswood, Eleanor <Eleanor.Spottswood@vermont.gov>
Subject: Re: Legislative Meeting

Oh, sorry Jill! Early in the day ok with everyone? How about 9:30?

Lucy

Lucy

Sent from my iPhone

On Sep 13, 2018, at 8:08 PM, Jill Krowinski <JKrowinski@leg.state.vt.us> wrote:

Hi all,

The 21st works for me. The earlier in the day the better.

Thanks,

Jill

Sent from my iPhone

On Sep 13, 2018, at 6:47 PM, Diamond, Joshua
<Joshua.Diamond@vermont.gov> wrote:

Folks, do we have a time for the 21st?

My calendar is beginning to fill in.

Best, Josh

Joshua R. Diamond, Deputy Attorney General
Vermont Attorney General's Office
109 State Street

Montpelier, Vermont 05609
802-828-3175
joshua.diamond@vermont.gov

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From: [Leriche, Lucy Rose](#)
To: [Diamond, Joshua](#)
Subject: Accepted: Reproductive Rights and Health

From: [Diamond, Joshua](#)
To: [Leriche, Lucy Rose](#); [Jill Krowinski](#); [Spottswood, Eleanor](#); [cwhite \[REDACTED\]](#); [Clark, Charity](#); [Matthews, Deborah](#)
Subject: Reproductive Rights and Health



Bob Ferguson
ATTORNEY GENERAL OF WASHINGTON

Administration Division

• Olympia, WA 98504-0100 •

July 31, 2018

VIA FEDERAL eRULEMAKING PORTAL

Secretary Alex M. Azar II
Assistant Secretary ADM Brett P. Giroir, M.D.
Deputy Assistant Secretary Diane Foley, M.D., FAAP
Attention: Family Planning
U.S. Department of Health and Human Services
Hubert H. Humphrey Building, Room 716G
200 Independence Avenue SW
Washington, DC 20201

RE: HHS-OS-2018-0008, Comments on Proposed Rule: *Compliance With Statutory Program Integrity Requirements*, Docket No.: HHS-OS-2018-0008

Dear Secretary Azar, Assistant Secretary Giroir, and Deputy Assistant Secretary Foley:

The undersigned, Attorneys General for the States of Washington, Oregon, and Vermont and the Commonwealth of Massachusetts, respectfully urge the Department of Health and Human Services (the Department) to withdraw its Proposed Rule: *Compliance with Statutory Program Integrity Requirements*, 83 Fed. Reg. 25,502 (June 1, 2018). We have grave concerns with the legality of the proposed rule, and do not believe it would survive judicial review in its current form.

The Title X family planning program was created to provide access to high-quality family planning and related preventive health care for low-income and underserved individuals. The proposed rule has a host of legal flaws. In some states, if implemented, it will eliminate from the Title X program many Title X providers and leave thousands of residents without reasonable options for critical family planning services. In other states, it will frustrate the ability of providers to deliver high-quality and complete care to their patients and will undermine the efficacy of the network as a whole. The proposed rule thus frustrates rather than promotes the purposes of Title X. The proposed rule shifts the burden and costs to the states, including myriad reproductive health services related to unintended pregnancies, treatment of sexually transmitted infections (STIs), cervical and breast cancer screening and treatment, and other public health

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Deputy Assistant Secretary Diane Foley, M.D., FAAP
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services that the Title X program currently covers. The public health impact will fall the heaviest on our States' most vulnerable populations – including low-income and rural women and families, immigrants and people of color that the program is intended to help.

Further, the proposed rule requires directive counseling, which is in violation of a federal statute governing Title X.¹ It illegally injects the government into the Title X medical examination room, and it violates the constitutional rights of providers and patients under the First and Fifth Amendments. The proposed rule also violates the Department's current statutory interpretation of "acceptable and effective family planning methods and services" without mentioning the current interpretation or the evidence justifying it. Various parts of the rule are unsupported by any evidence and are thus arbitrary and capricious. Finally, the proposed rule violates Executive Orders 12866 and 13562.

A. Relevant Background of Title X to the Public Health Service Act, 42 U.S.C. §§ 300-300a-6

The Family Planning and Services Population Research Act of 1970, which added Title X to the Public Health Service Act, authorizes the Secretary of Health and Human Services:

to make grants to and enter into contracts with public or nonprofit private entities to assist in the establishment and operation of voluntary family planning projects which shall offer a broad range of acceptable and effective family planning methods and services

42 U.S.C. § 300(a).

Title X projects serve an estimated four million women annually.² In 2015, 64 percent of U.S. counties had at least one safety-net family planning center supported by Title X, and 90 percent of women in need of publicly funded family planning care lived in those counties.³ Title X clients are among the nation's most vulnerable populations: two-thirds have incomes at or below the Federal Poverty Level (FPL)(\$20,090 for a family of three in 2015), nearly half are uninsured—even after implementation of the Affordable Care Act's (ACA) major insurance

¹ Public Law No. 115-141, § 118, <https://www.congress.gov/bill/115th-congress/house-bill/1625/text>.

² Fowler CI et al., Family Planning Annual Report: 2015 National Summary, Research Triangle Park, NC: RTI International, 2016, <http://www.hhs.gov/opa/sites/default/files/title-x-fpar-2015.pdf> (last accessed 7/17/18).

³ Frost JJ and Zolna MR, Response to inquiry concerning the availability of publicly funded contraceptive care to U.S. women, memo to U.S. Senator Patty Murray, Senate Health, Education, Labor and Pensions Committee, New York: Guttmacher Institute, May 3, 2017, <https://www.guttmacher.org/article/2017/05/guttmacher-murray-memo-2017> (last accessed 7/17/18).

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expansions—and another 35 percent have coverage through Medicaid and other public programs.⁴

In 2015, the contraceptive care delivered by Title X–funded providers helped women avoid 822,000 unintended pregnancies, which would have resulted in 387,000 unplanned births and 278,000 abortions.⁵ Without the contraceptive care provided by these health centers, the U.S. rates of unintended pregnancy and abortion would have been 31 percent higher, and the teen unintended pregnancy rate would have been 44 percent higher.⁶ Title X is a vital program, especially for low-income women and teens as:

access to and consistent use of the most effective contraceptive methods are not enjoyed equally by all U.S. women. Disparities in contraceptive use are a major reason why half of U.S. pregnancies—3.2 million each year—are unplanned. . . . [U]nplanned and teen pregnancies occur disproportionately to poor women (those with incomes below the federal poverty level), whose unplanned pregnancy rate is five times that of higher income women.⁷

Concern for low-income women led President Nixon to push for national family planning assistance in the 1960s, stating that “unwanted or untimely childbearing is one of the several forces which are driving many families into poverty or keeping them in that condition.”⁸ That remains a driving concern today. Studies have shown that access to family planning assistance makes it more likely that a teen will graduate high school, that a woman will achieve her educational and career goals, and that a woman will earn more money (positively impacting not only her life, but the lives of her family).⁹ Access to family planning also leads to healthier

⁴ Fowler CI et al., Family Planning Annual Report: 2015 National Summary, Research Triangle Park, NC: RTI International, 2016, <http://www.hhs.gov/opa/sites/default/files/title-x-fpar-2015.pdf> (last accessed 7/17/18).

⁵ Frost JJ, et al., Publicly Funded Contraceptive Services at U.S. Clinics, 2015, New York: Guttmacher Institute, 2017, <https://www.guttmacher.org/report/publicly-funded-contraceptive-services-us-clinics-2015> (last accessed 7/17/18).

⁶ Hasstedt K, Why We Cannot Afford to Undercut the Title X National Family Planning Program, Guttmacher Institute, Jan. 30, 2017, <https://www.guttmacher.org/gpr/2017/01/why-we-cannot-afford-undercut-title-x-national-family-planning-program> (last accessed 7/17/18).

⁷ Adam Sonfield, *What Women Already Know: Documenting the Social and Economic Benefits of Family Planning*, Guttmacher Institute (Mar. 2013), available at <https://www.guttmacher.org/gpr/2013/03/what-women-already-know-documenting-social-and-economic-benefits-family-planning>.

⁸ Special Message to the Congress on Problems of Population Growth (Jul. 18, 1969), available at <http://www.presidency.ucsb.edu/ws/?pid=2132>.

⁹ Adam Sonfield et al., *The Social and Economic Benefits of Women’s Ability To Determine Whether and When to Have Children*, Guttmacher Institute, available at <https://www.guttmacher.org/report/social-and-economic-benefits-womens-ability-determine-whether-and-when-have-children>, and Staff of J. Economic Comm., 114th Cong. *The Economic Benefits of Access to Family Planning*, available at

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relationships, better health outcomes, and better parenting.¹⁰ Title X is critical in assuring that teens and low-income women can achieve these same positive outcomes.

For many women, a visit to a family planning provider is about far more than birth control. During a visit for contraceptive services at a Title X site, women commonly receive other preventive sexual and reproductive health services, including preconception health care and counseling, STI testing and treatment, human papillomavirus (HPV) vaccinations, cancer screening, Pap tests for early detection of cervical cancer, and referrals for mammograms. Title X providers also screen for a host of other potential health issues, such as high blood pressure, diabetes, and depression, connecting clients to further care when needed.¹¹ For four in 10 women who obtain their contraceptive care from a safety-net family planning center that focuses on reproductive health, that provider is their only source of care.

Title X improves the health of our States' residents beyond helping them plan for their pregnancies. In 2010, the services provided within the Title X network prevented 87,000 preterm or low-weight births, 63,000 STIs and 2,000 cases of cervical cancer.¹²

B. Title X Is a Critical Program That Provides High-Quality Care To Thousands of Residents of Washington, Massachusetts, Oregon, and Vermont Every Year.

1. Washington

The Washington State Department of Health (DOH) is the sole grantee of Title X funds in Washington State and runs the program. Washington's current grant project period is one year and six months and ends August 31, 2018.

Washington's Title X expenditure for 2017 was approximately \$13 million. The state-funded amount was approximately \$9 million, and the federally funded amount was approximately \$4 million.

https://www.jec.senate.gov/public/_cache/files/d0a67745-74ff-439c-a75a-aacc47e0abc1/jec-fact-sheet---economic-benefits-of-access-to-family-planning.pdf.

¹⁰ *Id.*

¹¹ Frost JJ, Gold RB and Bucek A, Specialized family planning clinics in the United States: why women choose them and their role in meeting women's health care needs, *Women's Health Issues*, 2012, 22(6):e519–e525, [http://www.whijournal.com/article/S1049-3867\(12\)00073-4/pdf](http://www.whijournal.com/article/S1049-3867(12)00073-4/pdf) (last accessed 7/17/18).

¹² Sonfield A, Beyond preventing unplanned pregnancy: the broader benefits of publicly funded family planning services, *Guttmacher Policy Review*, 2014, 17(4):2–6, <http://www.guttmacher.org/gpr/2014/12/beyond-preventing-unplanned-pregnancy-broader-benefits-publicly-funded-family-planning> (last accessed 7/17/18). 2010 is the most recent year for which these data are available.

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Washington served 91,284 patients through Title X in 2017, with 128,296 patient visits. In 2017, 57 percent of Washington's Title X-funded patients were at or below the FPL, and 81 percent had incomes below 200 percent of the FPL. Sixteen percent of Title X clients were women of color. Nine percent of patients were under the age of 18. The DOH projects that Title X services prevented 16,233 unintended pregnancies in 2017; the resulting cost savings for Title X services (including STI, HIV, HPV, and Pap tests) was \$113,434,910.

DOH distributes Washington's Title X funds by an approved allocation process. DOH broadly distributes information about an upcoming competition for Title X funds toward the end of the project period. It conducts a formal Request for Proposals process to select providers. After the due date for proposals is past, they are reviewed by objective reviewers and scored on criteria that includes choosing the entities that can best utilize the available funding to carry out Title X requirements.

In addition to Title X funds, Washington separately funds contracted Title X health care providers for Title X-allowable services. Further, some Medicaid providers in Washington offer Title X-allowable services but are not Title X projects. The funding from Title X and Medicaid is separate and distinct. However, if an entity receives Title X funding, all clients that have received services according to Title X guidelines are counted as Title X clients in the data system regardless of their funding source.

There are 12 Title X sub-grantee agencies with 70 clinic sites across Washington State. Five of the 12 agencies that receive Title X funds in Washington perform abortions outside of the Title X project. There are several counties in Washington that only have one Title X provider, including Clallam, Grays Harbor, Pacific, Kitsap, Wahkiakum, Lewis, Thurston, Mason, Jefferson, Whatcom, Skagit, Clark, Skamania, Kittitas, Chelan, Ferry, Pend Oreille, Whitman, and Walla Walla. All sites have physicians on staff as medical directors, but nurse practitioners primarily provide care to patients. All sites have nurse practitioners accessible during all business hours.

Washington subjects Title X providers to numerous contractual requirements. These include: (1) they must be non-profit agencies; (2) they must be able to meet reporting requirements (including the ability to extract data from their Electronic Medical Records system to report to the contracted data vendor); (3) they must follow all regulations; (4) they must be able to separate abortion activities from Title X funding; and (5) they must have qualified personnel and licensed providers.

2. *Massachusetts*

Approximately \$6,155,000 in Title X funding flows into Massachusetts annually. These funds support, either directly or indirectly, 90 family planning providers. In 2016 alone, Title X

providers in Massachusetts served 66,072 people.¹³ Data from fiscal year 2017 shows that 88 percent of all Title X visits were made by female patients, 50 percent of all patients were between 18 and 29 years old, and 88 percent of all patients were at or below 200 percent of the FPL.

Title X providers in Massachusetts offer a wide range of services and care, including pregnancy testing and options counseling; contraceptive services and supplies; pelvic exams; screenings for cervical and breast cancer; screenings for high blood pressure, anemia, and diabetes; screenings and treatment for STIs; infertility services; health education; and referrals for other health and social services. These services not only have a profound and positive impact on patients' lives, but also save Massachusetts and the federal government money. In fact, according to one estimate, Title X services save Massachusetts and the federal government approximately \$140 million per year in Massachusetts alone.¹⁴ Beyond the significant fiscal impact, the services provided have a real and profound impact on the lives of Massachusetts women and their families. In 2014, Title X-funded centers met 15 percent of all contraceptive needs in Massachusetts¹⁵ and helped avert 13,600 unintended pregnancies.¹⁶

Title X funds are crucial and must be spent wisely. Programs that currently receive these funds do so in a culturally competent and welcoming manner. They offer an array of services. They understand the health needs of their patients. The proposed rule does not advance Title X's purpose and undermines the ability of its recipients to do the important work that they do every day on behalf of some of Massachusetts' most vulnerable patients.

3. *Oregon*

The state of Oregon has been the umbrella grantee for Title X services throughout Oregon since 1970. The Oregon Health Authority's Reproductive Health Program administers the state's Title X grant. In fiscal year 2018, Oregon's Title X award was \$3,076,000. This funding provides direct support to a network of 35 agencies with 106 clinic sites and is comprised of local public

¹³ *Title X in Massachusetts: Improving Public Health and Saving Taxpayer Dollars*, National Family Planning & Reproductive Health Association, at 1 (Dec. 2017), available at <https://www.nationalfamilyplanning.org/file/state-snapshots-2017/Massachusetts.pdf>.

¹⁴ *Contraception, Cost Savings at Title X-Funded Centers: From Contraceptive Services*, Guttmacher Institute Data Center, <https://data.guttmacher.org/states/table?state=MA&dataset=data&topics=96> (last visited July 30, 2018).

¹⁵ *Contraception, Title X-Funded Centers: Percentage of Need Met By Title X-Funded Centers*, Guttmacher Institute Data Center, <https://data.guttmacher.org/states/table?state=MA&dataset=data&topics=257> (last visited July 30, 2018).

¹⁶ *Contraception, Outcomes Averted By Title X-Funded Centers: From Contraceptive Services*, Guttmacher Institute Data Center, <https://data.guttmacher.org/states/table?state=MA&topics=120&dataset=data> (last visited July 30, 2018).

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Deputy Assistant Secretary Diane Foley, M.D., FAAP
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health authorities, federally qualified health centers (FQHCs), Planned Parenthood clinics, rural health centers, and other community health centers. Almost every county has at least one Title X Program provider, often with multiple clinic sites per provider.

A total of 37,012 unduplicated clients were served by Title X sub-recipient clinics in 2017. Of these clients, 15,225 (41 percent) were uninsured, meaning they have limited options for accessing affordable reproductive health services.

Oregon's Title X clinics provide essential, high-quality preventive reproductive health services to underserved individuals. Data from 2017 show that of the 37,012 clients served by Oregon's Title X clinics:

- 93 percent were female;
- 47 percent were females between the ages of 18 and 29;
- 95 percent were at or below 250 percent of the FPL and 66 percent were at or below 100 percent of the FPL; and
- 60,647 clinic visits were provided, including:
 - 6,511 cervical cancer screenings
 - 49,366 STI screenings
 - 12,649 annual/well-woman exams

Further evidence of the high quality of care in Oregon's Title X clinics comes from clients themselves. According to Oregon's 2015 Reproductive Health Client Satisfaction Survey, 99 percent of clients reported the following: that medical staff respected their values, they trust the medical staff to help them make decisions, and they would recommend the clinic to friends or family.

In addition to offering high quality care, Oregon's Title X program is also cost effective. In 2017, over 6,000 unintended pregnancies were averted through the provision of effective contraceptive methods and high-quality counseling services in Oregon's Title X clinics. Using a conservative estimate of \$16,000 for an average delivery and the first year of infant health care under Oregon's Medicaid program, even if less than half of these 6,000 unintended pregnancies resulted in births, the savings to the state were in excess of \$40 million in taxpayer funds in Oregon alone in 2017.

4. *Vermont*

The Vermont Department of Health, the sole grantee for Vermont, has relied on Title X grant funding for decades. The Vermont Department of Health receives about \$775,000 annually from Title X, of which the majority is passed on directly to the sole sub-grantee, Planned Parenthood of Northern New England (PPNNE). With these funds, PPNNE provides reproductive health

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services at 10 different clinics located throughout Vermont. These clinics serve a largely rural population—none are located in Chittenden County, the most populous county of Vermont.

Through these clinics, Title X provided family planning services to 9,808 Vermonters in 2016. Of these, 44 percent reported income of less than 100 percent of the FPL, and 76 percent had income less than 250 percent of the FPL. Vermont’s Title X patients were 11 percent male, and 20 percent were under age 20. And 22 percent had no health insurance.¹⁷

Services provided by Title X funds in Vermont include “a broad range of family planning and related preventive health services for Vermont women, men, and their partners.”¹⁸ As required in 42 C.F.R. Part 59, all pregnancy counseling at Title X clinics in Vermont is nondirective.¹⁹ In addition, Title X funds provided “patient education and counseling; breast and pelvic examinations; breast and cervical cancer screening according to nationally recognized standards of care; STI and Human Immunodeficiency Virus (HIV) prevention education, counseling, testing and referral; and pregnancy diagnosis and counseling.”²⁰

Title X funding has been an essential part of the success that Vermont has seen in reproductive health outcomes over time. For example, while the current Title X rules and program have been in place, the number of teen pregnancies in Vermont has steadily declined.²¹ And, the number of teen abortions occurring in Vermont has steadily declined.²² This is consistent with the overall drop in abortion rates in Vermont and nationwide.²³ Title X-specific analyses show that these trends over time are at least partly attributable to Title X funding. One estimate shows that approximately 1900 unintended pregnancies were averted by Title X-funded clinics in Vermont

¹⁷ Office of Population Affairs, Title X Family Planning Annual Report: Vermont (April 2017) (on file with Vermont Attorney General’s Office).

¹⁸ Office of Population Affairs, Program Review: Title X Family Planning Project: Vermont Department of Health, 1, 33 (May 2017) (on file with Vermont Attorney General’s Office).

¹⁹ *Id.* at 34-35.

²⁰ *Id.* at 1.

²¹ Kathryn Kost et al., *Pregnancies, Births and Abortions Among Adolescents and Young Women in the United States, 2013: National and State Trends by Age, Race and Ethnicity*, 36 (Guttmacher Inst. Aug. 2017) (data going back to 1988), available at https://www.guttmacher.org/sites/default/files/report_pdf/us-adolescent-pregnancy-trends-2013.pdf

²² *Id.* at 40.

²³ Vt. Dept. of Health, “Fig. 11: Vermont and U.S. Abortion Ratios 1980 – 2016,” *2016 Vital Statistics: 132nd Report Relating to the Registry and Return of Births, Deaths, Marriages, Divorces, and Dissolutions*, 129 (Agency of Human Servs. 2016) (data going back to 1980), available at <http://www.healthvermont.gov/sites/default/files/documents/pdf/Vital%20Statistics%20Bulletin%202016.pdf>

in 2014.²⁴ Of those, 400 would have been teen pregnancies.²⁵ In addition, Title X's successes have not been limited to pregnancy outcomes. Although Title X is not the only public health program addressing these issues, cervical cancer rates²⁶ and new HIV/AIDS diagnoses²⁷ in Vermont have been generally declining as well. In 2016, Title X clinics screened 1,344 clients for cervical cancer and 2,834 clients for HIV.²⁸

The successes of the Title X program translate from public health to the public fisc. By one estimate, Title X services in Vermont saved the state and federal governments \$7,868,000 in 2010.²⁹ Of that money, the majority (\$7,520,000) was saved in annual maternity and birth-related costs as a result of contraceptive services.³⁰ An additional \$215,000 was saved in annual miscarriage and ectopic pregnancy costs.³¹ Tens of thousands of dollars in public health costs were saved from STI and cancer screening at Title X clinics.³²

C. The Fatal Deficiencies in the Proposed Rule

²⁴ *Number of Unintended Pregnancies Averted by Title X-Funded Centers*, Data Ctr., Guttmacher Inst., <https://data.guttmacher.org/states/table?state=VT&topics=114> (last visited July 30, 2018).

²⁵ *Number of Unintended Pregnancies Averted to Clients Aged <20 by Title X-Funded Centers*, Data Ctr., Guttmacher Inst., <https://data.guttmacher.org/states/table?state=VT&topics=114> (last visited July 30, 2018).

²⁶ Vermont Cancer Registry, *HPV Associated Cancers—Data Brief*, 1 (Vt. Dept. of Health May 2018) (data going back to 1994), available at http://www.healthvermont.gov/sites/default/files/documents/pdf/stat_cancer HPV_Assoc_Ca_Data_Brief.pdf.

²⁷ Decrease seen since the height of the epidemic, and the introduction of the first effective treatments, in the early 1990s. Vt. Dept. of Health, "History of the HIV/AIDS epidemic, Vermont residents at diagnoses 1984 – 2014," *Vermont HIV/AIDS Annual Report*, 2 (May 2015), available at http://www.healthvermont.gov/sites/default/files/documents/pdf/ID_HIV_surveillance_Vt%20HIV%20Annual%20Rep%202014.pdf; see also Vt. Dept. of Health, *2016 Vermont HIV Annual Report*, 2-3 (May 2018), available at http://www.healthvermont.gov/sites/default/files/documents/pdf/ID_HIV_VermontHIVAnnualReport2016.pdf.

²⁸ Office of Population Affairs, *Title X Family Planning Annual Report: Vermont*, 10, 13 (April 2017) (on file with Vermont Attorney General's Office).

²⁹ *Total Annual Gross Savings from Services Provided During Family Planning Visits at Title X-Funded Centers*, Guttmacher Institute Data Center, <https://data.guttmacher.org/states/table?state=VT&topics=98> (last visited July 30, 2018).

³⁰ *Annual Maternity and Birth Related Costs (Through 60 Months) Saved from Contraceptive Services*, Guttmacher Institute Data Center, <https://data.guttmacher.org/states/table?state=VT&topics=96> (last visited July 30, 2018).

³¹ *Annual Miscarriage and Ectopic Pregnancy Costs Saved from Contraceptive Services*, Guttmacher Institute Data Center, <https://data.guttmacher.org/states/table?state=VT&topics=96> (last visited July 30, 2018).

³² *Annual Costs Saved From Chlamydia, Gonorrhea and HIV Testing at Title X-Funded Centers; Annual Costs Saved from Pap and HPV Testing at Title X-Funded Centers*, Guttmacher Institute Data Center, <https://data.guttmacher.org/states/table?state=VT&topics=97> (last visited July 30, 2018).

1. *The proposed rule requires directive counseling in violation of the Consolidated Appropriations Act, 2018.*

In numerous ways, the proposed rule imposes unethical requirements to provide directive, mandatory patient counseling. This is contrary to the Consolidated Appropriations Act, 2018, which states that, with respect to the amounts appropriated “for carrying out the program under title X of the PHS Act to provide for voluntary family planning projects, . . . all pregnancy counseling shall be nondirective.”³³ While Congress is free to “make a value judgment favoring childbirth over abortion,”³⁴ once Congress makes a policy choice executive agencies are not at liberty to ignore it. Here Congress has required that counseling of patients using Title X funds may not be slanted, and HHS may not direct Title X providers to disregard Congress’s directive.

The proposed rule requires Title X funds be used for directive counseling in several ways. First, the rule prohibits Title X providers from referring a patient who discovers she is pregnant to abortion providers, except in the narrow circumstances where the patient “clearly states” that she has “already decided” she will have an abortion.³⁵ Of course, such a “clear decision” for someone who learned minutes earlier that she was pregnant would be unlikely, meaning the vast majority of patients will be referred away from abortion providers. Second, providers are prohibited from even “present[ing]” the option of abortion. Third, providers must refer patients for “appropriate prenatal and/or social services (such as prenatal care and delivery, infant care, foster care, or adoption)” whether or not the patient desires such referrals.³⁶ Fourth, providers are required to assist in setting up these referral appointments—unless the patient wants an abortion.³⁷ In short, if a pregnant patient says that she wants advice on birth or adoption options the provider is unencumbered, but if she wants to discuss the option of abortion, the provider may not assist her. Only if the patient states she wants an abortion may the provider offer her a list that includes abortion providers, but that list must obfuscate which clinics offer what she seeks and which do not.³⁸

These provisions are intended to, and do, slant Title X counseling against termination and in favor of childbirth, in violation of Congress’s directive otherwise. Indeed, the text of the proposed rule says nothing about nondirective counseling, instead eliminating the former

³³ Pub. L. No. 115-141, div. H, tit. II, 132 Stat. 348, 716 (2018), <https://www.congress.gov/bill/115th-congress/house-bill/1625/text>.

³⁴ *Rust v. Sullivan*, 500 U.S. 173, 192 (1991) (quoting *Maher v. Roe*, 432 U.S. 464, 474 (1977)).

³⁵ 83 Fed. Reg. 25,531 (proposed § 59.14(a), (c)).

³⁶ 83 Fed. Reg. 25,531 (proposed § 59.14(b)).

³⁷ *Id.*

³⁸ 83 Fed. Reg. 25,531 (proposed § 59.14(c)).

requirement to provide “neutral, factual information and nondirective counseling . . .” 42 C.F.R. 59.5(a)(5)(ii). Through the repeal of the nondirective counseling requirement and the addition of severe restrictions on referrals, the proposed rule seeks to replace what has been a patient-guided, provider-informed approach to care with a system that jeopardizes both providers’ ethical obligations and patients’ health.

2. *The proposed rule illegally injects the government into the provider-patient relationship.*

We are deeply troubled by the Department’s proposed government interference in the relationship between a medical provider and a patient, and not only because it violates a federal law. The proposed rule purports to tell providers paid with Title X funds what they can and cannot say when a patient discovers she is pregnant. The government should have no role telling a health care provider what to say to a patient. Here, the proposed rule prohibits nurses and nurse practitioners, who see the majority of Title X patients, from mentioning abortion, and doctors may do so only in the very limited circumstances permitted in proposed section 59.14(c) and (d).³⁹ Under the proposed rule, Title X providers could not simply take off their “Title X hats” and offer the same nondirective advice that they currently offer because the rule would require Title X providers to comply with Title X requirements, whether or not Title X funds a particular patient’s service.

As America’s women’s health providers have jointly stated in opposing the proposed rule, “[p]oliticians have no role in picking and choosing among qualified providers.”⁴⁰ This government script for providers when addressing their Title X patients violates the American Medical Association’s Code of Ethics, which states that “withholding information without the patients’ knowledge or consent is ethically unacceptable.”⁴¹ Similarly, the Code of Ethics for Nursing requires nurses to give complete – not slanted – information to patients.⁴²

³⁹ 83 Fed. Reg. 25,531.

⁴⁰ “America’s Women’s Health Providers Oppose Efforts to Exclude Qualified Providers from Federally-Funded Programs,” Join Statement of the American College of Obstetricians and Gynecologists, the American Academy of Pediatrics, the American College of Nurse-Midwives, the American College of Physicians, the Association for Physician Assistants in Obstetrics and Gynecology, the National Association of Nurse Practitioners in Women’s Health, Nurses for Sexual and Reproductive Health, and the Society for Adolescent Health and Medicine (May 23, 2018), <https://www.acog.org/About-ACOG/News-Room/Statements/2018/Health-Providers-Oppose-Efforts-to-Exclude-Qualified-Providers-from-Federally-Funded-Programs> (last accessed on July 17, 2018).

⁴¹ American Medical Association, Code of Medicaid Ethics Opinion 2.1.3, Withholding Information from Patients, available at <https://www.ama-assn.org/delivering-care/withholding-information-patients> (last accessed on July 17, 2018).

⁴² Code of Ethics for Nursing, Provision 1.4, www.bc.edu/content/dam/files/schools/son/pdf2/ANA_code_of_ethics.pdf (last accessed on July 17, 2018) (patients must be given “accurate, complete, and understandable information in a manner that facilitates an informed decision”).

Further, the proposed rule is arbitrary and capricious because it only permits “a medical doctor” to provide the very limited referral for abortion the proposed rule allows.⁴³ In our States, this severely restricts the nondirective counseling Title X patients would receive. In Oregon, for example, over 93 percent of visits to Title X clinics in 2017 were conducted by non-physician caregivers such as nurse practitioners and physician assistants. The preamble to the proposed rule itself recognizes that only 22 percent of clinical service FTEs delivered to Title X patients were provided by medical doctors.⁴⁴ As a result, the proposed rule would prevent 78 percent of the medical professionals who see patients at Title X providers from providing even the limited and intentionally obfuscated abortion referral it claims to authorize. The Department does not explain why prohibiting such a large percentage of Title X caregivers from providing any kind of counseling on the legally available option of abortion comports with the statutory requirement that Title X funds be used only for nondirective counseling, and we request such an explanation.

The proposed rule’s roadblocks for a patient seeking complete and accurate health information also are arbitrary and capricious. First, the patient must already know that she wants an abortion. This precludes the patient from engaging in an important conversation with her health care provider about the pros and cons of abortion. The Department fails to address the fact that many women do not ask directly about abortions immediately upon learning they are pregnant, and instead consider it as one of many medical options. We ask that the Department explain how its proposed restrictions can be reconciled with this experience of clinicians. Second, only a doctor can give the patient the referral list. This appears designed to undermine the provision of healthcare. Moreover, it is not clear what, if any, counseling a physician is entitled to provide to a woman who has decided to have an abortion given that the proposed rules prohibit providers from “promot[ing]” and “support[ing]” abortion as a method of family planning. Limiting the medical information that physicians can offer their patients unreasonably intrudes upon the physician-patient relationship and undermines ethical standards of care.

The preamble to the proposed rule relies on “Federal conscience statutes” to justify its diverging from the requirement in the Consolidated Appropriations Act that Title X-funded counseling must be nondirective.⁴⁵ This reliance is misplaced. The proposed rule does not merely create an exception to nondirective counseling for conscience objectors. Instead, it allows conscience objectors to dictate what all Title X providers may say. Purportedly to uphold conscience protections, the proposed rule prohibits nearly 80 percent of the medical professionals who treat patients at Title X clinics from saying anything about abortion, regardless of their religious or moral beliefs. Likewise, it severely restricts the information medical doctors can impart, again regardless of their religious or moral convictions. In doing so, it makes no accommodation for providers who have religious or moral convictions contrary to the proposed rule, for instance

⁴³ 83 Fed. Reg. 25,531 (§ 59.14(a); *see also*, § 59.14(c)).

⁴⁴ 83 Fed. Reg. 25,523.

⁴⁵ 83 Fed. Reg. 25,506-507.

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those whose convictions align more closely with professional ethics rules. These prohibitions go substantially further than necessary to vindicate a select number of providers' conscience objections, and we ask the Department to better explain its reasoning.

3. *The proposed rule is contrary to, and ignores, the Department's authoritative recommendations for evidence-based "family planning methods and services" without reason or explanation.*

A federal agency cannot simply ignore its prior statutory interpretations. This is especially true where, as here, the prior interpretation is based on factual findings or cited evidence, and the new interpretation fails to consider that evidence. "[T]he consistency of an agency's position is a factor in assessing the weight that position is due." *Good Samaritan Hospital v. Shalala*, 508 U.S. 402, 417 (1993). "To be sure, the requirement that an agency provide reasoned explanation for its action would ordinarily demand that it display awareness that it is changing position." *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).

In 2014, the Department's Centers for Disease Control and Prevention (CDC) issued a Recommendations and Report entitled "Providing Quality Family Planning Services: Recommendations of CDC and the U.S. Office of Population Affairs."⁴⁶ The report provided the agency's view on what are "acceptable and effective family planning methods and services."⁴⁷ The CDC stated:

This report provides recommendations developed collaboratively by CDC and the Office of Population Affairs (OPA) of the U.S. Department of Health and Human Services (HHS). The recommendations outline how to provide quality family planning services, which include contraceptive services, pregnancy testing and counseling, helping clients achieve pregnancy, basic infertility services, preconception health services, and sexually transmitted disease services. The primary audience for this report is all current or potential providers of family planning services, including those working in service sites that are dedicated to family planning service delivery as well as private and public providers of more comprehensive primary care.⁴⁸

⁴⁶ Gavin, L, Moskosky, S, Carter, M, Curtis, K, Glass, E, Godfrey, E, Marcell, A, Mautone-Smith, N, Pazol, K, Zapata, L, "Providing Quality Family Planning Services: Recommendations of CDC and the U.S. Office of Population Affairs." *Morbidity and Mortality Weekly Report*, 63 Recommendations and Reports No. 4 (April 25, 2014), available at <https://www.cdc.gov/mmwr/pdf/rr/rr6304.pdf> (last accessed July 19, 2018) (hereinafter "CDC Report and Recommendations").

⁴⁷ 42 U.S.C. § 300(a).

⁴⁸ CDC Report and Recommendations at 1.

The report provided “recommendations for how to help prevent and achieve pregnancy, emphasize[d] offering a full range of contraceptive methods for persons seeking to prevent pregnancy, highlight[ed] the special needs of adolescent clients, and encourage[d] the use of the family planning visit to provide selected preventive health services for women, in accordance with the recommendations for women issued by the Institute of Medicine and adopted by HHS.”⁴⁹ In other words, it was a careful, evidence-based description of the best practices for family planning in the United States.

Without explanation, the proposed rule contradicts this report in numerous ways, and it does so without mentioning the report. The CDC report’s “recommendations support offering a full range of Food and Drug Administration (FDA)-approved contraceptive methods,”⁵⁰ while the proposed rule eliminates “medically approved” from the requirement that projects provide a broad range of family planning methods.⁵¹ The CDC report advocates a “[c]lient-centered approach” where the patient is offered a “broad range of contraceptive methods so that clients can make a selection based on their individual needs and preferences,”⁵² while the proposed rule offers Title X funds to a clinic that chooses to offer only a single method of family planning.⁵³ The CDC report states that a provider, after administering a pregnancy test, should present “options counseling” and “appropriate referrals,”⁵⁴ while the proposed rule mandates concealing the full range of options available to the patient, including abortion, and directs omitting abortion providers from referral lists.⁵⁵ These changes undermine long-held, evidence-based standards of care.

The Department fails to explain why it is rejecting its own recommendations expressly “based on scientific knowledge.”⁵⁶ Indeed, it fails even to acknowledge the existence of those

⁴⁹ *Id.*

⁵⁰ CDC Report and Recommendations at 2.

⁵¹ 83 Fed. Reg. 25,530 (proposed § 59.5).

⁵² CDC Report and Recommendations at 2.

⁵³ 83 Fed. Reg. 25,530 (proposed § 59.5). Without doubt, the proposed regulations’ emphasis on fertility awareness-based methods of family planning over all other forms of contraception will result in increased numbers of unintended pregnancies, including teen pregnancies. Table 3-2, Contraceptive Technology, <http://www.contraceptivetechnology.org/wp-content/uploads/2013/09/CTFailureTable.pdf> (last visited July 30, 2018) (listing a 24% failure rate for typical use of fertility awareness-based methods, compared to a less than 10% failure rate for typical use of hormonal contraceptives and less than 1% failure rate for long-acting reversible contraceptives).

⁵⁴ CDC Report and Recommendations at 14.

⁵⁵ 83 Fed. Reg. 25,531 (proposed § 59.14).

⁵⁶ CDC Report and Recommendations at 4.

recommendations. The proposed rule lacks the “reasoned analysis” the Department concedes is required.⁵⁷

4. *The financial separation requirement reverses a prior agency interpretation and is unsupported by any evidence.*

The proposed rule imposes a new requirement of physical separation between Title X projects and the abortion activities of the Title X grantee/sub-recipient.⁵⁸ This requirement reverses the Department’s prior interpretation, is imposed without supporting evidence, and does not reflect agency consideration of substantial evidence contradicting the Department’s conclusion.

The proposed rule reverses the Department’s longstanding interpretation that, “[i]f a Title X grantee can demonstrate [separation] by its financial records, counseling and service protocols, administrative procedures, and other means. . . ., then it is hard to see what additional statutory protection is afforded by the imposition of a requirement for ‘physical’ separation.”⁵⁹ The Department states that this reversal is necessary to avoid the risk of (i) intentional or unintentional use of Title X funds for impermissible purposes or the commingling of funds, and (ii) public confusion that Title X funds being used by a family planning organization may be supporting the program’s abortion activities.⁶⁰

Despite the need for *evidence* to justify an agency’s reversal of course, the preamble to the proposed rule cites no evidence of commingled funds or public confusion. The preamble states that the Department’s concerns are “acute” because, according to a Guttmacher Institute report, the percentage of “nonspecialized clinics” such as doctors’ offices accounting for abortions performed in the United States inched up 6 percent from 2008 to 2014, which may increase the risk of confusion and misuse of Title X funds.⁶¹ However, the Department has no evidence that any of these nonspecialized clinics receive Title X funds. The Guttmacher Institute itself noted that the data its report relied on included inaccuracies and out-of-date information.⁶² This is the only evidence the Department cites of potential public confusion and commingling of funds, yet

⁵⁷ 83 Fed. Reg. 25,505.

⁵⁸ 83 Fed. Reg. 25,532 (proposed § 59.15).

⁵⁹ Standards of Compliance for Abortion Related Services in Family Planning Services Projects, 65 Fed. Reg. 41,270, 41,276 (Jul. 3, 2000).

⁶⁰ 83 Fed. Reg. 25,507.

⁶¹ *Id.*

⁶² Jones, RK, Jerman, J, Abortion Incidence and Service Availability In the United States, 2014, Guttmacher Institute Perspectives on Sexual and Reproductive Health (March 2017) (“Limitations”), <https://www.guttmacher.org/journals/psrh/2017/01/abortion-incidence-and-service-availability-united-states-2014> (last accessed July 18, 2018).

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it evinces no actual *use* of Title X funds.⁶³ In fact, unlike the Title X regulations proposed in 1988—which relied in part on two reports, one from the Department’s Office of Inspector General (OIG) and the other from The General Accounting Office—the Department currently points to no reports or relevant evidence as justification for the proposed rule.

The Department fails to cite its own safeguards it already has in place to ensure that Title X funds are kept separate from abortion-related services. “According to [the Office of Population Affairs], family planning projects that receive Title X funds are closely monitored to ensure that federal funds are used appropriately and that funds are not used for prohibited activities, such as abortion.”⁶⁴ These “[s]afeguards to maintain this separation include (1) careful review of grant applications to ensure that the applicant understands the requirements and has the capacity to comply with all requirements; (2) independent financial audits to examine whether there is a system to account for program-funded activities and non-allowable program activities; (3) yearly comprehensive reviews of the grantees’ financial status and budget report; and (4) periodic and comprehensive program reviews and site visits by OPA regional offices.”⁶⁵ Despite this thorough monitoring, the Department fails to provide any evidence of actual threats to Title X funding and instead relies on reports from the 1980s, old Medicaid audits, and unsupported assertions.

The Department’s monitoring has been thorough. For example, the 2017 OPA Program Review Report for the Vermont Department of Health found the following:

Financial documentation at service sites demonstrates that Title X funds are not being used for abortion services and adequate separation exists between Title X and non-Title X activities. (42 C.F.R. § 59.5(a)(5))

REVIEW OF EVIDENCE

The grantee does not provide abortion services. However, the sub-recipient does provide these services. The sub-recipient has established policies, procedures, and practices to ensure the adequate separation of Title X activities from non-Title X activities. Staff separates their time, after the fact, into clearly defined cost centers in the TimeForce system. This is done each day, is checked by the site supervisor,

⁶³ In a separate part of the preamble addressing the purported need for monitoring of the use of Title X funds, the Department cites a Washington Medicaid Fraud Control Unit investigation. 83 Fed. Reg. 25,509. The Medicaid Fraud Control Unit is part of the Washington Attorney General’s Office. Our investigation found that the individuals reporting the alleged violations relied only a newsletter sent out by American Life League and had no additional information or any firsthand knowledge, the state Medicaid agency auditor did not see any indication of fraudulent billing, and there was no pattern of intentional billing misconduct.

⁶⁴ Angela Napili, Cong. Research Serv., R45181, *Family Planning Program Under Title X of the Public Health Service Act* 16 (2018), available at <https://fas.org/sgp/crs/misc/R45181.pdf>.

⁶⁵ *Id.*

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and is further checked through an analysis of the number and type of services provided each day in the clinic setting by administrative staff.

The sub-recipient demonstrated that no abortion-related activities were provided as part of the Title X project. This included policies and procedures and the actual practices in the clinic setting, counseling and service protocols, intake and referral procedures, and fiscal and other administrative procedures.

This requirement [compliance with Section 1008] was MET.⁶⁶

No evidence indicates that the Vermont Department of Health has ever had any issues complying with Section 1008.

In addition, the Department does not address the steps states like ours take to ensure sub-recipients' separation of Title X funds from any abortion-related activities. In Washington, the State Department of Health Family Planning Program ensures the separation of Title X funds from abortion services through contract language, desk reviews, and on-site monitoring. The goal of monitoring is to document the extent of sub-recipient agencies' compliance with state and federal laws and regulations. Monitoring helps the Family Planning Program assist local agencies with compliance with Federal Title X and state rules related to funding. This ensures accountability.

The Washington Department of Health (DOH) does three types of monitoring: Administrative, Clinical, and Fiscal. As federal grant funds flow through the Family Planning Program to a sub-recipient, the Family Planning Program maintains primary responsibility for ensuring enforcement of federal and state requirements. Those requirements pertain to sub-recipients as they receive state and federal funds. When a sub-recipient signs the Family Planning Program contract with the DOH, they agree to enforce those same certifications, assurances, cost principles, and administrative rules. All of these requirements are incorporated in contract language. Title X sub-recipient contract standard clauses include that the Contractor does "not provide abortion as a method of family planning within the Title X Project. (42 CFR 59.5(5))," and "[t]he Title X Project must not include sterilizations, abortions, or any flat rated service (for instance some STD or HIV testing) or income/revenue generated from them."

Furthermore, the DOH Fiscal Monitoring and Review Guide and On-site Monitoring Tool is used by site consultants and agency fiscal experts to perform on-site reviews every three years or more often if needed. They monitor for documentation that:

⁶⁶ Office of Population Affairs, Program Review: Title X Family Planning Project: Vermont Department of Health, 21 (May 2017) (on file with Vermont Attorney General's Office).

- i. The financial system provides for financial separation of Title X family planning service dollars and abortion service dollars;
- ii. Agency personnel must be informed that they could be prosecuted, under Federal law, if they coerce, or try to coerce, anyone to undergo abortion or a sterilization procedure, and the agency has a policy in place to this end;
- iii. The agency has written policies that clearly state that no Title X funds will be used in programs where abortion is a method of family planning;
- iv. The agency is in compliance with Title X, specifically calling out Section 1008; and
- v. Staff members have been trained about separating Title X family planning services and abortion services.

The site consultant verifies this onsite through the sub-recipients' policies and procedures, personnel records, and a review of the accounting system.

In addition, the Washington State Family Planning Manual⁶⁷ advises about separating Title X services from abortion, including that Contractors must be in full compliance with Section 1008 prohibiting the use of Title X funds for abortion as a method of family planning.

Oregon's Reproductive Health Program maintains a robust process for monitoring compliance among its Title X agencies. Ongoing and routine compliance reviews ensure that Title X agencies adhere to administrative, clinical, and fiscal requirements. The monitoring process includes:

- i. Annual recertification of agencies;
- ii. Onsite compliance reviews of consent forms, policies, procedures and protocols; chart audits; onsite clinical observation; and onsite observation of patient and physical environment; and
- iii. Regular billing, client enrollment, and quality assurance reviews.

Like Washington's DOH, Oregon's Reproductive Health Program uses a comprehensive Program Certification Verification Tool to monitor its Title X agencies. Specific policies relating to abortion, including the requirement that no federal funds are used for abortion services and that abortion is not provided as a birth control method, are reviewed and verified.

In Massachusetts, the Department of Public Health's robust oversight of sub-recipients providing abortion services ensures compliance with current Title X requirements. The Department of Public Health requires that these sub-recipients establish and follow written policies that clearly indicate that Title X funds will not be used for abortion services, clearly segregate Title X funds to prevent allocation of Title X funding to abortion services; maintain separate inventory for

⁶⁷ *Family Planning Manual*, Washington State Department of Health, September 2016, available at <https://www.doh.wa.gov/portals/1/Documents/Pubs/930-122-FPRHManualComplete.pdf> (last visited July 30, 2018)

abortion and non-abortion services; and implement fiscal review and oversight procedures to assure that no Title X funds are used for abortion services. The Massachusetts Department of Public Health also engages in regular monitoring, and requires all providers to inform them of any changes in their practice.

In Vermont, in addition to the safeguards noted above, PPNNE undergoes an annual financial audit, which specifically examines its Title X expenditures. PPNNE passes its audit every year, including its accounting of Title X funds.⁶⁸

The Department has not explained why these thorough guidance, monitoring, and auditing steps taken by our state agencies and by the Department itself are insufficient to prevent commingling of funds, and we ask the Department to provide this explanation.

5. *The proposed rule would violate the constitutional rights of Title X providers and their patients.*

The proposed rule imposes government restrictions on speech and denies women freedom from government interference in their most intimate and personal decisions that courts will find fatal under the First and Fifth Amendments. It should be withdrawn for these reasons.

In *Rust v. Sullivan*, the Supreme Court recognized that “funding by the government, even when coupled with the freedom of the fund recipients to speak outside of the scope of the Government-funded project,” is not “invariably sufficient to justify Government control over the content of expression.” 500 U.S. at 199. In some areas, particularly rural areas, the proposed rule is likely to drive all Title X providers from the program, leaving patients without reasonable access to any Title X services. And for those Title X providers remaining in the program, the Department’s restriction on speech will extend beyond the Title X program to every patient encounter by every Title X provider, whether or not Title X funds are used. As a consequence, the proposed rule will force all Title X grantees to give up neutral abortion-related speech, whether or not they are wearing a “Title X hat.” These facts are different from those presented in *Rust v. Sullivan*, which makes that decision distinguishable.

The massive contraction of the Title X program that would occur under the proposed rule, and is shown herein as to our States, results in a violation of the unconstitutional conditions doctrine and the vagueness and overbreadth doctrines of the First Amendment. The proposed rule interferes with a doctor’s ability to provide, and a woman’s right to receive, information concerning abortion and abortion-related services, both within and outside of the Title X program. This violates women’s Fifth Amendment rights to be free of government interference

⁶⁸ Financial audits for 2015 – 2017 may be downloaded at the Federal Audit Clearinghouse, <https://harvester.census.gov/facdissem/Main.aspx>. Financial audits for 2013 and 2014 on file with the Vermont Attorney General’s Office. Financial audits older than five years were not readily available.

in their decisions whether to continue pregnancies to term. It is also contrary to the First Amendment, especially given the Supreme Court’s recent recognition that “[a]s with other kinds of speech, regulating the content of professionals’ speech ‘pose[s] the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information.’” *National Institute of Family and Life Advocates v. Becerra*, 138 S. Ct. 2361, 2374 (2018) (quoting *Turner Broadcasting System v. FCC*, 512 U.S. 622, 641 (1994)). And it contravenes Supreme Court cases that reject “confin[ing] the attending physician in an undesired and uncomfortable straitjacket in the practice of his profession.” *Planned Parenthood of Central Mo. v. Danforth*, 428 U.S. 52, 67 n.8 (1976). Finally, it interferes in the states’ rights to design and implement health care programs in their states by causing the Title X regulations to be applicable outside the Title X program.

If the Department does not voluntarily withdraw the proposed rule, we ask it to explain, in light of these facts, how the proposed rule is consistent with the Constitution.

6. *The proposed rule includes many requirements that are unsupported by any evidence and, if not abandoned, will be found to be arbitrary and capricious.*

a. *The primary care requirement is unsupported and arbitrary.*

The proposed rule requires that Title X providers “should offer either comprehensive primary health services onsite or have a robust referral linkage with primary health providers who are in close physical proximity to the Title X site.”⁶⁹ This requirement is supposedly meant to “promote holistic health and provide seamless care.”⁷⁰ This call for holistic and seamless care rings hollow considering that the Department is simultaneously proposing specific steps to limit the provision of complete health information and seamless care to patients through abortion counseling and referral restrictions. Instead, the primary care requirement appears intended to push out long-standing Title X providers who have specialized in family planning services and rural Title X providers who may not have “robust referral linkage[s] . . . in close physical proximity.”⁷¹

This requirement alone could dramatically reduce the scope of the Title X program in our States depending upon how the Department defines “close physical proximity.” This requirement is not stated in the statute. The Department must explain how it can be reconciled with the goals of the Title X program.

⁶⁹ 83 Fed. Reg. 25,530.

⁷⁰ *Id.*

⁷¹ *Id.*

- b. *The provisions requiring reporting on minors are unsupported and irrational.*

Currently, Title X providers must attempt to encourage a minor to involve her or his family in the decision-making process when the minor seeks contraceptive services. Under the proposed rule, this “encouragement” would be replaced with undue pressure on both the provider and the minor. The proposed rule requires that a Title X provider document “in the minor’s medical records the specific actions taken by the provider to encourage the minor to involve her/his family (including her/his parents or guardian) in her/his decision to seek family planning services.”⁷² The only exception to this requirement, which must be documented in the minor’s medical record, is if the provider “suspects the minor to be the victim of child abuse or incest” and this has been reported in compliance with state or local law.

Today, if a minor explains to a Title X provider that she wishes not to involve her family, that wish is respected. Minors may choose not to involve their families in their health care decisions due to differences of religious belief, fear of violence, fear of abandonment, lack of a suitable adult to involve, or simply a desire for confidential care. By requiring that the providers’ efforts to encourage family involvement be recorded in the medical record, the proposed rule could force providers to apply pressure on minor patients to involve their families even when doing so is not in the minor’s best interests. The proposed rule could ultimately have a chilling effect on honest and open conversations between providers and minor patients. Further, the proposed rule imperils patient confidentiality to such a degree that minors could be discouraged from seeking care altogether.⁷³ This will serve neither the purposes of the Title X program nor patients.

- c. *The other reporting requirements are unsupported, vague, and beyond the Department’s legal authority.*

The proposed rule would bury Title X projects and sub-recipients in overly burdensome reporting requirements. For example, a Title X project would need to report for each sub-recipient and referral agency not only the exact services provided, but also a “[d]etailed description of the extent of the collaboration” even down to the individuals involved and inclusive of undefined “less formal partners within the community.”⁷⁴

Along with the inclusion of the “less formal partners,” the proposed rule’s definition of “referral agency” makes the reporting requirements overly broad. The proposed rule suggests that even if a referral agency does not receive Title X funds, it may still be “subject to the same reporting

⁷² *Id.*

⁷³ See, e.g., *Planned Parenthood Fed’n of Am. v. Heckler*, 712 F.2d 650, 659-61 (D.C. Cir. 1983) (describing Congress’s decision not to mandate family involvement in Title X care for minors).

⁷⁴ 83 Fed. Reg. 25,530.

requirements as a grantee or sub-recipient.”⁷⁵ These requirements improperly overreach into relationships not otherwise governed by Title X regulations and burden projects, sub-recipients, and referral agencies. Rather than achieving the stated goal of creating a robust referral system, these requirements will cause projects and sub-recipients to limit their referral networks in order to control the amount of reporting.

These changes will have significant impacts. For example, the proposed regulations’ applicability to “referral agencies”⁷⁶ of Title X clinics would impact a significant number of Vermont’s health care providers. As a small and rural state, Vermont’s pool of available health care referral partners is also small. PPNNE maintains a “comprehensive referral data base” of other local health care providers.⁷⁷ But the proposed regulations would be unnecessarily and prohibitively restrictive on those health care providers that do not receive Title X funds, interfering with those providers’ and their patients’ rights and their ability to provide ethical and professional care.

7. *The proposed rule does not comply with Executive Orders 12866 and 13562.*

Executive Orders 12866 and 13562 require agencies to “assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits.” 83 Fed. Reg. 25521. Executive Order 12866 requires that a “significant regulatory action” comply with additional regulatory requirements. This proposed rule meets all the definitions of a “significant regulatory action” because it would (1) have an annual effect on the economy of \$100 million or more and will “adversely and materially affect” the health sector of the economy, public health, and state and local governments; (2) create a serious inconsistency and interfere with an action taken or planned by another agency; (3) materially alter budgetary impacts of entitlement grants or the right and obligations of recipients thereof; and (4) raise novel legal or policy issues arising out of legal mandates.

The restrictive requirements of the proposed rule disqualify many current Title X grantees from the program across the country. Some Title X patients currently served by these providers will lose access altogether to family planning services, particularly among the uninsured and those residing in rural areas. In 2017, Title X services saved our four States alone many millions of dollars in costs for health care services. Extrapolating those cost savings across all states, the fiscal impact of the proposed rule on the economy will exceed \$100 million and will adversely affect public health, the health care sector, and state treasuries. Additionally, the proposed rule materially changes the outflow of entitlement grants and the rights and obligations of grant

⁷⁵ 83 Fed. Reg. 25,514.

⁷⁶ 83 Fed. Reg. 25514.

⁷⁷ Office of Population Affairs, Program Review: Title X Family Planning Project: Vermont Department of Health, 11 (May 2017) (on file with Vermont Attorney General’s Office).

applicants and recipients. It also raises novel legal and policy issues because of new restrictions on speech. The preamble wrongly concludes that the proposed rule is not economically significant and fails to address these considerations.

8. *The proposed rule is contrary to Congress's intent because it would exclude qualified and experienced Title X providers from the program and reduce access to essential preventive health services.*

The impact of the proposed rule is contrary to the Title X statute. The proposed rule appears to be designed to deny Title X funds to many of the current Title X providers in our States and nationwide, and it does not address the impact this rule will have on our States' residents and budgets. The proposed rule, if implemented, will leave many counties without a Title X provider. Because the proposed rule will undermine the quality of health care provided and impose burdensome and counterproductive separation and reporting requirements, many providers in our States will be unable or unwilling to comply. Further, the proposed rule falls particularly hard on uninsured patients and those in rural areas, who in some cases will have no other reasonable option for obtaining family planning services. As a result, thousands of people who rely on Title X providers for contraception and other family planning services will lose access to those services. The proposed rule thus frustrates, rather than promotes, the purpose of Title X.

It is no secret that the Department wants to expel Planned Parenthood from the network of Title X providers. As then-candidate Donald Trump stated, "We're not going to allow, and we're not going to fund, as long as you have the abortion going on at Planned Parenthood."⁷⁸ More recently, when introducing the proposed rule, President Trump stated: "For decades American taxpayers have been wrongfully forced to subsidize the abortion industry through Title X federal funding so today, we have kept another promise. My administration has proposed a new rule to prohibit Title X funding from going to any clinic that performs abortions."⁷⁹ The proposed rule would certainly achieve the President's goal, but as described herein, it would go much further than that.

For some Title X providers, creating a separate corporate entity with complete physical and financial separation will be prohibitively expensive. In Massachusetts, at least one Title X provider, if forced to create a separate corporate entity to continue providing abortion care, will have to stop participating in Title X at one of its locations, resulting in the loss of a geographically important Title X clinic. In Oregon, two major Title X agencies with 12 clinic sites would likely be unable to continue as Title X providers due to the onerous physical

⁷⁸ Danielle Paquette, "Donald Trump's Incredibly Bizarre Relationship with Planned Parenthood," *Washington Post* (Mar. 2, 2016), https://www.washingtonpost.com/news/wonk/wp/2016/03/02/donald-trumps-incredibly-bizarre-relationship-with-planned-parenthood/?utm_term=.db131f627e96 (last accessed 7/13/18).

⁷⁹ <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-susan-b-anthony-list-11th-annual-campaign-life-gala/> (last accessed 7/13/18).

separation requirements set forth in the rules. The same is true in Washington and Massachusetts. All of Vermont's Title X clinics would be ineligible to continue under the program. A wide range of Title X provider types will have no choice but to forgo Title X funds, thus reducing their capacity to provide much needed family planning services. For example, it is unclear whether a hospital that runs a Title X clinic (on or off site) that also provides abortion would be able to comply with the requirement to have "separate, accurate accounting records" or "separate personnel, electronic or paper-based health care records."⁸⁰ Would funds attributed to the clinic also be attributable to the hospital as a whole? In addition to the practical issues created by the proposed rule's separation requirement, it also creates serious risk to patient safety by requiring separate medical record systems and further stigmatizes legal medical procedures.

In 2017, in Washington, over 14,000 Title X-funded patients received their Title X services at Planned Parenthood or other clinics that provided abortions outside the Title X project. In fact, in 20 of Washington's 39 counties, the only Title X provider is one that performs abortions outside the Title X project.⁸¹ If these Title X providers no longer could offer Title X-funded family planning services due to the separation and other requirements, these patients would need to either locate new Title X providers for their contraception and other family planning services, or forego the benefits of the Title X program. In all of eastern Washington, which is comprised of 20 counties, only four of those counties would have any Title X provider at all. In western Washington, the proposed rule would drive out the Title X providers in 10 additional counties. This includes six of the 10 most populous counties in Washington.

If the proposed regulations take effect, for the first time in the history of Title X, the Vermont Department of Health's Title X funding will be jeopardized. None of the current Title X clinics in Vermont will be eligible for Title X funds. Nor does Vermont have the health care infrastructure to make up for the anticipated loss in funding. Although Vermont has several FQHCs and rural health centers, they are not equipped to absorb all the family planning patients currently served by Title X clinics. Vermont FQHCs saw a total of 4,047 patients for contraceptive management in 2016.⁸² By comparison, Vermont's Title X clinics served 9,808 family planning patients in 2016. The FQHCs would have to more than double their family planning patient services in rural areas to absorb the needs of all Title X patients. FQHCs in Vermont are not equipped to do this.

In the Department's zeal to punish providers that perform abortions *outside* of the Title X project, the Department is harming many recipients of Title X services in our States. The

⁸⁰ 83 Fed. Reg. 25,519.

⁸¹ See Attachment 1 (map of Washington counties without Title X services if organizations that also provide abortions are removed from Title X).

⁸² 2016 Health Center Data: Vermont Data, Health Resources & Servs. Admin., <https://bphc.hrsa.gov/uds/datacenter.aspx?q=tall&year=2016&state=VT> (last visited July 30, 2018).

Secretary Alex M. Azar II
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Deputy Assistant Secretary Diane Foley, M.D., FAAP
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Department has not explained why issuing a rule to govern Title X that requires thousands of Title X-funded patients to search for a new Title X family planning provider—or go without one entirely—is consistent with Congress’s intent in establishing the Title X program, and we ask the Department to provide this explanation.

The harmful consequences of the proposed rule uniquely impact rural and uninsured patients. In five Washington counties, for example, one quarter or more of Title X patients are uninsured, and the only Title X providers are ones that perform abortions outside the Title X project.⁸³ And in five other counties in rural Washington, Title X patients are served by small Title X clinics associated with providers that perform abortions outside the Title X project. These clinics are in Ellensburg (in Kittitas County), Walla Walla (in Walla Walla County), Wenatchee (in Chelan County), Pullman (in Whitman County), and Moses Lake (in Grant County). We are advised that, because they are so small and a significant amount of their work involves Title X-funded services, at least some of these clinics would not survive the loss of Title X funds. If these current Title X providers are driven from the Title X program, many of these patients will not be able to shift to another provider.⁸⁴ Even if some current Title X providers remain in the program, the distance these patients would have to travel to another Title X provider is impracticable. We ask that the Department explain how it reconciles the significant impact the proposed rule will have on rural and uninsured patients with the mission of the Title X program.

In Oregon, significant portions of the state, primarily the rural and frontier areas, are designated as Medically Underserved Areas because they have a shortage of primary health care providers and facilities coupled with high levels of need. The proposed rule will likely cause providers to decline Title X funds in order to maintain their quality of care, further straining access to reproductive health care for Oregonians in these areas. For the 40 percent of Oregon’s Title X clients who are uninsured, this burden is heightened because the high quality of care at Title X clinics may not be available to them at other clinics. Title X clinics currently are required to provide the same high quality of care to all clients regardless of ability to pay, whereas other clinics may limit services for patients without coverage sources.

A remarkably broad coalition of Vermont health care providers has joined the nationwide medical community’s condemnation of the proposed rule.⁸⁵ This Vermont coalition “strongly

⁸³ These counties are Mason (24 percent of Title X patients were uninsured in 2017), San Juan (30 percent), Skagit (29 percent), Douglas (28 percent), and Whitman (27 percent). These counties do not have local health jurisdictions providing family planning services.

⁸⁴ In addition, under the proposed rule, eliminating Planned Parenthood and other abortion providers from Title X will cause the following colleges and universities in Washington to lose their Title X providers: Washington State University, Western Washington University, Central Washington University, Eastern Washington University, Big Bend Community College, Columbia Basin College, and Yakima Valley Community College.

⁸⁵ *Vermont Health Care Coalition Title X Statement*, Vt. Ass’n of Hosps. and Health Sys. (June 15, 2018), <https://vahhs.org/title-x-statement.html> (endorsing, among other things, a statement from the American Nurses Association stating, “The Code of Ethics for Nurses outlines that the nurse’s primary commitment is to the patient,

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opposes” the proposed regulations and warns that those regulations “will significantly restrict access to necessary care for both women and men particularly in rural, hard to serve areas of Vermont.”⁸⁶ Vermont is a small state, and the Vermont coalition represents a significant majority of all health care providers in Vermont. It is therefore unlikely that the number of Vermont medical professionals who would consent to work in a clinic governed by the proposed regulations would be sufficient to replace the current robust number of Title X-funded providers statewide.

9. *The proposed rule would impose tens of millions of dollars of costs on the treasuries in Washington, Massachusetts, Oregon, and Vermont.*

The costs imposed on our States, along with all other states, by the proposed rule will be well over \$100 million. Because the cost or burdens of compliance with the proposed rule will be prohibitively high for many providers, the network of Title X providers will shrink in our States and around the country. Further, some Title X patients will lose all access to family planning services as a result of the proposed rule. As mentioned, in Oregon 41 percent of Title X patients were uninsured in 2017, and in Washington there are counties where upwards of 30 percent of Title X patients are uninsured.

Yet the Department fails to analyze either the significant public health impact or the fiscal impact to states. The Department fails to grapple with the fact that, unless it is expecting the states to step in to plug the fiscal hole created by the loss of Title X funding, unplanned pregnancies and births will occur, cervical cancers will not be diagnosed in early stages, and complications will occur due to untreated STIs, among other things, all resulting in significant increased health care costs for states that Title X is meant to address.

The Department provides no analysis explaining why these impacts are consistent with the fundamental mission of the Title X program. In fact, they are not. Analyses show that significant cost savings are achieved by funding family planning services. Nationally, an estimated \$7.09 is saved for every dollar spent.⁸⁷ In short, a significant portion of the cost savings created by

whether an individual, family, group, community, or population. This proposed rule interferes with that relationship and violates the basic ethics of the profession.”); *see also* Mike Faher, *Vermont health care coalition protests Title X change*, VTDigger.com (June 12, 2018), <https://vtdigger.org/2018/06/12/vermont-health-care-coalition-protests-title-x-change/> (calling the Vermont Health Care Coalition opposing the proposed regulations “an unlikely group of allies in Vermont”).

⁸⁶ *Vermont Health Care Coalition Title X Statement*, Vt. Ass’n of Hosps. and Health Sys. (June 15, 2018), <https://vahhs.org/title-x-statement.html>

⁸⁷ Jennifer J. Frost, *Return on Investment: A Fuller Assessment of the Benefits and Cost Savings of the US Publicly Funded Family Planning Program*, *Milbank Quarterly*, Vol. 92, No. 4, p. 668 (2014) (available at https://www.guttmacher.org/sites/default/files/pdfs/pubs/journals/MQ-Frost_1468-0009.12080.pdf).

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Assistant Secretary ADM Brett P. Giroir, M.D.
Deputy Assistant Secretary Diane Foley, M.D., FAAP
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funding family planning services is jeopardized by the proposed rule and would fall on our States, among others.

D. Conclusion

The proposed rule will drive many family planning providers from the Title X program. As a result, thousands of patients will lose reasonable access to family planning services and other critical reproductive health services. The Title X providers that remain will be prevented from delivering the high-quality and complete medical care that they have always provided. This frustrates rather than achieves the purposes of Title X, and the courts will strike down the proposed rule, if implemented, accordingly. The proposed rule would limit health care services to vulnerable populations that Congress intended to help. It also would shift the costs of reproductive health care, including services for unintended pregnancies, breast and cervical cancer diagnoses, spread of STIs, and other serious health conditions to our states. For these and the other reasons stated in our comments, we urge the Department to withdraw the proposed rule.

Thank you for considering our views.

Sincerely,



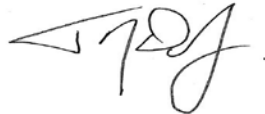
Bob Ferguson
Washington Attorney General



Maura Healey
Massachusetts Attorney General



Ellen Rosenblum
Oregon Attorney General



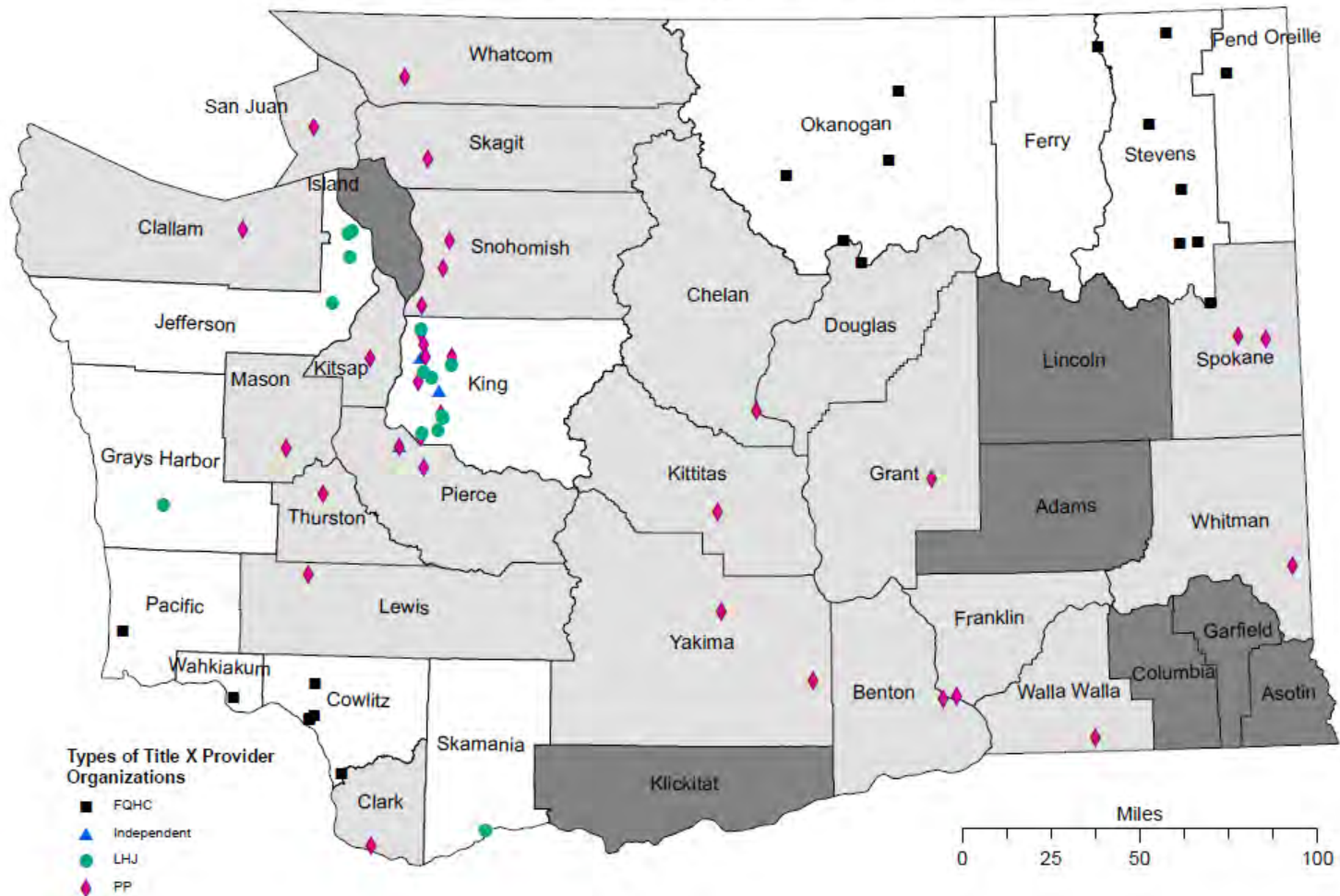
Thomas J. Donovan, Jr.
Vermont Attorney General

Secretary Alex M. Azar II
Assistant Secretary ADM Brett P. Giroir, M.D.
Deputy Assistant Secretary Diane Foley, M.D., FAAP
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Attachment 1

Washington State Counties Without Title X Services if Organizations that also Provide Abortions are Removed from Title X

Dark shaded counties currently have no Title X provider,
Light shaded counties would have no provider if organizations that also provide abortions were removed from Title X



From: [Diamond, Joshua](#)
To: [Wemple, Doug](#)
Cc: [Clark, Charity](#); [Spottswood, Eleanor](#)
Subject: FW: AG constituent inquiry
Date: Tuesday, September 18, 2018 2:36:00 PM
Attachments: [image001.gif](#)
[image002.png](#)
[image003.png](#)

Doug,

Please prepare a response that informs Ms. Daly that Vermont is opposing the proposed Title X rules and provide a copy of the public comments that we filed. Ella, could you provide a copy of the comments for Doug?

Thanks. Josh

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

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From: Wemple, Doug
Sent: Tuesday, September 18, 2018 1:39 PM
To: Matthews, Deborah <Deborah.Matthews@vermont.gov>; Clark, Charity <Charity.Clark@vermont.gov>; Diamond, Joshua <Joshua.Diamond@vermont.gov>
Subject: RE: AG constituent inquiry

I can follow up and let Judi know about our office's work around Title X.

Doug Wemple
Executive Assistant
Office of the Vermont Attorney General

109 State Street - Montpelier, VT
Office: (802)828-5515

From: Matthews, Deborah
Sent: Tuesday, September 18, 2018 8:13 AM
To: Wemple, Doug <Doug.Wemple@partner.vermont.gov>; Clark, Charity <Charity.Clark@vermont.gov>; Diamond, Joshua <Joshua.Diamond@vermont.gov>
Subject: FW: AG constituent inquiry

Deb Matthews

Administrative Secretary
Office of the Attorney General | GCAL
109 State Street, 3rd Floor
Montpelier, VT 05609
Phone | 802-828-3689
E-Mail | deborah.matthews@vermont.gov

From: Rubinstein, David
Sent: Monday, September 17, 2018 5:13 PM
To: AGO - Info <AGO.Info@vermont.gov>
Subject: AG constituent inquiry

Good evening,
We recently received this email at the Governor's Office – I figured I'd pass it along since it appears to fall under the AG's purview. Let me know if you would like any more information.
Best,
David

Why is Vermont not part of the group of states (12 states and the District of Columbia) urging the HHS Secretary Alex Azar NOT to implement proposed Title X rules that will effectively gag providers from advising patients on all their reproductive health options? Vermont has long supported Planned Parenthood and women's rights to family planning. The proposed rules are a disaster. Please refer to the letter written by a group of other state's attorney generals.

<https://oag.ca.gov/system/files/attachments/press-docs/final-title-xcomment-letter.pdf>

[Judi Daly](#)
judicdaly@yahoo.com

1061 Cobb Hill Rd
Waterbury, Vermont 05676



David Rubinstein

Executive Assistant

Office of Governor Phil Scott



State of Vermont

P. 802.828.6438

David.Rubinstein@vermont.gov | governor.vermont.gov



From: [Spottswood, Eleanor](#)
To: [Diamond, Joshua](#); [Wemple, Doug](#)
Cc: [Clark, Charity](#)
Subject: RE: AG constituent inquiry
Date: Tuesday, September 18, 2018 2:42:49 PM
Attachments: [Final Title X Comment Letter 7.31.18 WAMAORVT.PDF](#)
[VDH -HHS-OS-2018-0008 Vermont Comments.pdf](#)
[image001.gif](#)
[image002.png](#)
[image003.png](#)

I attach the official Title X comments from TJ and the AGs of Washington, Massachusetts, and Oregon.

In case you'd like to include it, I also attach comments filed separately (against the proposed rules) from the Vermont Department of Health.

Ella

From: Diamond, Joshua
Sent: Tuesday, September 18, 2018 2:36 PM
To: Wemple, Doug <Doug.Wemple@partner.vermont.gov>
Cc: Clark, Charity <Charity.Clark@vermont.gov>; Spottswood, Eleanor <Eleanor.Spottswood@vermont.gov>
Subject: FW: AG constituent inquiry

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<https://oag.ca.gov/system/files/attachments/press-docs/final-title-xcomment-letter.pdf>

[Judi Daly](#)

judicdaly@yahoo.com

1061 Cobb Hill Rd

Waterbury, Vermont 05676



David Rubinstein

Executive Assistant

Office of Governor Phil Scott



State of Vermont



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[phone] 802-863-7280

Agency of Human Services

July 31, 2018

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, DC 20201

Re: **Docket Number HHS-OS-2018-0008: "Compliance with Statutory Program Integrity Requirements" for the Title X Family Planning Program**

Assistant Secretary Giroir and Senior Policy Advisory Huber:

On behalf of the Vermont Department of Health, please accept the following comments regarding the Notice of Proposed Rulemaking published in the Federal Register on Jun 1 2018 (**Docket Number HHS-OS-2018-0008**). The proposed rule would reduce the funding going directly to evidence-based services and limit the number of vulnerable Vermont women able to access the care they need. As proposed, the rule would at a minimum jeopardize services, and potentially eliminate Title X access in whole areas of Vermont, leaving many patients without a source of reproductive health care. Title X projects deliver a host of critical services to Vermonters, including cancer screening and testing for sexually transmitted diseases. The reduction in services resulting from the proposed rule would not only mean higher health care costs resulting from lack of preventive care, but also an increase in unintended pregnancies and abortions.

The provisions of the proposed rule would undermine the high-quality standards of care in Title X and discourage and prevent highly qualified, trusted family planning providers in Vermont from participating in the Title X program. Title X services are currently offered across the state, serving largely rural and vulnerable populations. Approximately 10,000 Vermonters currently receive Title X services annually, twenty percent of whom are under the age of 20.

In Vermont, a diverse coalition of health care organizations, including all the major insurers, the hospital association and patient advocates have come out in strong opposition to the proposed rule. The Vermont Department of Health strongly opposes the proposed rule and recommends that the current regulatory framework be upheld. The following are specific comments on the proposal. The Vermont Department of Health is referred to as VT-DOH, and specific comments to which VT-DOH would like a comprehensive response are called out with the language "VT-DOH recommends".

Sincerely,



Mark A. Levine, MD
Commissioner
Vermont Department of Health



Comments

Section 59.1: To what programs do these regulations apply?

Health and Human Services (HHS) Title X relationship has been and is with the Title X grantee, in this case the VT-DOH, concerning the project it operates. Adding a relationship between HHS and the subgrantee is a duplication of effort, adding red tape, bureaucracy and cost that is unnecessary and redundant. This is contradictory to the requirement in Section 59.18 requiring that grantees “use the majority of grant fund to provide direct services to clients”. VT-DOH recommends the new language adding subgrantees to this section be struck.

Section 59.2: Definitions.

The proposed new definition of family planning differs substantively from current precedent and would have harmful effects on the quality of services provided. The proposed changes elevate the focus of the program towards natural family planning and other fertility awareness-based methods regardless of clinical efficacy and patient desire. This is counter-productive and harmful to patients who need medically accurate and up-to-date information in order to make the decision that is best for them.

Changes to the definition of “family planning” confuses the terms “choices,” “methods,” and “services”. The VT-DOH recommends this section be re-written to ensure that family planning is focused on medically accurate evidence-based **methods**.

The new requirement that minors may only be seen for medical advice or treatment if providers document specific actions taken to involve the minor’s family in the medical record or document a report of child abuse or incest in the medical record fails to consider the clinician’s judgment or privacy concerns inherent in written documentation of these sensitive issues. This stigmatizes young patients who may be sexually active and could prevent them from seeking care. VT-DOH recommends this be struck or amended to require it only for those patients who show signs of abuse.

The proposed rule expands the definition of “low-income family” so that any woman who has employer-sponsored health insurance coverage “which does not provide the contraceptive services sought by the woman because [the employer] has a sincerely held religious or moral objection to providing such coverage” “can be considered” to be low income. The VT-DOH supports increasing access to Title X services but would require additional funding to accommodate an expansion of eligible clients.

Section 59.5: What requirements must be met by a family planning project?

Vermont is committed to providing evidence-based care. As such, Paragraph (a)(1) must include the term “medically approved”: “a broad range of acceptable and effective **medically approved** family planning methods.” The VT-DOH recommends that this critical term be re-inserted into Paragraph (a)(1).

The removal of the current requirement that Title X providers offer non-directive and comprehensive counseling on all pregnancy options (parenting, adoption, or abortion) for pregnant patients (except for those options about which the patient states they do not



want to receive information) weakens the commitment to individualized patient care that is at the heart of the Title X program. Non-directive options counseling that includes all options is not only required according to existing Title X regulations but consistent with medical and ethical standards and many medical professional organizations.

Additionally, health equity is an important focus for Vermont. It is critical that all women, regardless of where they live, be able to decide between a broad range of evidence-based medically approved family planning methods. The proposed language, “projects are not required to provide every acceptable and effective family planning method or service” could seriously limit the options for women in a rural state should the project nearest them only provide one method. The VT-DOH recommends this language be struck.

VT-DOH recommends paragraph (5) be struck or clarified as stated above to ensure that there are no barriers for referral to abortion services or the provision of nondirective counseling.

Paragraph (12) requires that Title X providers offer comprehensive primary health services, services that are specifically prohibited with Title X funding. The paragraph states that if they do not provide these services they must refer a patient to such services in “close physical proximity”. In a rural state this is untenable and also vague. The language should be struck to ensure equal access to Title X services, particularly in rural states.

Paragraph (14) requires every Title X project to “[e]ncourage family participation in the decision of minors to seek family planning services and ensure that the records maintained with respect to each minor document the specific actions taken to encourage such family participation (or the specific reason why such family participation was not encouraged).” This is not required by Vermont state law and is a state law issue. It does not belong in federal rule and undermines the confidentiality of patients and could deter adolescents and young adults from seeking services. In Vermont, 20% of Title X participants are under 20 years old.

Extending the type of reporting expected of Title X grantees to subrecipients and referral partners would create extraordinary burdens for all involved. This focuses staff time and energy on duplicative reporting efforts when in Vermont there is no evidence that this would increase compliance with Title X requirements, further depleting the amount of Title X funding available for services. It could also limit the number of partners willing to work with VT-DOH, and in a small state with limited medical resources access is a critical issue. VT-DOH recommends that Title X grantees remain the responsible reporting party.

Section 59.7: What criteria will the Department of Health and Human Services use to decide which family planning services projects to fund and win what amounts?

As a state where the Health Department is the singular grantee, it is unclear how the VT-DOH would know it had satisfied the new criteria set out by HHS. VT-DOH recommends this section be improved to specifically and clearly state the criteria with which HHS will review applicants before they reach the objective merits panel review.

Section 59.14: Prohibition on referral for abortion.

The VT-DOH is dedicated to providing evidence-based care. The new language in this section eliminates the long-standing requirement for nondirective options counseling and prohibits abortion referral but requires all pregnant people to be referred for prenatal care and/or social services, regardless of their wishes. This will serve to undermine the



extensive systems level work that has been accomplished in Vermont to ensure that patients have access to quality family planning services, which includes being able to access the full range of contraceptive methods through Title X. It could also impede all the work the VT-DOH has done with other state partners, such as the Blueprint Women's Health Initiative, to ensure providers are trained in best practice approaches to contraceptive counselling, which is grounded in medical accuracy and a comprehensive understanding of the full range of contraceptive methods.

Given the critical importance of evidence-based medicine, VT-DOH recommends this section be modified to require evidence-based counseling methods and remove any barriers to referring a patient for an abortion. There are two major problems with providing a patient seeking an abortion with a mixed list of providers who do and do not provide abortion:

1. Misdirecting patients, or not providing information on locations that provide safe, legal abortions could lead to patients seeking abortions from unsafe providers or through unsafe means.
2. Misdirecting patients will lead to unnecessary increased medical cost for patients who make appointments with providers who do not end up providing the services they are seeking.

Limiting referrals for abortion to only come from doctors is an example of a barrier and is in conflict with 42 CFR § 59.5(b)(6) which requires that projects "[p]rovide that family planning medical services will be performed under the direction of a physician with special training or experience in family planning" (emphasis added). This provision of the rule already allows for the existing practice in Vermont of other qualified medical providers (i.e. nurse practitioners and physicians assistants) to provide care within the scope of their practice under the direction of a physician.

In addition, language in paragraph (a) is confusing when it states that a medical doctor may "provide a list of licensed, qualified, comprehensive health service providers (some but not all, of which also provide abortion services...". It is critical for the patient-provider relationship that when a patient requests information, such as a referral for an abortion, that the provider be able to answer the question accurately and completely. As such, the VT-DOH recommends that Paragraph (a) and (c) be struck.

Paragraph (b) requires providers to refer for prenatal and social services even for those women who do not want those services. This again is not evidence-based medicine and undermines the provider-patient relationship. Additionally, should a woman be referred for prenatal services who is not seeking such services and it is a true referral, time and energy will be wasted by both the sending and receiving provider in discussing services for a patient who will not use them. The VT-DOH recommends that paragraph (b) be struck or be re-written to require providers to provide such referrals only when the patient requests them.

Paragraph (d) of this section is confusing as it is unclear what "promote abortion" means. Vermont recommends that this be clarified in the rule so that it is clear that nondirective family planning counseling is not "promotion" of abortion.

Paragraph (e)(4) states: "None of the entities on the list are providers that principally provide abortions." What does this mean? How will HHS define or determine "principally"?

VT-DOH recommends this entire section be struck. Providers should be required to use evidence-based counseling methods and be fully able to provide medically accurate and specific information to their patients in order to provide them with the best possible care.



Section 59.15: Maintenance of physical and financial separation.

VT-DOH has a demonstrated history of full compliance with the prohibition against using Title X funding for abortion and has a continued commitment to complying completely with the law. As such, part (a) of this section is acceptable.

Although Title X statute, regulation, and policy already prohibit abortion as a family planning method and do not allow Title X funding to be used for abortion services, the proposed rule requires additional physical separation of abortion services from Title X services. These additional requirements would mandate physical separation, separation of email addresses and websites, separate staff, separate health care/medical records, and separate signs and materials. These requirements are unnecessarily burdensome and do not add additional clarity or quality to the Title X program. As such, VT-DOH opposes requirements for organizational separation and separate names.

Paragraphs (b), (c) and (d) are not tenable in Vermont and VT-DOH recommends they be struck. The Title X provider network has spent the past several years improving and enhancing infrastructure and opening new facilities. These conditions would undermine, if not negate, the significant investments made to develop this robust system. Health care delivery is extremely costly, and the cost of care is often associated with the overhead investment in medical facilities. This requirement goes far beyond what is necessary to ensure that taxpayer dollars are not spent on abortion services, undermines access to critical family planning, and would continue to drive up the cost of medical care. It is common practice, for example, for multiple types of providers to share a waiting area, as waiting rooms do not need to be specific to a type of care. Additionally, mandating physical separation can also become a barrier to receiving care – creating a fragmented system that is confusing and difficult to access.

Section 59.16: Prohibition on activities that encourage, promote or advocate for abortion.

This section is unclear. As the Grantee, VT-DOH would be responsible for assisting subgrantees to comply with this regulation. Paragraph (a) of this section is very broad and is followed by a list that “includes” a number of slightly more specific items. However, given that this is not a complete list and that Paragraph (a) is broad and vague, VT-DOH would be unable to provide guidance to subgrantees. For example, in Paragraph (b) the first example provided (1) states: “Clients at a Title X project are given brochures advertising a clinic that provides abortions...” These seem to directly contradict the guidance in Section 59.14 in which “...a doctor may, if asked, provide a list of licensed, qualified, comprehensive health service providers (some of which also provide abortion, in addition to comprehensive prenatal care).”

This list of prohibited activities threatens to isolate family planning services outside of common women’s health needs, limiting access and decreasing quality of care. VT-DOH recommends that health care providers be able to make their own decisions about the services they offer in addition to Title X services so long as they demonstrate financial separation.

Section 59.17: Compliance with Reporting Requirements.

Providers are already required to comply with State Laws. The addition of a compliance plan is an overreach and adds unnecessary costs and burden. This is contradictory to the



requirement in Section 59.18 requiring that grantees “use the majority of grant fund to provide direct services to clients” and VT-DOH recommends this requirement be struck.

Vermont’s Title X projects demonstrate compliance with legislative mandates that require Title X service sites to encourage family participation in the decision of minors to seek family planning services and provide counseling to minors on how to resist attempts to coerce minors into engaging in sexual activities. All Title X providers must comply with State laws requiring notification or the reporting of child abuse, child molestation, sexual abuse, rape, or incest. The addition of a reporting and documentation requirement is added bureaucracy and does not improve patient safety and could compromise patient confidentiality.

The new language also threatens patient confidentiality, particularly for minors. These individuals could be deterred from seeking much needed services if they were under the impression they would be reported for doing so. The required documentation of reports in the medical record is not best practice and experts in the sexual assault and domestic violence fields recommend against it.

VT-DOH recommends that these new reporting and documentation requirements be struck.



From: [Leriche, Lucy Rose](#)
To: [Diamond, Joshua](#); [Spottswood, Eleanor](#); cwhite@aclvt.org; [Jill Krowinski](mailto:Jill.Krowinski); jlyall@aclvt.org
Subject: FW: state ERA
Date: Wednesday, September 19, 2018 11:04:12 AM

Hello everyone,

I am looking forward to connecting with you all on Friday morning at 9am at the AG's office in Montpelier. Please see the message below from an attorney at PPFA. Some good information for us as we continue our discussion about abortion access in Vermont.

Best,
Lucy

Lucy Leriche(she/her/hers)
Vice President of Public Policy Vermont
Planned Parenthood Northern New England

[REDACTED]
Colchester, Vermont 05446

[REDACTED]
www.ppnne.org<<http://www.ppnne.org>>

Lucy.Leriche [REDACTED]

From: Sousa, Bethany <bethany.sousa [REDACTED]>
Sent: Tuesday, September 18, 2018 4:54 PM
To: Leriche, Lucy Rose <Lucy.Leriche [REDACTED]>
Subject: state ERA

Hi Lucy,

I wanted to get back to you but also happy to discuss this over the phone. I don't know who was pushing/supporting these ERA efforts, how likely it is to pass, etc so we could discuss more on the phone if it's helpful.

I do think it is a tricky proposition to add reproductive rights to your state ERA for several reasons. One, if you add it to the language and then it fails, there is some risk that courts look back at the failure and interpret it to mean that abortion isn't protected in the constitution because you tried to add it and failed. I don't think this reason disqualifies the idea, but I do think you would have to be very conscious of what legislators and advocates are saying about the reason to add this in and make clear that that abortion is already protected and this would just be more explicit, put it in a different place, etc. This obviously works both ways b/c then some will ask why you really need to do it if it's already protected, etc.

Second, there is no easy way to add it to this language without being explicit and without singling out sex discrimination from the other parts of the provision. You could add it into the

text rather than defining it below (ie sex, which includes pregnancy, etc), but however you do it, it will certainly stand out. This isn't about putting a privacy protection into the constitution - this is about defining sex to make sure it includes abortion/repro rights. I think this makes it hard politically and I would assume you would get push back from other advocacy groups who are behind the ERA.

Here is one formulation (new text in red):

“Equal protection under the law shall not be denied or abridged because of race, sex, age, religion, creed, color, familial status, disability, sexual orientation, gender identity, or national origin.”

“Sex” includes but is not limited to the capacity to become pregnant, pregnancy, and the prevention and termination of pregnancy.

I also think it's worth considering whether you can change it to "equal rights" rather than "equal protection." Although you have a common benefits clause rather than a state equal protection clause, the term "equal protection" references the federal constitutional provision and it may be better to have language that doesn't reference the federal constitution in that way and creates something new for the state. As you know, the federal constitution's abortion protections have been found within privacy and not equal protection, so referencing that body of law isn't necessarily helpful for abortion. Many other state ERAs use "equal rights" language, although I can't claim that all of those state ERAs that have used that language have been interpreted more broadly by state courts b/c that isn't the case. So not sure if you could get those pushing the amendment to change the language now, but I do think it would be worth considering if they are also willing to include your language/issue and define "sex" in some way.

I also think it's worth doing some research on how legislative history is treated in VT by the courts and whether it could be enough to argue that abortion is included in sex discrimination throughout the debates and passage of the ERA. This could be a fallback if it seems like you can't add something into the existing ERA language. We can do some research around constitutional amendments in VT and what the leg history looks like and if it was used in any analysis by state courts.

Let me know if you want to discuss. There are other ways to try to define sex but they are all somewhat similar.

On another note, some national coalition partners have been working with us to draft a model FOCA and it will look somewhat different than what I sent you (although it's not finalized yet). I can send you a version when I have it. We also have a ton of findings and I can send you what we have right now or wait another week or two to see what additions we get from our

partners. Let me know your timing. The findings can also be used as TPs.

Best,
Beth

--

Bethany Sousa
Senior Policy Counsel
Public Policy, Litigation and Law
Planned Parenthood Federation of America
[REDACTED] NYNY 10038

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From: [Wemple, Doug](#)
To: [Diamond, Joshua](#)
Cc: [Spottswood, Eleanor](#)
Subject: Title X Draft
Date: Wednesday, September 19, 2018 2:27:20 PM

Dear Judi:

Our office received your correspondence with Governor Scott's office inquiring about Vermont and the recently proposed changes to Title X funding.

Attorney General Donovan and his office remain committed to standing up for Title X. Earlier this summer, the Office of the Vermont Attorney General spoke out to encourage Vermonters to speak out against these proposed changes. Title X works. This program was created to provide access to high-quality family planning and related preventative health care for low-income and underserved individuals. Any potential changes would be devastating, particularly to rural communities in Vermont. Title X clinics provide essential preventive health care services to millions nationwide, including STD testing, family planning, and cancer screenings.

The Vermont Department of Health is the sole grantee in the State of Title X funds, most of which are designated to Planned Parenthood of Northern New England. PPNNE provides services at ten locations in Vermont, serving rural populations.

On July 31st, Attorney General Donovan joined Attorney's General Ferguson (Washington), Healey (Massachusetts), and Rosenblum (Oregon) urging the U.S. Department of Health and Human Services to withdraw its proposed rule changes. I've attached a copy of this letter for your review.

Thank you for speaking out in support of this important issue. Attorney General Donovan shares your concerns and will continue to speak out in support of Vermonters having access to these essential healthcare services. Please be in touch with any questions or further concerns.

Sincerely,


Doug Wemple

Doug Wemple

Executive Assistant

Office of the Vermont Attorney General

109 State Street - Montpelier, VT



From: [Jill Krowinski](#)
To: [Leriche, Lucy Rose](#)
Cc: [Diamond, Joshua](#); [Spottswood, Eleanor](#); [cwhite \[REDACTED\]](#); [jlyal \[REDACTED\]](#)
Subject: Re: state ERA
Date: Thursday, September 20, 2018 10:41:33 PM

Hi all,

Thanks for this info, Lucy.

Just a heads up I'm going to bring a Katherine Levasseur from the Speaker's office with me tomorrow.

See you soon,
Jill

Sent from my iPhone

On Sep 19, 2018, at 11:04 AM, Leriche, Lucy Rose <[Lucy.Leriche \[REDACTED\]](mailto:Lucy.Leriche [REDACTED])> wrote:

Hello everyone,

I am looking forward to connecting with you all on Friday morning at 9am at the AG's office in Montpelier. Please see the message below from an attorney at PPFa. Some good information for us as we continue our discussion about abortion access in Vermont.

Best,
Lucy

Lucy Leriche (she/her/hers)
Vice President of Public Policy Vermont
Planned Parenthood Northern New England
[REDACTED]
Colchester, Vermont 05446
[REDACTED]
www.ppnne.org<<http://www.ppnne.org>>
[Lucy.Leriche \[REDACTED\]](mailto:Lucy.Leriche [REDACTED])

From: Sousa, Bethany <[bethany.sousa \[REDACTED\]](mailto:bethany.sousa [REDACTED])>
Sent: Tuesday, September 18, 2018 4:54 PM
To: Leriche, Lucy Rose <[Lucy.Leriche \[REDACTED\]](mailto:Lucy.Leriche [REDACTED])>
Subject: state ERA

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know who was pushing/supporting these ERA efforts, how likely it is to pass, etc so we could discuss more on the phone if it's helpful.

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Best,
Beth

--

Bethany Sousa
Senior Policy Counsel
Public Policy, Litigation and Law
Planned Parenthood Federation of America
[REDACTED] NYNY 10038

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From: [Diamond, Joshua](#)
To: [Jill Krowinski](#)
Subject: RE: Following Up
Date: Tuesday, September 25, 2018 5:54:00 PM

Thanks. Josh

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

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From: Jill Krowinski <JKrowinski@leg.state.vt.us>
Sent: Tuesday, September 25, 2018 2:22 PM
To: Diamond, Joshua <Joshua.Diamond@vermont.gov>; Spottswood, Eleanor <Eleanor.Spottswood@vermont.gov>; cwhite@aclvt.org; jlyall@aclvt.org; Lucy Leriche <lucy.leriche@ppnne.org>
Cc: Levasseur, Katherine <klevasseur@leg.state.vt.us>
Subject: Following Up

Hello,

It was good to see all of you last week. I spoke with Sen. Balint, she is supportive and wants to be part of the group discussion. Lucy, can you please include her in the next round of group emails? Thank you!

I spoke with Brynn in legislative council and put in a drafting request on the short term game plan bill and am meeting with Sen. Lyons on Thursday.

Thanks,

Jill

Representative Jill Krowinski

(she/her/hers)

House Majority Leader

Chittenden 6-3



From: [Leriche, Lucy Rose](#)
To: [Diamond, Joshua](#); [Spottswood, Eleanor](#); [cwhite \[REDACTED\]](#); [jlyal \[REDACTED\]](#); [Jill Krowinski](#); [Becca Balint](#)
Subject: Next abortion Rights meeting
Date: Friday, October 5, 2018 11:40:01 AM

Please fill out the following doodle so we can get our next meeting on the books!

<https://doodle.com/poll/34ixxbv3kand3g6u>

Lucy

Lucy Leriche(she/her/hers)
Vice President of Public Policy Vermont
Planned Parenthood Northern New England
[REDACTED]
Colchester, Vermont 05446
[REDACTED]
www.ppnne.org<<http://www.ppnne.org>>
[Lucy.Leriche \[REDACTED\]](mailto:Lucy.Leriche@[REDACTED])

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From: [Becca Balint](#)
To: [Leriche, Lucy Rose](#)
Cc: [Diamond, Joshua](#); [Jill Krowinski](#)
Subject: Re: Next abortion Rights meeting
Date: Monday, October 8, 2018 4:55:55 PM

Just logged on to the doodle

Sent from my iPad

On Oct 8, 2018, at 4:12 PM, Leriche, Lucy Rose <[Lucy.Leriche](#) [REDACTED]> wrote:

Hi Josh, Jill and Becca,
I am resending this Doodle as a gentle reminder to please fill it out. Thanks!
Lucy

Please fill out the following doodle so we can get our next meeting on the books!

<https://doodle.com/poll/34ixxbv3kand3g6u>

Lucy

Lucy Leriche(she/her/hers)
Vice President of Public Policy Vermont
Planned Parenthood Northern New England
[REDACTED]
Colchester, Vermont 05446
[REDACTED]
www.ppnne.org<<http://www.ppnne.org/>>
[Lucy.Leriche](#) [REDACTED]

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From: [Diamond, Joshua](#)
To: [Leriche, Lucy Rose](#); [Jill Krowinski](#); [Becca Balint](#)
Subject: RE: Next abortion Rights meeting
Date: Monday, October 8, 2018 6:06:00 PM

Just finished as well.

Best, Josh

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

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From: Leriche, Lucy Rose <Lucy.Leriche [REDACTED]>
Sent: Monday, October 8, 2018 4:13 PM
To: Diamond, Joshua <Joshua.Diamond@vermont.gov>; Jill Krowinski <JKrowinski@leg.state.vt.us>; Becca Balint <beccabalint [REDACTED]>
Subject: FW: Next abortion Rights meeting

Hi Josh, Jill and Becca,
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Lucy

Please fill out the following doodle so we can get our next meeting on the books!

<https://doodle.com/poll/34ixxbv3kand3g6u>

Lucy

Lucy Leriche(she/her/hers)
Vice President of Public Policy Vermont
Planned Parenthood Northern New England

[REDACTED]
Colchester, Vermont 05446

[REDACTED]
www.ppnne.org<<http://www.ppnne.org/>>
[Lucy.Leriche@\[REDACTED\]](mailto:Lucy.Leriche@[REDACTED])

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From: [Diamond, Joshua](#)
To: [Leriche, Lucy Rose](#)
Subject: Accepted: Repro Rights

From: [Leriche, Lucy Rose](#)
To: [Diamond, Joshua](#); [Spottswood, Eleanor](#); [cwhite \[REDACTED\]](#); [jlyal \[REDACTED\]](#); [Jill Krowinski](#); [jill.krowinski \[REDACTED\]](#); [Becca Balint](#)
Subject: Meeting Invite Sent
Date: Tuesday, October 9, 2018 9:42:53 AM

Hi All!

Our meeting will be on Friday 10/19 at 9:00am at the ACLU Offices in Montpelier. See you then!
Lucy

Lucy Leriche(she/her/hers)
Vice President of Public Policy Vermont
Planned Parenthood Northern New England
[REDACTED]
Colchester, Vermont 05446
[REDACTED]
www.ppnne.org<<http://www.ppnne.org/>>
[Lucy.Leriche \[REDACTED\]](#)

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From: [jlyal](#) [REDACTED]
To: [Leriche, Lucy Rose](#); [Diamond, Joshua](#); [Spottswood, Eleanor](#); [cwhite](#) [REDACTED]; [Jill Krowinski](#); [jill.krowinsk](#) [REDACTED]; [Becca Balint](#)
Subject: RE: Meeting Invite Sent
Date: Tuesday, October 9, 2018 10:04:28 AM
Attachments: [image001.png](#)
[image002.png](#)
[image003.png](#)

Thanks Lucy – it's 90 Main St, Suite 200 (above TD Bank). See you all then.

James Duff Lyall

Executive Director

American Civil Liberties Union of Vermont

[REDACTED] Montpelier, VT 05601

[REDACTED] | jlyall@aclvt.org

aclvt.org  

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[Donate](#)



From: Leriche, Lucy Rose <Lucy.Leriche [REDACTED]>
Sent: Tuesday, October 09, 2018 9:43 AM
To: Diamond, Joshua <Joshua.Diamond@vermont.gov>; Spottswood, Eleanor <Eleanor.Spottswood@vermont.gov>; cwhite [REDACTED]; jlyal [REDACTED]; Jill Krowinski <JKrowinski@leg.state.vt.us>; jill.krowinski@gmail.com; Becca Balint <beccabalint [REDACTED]>
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Colchester, Vermont 05446

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www.ppnne.org <<http://www.ppnne.org>>

[Lucy.Leriche](#) [REDACTED]

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From: [Leriche, Lucy Rose](#)
To: [Diamond, Joshua](#)
Cc: [Jill Krowinski](#); [Becca Balint](#)
Subject: Re: Next abortion Rights meeting
Date: Tuesday, October 9, 2018 6:54:56 AM

Thank you both!
Lucy

Sent from my iPhone

On Oct 8, 2018, at 6:06 PM, Diamond, Joshua <Joshua.Diamond@vermont.gov> wrote:

Just finished as well.

Best, Josh

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

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From: Leriche, Lucy Rose <Lucy.Leriche [REDACTED]>
Sent: Monday, October 8, 2018 4:13 PM
To: Diamond, Joshua <Joshua.Diamond@vermont.gov>; Jill Krowinski <JKrowinski@leg.state.vt.us>; Becca Balint <beccabalint [REDACTED]>
Subject: FW: Next abortion Rights meeting

Hi Josh, Jill and Becca,
I am resending this Doodle as a gentle reminder to please fill it out. Thanks!
Lucy

Please fill out the following doodle so we can get our next meeting on the books!

<https://doodle.com/poll/34ixxbv3kand3g6u>

Lucy

Lucy Leriche(she/her/hers)
Vice President of Public Policy Vermont
Planned Parenthood Northern New England

[REDACTED]
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[Lucy.Leriche](mailto:Lucy.Leriche@[REDACTED]) [REDACTED]

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From: [Leriche, Lucy Rose](#)
To: [Jill Krowinski](#); [jill.krowinsk\[REDACTED\]](#); [Becca Balint](#); [Diamond, Joshua](#); [Spottswood, Eleanor](#);
[cwhite\[REDACTED\]](#); [jlyal\[REDACTED\]](#)
Subject: Repro Rights

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DRAFT FOCA TEXT

(a) Every individual has the fundamental right to choose or refuse contraception or sterilization, and to parent their child.

(b) Every individual who becomes pregnant has the fundamental right to choose to carry a pregnancy to term, give birth to a child, or to have an abortion.

(c) The state shall not, in the regulation or provision of benefits, facilities, services, or information, deny or interfere with an individual's fundamental rights:

(i) to choose or refuse contraception or sterilization, or to parent their child, except for [STATE child abuse/neglect state statutes] to the extent that such statutes do not discriminate on the basis of sex, gender identity, sexual orientation disability, race, ethnicity, age, national origin, immigration status, or religion;

(ii) to choose to carry a pregnancy to term, to give birth to a child, or to obtain an abortion, including individuals under state control or supervision.

(d) A fertilized egg, embryo, or fetus does not have independent rights under the laws of this state.

(e) Neither the state nor any subdivision or agency, nor any municipality nor any subdivision or agency thereof shall prosecute any individual for inducing, performing, or attempting to induce or perform, their own abortion.

(f) Neither the state nor any subdivision or agency, nor any municipality nor any subdivision or agency thereof, shall prosecute any individual for any act or failure to act during their own pregnancy based on the potential or actual impact on their maternal health or the pregnancy.

(g) The state shall not discriminate in the protection or enforcement of these fundamental rights on the basis of sex, disability, race, ethnicity, gender identity, age, national origin, immigration status, religion, or sexual orientation.

MODEL FOCA FINDINGS:

Given historic and continued attacks on abortion access at the federal level and in many states, it is critical that [STATE] ensures that its residents [and those who come here] maintain the fundamental rights to choose to use or refuse contraception or sterilization, carry a pregnancy, give birth to a child, or have an abortion, regardless of where they live.

[STATE] believes the legislature and state government have a critical role in supporting the provision of comprehensive reproductive healthcare, including the full range of evidence-based information and counseling and quality healthcare services.

Women's ability to access contraception, as well as safe and legal abortion, allows women to participate fully in society and many of the gains women have made in obtaining education, pursuing careers, and moving closer to pay equity, and in having greater determination over the timing and spacing of their children—are the direct result of increased access to birth control.

A woman's ability to access safe and legal abortion when she needs it is a critical component of her health and dignity, as well as independence, freedom, and equality.

Women and families in [STATE] have come to rely on the right to abortion recognized over 45 years ago in *Roe v. Wade*.

Abortion is one of the safest medical procedures in the United States.

Experts at the National Academies of Science, Engineering, and Medicine recently published a study confirming that scientific evidence consistently indicates that legal abortions in the U.S., including those performed in the second-trimester, are extremely safe.¹

Access to the full range of reproductive health care should be free from discrimination and unnecessary barriers, including for women who are under state control or supervision, such as those who are incarcerated or living in state-funded institutions.

Transgender men and gender non-conforming people may also become pregnant and need access to comprehensive reproductive healthcare, including contraception, abortion, prenatal care, and care during and after giving birth.

Abortion must be not just legal but accessible; studies show that rapidly declining access to abortion can cause women to turn to self-induction.²

¹ NAT'L ACADEMIES OF SCI., ENGINEERING, AND MED. ("NAT'L ACADEMIES"), THE SAFETY & QUALITY OF ABORTION CARE IN THE U.S. (March 2018).

² See D. GROSSMAN, ET AL., TEXAS EVALUATION PROJECT, KNOWLEDGE, OPINION, AND EXPERIENCE RELATED TO ABORTION SELF-INDUCTION IN TEXAS (2015), available at <https://liberalarts.utexas.edu/txpep/files/pdf/TxPEP-Research-Brief-KnowledgeOpinionExperience.pdf>

Throughout her pregnancy, women must be able to make their own health care decisions with the advice of health care professionals they trust and without government interference or fear of prosecution.

The National Academies of Science, Engineering, and Medicine study concluded that abortion is safe and effective, but that medically unnecessary regulations of abortion can diminish the quality of abortion care by contributing to a declining number of facilities that provide abortion, needlessly delaying abortion, and making it unnecessarily difficult to access.³

The impact of abortion restrictions is predominantly felt by those who already experience barriers to health care, including young women, women of color and those with disabilities, women with low incomes, and women who live in rural areas or are undocumented.

Women of color experience disparities across a range of reproductive health outcomes, including infant and maternal mortality, unintended pregnancies, and preventive care.⁴

The state recognizes this country's long history of discrimination and forced sterilization against women of color and women with disabilities, and finds it imperative to ensure true reproductive choice and access.

Proactively safeguarding the right to contraception and abortion in [STATE] will protect and show respect for women's health and safety, as well as the wellbeing of all people in [STATE].

ADDITIONAL FINDINGS:

Abortion Safety

Abortion is one of the safest medical procedures performed in the United States, and data, including from the CDC, show that abortion has over a 99 percent safety record.

(finding that between 100,000 and 240,000 women of reproductive age in Texas have attempted to self-induce abortion in their lifetime and linking an increase in self-induced abortion attempts to the closure of abortion clinics); Teddy Wilson, *Advocates: Texas Law Brought Surge in Self-Induced Abortions*, REWIRE, (Jan. 20, 2016, 12:20 PM), <https://rewire.news/article/2016/01/20/advocates-texas-law-brought-surge-self-induced-abortions/>.

³ NAT'L ACADEMIES, *supra* note 1 at 32, 76-80.

⁴ Ngozi Anachebe & Madeline Sutton, *Racial Disparities in Reproductive Health Outcomes*, 188 AM. J. OBSTETRICS GYNECOLOGY S37 (2003).

Legal abortion is among the safest outpatient procedures performed in the United States, and is significantly safer than carrying a pregnancy to term: the risk of maternal mortality associated with pregnancy is 14 times higher than with that of abortion.⁵

The National Academies of Science, Engineering, and Medicine study also concluded that abortion can be performed safely by a physician assistant, certified nurse-midwife, nurse practitioner or physician, and that medication abortion can be provided safely through telemedicine.⁶

Abortion can be safely provided in doctor's offices and outpatient health centers, and carries similar risks as other gynecological procedures that take place in doctors' offices every day.⁷

In order for individuals to be able to exercise their right to decide to have an abortion, health care professionals must be trained and available to provide abortions without fear of government interference.

The Need to Prevent Restrictions on Abortion

Every individual has a fundamental right to make personal reproductive health decisions free from coercion, discrimination, and stigma.

Politicians have passed more than 400 abortion restrictions since 2011.⁸

The National Academies of Science, Engineering, and Medicine study concluded that abortion is safe and effective, but that medically unnecessary regulations of abortion can diminish the quality of abortion care by contributing to the decline of facilities that provide abortion, needlessly delaying abortion, and making it unnecessarily difficult to access.⁹

A woman's health needs should not be dictated by ideology or politicians.

The Importance of Abortion to Women's Equality

Access to abortion is a core component to women's social and economic equality.

Access to abortion is crucial for individual liberty, dignity, equality, and privacy.

⁵ E.G. Raymond & D.A. Grimes, *The Comparative Safety of Legal Induced Abortion and Childbirth in the United States*, 119 OBSTETRICS & GYNECOLOGY 215 (2012).

⁶ NAT'L ACADEMIES, *supra* note 1 at 57–58.

⁷ Bonnie Scott Jones & Tracy Weitz, *Legal Barriers to Second-Trimester Abortion Provision and Public Health Consequences*, 99 AM. J. PUB. HEALTH 623, 627 (2009), available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2661467/>.

⁸ Elizabeth Nash, et al., *Policy Trends in the States, 2017*, GUTTMACHER INST. (Jan. 2018), <https://www.guttmacher.org/article/2018/01/policy-trends-states-2017>.

⁹ NAT'L ACADEMIES, *supra* note 1 at 32, 76-80.

The legalization of abortion, in Justice Ruth Bader Ginsburg's words, made it possible for a woman to take "autonomous charge of her full life's course,"¹⁰ by giving her the option to enter the workforce, gain financial independence, and plan her family.

Individuals are more likely to stay in abusive relationships when they are unable to access abortion.¹¹

Being forced to carry a pregnancy to term has long-term economic consequences for women and their families.

Women who are denied an abortion are more likely than those who receive an abortion to be living in poverty and lacking full-time employment six months after the denial.¹²

Abortion as a Public Health Issue

Keeping abortion safe and legal drastically reduces the odds of medical risk or death for women in this state.

Before *Roe v. Wade*, illegal abortions were estimated to range from 200,000 to 1.2 million per year, and constituted at least 17 percent of all deaths attributed to pregnancy and childbirth in 1965 alone.¹³

The legalization of abortion in the U.S. led to safer practices and drastically reduced the incidence of maternal deaths and hospitalizations related to abortion.¹⁴

Abortion must be not just legal but accessible; studies show that rapidly declining access to abortion can cause women to turn to self-induction.¹⁵

According to the American College of Obstetricians and Gynecologists, the American Medical Association, American Academy of Family Physicians, and the American

¹⁰ Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. REV. 375, 383 (1985).

¹¹ Sarah C.M. Roberts et al., *Risk of Violence from the Man Involved in Pregnancy After Receiving or Being Denied an Abortion*, 12 BMC MED. 1 (2014), available at <https://bmcmmedicine.biomedcentral.com/track/pdf/10.1186/s12916-014-0144-z>.

¹² Diane Greene Foster, et al., *Socioeconomic Outcomes of Women Who Receive and Women Who are Denied Wanted Abortions in the United States*, 108 AM. J. PUB. HEALTH 407 (2018).

¹³ Rachel Benson Gold, *Lessons from Before Roe: Will Past Be Prologue?*, GUTTMACHER INST. (March 2003), <https://www.guttmacher.org/gpr/2003/03/lessons-roe-will-past-be-prologue>.

¹⁴ Susan A. Cohen, *Facts and Consequences: Legality, Incidence and Safety of Abortion Worldwide*, 12 GUTTMACHER POLICY REVIEW 2 (2009), available at https://www.guttmacher.org/sites/default/files/article_files/gpr120402.pdf.

¹⁵ See D. GROSSMAN, *supra* note 2 (finding that between 100,000 and 240,000 women of reproductive age in Texas have attempted to self-induce abortion in their lifetime and linking an increase in self-induced abortion attempts to the closure of abortion clinics); Teddy Wilson, *supra* note 2.

Osteopathic Association, leading public health organizations, blocking women’s access to legal abortion “jeopardize[s] women’s health.”¹⁶

Each year about five million women worldwide are hospitalized for complications arising from unsafe, illegal abortions.¹⁷

Internationally, abortion-related deaths occur more frequently in countries that restrict abortion, and the 82 countries with the most restrictive abortion laws also have the highest incidence of unsafe abortions.¹⁸

The Importance of Reproductive Choices and Access to Healthcare

Whether a woman is choosing parenting, abortion, sterilization, or is attempting to get pregnant through assisted reproductive technologies, her choice should be free from governmental interference, discrimination, and unnecessary barriers.

Women living in states with policies that support women’s access to health care have higher earnings and are more integrated into the workforce than women in other states.¹⁹

Access to reproductive health care has been linked to reduced unemployment gaps between jobs.²⁰

[STATE] finds it unacceptable that about one-half of all counties in the United States do not have an OB-GYN,²¹ and believes that an individual’s ability to access quality health care should not depend on her zip code.

Findings on Importance of Contraception

¹⁶ Brief for American College of Obstetricians and Gynecologists et al. as Amici Curiae Supporting Appellant at 5, *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016) 2016 WL 74948.

¹⁷ Susan A. Cohen, *Facts and Consequences: Legality, Incidence and Safety of Abortion Worldwide*, 12 GUTTMACHER POLICY REVIEW 2 4 (2009), available at https://www.guttmacher.org/sites/default/files/article_files/gpr120402.pdf.

¹⁸ Lisa Haddad & Nawal Naur, *Unsafe Abortion: Unnecessary Maternal Mortality*, 2 REVIEWS IN OBSTETRICS & GYNECOLOGY 122, 124 (2009), available at https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2709326/pdf/RIOG002002_0122.pdf.

¹⁹ Kate Bahn et al., *Linking Reproductive Health Care Access to Labor Market Opportunities for Women*, CTR. FOR AM. PROGRESS (2017), available at

<https://www.americanprogress.org/issues/women/reports/2017/11/21/442653/linking-reproductive-health-care-access-labor-market-opportunities-women/> (finding that “women living in states with a better reproductive health care climate—including insurance coverage of contraceptive drugs and services; expanded Medicaid eligibility for family-planning services; insurance coverage of infertility treatments; and the availability of state-supported public funding for medically necessary abortions—have higher earnings and face less occupational segregation compared with women living in states that have more limited reproductive health care access”).

²⁰ Kate Bahn et al., *supra* note 19.

²¹ Kate Bahn et al., [supra](#) note 19.

One-third of the wage gains women have made since the 1960s are the result of access to oral contraceptives.²²

Studies have found that access to birth control by age 21 is the most influential factor in enabling women to stay in college.²³

The Centers for Disease Control and Prevention named family planning, including access to modern contraception, one of the ten great public health achievements of the 20th century.²⁴

More than 99 percent of women between the ages of 15–44 who have ever had sexual intercourse have used at least one contraception method.²⁵

Contraception is commonly used across all demographics and religious denominations by individuals who are sexually active and do not want to become pregnant.²⁶

Importance of Access to Reproductive Healthcare for Women of Color

The ability to access safe and legal abortion has been a critical component of women's ability to gain independence and participate fully in society.

Accessing safe and legal abortion is not only critical to women's health and independence, but also to their dignity, freedom, and empowerment.

The rate of maternal mortality for Black women is four times higher than for white women.²⁷

Racial and ethnic disparities in health care exist in every state and are exacerbated by policies that make access to the full range of reproductive health services challenging.²⁸

²² Martha J. Bailey, et al., *The Opt-In Revolution? Contraception and the Gender Gap in Wages*, 4 AM. ECON. J. APPLIED ECON. 225

(2012), available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3684076/>.

²³ Heinrich Hock, *The Pill and the College Attainment of American Women and Men*, Working Paper, Washington, DC: Mathematica Policy Research, 2008; see also, ADAM SONFIELD ET AL., GUTTMACHER INST., *THE SOCIAL AND ECONOMIC BENEFITS OF WOMEN'S ABILITY TO DETERMINE WHETHER AND WHEN TO HAVE CHILDREN* 7 (2013), available at https://www.guttmacher.org/sites/default/files/report_pdf/social-economic-benefits.pdf.

²⁴ Ctr. for Disease Control, *Achievements in Public Health, 1900–1999: Family Planning*, MORBIDITY AND MORTALITY WEEKLY REPORT, 48(47), 1073-1080 (1999), <https://www.cdc.gov/mmwr/preview/mmwrhtml/mm4847a1.htm>.

²⁵ *Insurance Coverage of Contraception*, GUTTMACHER INST. (Dec. 2016),

<https://www.guttmacher.org/evidence-you-can-use/insurance-coverage-contraception>.

²⁶ *Contraceptive Use in the United States*, Fact Sheet, GUTTMACHER INST. (July 2018), <https://www.guttmacher.org/fact-sheet/contraceptive-use-united-states>.

²⁷ Linda Villarosa, *Why America's Black Mothers and Babies are in a Life-or-Death Crisis*, N.Y. TIMES, April 11, 2018, <https://www.nytimes.com/2018/04/11/magazine/black-mothers-babies-death-maternal-mortality.html>.

Women of color face significant barriers to accessing prenatal care, and consequently the percentage of Black and Latina women with delayed or no prenatal care continues to be about two times that of white women.²⁹

Women of color are more likely to be denied coverage for abortion, even when they have health insurance.³⁰

Coerced Sterilization for Women of Color and Women with Disabilities

There is a long history of forced sterilization of women of color and people with mental and physical disabilities.³¹

More than half of the states had some type of eugenics law impacting women of color and women with disabilities, some of which lasted through the 1970s.³²

Even today, women with disabilities continue to face coercive tactics designed to encourage sterilization or abortion, and rates of female sterilization are higher among women with cognitive disabilities than among those with non-cognitive disabilities or no disability.³³

Women with disabilities are still less likely to receive information about contraception and STI screening than the general population.³⁴

Every woman should be able to exercise her reproductive choices free from coercion or discrimination.

Importance of Giving Birth Free from State Interference

²⁸ KAISER FAMILY FOUNDATION, PUTTING WOMEN'S HEALTH CARE DISPARITIES ON THE MAP 99–101 (2009), available at <https://kaiserfamilyfoundation.files.wordpress.com/2013/01/7886.pdf>.

²⁹ Ngozi Anachebe & Madeline Sutton, *Racial Disparities in Reproductive Health Outcomes*, 188 AM. J. OBSTETRICS GYNECOLOGY S37, S38 (2003).

³⁰ Megan K. Donovan, *In Real Life: Federal Restrictions on Abortion Coverage and the Women They Impact*, 20 GUTTMACHER POLICY REVIEW 1 (2017), available at https://www.guttmacher.org/sites/default/files/article_files/gpr2000116.pdf.

³¹ See Roberta Cepko, *Involuntary Sterilization of Mentally Disabled Women*, 8 BERKLEY J. OF GENDER, LAW & JUSTICE 122 (1993); Rachel Benson Gold, *Guarding Against Coercion While Ensuring Access: A Delicate Balance*, 17 GUTTMACHER POLICY REV. 8, 9-10 (2014), available at https://www.guttmacher.org/sites/default/files/article_files/gpr170308.pdf.

³² OPEN SOC'Y FOUND., AGAINST HER WILL: FORCED AND COERCED STERILIZATION OF WOMEN WORLDWIDE 3 (2011), <https://www.opensocietyfoundations.org/sites/default/files/against-her-will-20111003.pdf>.

³³ Henan Li, et al., *Female Sterilization and Cognitive Disability in the United States, 2011–2015*, 132 OBSTETRICS & GYNECOLOGY 559 (2018).

³⁴ See CAROLYN FROHMADER & STEPHANIE ORTOLEVA, INT'L CONFERENCE ON HUMAN RIGHTS, THE SEXUAL AND REPRODUCTIVE RIGHTS OF WOMEN AND GIRLS WITH DISABILITIES 6–7 (July 1, 2013), http://www.womenenabled.org/pdfs/issues_paper_srr_women_and_girls_with_disabilities_final.pdf.

The practice of shackling pregnant incarcerated women during labor, childbirth, or recovery, which includes placing handcuffs or shackles around a woman's wrists, ankles, or even stomach, continues in some places despite efforts to prohibit the practice and requires further legislative action.³⁵

Shackling pregnant women deprives women of their liberty and freedom to move around during labor.

The practice of shackling disproportionately affects women of color, who are overrepresented in U.S. prisons and are eight times more likely to be incarcerated than white women.³⁶

Shackling incarcerated women not only increases the risks associated with pregnancy, labor, and delivery, but is rarely necessary and demeans women's basic dignity.³⁷

Major national medical associations and even correctional associations oppose shackling.³⁸

Independent Rights for Embryos or Fetuses

If a fertilized egg, embryo, or fetus, is granted rights, it could result in the criminalization and prosecution of pregnant women not just for abortion, but for anything that goes wrong during pregnancy, putting women's health and lives at risk.

It is critical that [X STATE] ensure that women cannot be criminalized for a miscarriage or for their actions during pregnancy.

Granting legal rights to a fertilized egg, embryo, or fetus could create a chilling effect on health care professionals who provide any type of health care to pregnant women and who treat women for miscarriages.

³⁵ INT'L HUMAN RIGHTS CLINIC, UNIV. OF CHICAGO, THE SHACKLING OF INCARCERATED PREGNANT WOMEN: A HUMAN RIGHTS VIOLATION COMMITTED REGULARLY IN THE UNITED STATES 3 (2013), available at <https://ihrcclinic.uchicago.edu/sites/ihrcclinic.uchicago.edu/files/uploads/Report%20-%20Shackling%20of%20Pregnant%20Prisoners%20in%20the%20US.pdf>. See also Priscilla A. Ocen, *Punishing Pregnancy: Race, Incarceration, and the Shackling of Pregnant Prisoners*, 100 CAL. L. REV. 1239, 1247-48 (2012), available at <https://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=4181&context=californialawreview> (describing how shackling has continued in some places despite efforts to prohibit the practice).

³⁶ Priscilla A. Ocen, *supra* note 35 at 1250-51.

³⁷ Women's Health Care Physician: Committee on Health Care for Underserved Women, *Health Care for Pregnant and Postpartum Incarcerated Women and Adolescent Females* 2-3 (Am. Coll. of Obstetricians & Gynecologists, Comm. Op. No. 511, Nov. 2011), available at <http://www.acog.org/~media/Committee%20Opinions/Committee%20on%20Health%20Care%20for%20Underserved%20Women/co511.pdf?dmc=1&ts=20130725T1738421657>.

³⁸ See Int'l Human Rights Clinic, *supra* note 35 at 4 n.20.

Women experiencing health crises during pregnancy should have greater access to the health care system, and should not be criminalized or fear prosecution for accessing needed health care.

It is important that the state safeguard a woman's right to be free from prosecution for actions during pregnancy or miscarriage if in the future, federal constitutional law no longer offers that protection.

Coercion to Continue a Pregnancy or Obtain an Abortion

A pregnant woman's choice to either have an abortion or keep a pregnancy should be entirely her own and free from coercion by any individual, including state inference in the doctor-patient relationship.

One study found that women with unintended pregnancies are four times more likely to experience intimate partner violence than women with intended pregnancies,³⁹ and reproductive coercion—a partner's attempt to control a woman's reproductive choices—may largely be to blame for the higher level of unplanned pregnancies for women in abusive relationships.⁴⁰

The state shall ensure that all women, including those with disabilities, are protected from coercion to become pregnant, carry a pregnancy to term, or have an abortion.

Women need access to qualified and unbiased advice from health care professionals they trust, not state interference with their personal, medical decisions.

³⁹ *Reproductive and Sexual Coercion* (Am. Coll. of Obstetricians & Gynecologists, Comm. Op. No. 554, Feb. 2013) at 2, available at <https://www.acog.org/-/media/Committee-Opinions/Committee-on-Health-Care-for-Underserved-Women/co554.pdf?dmc=1&ts=20180830T1925162724>

⁴⁰ See Elizabeth Miller, et al., *Pregnancy Coercion, Intimate Partner Violence, and Unintended Pregnancy*, 81 *CONTRACEPTION* 316 (2010), available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2896047/> (“Women's lack of control over her reproductive health is increasingly recognized as a critical mechanism underlying abused women's elevated risk for unintended pregnancy.”).

From: [Leriche, Lucy Rose](#)
To: [Jill Krowinski](#); [Diamond, Joshua](#); [cwhite \[REDACTED\]](#); [Spottswood, Eleanor](#); [jlyal \[REDACTED\]](#)
Subject: FW: VT ERA and FOCA
Date: Monday, October 15, 2018 2:59:56 PM
Attachments: [DRAFT MODEL FOCA 10-12-18.docx](#)
[FOCA Findings 10.15.18 FINAL.docx](#)

For our meeting on Friday. Jill please share with Katherine Lavassar. I can't seem to find her email address. Thanks!

Lucy

Lucy Leriche(she/her/hers)
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[Lucy.Leriche \[REDACTED\]](mailto:Lucy.Leriche [REDACTED])

From: Sousa, Bethany <[bethany.sousa \[REDACTED\]](mailto:bethany.sousa [REDACTED])>
Sent: Monday, October 15, 2018 9:34 AM
To: Leriche, Lucy Rose <[Lucy.Leriche \[REDACTED\]](mailto:Lucy.Leriche [REDACTED])>
Cc: Keauna Gregory <[keauna.gregory \[REDACTED\]](mailto:keauna.gregory [REDACTED])>
Subject: VT ERA and FOCA

Hi Lucy,

I am attaching a revised FOCA model and some findings that might be helpful either as findings for your bill or as talking points. I know you said you weren't including the right to parent and I am not sure how broad you decided to go on other issues, but I thought you would like to see the latest draft anyway.

I also heard from Keauna that the leg counsel is now drafting some ERA language on abortion. I would love to see what they come up with when you get it back. We did do some research on legislative history for constitutional amendments in VT but it wasn't that helpful. I will send you what we have with an explanation in a separate email. I do think that if you can't get the abortion language into the ERA, you should at least try to create legislative history that makes it clear that "sex" includes abortion/repro health care. I understand that you do have legislators who are supportive of including the language but one thing to consider might be whether it could get included in the initial draft but then taken out down the line. If that were to happen, it could actually create negative legislative history around the inclusion of repro health in the original language (ie - the fact that it was inserted and then removed demonstrates that it was not thought to be included in the original language).

Best,
Beth

--

Bethany Sousa
Senior Policy Counsel
Public Policy, Litigation and Law
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From: [Leriche, Lucy Rose](#)
To: [Jill Krowinski; jill.krowinsk\[REDACTED\]](#); [Becca Balint](#); [Diamond, Joshua](#); [Spottswood, Eleanor](#); [cwwhite\[REDACTED\]](#); [jlyal\[REDACTED\]](#)
Subject: Repro Rights
Start: Friday, October 19, 2018 9:00:00 AM
End: Friday, October 19, 2018 10:00:00 AM
Location: ACLU Offices Montpelier

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To: [Diamond, Joshua](#); [Spottswood, Eleanor](#); [REDACTED]; [jlyal](#); [REDACTED]; [Jill Krowinski](#); [jill.krowinsk](#); [REDACTED]; [Levasseur, Katherine](#); [Becca Baint](#)
Subject: Abortion Rights Meeting

As a reminder, this is the meeting where we are going to try to hash out some language options/decisions to help inform our poll design. If you can circulate any language options you are working on before the meeting that would be helpful. Thanks and see you all soon!

Lucy

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From: [Diamond, Joshua](#)
To: [Leriche, Lucy Rose](#)
Subject: Accepted: Abortion Rights Meeting

From: [Leriche, Lucy Rose](#)
To: [Diamond, Joshua](#); [Spottswood, Eleanor](#); [jlyal \[REDACTED\]](#); [cwhite \[REDACTED\]](#); [Jill Krowinski](#); [jill.krowinsk \[REDACTED\]](#); [Becca Balint](#); [Levasseur, Katherine](#)
Subject: FW: VT ERA research
Date: Tuesday, October 23, 2018 3:45:59 PM
Attachments: [VT Leg History Memo .docx](#)
[STATE EQUAL RIGHTS AMENDMENTS REVISITED EVALUATING THEIR EFFECTIVENESS IN ADVANC \(2\).pdf](#)

Here is some research from PPFA to help inform our discussions next week.

Thanks!

Lucy

Lucy Leriche (she/her/hers)
Vice President of Public Policy Vermont
Planned Parenthood Northern New England

[REDACTED]
Colchester, Vermont 05446

[REDACTED]
www.ppnne.org<<http://www.ppnne.org>>

[Lucy.Leriche \[REDACTED\]](#)

From: Sousa, Bethany <[bethany.sousa \[REDACTED\]](mailto:bethany.sousa [REDACTED])>
Sent: Tuesday, October 23, 2018 2:30 PM
To: Leriche, Lucy Rose <[Lucy.Leriche \[REDACTED\]](mailto:Lucy.Leriche [REDACTED])>
Cc: Keana Gregory <[keana.gregory \[REDACTED\]](mailto:keana.gregory [REDACTED])>; Abigail Wiley <[Abby.Wiley \[REDACTED\]](mailto:Abby.Wiley [REDACTED])>
Subject: VT ERA research

Hi Lucy,

We did some research on the extent to which VT courts consider legislative history when examining the meaning of constitutional amendments. We were thinking that if you can't include explicit abortion language in the ERA, you could at least create legislative history regarding the inclusion of abortion within the term "sex." We didn't find anything that was especially helpful, but I am attaching the memo anyway. It seems like a VT state court will go beyond the text when needed and may consider some external sources, but it's not clear from this research how you could ensure a certain interpretation.

One helpful point is that "sex" in VT's anti-discrimination statute has been interpreted to include pregnancy. It also may be helpful that there are a couple of other states where the ERAs have been interpreted to include abortion, at least in the context of public funding (CT and NM). State courts in VT have noted that they do look to "sister states" when construing constitutional amendments. So although other state courts in TX and PA explicitly held that prohibiting state medicaid abortion coverage was not a violation of their state ERA, VT courts could choose to look to and follow the states that have found the opposite. To date, state

courts have not been asked to apply a state ERA to invalidate another types of abortion restriction as far as we are aware, so we do not have a lot of precedent to rely upon.

If legislators do decide to include abortion language, one note of caution would be that if the language gets stripped out somewhere down the line, it would certainly make it harder to argue that abortion is protected in the original language. So it could be that it is better to start without it than to have it removed from both a substantive and political perspective.

I am also attaching a law review article on state ERAs that is a little old but has some useful background. And below is a little more info on state ERA claims re abortion funding.

Let me know if you want to discuss.

Best,
Beth

State ERAs and Abortion

Outside of ERAs, courts in other states have struck down funding restrictions of abortions based on state constitutional provisions.^[1] However, it seems that only Connecticut and New Mexico have specifically relied on their ERAs to find that the funding restriction on abortion constitutes unlawful sex discrimination that must be struck down.

Connecticut and New Mexico have successfully relied on their ERAs to strike public funding restrictions on abortion. In 1986, a Connecticut state court used the state ERA and due process protections to invalidate the state's restrictions on funding medically necessary abortions. *Doe v. Maher*, 515 A.2d 134, 162 (Conn. Super. Ct. 1986). The New Mexico Supreme Court similarly relied on the state's ERA to invalidate New Mexico's public funding restriction on medically necessary abortions. *N.M. Right to Choose/NARAL v. Johnson*, 975 P.2d 841, 859 (N.M. 1998). Rejecting earlier U.S. Supreme Court reasoning, the New Mexico Supreme Court found that the ERA in its state constitution required the court to give a close scrutiny to laws that made a distinction based on pregnancy. The court reasoned that it is obligated to look to the *purpose* of the law, and whether it operates to disadvantage women. In conducting its analysis and rejecting the funding ban, the court found that "New Mexico's funding ban was part and parcel of a long history in which 'women's biology and ability to bear children have been used as a basis for discrimination against them,'" ^[2] and that the funding ban discriminated against women by treating them differently from men "with respect to medically necessary services." ^[3]

Other courts, however, have refused to find that their state ERAs encompass the right to publicly funded abortions. In a Texas case, for example, the state supreme court upheld the state's funding restriction on abortion. That court held that the decision to single out abortion for different treatment did not involve a distinction based on sex because it was "not so much direct at women as a class as it [was] abortion as a medical treatment," and there was no proof that the ban was based on an invidious discriminatory purpose. *Bell v. Low-Income Women of Texas*, 95 S.W.3d 253, 268 (Tex. 2002). Pennsylvania, using similar reasoning, also found that its ERAs does not require state funding of abortion. *Fischer v. Dep't of Pub. Welfare*, 502 A.2d 114 (1985).

^[1] See Wharton, *State Equal Rights Amendments Revisited*, *supra* note 1, at fns. 217, 218 (describing cases from Alaska, Arizona, California, Indiana,

Massachusetts, Minnesota, New Jersey, and West Virginia).

^[2] Linda J. Wharton, *State Equal Rights Amendments Revisited: Evaluating Their Effectiveness in Advancing Protection Against Sex Discrimination*, 36 Rutgers L.J. 1201, 1251 (2005) (quoting N.M. Right to Choose/NARAL v. Johnson, 975 P.2d 841, 854 (N.M. 1998)).

^[3] Wharton, *State Equal Rights Amendments Revisited*, *supra* note 1, at 1252.

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Bethany Sousa
Senior Policy Counsel
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To: [Diamond, Joshua](#); [Spottswood, Eleanor](#); [jlyal \[REDACTED\]](#); [cwhite \[REDACTED\]](#); [Jill Krowinski](#); [Jill Krowinski](#); [Becca Balint](#); [Levasseur, Katherine](#)
Subject: Intern
Date: Tuesday, October 23, 2018 10:55:24 AM

Hi all,
I will be working with a legislative intern this session, and I would like to bring her along to the meeting on the 31st, unless any of you have objections. Please let me know. Thanks!
Lucy

Lucy Leriche(she/her/hers)
Vice President of Public Policy Vermont
Planned Parenthood Northern New England
[REDACTED]
Colchester, Vermont 05446
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From: [Becca Balint](#)
To: [Levasseur, Katherine](#)
Cc: [Leriche, Lucy Rose](#); [Diamond, Joshua](#); [Spottswood, Eleanor](#); [cwhite \[REDACTED\]](#); [jlyal \[REDACTED\]](#); [Jill Krowinski](#); [jill.krowinski \[REDACTED\]](#)
Subject: Re: Abortion Rights Meeting
Date: Tuesday, October 23, 2018 10:53:18 AM

I'll be there by phone...

Sent from my iPad

On Oct 23, 2018, at 10:51 AM, Katherine Levasseur <KLevasseur@leg.state.vt.us> wrote:

Hi Lucy,

I have this in my notes for 10/31 at 11am, is that correct?

Thank you,

Katherine

Katherine Levasseur

Chief of Staff, Office of the Speaker
115 State St., Montpelier, VT 05633

KLevasseur@leg.state.vt.us
[REDACTED]
[REDACTED]

From: Leriche, Lucy Rose <[Lucy.Leriche \[REDACTED\]](mailto:Lucy.Leriche [REDACTED])>

Sent: Tuesday, October 23, 2018 10:49:19 AM

To: Diamond, Joshua; Spottswood, Eleanor; [cwhite \[REDACTED\]](#); [jlyal \[REDACTED\]](#); Jill Krowinski; [jill.krowinski \[REDACTED\]](#); Katherine Levasseur; Becca Balint

Subject: Abortion Rights Meeting

When: Tuesday, October 23, 2018 11:00 AM-11:30 AM.

Where: ACLU offices Montpelier

As a reminder, this is the meeting where we are going to try to hash out some language options/decisions to help inform our poll design. If you can circulate any language options you are working on before the meeting that would be helpful. Thanks and see you all soon!

Lucy

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Rutgers Law Journal
Summer 2005

Articles

Linda J. Wharton ^{a1}

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STATE EQUAL RIGHTS AMENDMENTS REVISITED: EVALUATING THEIR EFFECTIVENESS IN ADVANCING PROTECTION AGAINST SEX DISCRIMINATION

I. Introduction

Three decades have passed since fourteen states—inspired by the Federal Equal Rights Amendment (“ERA”) campaign of the 1970s and early 1980s—added ERAs to their state constitutions.¹ In adding these provisions to their constitutions, these states joined three others that already had explicit protection from sex discrimination in their state constitutions.² The language of many of these amendments tracked that of the proposed Federal ERA, and their legislative histories indicate a specific desire to provide more comprehensive protection against sex discrimination than that available *1202 under the existing Federal Constitution.³ In recent years, additional states have added ERAs to their state constitutions,⁴ and states continue to consider adding them.⁵ Today, twenty-two states have some form of explicit protection against sex discrimination in their state constitutions.⁶

In the 1970s, when most of these state ERAs were adopted, it seemed possible that either through judicial interpretation of the Equal Protection Clause of the Fourteenth Amendment or ratification of the proposed Federal ERA, sex equality would receive rigorous protection under the Federal Constitution. To date, however, efforts to add an ERA to the Federal Constitution have not succeeded, although it continues to be reintroduced in Congress each session.⁷ Moreover, the effectiveness of the Supreme Court’s *1203 application of the Equal Protection Clause to sex discrimination claims has been limited by various factors, including its reliance on a formal equality model of analysis that primarily protects against discrimination by governmental actors in instances where men and women are similarly situated. This analysis, embedded in constitutional doctrine by an emerging conservative majority, insulates from heightened scrutiny legislation that impacts women more heavily than men or regulates women in areas, such as reproduction, where men and women are biologically different or women are otherwise not similarly situated to men. In light of serious inadequacies in the protection offered by the Federal Constitution, state ERAs remain important legal tools for combating sex discrimination. Indeed, especially in this age of new judicial federalism, in which many state courts are interpreting state constitutions as independent, and often broader, sources of protection for individual liberties, state ERAs provide the potential for a more broadly-based framework of sex discrimination jurisprudence that goes well beyond the protection afforded under the Federal Constitution. Some recent legal scholarship on state ERAs, however, has expressed disappointment at their underutilization by litigators,⁸ and the failure of state courts to interpret ERAs expansively in areas such as abortion and same-sex marriage.⁹ One commentator, Paul Benjamin Linton,¹⁰ has questioned the overall effectiveness of state ERAs, charging that state ERAs have been used to benefit men at the expense of women and that they have ultimately been ineffective “except as symbols” in advancing women’s equality.¹¹

***1204** This Article examines the extent to which state ERAs are, in fact, fulfilling their potential for enhancing protection against sex discrimination beyond the formal equality limits of Federal Equal Protection Clause analysis, finding, in direct contrast to Mr. Linton, that state ERAs have been an extremely important tool in advancing sex equality for women. While judicial interpretation has been uneven, in noteworthy instances state courts have interpreted these provisions in rich and expansive ways that extend the scope of protection for sex equality considerably beyond that afforded by the Equal Protection Clause.¹² Part II summarizes the status of the Supreme Court's interpretation of the Equal Protection Clause in sex discrimination cases, highlighting the limits of this analysis. Part III contrasts judicial interpretations of state ERAs with prevailing Equal Protection Clause jurisprudence, highlighting both selected state court decisions that have provided comprehensive protection against sex discrimination and others that have not. Part IV summarizes and responds to recent legal scholarship on state ERAs and identifies factors that have limited the scope of protection afforded by them, including the continuing tendency of some state court judges to rely on the Supreme Court's limited Federal Equal Protection Clause analysis in interpreting their state constitutions. Part V concludes with recommendations for surmounting the obstacles that have hindered their effectiveness, highlighting the role of lawyers, courts, policymakers and citizens in bringing to fruition the positive potential of these important state equality guarantees.

II. The Limits of Sex Equality Jurisprudence Under the Equal Protection Clause

Although the Supreme Court has been divided between a narrow and a much more progressive vision of the meaning of sex equality, in significant respects, the conservative majority of the Court has prevailed in limiting the scope of protection afforded against sex discrimination by the Equal Protection Clause of the Fourteenth Amendment. As a result, the Supreme Court's prevailing sex discrimination jurisprudence is highly selective, ***1205** identifying “as wrongful only some of the practices and understandings that maintain inequality in the social position of women and men, and obscur[ing]—or affirmatively vindicat[ing] many others.”¹³ The following factors have limited the scope of protection available under the Equal Protection Clause: (1) the requirement of state action; (2) the failure of the Supreme Court to subject claims of sex discrimination to the “strict scrutiny” standard of review applied to claims of race discrimination; (3) the Supreme Court's application of a formal equality model of analysis that further reduces the protection afforded claims of sex discrimination when men and women are deemed not similarly situated; and (4) the unwillingness of the Supreme Court, absent proof of intentional discrimination, to closely scrutinize facially neutral governmental regulations or policies that disparately impact women. These barriers to broad constitutional protection for sex equality, and the rationale underlying them, are discussed below.

A. State Action

The Equal Protection Clause of the Fourteenth Amendment provides that “[n]o State shall deny to any person within its jurisdiction the equal protection of the laws.”¹⁴ Based on its plain language; history;¹⁵ and public policy rationales of federalism,¹⁶ individual autonomy,¹⁷ and separation of ***1206** powers;¹⁸ the Supreme Court has interpreted the Fourteenth Amendment as a prohibition on discriminatory governmental action, not purely private discrimination by individuals, organizations, employers or businesses.¹⁹ While the Court has defined the concept of state action to include nominally private parties engaged in public functions or closely connected with government,²⁰ in recent years, the conservative majority contracted the ***1207** definition of state action in certain cases.²¹ Moreover, in a retreat from suggestions in earlier decisions,²² a majority of the Court has recently insisted that the state action requirement extends beyond the self-enforcing provision of Section 1 of the Equal Protection Clause to legislation enacted by Congress pursuant to its Section 5 enforcement authority.²³ Accordingly, in *United States v. Morrison*, by a vote of five to four, the Court invalidated a provision of the Violence Against Women Act of 1994 (“VAWA”)²⁴ enacted ***1208** by Congress

to remedy pervasive bias against victims of gender-motivated violence in the state justice systems by allowing them to bring a civil lawsuit to redress the civil rights deprivation.²⁵

The requirement of state action, and the Supreme Court's narrow interpretation of it, obviously substantially limits the scope of protection afforded by the Federal Constitution against sex discrimination.²⁶ As several feminist scholars have noted, the state action requirement impacts women more harshly than men since

[t]he major sites of women's oppression—including the nongovernmental workplace and the home—are located in the private sphere of civil society and therefore have historically not been considered appropriate subjects for protection under federal constitutional and civil rights law. Gender inequality arising from disparities in private power is invisible to a system designed to protect individuals from state interference.²⁷

While numerous federal statutes fill the gap by extending protection against sex discrimination to actions by private entities, these statutes are targeted at sex discrimination in specific contexts and, of course, are subject to repeal *1209 and amendment by Congress and narrow interpretation and enforcement by federal administrative agencies.²⁸ Moreover, as Morrison illustrates, through its federalism jurisprudence, the conservative majority of the Supreme Court has limited the power of Congress to pass laws protecting sex equality and other individual rights even in instances where an abysmal record of state failure in enforcing equality exists.²⁹

*1210 B. Standard of Review

Although it took many decades³⁰ and serious inadequacies still permeate its race discrimination jurisprudence,³¹ the Supreme Court in recent years has *1211 applied a rigorous standard of scrutiny in reviewing overt facial distinctions based on race under the Equal Protection Clause, requiring the government to justify such classifications by proving that they are necessary to advance a compelling governmental interest.³² The Supreme Court has explained that this rigorous “strict scrutiny” standard of review is applied to “all racial classifications to ‘smoke out illegitimate uses of race by assuring that [government] is pursuing a goal important enough to warrant use of a highly suspect tool.’”³³ In justifying strict scrutiny review, the Supreme Court has explained that, “‘whenever the government treats any person unequally because of his or her race, that person has suffered an injury that falls squarely within the language and spirit of the Constitution’s guarantee of equal protection.’”³⁴

Despite the valiant efforts of feminist litigators to convince the Supreme Court to apply the strict scrutiny standard of review to sex-based discrimination, this argument never garnered more than four votes from the Supreme Court.³⁵ In 1976, in *Craig v. Boren*,³⁶ the Supreme Court stated that sex discrimination claims would be reviewed under a less rigorous standard, requiring proof that classifications based on sex “serve important governmental objectives,” and those objectives must be substantially advanced by the use of the sex-based classification.³⁷ Under this “intermediate scrutiny” standard, the government need not, as in the case of race and other suspect classifications, demonstrate “compelling” objectives. Moreover, the availability of less discriminatory alternatives to the sex-based classification is not necessarily fatal to the government's case.³⁸ While some *1212 commentators argue that the Court's 1996 opinion in *United States v. Virginia*³⁹ put more teeth into the intermediate standard of review,⁴⁰ recent precedent casts doubts on that conclusion and indicates that the Justices are sharply divided in their understanding and application of the intermediate standard.⁴¹

*1213 Lower courts,⁴² commentators,⁴³ and even Supreme Court Justices,⁴⁴ have criticized the intermediate standard as vague, poorly defined and malleable, providing insufficient guidance in individual cases and giving broad discretion to individual judges in deciding the importance of a state interest and whether the classification is substantially related. Professor Deborah Brake, for example, has argued that “the history of intermediate scrutiny in the lower courts demonstrates widespread confusion and inconsistent results.”⁴⁵ A recent quantitative analysis of equal protection decisions supports these criticisms, finding that, in contrast to the “relatively predictable outcomes” under the strict scrutiny and rational basis standards, *1214 “when courts apply the intermediate standard, litigants alleging sex discrimination are nearly as likely to win as they are to lose.”⁴⁶

Although the Supreme Court has never clearly explained why it chose to apply a different standard to sex and race discrimination cases,⁴⁷ the limited scope of protection afforded against sex discrimination stems in part from the fact that the source of constitutional protection is the Fourteenth Amendment with its distinct history and purpose relating to race discrimination, as opposed to an Equal Rights Amendment or other constitutional provision with a history and purpose targeted specifically at sex discrimination. As Professor Reva Siegel explains:

The intermediate standard of scrutiny expresses the intuition that sex discrimination is just like race discrimination—but, in the end, not exactly like race discrimination. Commentators commonly invoke several differences between sex and race discrimination to justify this difference in doctrinal standards. First, the framers of the Fourteenth Amendment were thinking about questions of race discrimination, not sex discrimination. Thus, it is appropriate for courts to apply a less rigorous standard of review to questions concerning equal citizenship for women; bluntly put, the nation never made a collective constitutional commitment to respect women as equals of men. Second the difference in standards reflects a pervasive *1215 intuition that the problem of sex discrimination is not as grave, harmful, or significant in American history as the problem of race discrimination. The case law presents sex discrimination as a problem involving old-fashioned ways of thinking rather than a long trail of state-sponsored coercion. Third, underneath it all, there is a sense that sex discrimination is at root different from race discrimination. Sex distinctions are not always harmful (or based on animus) the way race distinctions are. Note how, from this vantage point, the central constitutional question about sex discrimination is whether it is really like race discrimination.⁴⁸

While powerful counter-arguments exist that support full constitutional protection for sex equality under the Equal Protection Clause,⁴⁹ explicit constitutional guarantees of sex equality—like those in the proposed Federal ERA and the guarantees expressed in many existing state ERAs—provide courts with direct authority, indeed a mandate, to treat sex-based discrimination as highly suspect.⁵⁰

*1216 C. Formal Equality and Real Differences

The inadequacy of the federal constitutional protection afforded against sex discrimination is further exacerbated by the Supreme Court's reliance on a formal equality model of analysis. This analysis stems from the Supreme Court's insistence—applicable to all discrimination claims whether based on race, sex, or other classifications—that the Equal Protection Clause “is essentially a direction that all persons similarly situated should be treated alike.”⁵¹ Much as it does in the area of race discrimination, this formal equality model substantially limits the scope of protection afforded claims of sex discrimination. Only laws that discriminate against women in situations in which they are similarly situated to men trigger review under even the more modest “intermediate standard” of review. Thus, the Supreme Court has allowed

differences in treatment where they correspond to differences between men and women relating to biological or legal status, or other relevant differences.⁵²

In *Geduldig v. Aiello*, for example, the Supreme Court held that the exclusion of pregnancy-related disabilities from a state disability insurance program does not violate the Equal Protection Clause.⁵³ The Court reasoned that the pregnancy exclusion was not discriminatory because, under the disability insurance program, “[t]here is no risk from which men are protected and women are not. Likewise, there is no risk from which women are protected and men are not.”⁵⁴ Since “[n]ormal pregnancy is an objectively identifiable physical condition with unique characteristics . . . *1217 lawmakers are constitutionally free to include or exclude pregnancy from the coverage of legislation such as this on any reasonable basis.”⁵⁵ Legal commentators have widely criticized this decision and the Court's general insistence on formal equality as “injurious to women by ignoring important sex-based differences, or ultimately holding women to standards that have been established principally by men in a sexually unequal past.”⁵⁶ Specifically, commentators have emphasized that by analyzing “pregnancy-based classifications as if pregnancy were merely a physical condition appearing in only one sex,”⁵⁷ the Court ignored the long and troublesome history of women's disadvantageous treatment in the workplace and elsewhere precisely because of their reproductive capacity, thereby perpetuating the subordination of women.⁵⁸ Simply put, the *Geduldig* *1218 analysis turns a blind eye to the reality that “the fundamental problem is [the] willingness to transmute woman's ‘real’ biological difference to woman's disadvantage.”⁵⁹

The formalistic reasoning of *Geduldig* has also been extended to uphold laws that make sex-based distinctions based on the capacity to become pregnant. For example, in *Michael M. v. Superior Court*,⁶⁰ the Court upheld a California statutory rape law that made only men criminally liable for sexual intercourse with females under eighteen.⁶¹ The Court's plurality opinion by Justice Rehnquist reasoned that the statute was permissible because men and women were not similarly situated with respect to the State's asserted goal of preventing teenage pregnancy:⁶²

Only women may become pregnant, and they suffer disproportionately the profound physical, emotional, and psychological consequences of sexual activity. Because virtually all of the significant harmful and inescapable identifiable consequences of teenage pregnancy fall on the young female, a legislature acts well within its authority when it elects to punish only the participant who, by nature, suffers few of the consequences of his conduct.⁶³

As in *Geduldig*, the Court's formalistic reasoning failed completely to recognize and distinguish between biological differences and “the social consequences of biology.”⁶⁴ The failure to scrutinize carefully the gender distinctions at the heart of the case led the Court to “accept[] and reinforce[] *1219 the sex-based stereotypes that men are naturally, biologically aggressive in relation to sex, while women are sexually passive, and that young women need the law's protection from their own weakness.”⁶⁵

The Court's refusal to closely scrutinize sex-based legislative classifications has also been extended to situations in which the perceived differences between men and women were created by law rather than biology. For example, in *Rostker v. Goldberg*, the Supreme Court upheld the exclusion of women from military draft registration because it found that men and women were not similarly situated with regard to the purpose of the draft.⁶⁶ Because the primary purpose of the draft is to call up troops for combat, and women were excluded from combat participation by law, men and women were not similarly situated with regard to the purpose of the draft.⁶⁷ Based on the different legal status of men and women, the Court deferred to the judgments of Congress, ignoring completely the sex stereotypes about the roles and capabilities of women and men underlying both the combat exclusion and the all-male draft.⁶⁸ The Court's reliance on

the legally created combat exclusion as the basis for the dissimilarity is troubling. As Professor Ann Freedman has noted, “If legislatures can create ‘real’ sex differences at will by passing sex-based laws, the [E]qual [P]rotection [C]lause can easily be circumvented.”⁶⁹ Moreover, the Rostker **1220* decision, fails utterly to examine the serious gender equality implications of the all-male draft:

On the surface, [Rostker] appears to favor women—allowing them to volunteer for the military or not as they so choose, while subjecting men to involuntary registration. This facile conclusion vanishes when one asks why males are subjected to this burden. The answer that our government gives the recalcitrant young man is: “It is your duty as a United States citizen.” The message to young women is: “Your citizenship duty is optional, while your brother's is mandatory.”⁷⁰

In its subsequent decisions in *Mississippi University for Women v. Hogan*⁷¹ and *United States v. Virginia*,⁷² the Supreme Court indicated that the real differences doctrine does not extend to normative generalizations about the sexes. In *United States v. Virginia*, for example, Justice Ginsburg emphasized that in seeking to justify sex-based classifications, government “must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females.”⁷³ Moreover, “generalizations about ‘the way women are,’ estimates of what is appropriate for most women, no longer justify denying opportunity to women whose talent and capacity place them outside the average description.”⁷⁴

However, the Supreme Court continued the formalistic reasoning of the *Geduldig/Rostker* line of cases in *Nguyen v. INS*,⁷⁵ a case decided in 2001, in which it upheld a federal immigration law that explicitly distinguished between parents based on sex, making it significantly easier for an out-of-wedlock child born overseas to a United States citizen to claim citizenship through a citizen-mother than a citizen-father.⁷⁶ The Court identified two **1221* important governmental objectives served by the statute.⁷⁷ First, the sex-based classification served the government's interest in ensuring “that a biological parent-child relationship exists.”⁷⁸ The Court reasoned that “[f]athers and mothers are not similarly situated with regard to the proof of biological parenthood.”⁷⁹ Whereas paternity is uncertain, “[i]n the case of the mother, the relation is verifiable from the birth itself.”⁸⁰ While recognizing that sex-neutral alternatives existed to accomplish the same ends—such as requiring both parents to prove biological parenthood—the Court concluded that the Constitution did not require their use since “the use of gender specific terms takes into account a biological difference between the parents.”⁸¹ Second, the sex-based distinction furthered the government's interest in ensuring the opportunity to develop a truly meaningful connection between the child and the citizen parent and, in turn, the United States.⁸² In the case of a citizen-mother, the Court reasoned that this opportunity “inheres in the very event of birth.”⁸³ In contrast, “it is not always certain that a father will know that a child was conceived, nor is it always clear that even the mother will be sure of the father's identity.”⁸⁴ These factors create what the Court called an “undeniable difference in the circumstances of the parents.”⁸⁵

In a sharp dissent, Justice O'Connor accused the majority of watering down the intermediate scrutiny standard by “hypothesiz[ing] about the interests served by the statute,” “fail[ing] adequately to inquire about the actual purposes” of the statute, and “casually dismiss[ing] the relevance of available sex-neutral alternatives.”⁸⁶ She also charged that the law was based “not in biological differences but instead in a stereotype—i.e., ‘the **1222* generalization that mothers are significantly more likely than fathers to develop caring relationships with children.’”⁸⁷ Finally, Justice O'Connor correctly noted that in analyzing the law's sex-based classification from the limited and formalistic perspective of biological difference, the Court ignored both the long history of gender biases in laws governing the transmission of

citizenship⁸⁸ and the detrimental impact of a scheme that burdens women with the responsibility for unwed children and frees males to ignore parental responsibilities:

Section 1409(a)(4) is paradigmatic of a historic regime that left women with responsibility, and freed men from responsibility, for nonmarital children. Unlike § 1409(a)(4), our States' child custody and support laws no longer assume that mothers alone are "bound" to serve as "natural guardians" of nonmarital children. The majority, however, rather than confronting the stereotypical notion that mothers must care for these children and fathers may ignore them, quietly condones the "very stereotype the law condemns."⁸⁹

*1223 As in past cases, in *Nguyen*, the Court confuses biology with social patterns and sex-based stereotypes, and ultimately accepts and reinforces the stereotype of motherhood as "unshakable responsibility" and fatherhood as "opportunity."⁹⁰

D. Sex-Neutral Rules that Disparately Impact Women or Men

Finally, as in the case of race-neutral classifications, the Court's formal equality analysis has also resulted in its refusal to closely scrutinize sex-neutral classifications that are administered in a discriminatory manner or disproportionately impact women or men. Here, again, the reasoning is formalistic: because men and women are similarly situated with respect to rules that treat them equally on their face, the formal mandate of the equal protection clause is satisfied in the absence of direct proof that intentional sex discrimination has occurred. The Court's decision in *Personnel Administrator of Massachusetts v. Feeney*,⁹¹ exemplifies this analysis. In *Feeney*, the Court rejected a challenge to a Massachusetts policy granting lifetime preference to veterans for state civil service positions.⁹² Although the policy was neutral on its face, because over ninety-eight percent of veterans in Massachusetts were male, "the preference operate[d] overwhelmingly to the advantage of males."⁹³ Relying on its earlier *1224 reasoning in racial discrimination cases under the Equal Protection Clause,⁹⁴ the Court employed a two-fold inquiry:

The first question is whether the statutory classification is indeed neutral in the sense that it is not gender-based. If the classification itself, covert or overt, is not based upon gender, the second question is whether the adverse effect reflects invidious gender-based discrimination. In this second inquiry, impact provides an "important starting point," but purposeful discrimination is "the condition that offends the Constitution."⁹⁵

Moreover, the Court narrowly defined the requisite discriminatory purpose, requiring proof that the government desired to discriminate, not merely that it took action with knowledge that it would have discriminatory consequences.⁹⁶ Despite the overwhelming disproportionate negative impact on women seeking civil service jobs, the Massachusetts veterans' preference policy met the requirements of the Equal Protection Clause because there *1225 was no proof that the State's desire in adopting the law was to disadvantage women.⁹⁷

The Court's refusal to closely scrutinize legal rules for discriminatory impact absent proof of discriminatory purpose poses formidable challenges to litigants. Especially now that legislators and other policymakers have adapted to the Court's modern equal protection jurisprudence,⁹⁸ discriminatory motives are rarely expressed and benign purposes can easily be articulated for most laws.⁹⁹ Moreover, over time the predominant forms of sexism, much like racism, have evolved from overt expressions of discrimination to more subtle forms.¹⁰⁰ Indeed, "many of the forms of state action

that are most detrimental to women involve laws and policies that are embedded in sexist stereotypes, but expressed in gender neutral language.”¹⁰¹ The impact of the Feeney decision is thus increasingly problematic, insulating most forms of facially neutral governmental action from review.¹⁰² As Professor Reva Siegel has documented, the Court's reasoning in this area has, for example, eviscerated the effectiveness of the Equal Protection Clause in protecting against discriminatory marital status doctrines (now *1226 expressed in gender-neutral terms), including lenient spousal assault and rape policies:

[W]hen women challenged policies that provided victims of domestic violence less protection than victims of other violent crimes, they had great difficulty proving that the policies discriminated on the basis of sex—despite the fact that it is women who are overwhelmingly the targets of assaults between intimates. Federal courts have repeatedly ruled that facially neutral spousal assault policies do not trigger heightened review under the Equal Protection Clause. Judicial interpretation of the Equal Protection Clause thus has played virtually no role in the campaign to reform the law of rape, to abolish the marital rape exemption, and to alter domestic violence policies, which for the most part has been conducted in legislatures, administrative agencies, and on the streets.¹⁰³

Many scholars have been highly critical of the purpose requirement. Professor Laurence Tribe argues that it is squarely at odds with the goal of the Equal Protection Clause: “The goal is not to stamp out impure thoughts, but to guarantee a full measure of human dignity for all [M]inorities can also be injured when the government is ‘only’ indifferent to their suffering or ‘merely’ blind to how prior official discrimination contributed to it and how current official acts will perpetuate it.”¹⁰⁴ Scholars have also articulated various alternatives to the Court's narrow purpose requirement, including a standard that would operate much like the disparate effects test used under Title VI and Title VII requiring courts to closely scrutinize the impact of governmental practices that fall disproportionately on one gender.¹⁰⁵ *1227 In sum, these decisions illustrate the multiple barriers to broad constitutional protection for sex equality under prevailing Equal Protection Clause jurisprudence. The next section compares the approach of selected state court decisions in applying and interpreting state ERAs to claims of sex discrimination.

III. An Overview of State Court Interpretations of State ERAs

Although judicial interpretation of state ERAs has been uneven, in considering claims of sex discrimination, state court judges have interpreted their own constitutions in rich and expansive ways that extend the scope of protection against sex inequality considerably beyond that afforded by the Equal Protection Clause. Indeed, in each of the four areas discussed above, the specific limits of equal protection analysis have been surmounted in some state court opinions.¹⁰⁶ In other instances, however, state court judges limited the scope of protection afforded under state ERAs.

A. State ERAs and the Requirement of State Action

As discussed supra Part II, the state action requirement of the Fourteenth Amendment derives from its text and history as well as concerns of federalism, separation of powers and protection of individual autonomy. In *1228 contrast, state ERAs have their own unique language and legislative history with regard to state action. Moreover, the federalism concerns that serve as a primary justification for the state action requirement and lead to the Equal Protection Clause's “underenforcement,”¹⁰⁷ plainly do not apply to state constitutions.¹⁰⁸ Separation of powers¹⁰⁹ and individual autonomy¹¹⁰ concerns *1229 may also be less salient in the state context. Accordingly, as Professor Jennifer Friesen has emphasized, “the question [of whether a state equality guarantee extends to private actors] cannot be fruitfully resolved by imitating [F]ederal [F]ourteenth [A]mendment state action doctrine.”¹¹¹ Rather, subject to the limits posed by the

Federal Constitution,¹¹² the question must be approached separately by reference to the text, history and public policies underlying individual state ERAs.

The language of individual state ERAs varies considerably with regard to whether their reach is limited to state action. Montana's ERA expressly extends to private actors.¹¹³ Rhode Island's extends to "persons doing business with the state."¹¹⁴ The Louisiana Constitution contains separate *1230 prohibitions on sex discrimination that apply to both governmental actors¹¹⁵ and all actors operating public accommodations.¹¹⁶ On the other hand, five states—Virginia,¹¹⁷ Colorado,¹¹⁸ Illinois,¹¹⁹ Hawaii,¹²⁰ and New Hampshire,¹²¹—expressly limit the scope of their ERAs to governmental actors. The remaining fourteen state ERAs contain more open-textured language, which could be interpreted as extending to private actors. Of these states, six state ERAs— Maryland,¹²² Pennsylvania,¹²³ Massachusetts,¹²⁴ Washington,¹²⁵ Texas¹²⁶ and New Mexico¹²⁷—expressly forbid the denial of equality of rights "under the law."¹²⁸ Others contain broader language prohibiting the deprivation of undefined "political or civil rights" based on *1231 sex,¹²⁹ or otherwise broadly proscribing sex-based discrimination without specifically referring to governmental involvement.¹³⁰ The broad language of these open-textured provisions differs markedly from the language of the Fourteenth Amendment and more readily supports extension to private actors.¹³¹

Judicial interpretation of the language of state ERAs falls into two categories of cases: (1) those considering whether the state ERA directly applies to private actors; and (2) those considering whether the values of state ERAs may be enforced against private actors via existing common law causes of action. In both categories of cases, some state courts have extended the scope of their ERAs beyond the limits of the federal state action requirement.

1. Direct Extension of ERAs to Private Actors

Pennsylvania courts have considered whether its ERA extends directly to private or nominally private actors on several occasions and expansively interpreted the scope of the Pennsylvania ERA on each occasion. In *Hartford Accident & Indemnity Co. v. Insurance Commissioner of the Commonwealth*, the Pennsylvania Supreme Court rejected the attempt of a private insurance company to rely on a requirement of state action.¹³² The case involved a complaint by a male that the Insurance Commissioner had violated the state ERA by approving gender-based rates. In explicitly rejecting the Company's *1232 attempt to "employ the state action concept of our federal system" in the context of a state ERA challenge, the court reasoned:

The "state action" test is applied by the courts in determining whether, in a given case, a state's involvement in private activity is sufficient to justify the application of a federal constitutional prohibition of state action to that conduct. The rationale underlying the "state action" doctrine is irrelevant to the interpretation of the scope of the Pennsylvania Equal Rights Amendment, a state constitutional amendment adopted by the Commonwealth as part of its own organic law. The language of that enactment, not a test used to measure the extent of federal constitutional protections, is controlling.¹³³

The court then turned to a close examination of the language of Pennsylvania's ERA and focusing on the words "under the law,"¹³⁴ concluded that the amendment "circumscribes the conduct of state and local government entities and officials of all levels in their formulation, interpretation and enforcement of statutes, regulations, ordinances and other legislation as well as decisional law."¹³⁵ The court reasoned that the decision of the Pennsylvania Insurance Commissioner, a public official, was both an act "under the law" and constituted "the law."¹³⁶

Following Hartford, the Pennsylvania Superior Court in *Welsch v. Aetna Insurance Co.* extended its rationale to a sex discrimination claim brought by males directly against their private automobile insurance companies.¹³⁷ The plaintiffs claimed that any requirement of state action was met because “they were compelled to obtain insurance coverage in accordance with the laws of the Commonwealth of Pennsylvania.”¹³⁸ In response, the Pennsylvania court again carefully distinguished between the requirements of state action under the Federal Equal Protection Clause and those applicable under the Pennsylvania ERA, finding that although the plaintiffs’ claims did not meet *1233 the federal state action requirement,¹³⁹ the requirements of the ERA were met.¹⁴⁰

These Pennsylvania state court decisions “suggest that Pennsylvania ERA protections against gender discrimination are greater than those protections typically provided in federal cases requiring state action.”¹⁴¹ Significantly, at least two recent federal district court opinions have interpreted these state court decisions as extending the reach of Pennsylvania’s ERA to purely private actors. For example, in *Imboden v. Chowns Communications*,¹⁴² a federal district court, relying on *Welsch*, refused to dismiss a sex discrimination claim against a private employer, holding that the argument that Pennsylvania’s ERA did not extend to private actors was without merit.¹⁴³

The court has also relied on the unique language and history of its constitutional guarantee of sex equality¹⁴⁴ to expand its application beyond federal standards. In *Peper v. Princeton University Board of Trustees*,¹⁴⁵ the *1234 court, while rejecting claims under Title VII and a state anti-discrimination statute,¹⁴⁶ permitted a female plaintiff to state a claim of sex discrimination under the New Jersey Constitution against Princeton University, a private entity.¹⁴⁷ While not explicitly discussing the state action issue, the court reasoned that if the plaintiff was correct in her allegation that she was not promoted because she was a woman, then she was denied the same rights to acquire property as guaranteed to males under New Jersey’s constitutional guarantee that “all persons” have a right to acquire property.¹⁴⁸ The court supported its holding by noting that in 1947, when the language of the New Jersey Constitution was expressly extended to include both sexes, “women were granted rights of employment and property protection equal to those enjoyed by men.”¹⁴⁹ The court further found that it “has the power to enforce rights recognized by the New Jersey Constitution, even in the absence of implementing legislation.”¹⁵⁰

Peper, Hartford and the other Pennsylvania cases illustrate the potential for using state ERAs to expand protection against sex discrimination in the employment and insurance discrimination areas. In contrast, other state courts considering direct constitutional claims against private actors have specifically declined to extend their ERAs to private actors.¹⁵¹ In Texas, for example, two appellate courts refused to apply the protections of the Texas *1235 ERA to private, nonprofit corporations operating junior football leagues in Texas.¹⁵² Both cases involved girls who challenged their exclusion from participating in junior football.¹⁵³ The plaintiffs argued that any requirement of governmental involvement under the Texas ERA was met because the cases involved teams that practiced and played their games on public school grounds¹⁵⁴ or in publicly-owned parks.¹⁵⁵ While the courts indicated that state action would extend to private conduct affirmatively “encouraged by, enabled by, or closely interrelated in function with state action,” the facts of these cases did not meet this level of state involvement.¹⁵⁶

The reasoning of these Texas courts has been sharply criticized by Justice William Wayne Kilgarlin, a former justice of the Texas Supreme Court.¹⁵⁷ Justice Kilgarlin focuses on the unexamined willingness of these state courts to defer to federal state action doctrine despite the inapplicability of the purposes of that doctrine in the state constitutional law context and without close analysis of the unique language and history of the Texas ERA.¹⁵⁸ With regard to the language of the Texas ERA,¹⁵⁹ Justice Kilgarlin notes that, while including the phrase “under the law,” unlike the

Federal ERA and other state ERAs enacted at the same time, the Texas provision *1236 does not expressly limit its reach to governmental actors.¹⁶⁰ Moreover, an assumption that the Texas Legislature intended to require governmental action is inconsistent with both the structure of the Texas Constitution¹⁶¹ and the legislative history of its ERA, which indicated a legislative intent to extend its reach to private discrimination.¹⁶² In deferring to federal precedent “without any apparent hesitation,” and ignoring the text and legislative intent underlying the drafting and passage of the Texas ERA, Justice Kilgarlin concludes that these courts denied the Texas ERA of its independent meaning.¹⁶³

Similarly, in *United States Jaycees v. Richardet*, the Alaska Supreme Court refused to extend the protections of Alaska's ERA to a plaintiff who challenged the Jaycees' exclusion of females from its membership.¹⁶⁴ Summarily rejecting the plaintiff's reliance on the language of the Alaska ERA, which by its plain terms appeared to extend beyond governmental conduct,¹⁶⁵ the court held that state action was a necessary predicate to an ERA claim because “the American constitutional theory is that constitutions are a restraining force against the abuse of governmental power.”¹⁶⁶ The court then went on to apply federal state action principles and precedent, *1237 concluding that neither the Jaycees' use of governmental facilities for free or at reduced rates nor government aid to several Jaycee programs met the state action requirement.¹⁶⁷ In stark contrast to the Pennsylvania Supreme Court's reasoning in *Hartford*, the Alaska Supreme Court in *Richardet* did not closely examine the language and legislative history of the Alaska provision, nor did it consider whether the rationale underlying federal action doctrine was applicable in the state context.

2. ERAs as Sources of Public Policy

An alternative approach to the direct extension of state ERAs to private actors is one in which courts essentially transport the equality values reflected in state ERAs into common law causes of action, thereby effectively enforcing these provisions against private actors without the need to discuss state action. This “private sector constitutional tort” approach has been used successfully in cases involving claims of sex discrimination in employment.¹⁶⁸ In *Rojo v. Klinger*, the California Supreme Court held that the female plaintiffs could bring a claim for wrongful discharge in violation of public policy against a private employer where they were continually subjected to sexual harassment in the workplace and their refusal to tolerate the harassment resulted in their discharge from employment.¹⁶⁹ In defining the public policy of California, the court imported the values reflected in California's constitutional prohibition against sex discrimination in employment and expressly rejected the defendant's attempt to invoke the requirement of state action as a defense:

[W]hether [article I, section 8 \[of the California Constitution\]](#) applies exclusively to state action is largely irrelevant; the provision unquestionably reflects a fundamental public policy against discrimination in employment—public or private—on account of sex. Regardless of the precise scope of its application, [article I, section 8](#) is declaratory of this state's fundamental public policy against sex discrimination, including sexual harassment. No extensive discussion is needed to establish the fundamental public *1238 interest in a workplace free from the pernicious influence of sexism. So long as it exists, we are all demeaned.¹⁷⁰

In *Badih v. Myers*,¹⁷¹ a California state appellate court extended the reasoning of *Rojo* to allow a claim for pregnancy discrimination against a private employer even though that employer was exempted from the coverage of California's employment discrimination statute because it employed fewer than five individuals.¹⁷² The court reasoned that discrimination based on pregnancy contravened the strong public policy against sex discrimination in employment stated explicitly in California's constitutional equality guarantee.¹⁷³ Opinions in other states have likewise looked to the clear public policy expressed in state ERAs as justification for allowing wrongful discharge claims against private employers in sex discrimination cases,¹⁷⁴ or interpreting statutes liberally with an eye to realizing the sex equality ideals embodied in

state ERAs.¹⁷⁵ *1239 The possibility of imposing constitutional sex equality guarantees on private actors reflected in this innovative line of cases holds great potential for expanding the reach and impact of state ERAs. This approach holds certain practical advantages over proceeding under anti-discrimination statutes, which might require administrative exhaustion or provide defendants with specific statutory defenses. Moreover, as Professor Friesen notes, this approach is more likely to develop positively in the future than efforts to directly extend constitutional provisions to private actors for a variety of reasons:

First, advocates who urge [this approach] are asking courts to act consistently with tradition. Second, judges are often required to consider public interest and public policy, and may feel more comfortable doing justice on a case by case basis than by making broad declarations about the nature of the state's bill of rights. Third, this approach neutralizes the policy concerns about separation of powers and diminution of legislative power. Fourth, seeking a resolution of a dispute by resort to non-constitutional grounds is consistent with normal principles of judicial economy and restraint.¹⁷⁶

B. The Standard of Review Under State ERAs

Much like the state action determination, the question of what standard of review is applicable to claims under state ERAs is not controlled by federal precedent, which, as discussed *supra* Part II, is tied to the unique history of the Fourteenth Amendment and the Supreme Court's apparent reluctance to overstep "the bounds between constitutional interpretation and *1240 constitutional amendment."¹⁷⁷ The majority of courts interpreting state ERAs have recognized this point and approached the question of standard of review by examining the legislative history and purpose of their individual provisions. Based on this analysis, most state courts have interpreted their state ERAs as requiring higher justification for gender-based classifications than the intermediate standard of review used by the Supreme Court in interpreting the Equal Protection Clause. Accordingly, a critical difference between state ERA jurisprudence and federal precedent is the higher standard of review applied to claims of sex discrimination.¹⁷⁸

Most state courts apply a "strict scrutiny" standard of review, requiring proof that sex-based classifications are narrowly tailored to serve a compelling governmental interest and specifically rejecting such classifications if gender-neutral alternatives are available.¹⁷⁹ A handful of *1241 other courts have announced an even more stringent "near absolutist" standard, condemning the vast majority of sex-based classifications except where physical differences dictate a different result.¹⁸⁰ In justifying these rigorous standards of review, many of these courts looked to the unique text and legislative history of their state ERAs and found that the very reason for adding these provisions to the Constitution was a specific legislative intent to provide more protection than that afforded under the Federal Constitution or previously afforded under their own state constitution. In *Darrin v. Gould*, for example, the Washington Supreme Court looked to the text, timing and purpose of that state's adoption of its ERA in 1972 and concluded that an absolute prohibition on sex discrimination was appropriate.¹⁸¹ The court rejected both the standard applied under the Federal Equal Protection Clause and the strict scrutiny standard that had already been applied by Washington courts prior to the adoption of its ERA:

Presumably the people in adopting [the ERA] intended to do more than repeat what was already contained in the otherwise governing constitutional *1242 provisions, federal and state. Any other view would mean the people intended to accomplish no change in the existing law. Had such a limited purpose been intended, there would have been no necessity to resort to the broad, sweeping, mandatory language of the Equal Rights Amendment.¹⁸²

Similarly, in *People v. Ellis*, the Illinois Supreme Court reasoned that, at minimum, the strict scrutiny standard of review was appropriate given the language and legislative history of the Illinois ERA:

In contrast to the Federal Constitution, which, thus far, does not contain the Equal Rights Amendment, the [c]onstitution of 1970 contains [the state ERA] and in view of its explicit language, and the debates, we find inescapable the conclusion that it was intended to supplement and expand the guaranties of the equal protection provision of the Bill of Rights.¹⁸³

In contrast, a minority of states assess the validity of sex-based classifications under their equality guarantees using a standard of review that is much like the federal intermediate standard of review.¹⁸⁴ Courts in two of *1243 these states—Virginia¹⁸⁵ and Utah¹⁸⁶—have done so based on a conclusion that their state equality guarantees are specifically coextensive with the standard applied under the Federal Equal Protection Clause, although with little analysis of the specific text and history of their provisions.¹⁸⁷

Courts in Rhode Island and Florida have also adopted an intermediate standard of review, doing so, however, after specific examination of the legislative history of their provisions. In *Kleczek v. Rhode Island Interscholastic Little League, Inc.*, the Rhode Island Supreme Court examined the distinct legislative history of Rhode Island's sex equality guarantee, which was added to its constitution in 1986 as part of a revision that also added protection against discrimination based on race and disability, and concluded that it was not a “true ERA” but rather “an adoption of an equal protection and nondiscrimination clause that contains protections similar to the equal protection guarantees contained in the Fourteenth Amendment.”¹⁸⁸ The court noted that: (1) minutes of the constitutional convention established that the intent of the delegates was to add a general equal protection clause that would “catch [the Constitution] up” with prior *1244 court rulings that had been applying federal equal protection standards¹⁸⁹ and thereby “fill a void that had existed in [Rhode Island’s] Constitution”; (2) legislative committees at the time had considered and tabled all resolutions relating to an ERA “because of problems with language and interpretation”; and (3) in contrast to other states where adoption of ERAs occurred “only after full debate and with notice to all by calling the resolution what it was, an Equal Rights Amendment,” the Rhode Island delegates knew that they were not acting on a true ERA.¹⁹⁰ On this basis, the court concluded that review of sex discrimination claims under the intermediate standard of review was appropriate, reversing the trial court's use of a strict scrutiny standard to invalidate a rule that prohibited boys from participating in girls' field hockey.¹⁹¹

Although the Florida Supreme Court has not considered the standard of review under Florida's ERA, which was adopted in 1998, two lower state courts have rejected the strict scrutiny standard of review. In *Frandsen v. County of Brevard*, a Florida appellate court looked to both the plain language and legislative history of revisions made to *1245 [article I, section 2 of the Florida Constitution](#) in 1998.¹⁹² The 1998 revisions added protection against discrimination based on both sex and national origin, but did so in two different sentences: “All natural persons, female and male alike, are equal before the law and have inalienable rights No person shall be deprived of any right because of race, religion, national origin, or physical disability.”¹⁹³ The court also reviewed the commentary of the Constitution Revision Commission and found that an “initial proposal ‘would have added ‘sex’ to the list of protected classes [along with race, religion, national origin and physical disability],’ but some members objected that such an amendment could lead Florida courts to conclude that it required same-sex marriages.”¹⁹⁴ To address these concerns, the Florida Legislature removed “sex” from the list of classes protected in the final sentence of [article I](#) and, instead, extended protection against sex-based discrimination via the “female and male alike” language.¹⁹⁵ The Constitution Revision Commission's report explained their intention for this change as follows:

The intent of [this proposal], as adopted, was to affirm explicitly that all natural persons, female and male alike, are equal before the law. The proposal as adopted is not intended, and should not be construed, to confer any right to same-sex marriages in this state. Many in the body were concerned that the proposal as it was originally proposed would have opened the door to same-sex marriage in Florida. That was not an acceptable result to many members of the Commission. Consequently, the purpose in amending the original proposal and adopting it in its amended form was to assure that the proposal would not be deemed in any way to countenance same sex marriages.¹⁹⁶

The Commission report also specifically stated that the addition of “national origin” to the listing of protected classes “will require strict scrutiny of classifications based upon the place of a person's birth, ancestry or *1246 ethnicity.”¹⁹⁷ The Frandsen court concluded that “based on this different treatment of ‘sex,’ on the one hand, and ‘national origin’ and ‘physical disability,’ on the other, it must be concluded that classifications based on sex are not subject to strict scrutiny.”¹⁹⁸ The court then applied the intermediate standard of review to uphold the sex-based classification before it.¹⁹⁹ In 2004, a second Florida appellate court, relying entirely on Frandsen, rejected the strict scrutiny standard with no independent analysis.²⁰⁰

While the standard of review adopted by the Rhode Island Supreme Court in Kleczek is at least grounded in some relevant legislative history, the reasoning of the Florida courts is not. The legislative history of the Florida provision does indicate a clear legislative intent not to extend protection to same-sex marriage. However, the Frandsen court's conclusion that the Florida delegates intended a wholesale rejection of strict scrutiny in other fact settings involving sex discrimination is at odds with the apparent original and overarching legislative desire to expand Florida's protection against sex discrimination beyond that contained in existing interpretations of state and federal law.²⁰¹ Since existing Florida case law already applied the intermediate scrutiny standard,²⁰² the Frandsen court's interpretation means that it essentially added nothing to the governing constitutional standards for sex discrimination in Florida. This conclusion is contradicted by the analysis of at least one early legal commentary on the 1998 revisions, which concludes, based on a detailed analysis of the legislative record and documents distributed to guide the public in their understanding of the revisions, that “both the Commissioners and the voters were aware of the *1247 ERA's intent to provide greater rights to women and of the probability that the strict scrutiny standard would apply to gender classifications.”²⁰³ The author notes, for example, that unlike the Rhode Island record examined in Kleczek, the Florida record indicates that those involved in its amendment proceedings viewed the 1998 revision as an ERA, specifically referring to it as an “equal rights proposal.”²⁰⁴ A more careful, detailed analysis of the legislative record in Florida by the courts thus may have warranted a different result.

C. Formal Equality and Real Differences

Although some state court decisions have followed the path of the Supreme Court in applying a formal equality approach to protection under their state ERAs, in noteworthy instances, others have moved beyond formalistic reasoning and employed a substantive equality model that closely scrutinizes all sex-based classifications, including those relating to biological differences, to assess their discriminatory nature and impact. Decisions relating to reproductive autonomy and the rights of unwed parents illustrate this expansive approach.²⁰⁵

*1248 1. Reproductive Autonomy: Pregnancy and Abortion

State ERAs have been successfully used in a variety of factual contexts to challenge laws and policies that discriminated against women on the basis of pregnancy. In *Colorado Civil Rights Commission v. Travelers Insurance Co.*, the Colorado Supreme Court held that excluding the costs of normal pregnancy care from an otherwise comprehensive insurance coverage constitutes sex discrimination in violation of the Colorado ERA.²⁰⁶ The court began its analysis by specifically rejecting the United States Supreme Court's analysis in *Geduldig v. Aiello*²⁰⁷ and *General Electric Co. v. Gilbert*,²⁰⁸ emphasizing that, after Colorado's adoption of an ERA in 1972, “[r]eliance on the Gilbert rationale is particularly inappropriate in light of the fact that Colorado constitutional provisions provide additional prohibitions against sex discrimination not present in the United States Constitution.”²⁰⁹ In contrast to the United States Supreme Court's conclusion in *Geduldig* and *General Electric* that men and women are not similarly situated with respect to pregnancy, the Colorado Supreme Court reasoned that:

[B]ecause pregnancy is a condition unique to women, an employer offers fewer benefits to female employees on the basis of sex when it fails to provide them insurance coverage for pregnancy while providing male employees comprehensive coverage for all conditions, including those unique to men. This disparity in the provision of comprehensive insurance benefits as a part of employment compensation constitutes discriminatory conduct on the basis of sex, and is essentially no different in effect than if the employer had provided female employees a lower wage on the basis of sex.²¹⁰

*1249 State ERAs have also provided protection against pregnancy-based discrimination where an employer reassigned a pregnant worker to lesser duties²¹¹ or discharged her because of pregnancy.²¹²

The guarantee of equality at the heart of state ERAs is also clearly implicated by laws that single out abortion services for prohibition or restriction:

Because only women obtain abortions, the direct impact of abortion restrictions falls on a class composed only of women, while men are able to protect their health and exercise their pro-creative choices free of governmental interference. Restrictive legislation coerces only women to continue their pregnancies to term. Only women bear the harmful consequences of dangerous, illegal abortions, where the state has made safe, legal abortions unavailable. By restricting a woman's right to choose abortion, the state conscripts women's bodies into its service, forcing women to continue their pregnancies and involuntarily bear children.²¹³

Most state ERA challenges in this context have focused on state laws restricting public funding for abortion.²¹⁴ Challenges under the Federal Constitution to restrictions on public funding for abortion have uniformly failed, and the Supreme Court has explicitly permitted states to discriminate *1250 between childbirth and abortion in their allocation of funds.²¹⁵ In contrast, challenges under state ERAs²¹⁶ or other state constitutional guarantees²¹⁷ have successfully invalidated restrictions on public funding for abortion in *1251 many states.²¹⁸ State ERA challenges have been successful where state courts have been willing to abandon the formal equality analysis of federal precedent and extend greater protection for abortion rights under state equality provisions. The 1998 decision of the New Mexico Supreme Court in *New Mexico Right to Choose/NARAL v. Johnson* best illustrates this independent approach.²¹⁹ In holding that New Mexico's restrictions on state Medicaid funding for medically necessary abortions²²⁰ violated the state ERA, the court reasoned that distinctions based on pregnancy, although a physical characteristic unique to women, must be subject to close scrutiny.²²¹ The court flatly rejected the reasoning of the United States Supreme Court in *Geduldig*, emphasizing that it “would be error to conclude that men and women are not similarly situated with respect to a classification simply because the classifying trait is a physical characteristic unique to one sex.”²²² Instead, the court reasoned that New Mexico's ERA demanded that it look “beyond the classification to the purpose of the law”²²³ and to

whether the law operates to the disadvantage of women. The court emphasized that “[t]he question at hand is whether the government has the power to turn the capacity [to bear children], limited as it is to one gender, into a source of social disadvantage.”²²⁴ In this regard, the court noted that New Mexico's funding ban was part and parcel of a long history in which “women's biology and ability to bear children have been used as a basis for discrimination against them.”²²⁵ The court also noted that the record in the trial court established “profound [potential] health consequences” of ***1252** pregnancy.²²⁶ Finally, the court found that the New Mexico law discriminated against women by singling them out for distinctly different treatment than men with respect to medically necessary medical services:

[T]here is no comparable restriction on medically necessary services relating to physical characteristics or conditions that are unique to men. Indeed, we can find no provision that disfavors any comparable, medically necessary procedure unique to the male anatomy

Thus, [the regulation] undoubtedly singles out for less favorable treatment a gender-linked condition that is unique to women.²²⁷

Applying what it described as “searching judicial scrutiny,” the court found that the State had produced no compelling justification for its discriminatory treatment of pregnant women seeking abortion.²²⁸

The New Mexico Right to Choose decision is noteworthy for its thorough and careful analysis of whether divergence from federal precedent was appropriate in light of “distinct characteristics” of New Mexico law. The New Mexico Supreme Court examined both the text of the New Mexico ERA and its history and meaning in the context of protection from sex discrimination under New Mexico law from territorial times to present.²²⁹ With respect to the New Mexico ERA, the court noted that it was passed in 1973 “by an overwhelming margin” and represented a culmination of a series of state constitutional amendments “that reflect an evolving concept of gender equality.”²³⁰ Based on the distinctive text and legislative history of the New Mexico ERA, the court found that the ERA was added to New Mexico's constitution with the specific intention of providing broader protection against sex discrimination than that afforded under the Federal Constitution.²³¹ Thus, the court concluded that “the federal equal protection analysis [was] inapposite with respect to [the] claim of gender ***1253** discrimination” before it.²³² Having put federal precedent aside, the court went on to undertake an analysis that scrutinized the New Mexico funding cut-off from a substantive equality perspective that focused on the multiple ways in which the cut-off contributed to women's subordination.²³³

In contrast to the New Mexico Supreme Court, other courts have explicitly declined to find protection for abortion funding under their state ERAs.²³⁴ In *Bell v. Low-Income Women of Texas*, for example, the Texas Supreme Court held that the Texas Medical Assistance Program's restrictions on abortion funding for indigent women did not violate the Texas ERA.²³⁵ Unlike the New Mexico Supreme Court, the Texas Supreme Court refused to find that the State's decision to single abortion out for different treatment involved a sex-based classification:

[I]t is true that the funding restrictions only affect women, but that is because only women can become pregnant. If the State were to deny funding of all medically-necessary pregnancy-related services, the classification might be comparable to [an] overt gender-based classification. The classification here is not

so much directed at women as a class as it is abortion as a medical treatment, which, because it involves potential life, has no parallel treatment method.²³⁶

Having concluded that no discriminatory facial classification was involved by relying upon the United States Supreme Court's decisions in *Feeney* and other cases, the Texas Supreme Court required proof that the funding restriction was based on an invidious discriminatory purpose.²³⁷ Finding that the plaintiffs had failed to demonstrate a purpose to discriminate because of sex, the court refused to apply heightened scrutiny and reviewed the Texas law only to determine whether it was rationally related to a legitimate government purpose.²³⁸ In addition to its outcome, the Bell opinion also differs from the *New Mexico Right to Choose* opinion in its reliance on *1254 federal precedent. While noting that the Texas ERA was ““designed expressly to provide protection which supplements the federal guarantees of equal treatment”” and insisting that federal precedent was therefore not controlling, the Texas Supreme Court went on to rely heavily—indeed almost exclusively—on it.²³⁹

2. Unwed Parents

State ERAs have also frequently been used to mount successful challenges to a variety of state laws that make sex-based distinctions regarding the rights and responsibilities of unwed parents and their children. In *Guard v. Jackson*, the Washington Supreme Court relied on the state ERA to invalidate a statute that required the father, but not the mother, of an illegitimate child to have regularly contributed to the support of a minor child in order to recover for the child's wrongful death.²⁴⁰ The court began by noting that the United States Supreme Court's reasoning in *Parham v. Hughes*,²⁴¹ upholding a similar statute, “provides no guidance to this court's consideration under the ERA.”²⁴² Instead, the court reviewed the statute under the rigorous standard of review adopted in *Darrin v. Gould*,²⁴³ which allows sex-based classifications only where actual differences justify it. The court concluded that, given the statute's purpose of allowing compensation “for the loss of love and companionship of a child,” no actual differences justified barring a father from recovering damages, because “the capacity to suffer loss when a child dies is not unique to mothers.”²⁴⁴

Similarly, in *Estate of Hicks*, the Illinois Supreme Court relied on the Illinois ERA to strike down a provision allowing only mothers to inherit from illegitimate children who die intestate.²⁴⁵ The court rejected the State's argument that the sex-based distinction was legitimately based on biological differences between mothers and fathers and applied the strict scrutiny *1255 standard of review to assess the statute.²⁴⁶ The court reasoned that distinguishing between mothers and fathers was not necessary to achieve the State's goal of giving effect to the presumed intentions of a deceased child.²⁴⁷ Instead, the court found that the statute was based on overbroad and impermissible generalizations about parental roles and behavior:

[The statute] is based upon the presumption that a particular parent will be involved or uninvolved in his illegitimate child's life simply because that parent happens to be a man or a woman. Not all mothers assume sole responsibility for their illegitimate offspring, and not all fathers abandon such offspring. In fact, by employing a gender-based classification, [the statute] may actually thwart the legislature's desire to effectuate an illegitimate child's presumed intent [The statute] allows a mother who abandons her illegitimate child at birth to inherit from that child, while denying surviving fathers the opportunity to inherit even where there is conclusive evidence that they were objects of their child's affection.²⁴⁸

In *In re McLean*, the Texas Supreme Court relied on the Texas ERA to strike down a statute that required a father, but not a mother, to prove it was in the best interest of a child born out of wedlock that he be recognized as a parent.²⁴⁹ The court began its opinion by emphasizing that the adoption of the Texas ERA required it to review the case on independent state constitutional grounds:

We decline to give the Texas Equal Rights Amendment an interpretation identical to that given state and federal due process and equal protection guarantees. Both the United States Constitution and the Texas Constitution had due process and equal protection guarantees before the Texas Equal Rights Amendment was adopted in 1972. If the due process and equal protection provisions and the Equal Rights Amendment are given identical *1256 interpretation, then the 1972 amendment, adopted by a four to one margin by Texas voters, was an exercise in futility.²⁵⁰

Applying a standard of strict scrutiny to assess the validity of the statute, the court found that while the state had a significant interest in protecting the welfare of a child born to a mother not married to the child's father, that interest could be served without discriminating on the basis of sex: "A father who steps forward, willing and able to shoulder the responsibilities of raising a child should not be required to meet a higher burden of proof solely because he is male."²⁵¹

These cases are noteworthy because, in squarely rejecting harmful stereotypes and assumptions about the roles and responsibilities of parents, they reject the unreflective biological determinism reflected in Supreme Court decisions such as *Parham* and *Nguyen*.

D. Disparate Impact

Although there are relatively few reported decisions involving disparate impact claims, some courts have also been willing to extend the protection of state ERAs to facially neutral laws or policies that disproportionately impact men or women.²⁵² The Pennsylvania Supreme Court's 1975 decision in *DiFlorido v. DiFlorido*²⁵³ is one early example of an expansive interpretation of a state ERA to reach a classification that was neutral on its face but disproportionately disadvantaged women. The court first invalidated a Pennsylvania common law rule that made household goods acquired during a marriage presumptively the property of the husband.²⁵⁴ Next, the court went on to find invalid the trial court's alternative sex-neutral presumption that the actual purchaser of marital property is the owner.²⁵⁵ In rejecting the notion that ownership should be based solely on proof of financial contribution, the *1257 court reasoned that this "would necessitate an itemized accounting whenever a dispute over household goods arose and would fail to acknowledge the equally important and often substantial non-monetary contributions made by either spouse."²⁵⁶ Noting that the ERA demanded that the law not impose "different benefits or different burdens" on members of either sex, the court held that household goods acquired during the marriage must be presumed to be held jointly by the couple unless specific proof was presented to overcome that presumption.²⁵⁷

More recently, in *Kemether v. Pennsylvania Interscholastic Athletic Ass'n, Inc.*, a federal district court, relying on precedent from Pennsylvania's state courts, sustained a favorable jury verdict based on a disparate impact claim under Pennsylvania's ERA.²⁵⁸ The case involved a claim by a female basketball referee that the Pennsylvania Interscholastic Athletic Association ("PIAA") discriminated against her on the basis of sex by refusing to assign her to officiate at boys' interscholastic basketball games during regular season play.²⁵⁹ The plaintiff also alleged that the PIAA limited eligibility to officiate at boys' post-season playoff games to officials who officiated at ten regular season varsity boys' games.²⁶⁰ The plaintiff argued that because of the ten-game rule and the inability of women to obtain assignments to

regular season boys' games, female officials were effectively precluded from officiating at boys' postseason games.²⁶¹ The court expressly rejected the defendant's claim that Pennsylvania's ERA did not extend to PIAA's facially neutral policy regarding post-season games: “[W]hile a practice may purport to treat men and women equally, if it has the effect of perpetuating discriminatory practices, thus placing an unfair burden on women, it may violate the ERA.”²⁶² The court also rejected the defendant's claim that plaintiff had failed to provide evidence of disproportionate effect, noting both that “the record [was] replete with evidence to the contrary,” and that “[i]t was known to PIAA that, because of the ten-game rule and the inability of women to obtain assignments to regular season boys' games, female officials were only ever eligible to officiate girls' playoff games.”²⁶³ *1258 Importantly, in these cases, neither court imposed a requirement—like that applicable under *Personnel Administrator of Massachusetts v. Feeney*²⁶⁴ and other Federal Equal Protection Clause precedent—that the plaintiffs demonstrate discriminatory purpose. Under *Feeney*, these plaintiffs could not have prevailed absent proof that the defendants desired to discriminate; proof that they took action with knowledge of the consequences, accepted by the court in *Kemether*, would not have been sufficient.²⁶⁵ In these and other cases,²⁶⁶ claims under state ERAs have enjoyed expanded protection against sex discrimination beyond the constraints of federal precedent.

In contrast, the Texas Supreme Court's opinion in *Bell v. Low-Income Women of Texas*,²⁶⁷ represents a far more restrictive interpretation and application of a state ERA in the context of a claim viewed by the court as facially neutral. Repeatedly citing *Feeney* and other federal precedent, the Texas Supreme Court held that Texas's restriction on Medicaid funding for medically necessary abortions was facially neutral and therefore not subject to close scrutiny absent proof that Texas lawmakers acted with an explicit “purpose to discriminate because of sex“:

*1259 “Whatever one thinks of abortion, it cannot be denied that there are common and respectable reasons for opposing it, other than hatred of, or condescension toward women as a class.” The biological truism that abortions can only be performed on women does not necessarily mean that governmental action restricting abortion funding discriminates on the basis of gender [T]hat might be true if the State refused to fund medically necessary pregnancy-related services. But, other than abortion, the [Texas law] does fund all medically necessary pregnancy-related care.²⁶⁸

Finding no proof of such invidious intent, the court evaluated the Texas law under the highly deferential rational basis standard of review, readily concluding that it rationally furthered the state's legitimate purposes of providing funding where federal reimbursement was available and “encouraging childbirth and protecting potential life.”²⁶⁹ In contrast, the strict scrutiny standard employed by the New Mexico Supreme Court in *New Mexico Right to Choose/NARAL v. Johnson* would have required the State to provide compelling justification for its funding restriction and to demonstrate why that goal could not be achieved via less discriminatory means.²⁷⁰ Numerous courts applying this standard have invalidated discriminatory funding bans, finding no compelling justification for denying medically necessary health care to poor women who need abortions.²⁷¹

E. Sexual Orientation and Formal Equality

Finally, state court opinions demonstrate that state ERAs may provide protection from discrimination based on sexual orientation that goes well beyond that available under the Federal Constitution. The United States Supreme Court's own decision-making in this area has been sparse. In 1996, *1260 the Supreme Court in *Romer v. Evans* held that a Colorado constitutional amendment prohibiting all legislative, administrative or judicial actions designed to protect gays and lesbians violated the Equal Protection Clause.²⁷² The Court held that the Colorado provision could not survive

minimum rationality scrutiny.²⁷³ In 2003, in *Lawrence v. Texas*,²⁷⁴ the Court used rationality review to strike down a law banning same-sex sodomy under the Due Process Clause,²⁷⁵ expressly declining to rest its reasoning on the Equal Protection Clause.²⁷⁶ The Supreme Court has never expressly decided whether sexual orientation is a suspect or quasi-suspect classification warranting application of heightened scrutiny.²⁷⁷ Nor has the Supreme Court considered whether discrimination against gays and lesbians is a form of sex-based discrimination, warranting heightened scrutiny under *Craig v. Boren*.²⁷⁸

The sex discrimination argument has frequently been made in state constitutional law challenges to laws restricting marriage to opposite-sex *1261 couples. Although state ERAs have not provided the legal basis for recent victories in Vermont²⁷⁹ and Massachusetts,²⁸⁰ in the Hawaii Supreme Court's landmark 1993 ruling in *Baehr v. Lewin*, the court relied on the Hawaii ERA in holding that its prohibition on same-sex marriage established a sex-based classification that could only pass muster if the state could satisfy the strict scrutiny standard.²⁸¹ The *Baehr* court employed a straightforward formal equality analysis to reach this result reasoning essentially that because Hawaii's law allowed men to marry women, but prevented women from marrying women, it denied women (and vice versa men) the ability to do something that men could do and therefore constrained women's (and men's) choice of marital partners because of sex.²⁸² The court supported its reasoning by analogizing to the Supreme Court's 1967 holding in *Loving v. Virginia*²⁸³ that the Equal Protection Clause forbids the criminalization of marriage between persons of different races.²⁸⁴ On remand, a trial court invalidated the statute after finding that the state had not proven that the marriage statute was supported by a compelling governmental interest.²⁸⁵ The court's ruling, however, never went into effect because Hawaii voters amended the Hawaii Constitution to allow the state legislature "the power to *1262 reserve marriage to opposite-sex couples."²⁸⁶ No subsequent final appellate decisions have adopted the *Baehr* court's sex discrimination rationale. However, concurring opinions of supreme court justices in Massachusetts²⁸⁷ and Vermont²⁸⁸ and trial court opinions in Maryland,²⁸⁹ Alaska²⁹⁰ and Oregon²⁹¹ accepted the argument in same-sex marriage challenges, and a few opinions have done so in other contexts.²⁹² *1263 Other state courts have squarely rejected the sex discrimination argument in a variety of cases.²⁹³ In direct contrast to *Baehr*, several state courts have used a formal equality analysis to reason that prohibitions on same-sex marriage do not involve impermissible sex-based classifications because: (1) they apply equally to men and women in the sense that both men and women are precluded from marrying same-sex partners;²⁹⁴ (2) they are not motivated by purposeful sex-based discrimination;²⁹⁵ and (3) they are based upon "the unique physical characteristics" of the sexes.²⁹⁶ These courts explicitly rejected *Baehr's* analogy to *Loving*. In the 1974 decision in *Singer v. Hara*, for example, the Washington Court of Appeals dismissed *Loving* as inapposite, reasoning that gender, unlike race, is an essential element of marriage: "[M]arriage [by definition], as a legal relationship, may exist only between one man and one woman."²⁹⁷ More recently, in *Baker v. Vermont*, *1264 the Vermont Supreme Court also rejected the analogy to *Loving* as "misplaced."²⁹⁸ The *Baker* court emphasized that the United States Supreme Court was able to look beyond the facial neutrality of the miscegenation ban in *Loving* because it found that "its real purpose was to maintain the pernicious doctrine of white supremacy."²⁹⁹ Relying on the Feeney discriminatory purpose standard, the court reasoned that, in contrast, on the record before it, there was insufficient evidence "to demonstrate that the authors of marriage laws excluded same-sex couples because of incorrect and discriminatory assumptions about gender roles."³⁰⁰

Given the limits of formal equality analysis reflected in the reasoning of *Singer*, *Baker* and other cases rejecting the sex discrimination argument, some legal scholars have suggested that those advancing this argument must go beyond the mechanical analysis of *Baehr* to a more substantive equality analysis that recognizes the ways in which discrimination against gays and lesbians perpetuates sex stereotypes, subordinates women and enforces heterosexual norms.³⁰¹ These

arguments have been well developed by legal scholars. Professor Andrew Koppelman, for example, has compellingly articulated the argument that, just as miscegenation laws enforce a code of white supremacist preservation of a “superior” race, laws that discriminate against gays and lesbians reinforce both gender stereotypes about proper male and female behavior and the hierarchy of males over females:

Much of the connection between sexism and [homophobia] lies in social meanings that are accessible to everyone. It should be clear from ordinary experience that the stigmatization of the homosexual has something to do with the homosexual's supposed deviance from traditional sex roles. . . .

Most Americans learn no later than high school that of the nastier sanction that one will suffer if one deviates from the behavior traditionally deemed appropriate for one's sex is the imputation of homosexuality. . . .

***1265** This common sense meaning shares certain implicit, rather ugly assumption with the miscegenation taboo. Both assume the hierarchical significance of sexual intercourse and the polluted status of the penetrated person. The central outrage of male sodomy is that a man is reduced to the status of a woman, which is understood to be degrading. Just as miscegenation was threatening because it called into question the distinctive and superior status of being white, homosexuality is threatening because it calls into question the distinctive and superior status of being male. . . . Lesbianism, on the other hand, is a form of insubordination: it denies that female sexuality exists, or should exist, only for the sake of male gratification.³⁰²

Professor Sylvia Law has also cogently demonstrated that negative attitudes towards homosexuality preserve “traditional concepts of masculinity and femininity, and those traditional concepts in turn sustain particular political, market and family structures”³⁰³ :

Sexism and heterosexism are tightly linked. Lesbians and gay men pose a formidable threat to the classic gender script. They deny the inevitability of heterosexuality. They do not fit. Such persons, particularly if they are comfortable with their sexuality and reasonably content and successful in their work and family life, invite heterosexual people to explore whether their own sexual orientation is innate, “freely chosen,” or simply the socially comfortable course of least resistance.

. . . .

At its core, secular opposition to homosexual expression and feminism rests on a defense of traditional ideas of family stability. Gay people and feminists violate conservative ideology of family in many ways. Most obviously, gay people engage in non-marital sex involving no immediate potential for procreation. More importantly, when homosexual people build ***1266** relationships of caring and commitment, they deny the traditional belief and prescription that stable relationships require the hierarchy and reciprocity of male/female polarity. In homosexual relationships authority cannot be premised on the traditional criteria of gender.³⁰⁴

Although the anti-subordination arguments of Professors Koppelman, Law and other scholars³⁰⁵ have for the most part not been adopted in judicial opinions, the seeds of these more nuanced arguments are reflected in at least two recent concurring opinions in state constitutional law challenges to discrimination against gays and lesbians. In her concurring and dissenting opinion in *Baker v. Vermont*, Justice Johnson argued that Vermont's exclusion of same-sex couples from the benefits and protections of marriage should be subject to heightened scrutiny as a "suspect" or quasi-suspect classification based on sex.³⁰⁶ Significantly, Justice Johnson viewed Vermont's opposite-sex marriage limitation as "a vestige of the sex-role stereotyping" that historically has pervaded marriage laws.³⁰⁷ She specifically cited the long history of subordination of women within marriage via laws that enforced economic dependency and treated married women as legal incompetents.³⁰⁸

More recently, in a concurring opinion in *Snetsinger v. Montana University System*, Justice Nelson argued that the Montana University System's exclusion of health benefits to partners of gay and lesbian employees constituted a sex-based classification in violation of the Montana ERA.³⁰⁹ Citing Professor Koppelman, Justice Nelson emphasized that the purpose and effect of the challenged restriction was essentially to force individuals into traditional gender roles:

[T]he entire focus of laws directed at gays and lesbians is sex. Majoritarian morality and prevailing political ideology are offended by the fact that *1267 people of the same sex have sexual relations with each other. This offense translates into laws and policies that explicitly or implicitly demonize homosexuals and make them a disfavored class.³¹⁰

Baehr and other decisions demonstrate that state ERAs may support successful legal challenges to laws and policies that discriminate against gays and lesbians. Although some legal scholars, including those sympathetic to lesbian and gay rights, have disagreed with the use of the sex discrimination argument and advised that it "should be used with caution,"³¹¹ others have compellingly demonstrated the advantages of the argument and championed its use as one additional "arrow in the quiver"³¹² in ongoing efforts to challenge discrimination against gays and lesbians. Professor Koppelman, for example, emphasizes that the sex discrimination argument has important analytic and moral strengths that support its use, along with other arguments, by gay and lesbian rights advocates.³¹³ Although the *1268 argument has met with considerable judicial resistance,³¹⁴ as reflected in the recent concurring opinions in *Baker* and *Snetsinger*, highlighting the dynamic of gender oppression and heterosexism that underlie laws that restrict gays and lesbians may strengthen the claim and enhance its probability of success.

IV. Evaluating State ERAs

Although state ERAs were the subject of considerable scholarly interest from the mid-1970s through the mid-1990s,³¹⁵ relatively little legal scholarship has focused on them in the past decade. The scant scholarship of the past decade has focused primarily on the experience of ERAs in specific states³¹⁶ and the application of ERAs in specific areas.³¹⁷ While nearly all of *1269 these recent articles have concluded that state ERAs have advanced protection against sex-based discrimination,³¹⁸ some commentators have expressed disappointment at the underutilization of ERAs by litigators³¹⁹ and the failure of state courts to interpret ERAs in such a way as to advance sex *1270 equality jurisprudence in specific areas.³²⁰ One commentator, Paul Benjamin Linton, has questioned their overall usefulness charging that state ERAs have benefited male litigants more often than female litigants and function essentially as mere symbols of equality.³²¹ Relatively little of this recent scholarship has addressed the specific reasons for either the substantive shortcomings of

ERAs or their underutilization by litigators.³²² Yet, identifying and addressing these underlying issues is essential if state ERAs are to achieve their full potential in the future. This section addresses these issues, identifying obstacles that have hindered the effectiveness of state ERAs and responding to some of the recent commentary on them.

A. The Continuing Problem of Unexamined Reliance on Federal Precedent

The decisions highlighted in Part III illustrate that in many important respects state ERAs provide more comprehensive protection against gender discrimination than that afforded under the Federal Equal Protection Clause. Some state courts have extended the scope of their ERAs beyond the limits of federal state-action constraints, reaching private actors and persons loosely affiliated with the state.³²³ The majority of state courts have applied the rigorous strict scrutiny or an even stricter standard to review claims under their state ERAs³²⁴—a standard unavailable at the federal level. Moreover, in important and meaningful ways, some state courts have reached beyond the constraints of formal equality to a far more substantive analysis that evaluates sex-based classifications in the context of a long history in which biological differences between the sexes have been used to discriminate and *1271 with a focus on the negative impact of sex-based classifications on both men and women. This substantive equality analysis has resulted in decisions at the state level that: provide constitutional protection against pregnancy-based discrimination;³²⁵ prohibit the denial of medically necessary health care to poor women;³²⁶ reject rules that are based on harmful sex-based stereotypes about parental roles;³²⁷ and closely scrutinize a variety of classifications that have a disparate impact on the basis of sex.³²⁸

The emergence during the early 1970s of the “new judicial federalism,”³²⁹ in which state court judges have increasingly relied on their state constitutions to expand individual rights and liberties, has supported this development of state ERAs as independent, broad-based sources of protection.³³⁰ Yet, as decisions highlighted in Part III illustrate, an obstacle in the path of enhancing the scope of their protection is the continuing tendency of some state courts to conform their interpretations of these provisions to conventional Federal Equal Protection Clause analysis. This tendency—flagged over two decades ago by Professor Robert Williams and other constitutional law scholars³³¹ as a potential obstacle to the effectiveness of *1272 state ERAs—is illustrated by state action decisions such as the Alaska Supreme Court's in *United States Jaycees v. Richardet*,³³² in which the court imported the federal state action requirement without independent analysis and without considering closely the text of Alaska's ERA or whether the policy concerns underlying that requirement apply in the state constitutional context. Likewise, the Texas Supreme Court's decision in *Bell v. Low-Income Women of Texas*³³³ placed heavy, unexamined reliance on the formal equality analysis of the United States Supreme Court in determining both what constitutes a sex-based classification and how to assess classifications that disparately impact women. Preoccupied with federal precedent, the Texas Supreme Court did not undertake a truly independent analysis in which it examined the Texas funding restriction in light of the meaning and purpose of the Texas ERA.

State constitutional law scholars have frequently criticized this tendency of state courts reflexively to rely on federal precedent in interpreting their own constitutions.³³⁴ State constitutions are not a mere reflection of the Federal Constitution, but rather differ in their text and history and serve as independent sources of state law. Institutional concerns, such as federalism, that underlie federal decisions may be inapplicable to state courts.³³⁵ Moreover, “institutional environments and histories vary dramatically from state to state” and may require³³⁶ state judges to employ different strategies *1273 in enforcing constitutional norms. Therefore, as Justice Hans Linde of Oregon emphasizes, “the right question [in interpreting these independent state charters] is not whether a state's guarantee is the same as or broader than its federal counterpart as interpreted by the Supreme Court. The right question is what the state's guarantee means and how it applies to the case at hand.”³³⁷ Although Supreme Court decisions are a “valuable

source of guidance, state courts are responsible for construing state law, and need not justify their decisions by reference to any federal benchmark.”³³⁸

These observations are especially apt in the context of state court interpretation of state ERAs. The language and legislative history of these provisions differs markedly from that of the Federal Equal Protection Clause. Indeed, as many state courts have recognized,³³⁹ most of these provisions were added to state constitutions to overcome the very limits posed by the historical and doctrinal underpinnings of the Equal Protection Clause. In this sense, many are mandates for a high level of constitutional protection against sex discrimination. As Professor Robert Williams wrote over two decades ago, “Adoption of these provisions through popular referenda reflects an important social and political movement in our society [S]tate ERAs seem to direct, rather than just record, social change.”³⁴⁰ Their presence in state constitutions “is unmistakable evidence of societal action, of the choice whether to enact an idea into law. To bury such choices under a theory of noninterpretive adjudication deprives political action of its constitutional significance.”³⁴¹

*1274 Independent interpretation of state ERAs, however, does not necessarily mean that state courts will in every instance extend protection beyond that provided under the Federal Equal Protection Clause.³⁴² Rather, it means that state judges must employ a careful process, which includes a close and independent review of the text of the provision, its history, its doctrinal and political underpinnings, past judicial interpretations, its “place in the state’s overall constitutional design,”³⁴³ its relation to earlier state constitutional provisions,³⁴⁴ and provisions in other state constitutions.³⁴⁵ Decisions such as the New Mexico Supreme Court’s in *New Mexico Right to Choose*,³⁴⁶ the Washington Supreme Court’s in *Darrin v. Gould*³⁴⁷ and the Colorado Supreme Court’s in *Colorado Civil Rights Comm’n v. Travelers Insurance Co.*³⁴⁸ reflect this kind of careful, independent analysis. Importantly, in considering text and history of state ERAs, these decisions do not reflect narrow literalism or rigid originalism,³⁴⁹ but rather reflect a genuine *1275 commitment to independent analysis that remains faithful to the equality values underlying these provisions.³⁵⁰

B. Underutilization by Litigators

Commentators have correctly noted that realization of the full potential of state ERAs has been hampered by the fact that they have not been frequently used by litigators.³⁵¹ Moreover, the use of state ERAs appears to be diminishing. For example, Judge Phyllis Beck, an expert on the Pennsylvania ERA, points out that “since 1994, Pennsylvania courts have published less than one case per year discussing the state ERA.”³⁵² This phenomenon may, in part, be attributable to the fact that during the past thirty years numerous statutes and regulations targeted at sex discrimination have created alternative avenues for relief in some specific contexts.³⁵³ In addition, as already noted, over time the predominant forms of sexism have evolved from overt expressions of sex discrimination to more subtle forms, which are more difficult to challenge given the potential lack of receptivity of courts to disparate impact claims.³⁵⁴

*1276 While these factors provide a partial explanation for the under use of state ERAs, they do not fully explain the phenomenon. As the cases discussed in Part III illustrate, there continues to be a strong need for the protection of ERAs in many areas. Moreover, the problem of underutilization of state ERAs is not a new one.³⁵⁵ Nor is it limited to state ERAs.³⁵⁶ Although, as cases challenging bans on same-sex marriage and prohibitions on Medicaid funding for abortion illustrate, resort to state constitutional law guarantees has increased in recent years, the problem of over-reliance on the Federal Constitution in framing individual rights claims has dogged the field of state constitutional law.³⁵⁷

State constitutional law scholars have offered several explanations for the underutilization of state constitutional law claims. First, while the receptivity of law schools to training in state constitutional law is steadily improving, legal education and legal resources have tended to focus on federal constitutional law and therefore lawyers are less comfortable and knowledgeable in the state constitutional law arena.³⁵⁸ As Professor Friesen has pointed out, “[a]n advocate wishing to know how Pennsylvania and other *1277 northeastern states have treated the issue of abortion funding under their bill of rights would get no help from the leading national treatise, despite its promising title, *American Constitutional Law*.”³⁵⁹ Educated in federal law, legal advocates may be less likely to bring claims under state constitutional law and, when they do, “will inevitably be tempted to use federal law as a reference point for the construction of state remedies for constitutional rights.”³⁶⁰

Second, obstacles to adequate remedies in state judicial systems may discourage claims under state constitutions. Many states still do not allow private actions for damages for violations of state constitutional rights, although there is a growing trend towards recognizing such actions.³⁶¹ As a result, state ERAs have primarily been used to obtain injunctive relief, rather than as a grounds for recovering damages. In addition, in contrast to claims brought under federal law,³⁶² the prospects of obtaining court awarded attorneys' fees in cases brought solely on the basis of claims under state constitutional law are dim. Most states do not have statutes that permit state courts to award attorneys' fees to a party prevailing on a claim under state constitutional law.³⁶³ In the absence of such statutes, attorneys' fees are not available for plaintiffs proceeding solely on state constitutional law grounds unless the state court can be convinced to award fees based on its equitable powers.³⁶⁴

*1278 The experience of the plaintiffs in *New Mexico Right to Choose/NARAL v. Johnson*³⁶⁵ illustrates the difficulty of convincing a court to award fees in the absence of a statute. Following their groundbreaking victory in obtaining abortion funding for poor women under New Mexico's ERA, the plaintiffs were denied attorneys' fees by the New Mexico Supreme Court.³⁶⁶ The court joined the majority of states in refusing to adopt a “private attorney general” exception that would allow fees in the absence of a statute when litigation protects important societal interests.³⁶⁷ Ironically, as one commentator has noted, while the New Mexico Supreme Court expanded the availability of judicially enforceable rights under its state constitution in its abortion funding ruling and other cases, “it fail[ed] to facilitate and encourage the bringing of such cases” by exercising its equitable power to award fees in cases that succeed in vindicating important constitutional rights.³⁶⁸ Unless plaintiffs seeking protections from sex discrimination can bear their own legal costs or obtain pro bono legal services, the unavailability of attorneys' fees may be a strong disincentive to proceeding in state court under a state ERA claim and may partially contribute to their underutilization in the courts.³⁶⁹

*1279 C. The Role of External Factors in Judicial Decision-Making

A variety of external factors also influence outcomes under state ERAs. As in the case of other constitutional guarantees and legal rules, courts interpret ERAs in the context of political factors, majoritarian cultural norms and individual ideologies that may influence outcomes. Indeed, as noted above, a recent quantitative study of state ERAs showed that factors such as the particular facts of the case, the proportion of women on the bench, the political ideology of individual judges, and the sex of the litigant influence the outcome in claims under state ERAs.³⁷⁰ These external factors may be especially relevant when ERAs are used to challenge more controversial governmental policies such as restrictions on abortion and same-sex marriage.³⁷¹ Thus, the mere presence on the books of an ERA does not automatically guarantee an outcome in litigation that advances sex equality. Nonetheless, as many of the decisions discussed in Part III reflect and the quantitative assessment documents,³⁷² though these external political factors are undoubtedly relevant and influential, the presence of a state ERA often makes a significant difference in increasing the likelihood of judicial

interpretations that advance sex equality principles. Moreover, as discussed below, the impact of state ERAs on executive and legislative decision-making, as well as their cultural and symbolic value, is extremely important.

***1280 D. Extending Protection to Both Males and Females**

Finally, several commentators have noted that male plaintiffs have frequently been the beneficiaries of protection against sex discrimination in state ERA challenges.³⁷³ Paul Benjamin Linton is alone among these commentators in suggesting in two frequently-cited articles that the application of state ERAs to protect men somehow diminishes their value, renders them harmful to women and ultimately ineffective “except as symbols.”³⁷⁴ Pointing out that courts have invalidated statutes and rules that “traditionally favored women over men,” such as the tender years presumption in custody cases, Mr. Linton concludes that “the ultimate irony in the adoption of the equal rights provision is that women have given up ‘privileges’ they have always enjoyed for ‘rights’ that were never in jeopardy.”³⁷⁵

Mr. Linton's conclusions are misplaced. First, the mere fact that males are the immediate beneficiaries of court outcomes in some cases³⁷⁶ does not *1281 mean that the principles established in those cases do not also inure to the ultimate benefit of women and society at large. In many instances, rules that appear to benefit women “promote attitudes and expectations about women, including their dependency or status as victims, that disadvantage them across a wide spectrum of social contexts.”³⁷⁷ State ERA decisions invalidating rules that disadvantaged the fathers of illegitimate children in the context of wrongful death actions and inheritance rights, discussed in Part III,³⁷⁸ illustrate this principle. The sex-based classifications invalidated in those cases, like those upheld in *Nguyen*, all serve to perpetuate and reinforce stereotypes about the role and responsibilities of mothers and fathers that are ultimately harmful to both men and women and their children:

In taking responsibility for children women act as independent moral agents. When the Supreme Court assumes that “biology” dictates that women care for infants, it is impossible to attach moral value to the woman's actions or to acknowledge the human and social worth of the nurturing that women do. When the [Supreme] Court allows sex-based classifications to be justified by the presumption that fathers are unidentified, absent, and irresponsible, it is *1282 more likely that these generalizations will continue to be true. Assertions that it is “virtually inevitable” that the mother will care for the child, assumptions of “unshakeable responsibility” and the “undeniable social reality that the mother is always the custodian of the child,” are no different from the “old notion” that motherhood is “the noble and benign” mission of women. The assumption reinforces stereotypes and degrades women.³⁷⁹

Similarly, Mr. Linton's conclusion that state ERA decisions invalidating the tender years presumption in child custody cases³⁸⁰ harm women is simplistic. As numerous feminist legal scholars have pointed out, while “[t]he maternal preference made it easier for women to leave marriages without losing custody and affirmed their centrality in childrearing,” it also “encouraged the maintenance of traditional dichotomous gender roles in marriage, confining women to domesticity and stigmatizing those who did not conform.”³⁸¹ Moreover, “because the maternal preference was based on ideologies about women's proper role, a judge had wide discretion to penalize a mother who had deviated from traditional homemaker norms .”³⁸² The “privilege” of the tender years presumption thus came with powerful negative ramifications for women, which Mr. Linton's analysis completely ignores. Sex-neutral custody standards that are applied in a non-biased fashion and that seek to undermine, not perpetuate, traditional gender roles are ultimately far more beneficial to women, men and society at large.³⁸³

*1283 Second, Mr. Linton's assessment of the value of state ERAs is utterly devoid of context. By failing to evaluate state ERAs in the broader context of their effectiveness at advancing sex equality jurisprudence beyond the constraints of federal equal protection analysis, his analysis ignores the myriad ways, detailed in this Article, in which courts have advanced legal protection for women beyond that available under federal law by employing substantive equality analyses that focus on the harmful effects of sex-based classifications. Cases extending protection to women discriminated against on the basis of pregnancy and reproductive capacity, for example, are hardly “symbolic” advancements in the law. Moreover, Mr. Linton's evaluation of the impact of state ERAs also ignores entirely the tremendous statutory reform and executive action that came about as a result of the passage of state ERAs. In Pennsylvania, for example, upon ratification of the ERA in 1971, the Governor immediately appointed a commission on the status of women to review Pennsylvania law for sex bias, which led to the passage in 1978 of a package of nineteen statutes implementing the mandate of its ERA and ultimately to the repeal or revision of over 140 discriminatory laws.³⁸⁴ At *1284 the executive level, the Pennsylvania Attorney General issued a flurry of opinions on a wide range of topics, including the right of women to use their birth names, the elimination of minimum height requirements for state troopers, and prohibitions on gender discrimination in insurance.³⁸⁵ In addition, state agencies and departments, such as the Pennsylvania Department of Education and the Department of Insurance, issued regulations prohibiting discrimination in specific areas.³⁸⁶ This reform, like so much of the case law described in this Article, inured to the direct benefit of women.

Finally, while totally ignoring the real practical impact and value of state ERAs, Mr. Linton also mistakenly trivializes their symbolic value. The choice of the citizens of individual states to add explicit protection against sex discrimination to their constitution affirms fundamental principles of human dignity, equality and liberty at the core of American democracy. This unequivocal commitment to gender equality has powerful implications beyond the outcomes in individual cases. The law operates “as a system of cultural and symbolic meanings” and the very presence of legal norms affects us—“through communication of symbols—by providing threats, promises, models, persuasion, legitimacy [and] stigma.”³⁸⁷ State ERAs make crystal clear that the principle of sex equality is so important that it is “deemed worthy of constitutional magnitude.”³⁸⁸ As Justice Ginsburg emphasized nearly thirty years ago in the context of the Federal ERA, they serve “as a forthright statement of our moral and legal commitment to a system in which neither sons nor daughters are pigeonholed because of sex.”³⁸⁹ Moreover, this textual clarification is vitally important:

Text matters in our tradition because it is the site of understandings and practices that authorize, encourage, and empower ordinary citizens to make claims about the Constitution's meaning.

*1285 In our constitutional culture, elected officials and ordinary citizens understand themselves as authorized to make claims about the Constitution's meaning and regularly act on this understanding in a wide variety of social settings and through an array of practices, only some of which are formally identified in the text of the Constitution itself.³⁹⁰ Although not fully quantifiable, the Pennsylvania experience demonstrates that the very presence of an ERA will have a ripple effect through states, sensitizing both elected officials and citizens and mobilizing action to effectuate the values enshrined in its constitutional commitment to sex equality. Moreover, even where courts fail to interpret ERAs fully and effectively, litigation under state ERAs may have the effect of raising public consciousness about sex discrimination and mobilizing individuals to work for needed reform.³⁹¹ The cultural and symbolic meanings of state ERAs are thus profoundly important.

V. Recommendations and Conclusion

While judicial interpretation of state ERAs has been inconsistent, state court decisions of the past three decades powerfully demonstrate that they provide the potential for a more broad-based framework of sex discrimination jurisprudence that goes well beyond the protection afforded under the Federal Constitution. Especially at a time when

the United States Supreme Court is likely to become increasingly conservative as President Bush adds replacements to the Court, state ERAs are extremely important sources of protection against sex-based discrimination. Meaningful implementation of any law, however, is not guaranteed by its mere passage. Judges, lawyers and others play a critical role in shaping constitutional meaning and enhancing the effectiveness of constitutional guarantees. If the positive potential of state ERAs is to be fully realized, lawyers, courts, legislative policymakers and citizens themselves must participate in the hard work of giving them vitality and potency. As Professor Robert Williams has noted, as the New Judicial Federalism has matured to its “third stage,” *1286 considerable challenges and difficult work confront those involved in this “evolving phenomenon.”³⁹²

Lawyers must make claims under state ERAs and must do so in terms independent of federal analysis. As courts and constitutional law scholars have emphasized, in briefing and analyzing state constitutional law claims, lawyers must break the habit of arguing state constitutional claims in the defensive language of federal jargon and instead must base arguments on the specific text, history and meaning of state provisions.³⁹³ For example, in its famous opinion in *State v. Jewett*,³⁹⁴ the Vermont Supreme Court admonished:

One longs to hear once again of legal concepts, their meaning and their origin. All too often legal argument consists of a litany of federal buzz words memorized like baseball cards. As Justice Linde has noted: “People do not claim rights against self-incrimination, they ‘take the fifth’ and expect ‘Miranda warnings.’ All claims of unequal treatment are phrased as denials of equal protection of the laws.”³⁹⁵

As Professor Friesen has counseled, “One way to break the state tie is to imagine a world in which there is no federal law.”³⁹⁶ In the case of state ERAs, for example, this would entail breaking free of the constraints of *Feeney* in arguing disparate impact claims, avoiding the automatic assumption that federal state action principles apply, and, most importantly, proceeding from the premise that sex equality jurisprudence rests on a model of substantive rather than formal equality. These arguments may be supported by the innovative work in recent years of commentators who have urged the use of state ERAs in areas such as reproductive autonomy,³⁹⁷ *1287 public benefits,³⁹⁸ pay equity,³⁹⁹ juvenile justice⁴⁰⁰ and other cutting-edge issues of sex discrimination, including challenges to single-sex schools.⁴⁰¹

Lawyers and litigants cannot act alone. Legislators and other public policy makers must support and facilitate the use of state equality provisions by enacting statutes that permit direct suits for damages for violations of state constitutional rights and, equally importantly, provide prevailing parties with attorneys' fees. Moreover, as the cases discussed in this Article demonstrate, the language and legislative history of these provisions matter. The option of amending constitutional guarantees is readily available much more at the state level than the federal level. Some existing state ERAs may benefit from amendments that strengthen and clarify their meaning.⁴⁰² States that are currently considering the addition of ERAs to their constitutions must write them in language that expresses the mandate of sex equality broadly and clearly; legislative intent regarding state action, standard of review and scope of coverage must also be clearly stated.

Citizens, in turn, can play a vital role by mobilizing to support legislative reform, insisting on gender and racial diversity in their state judiciaries and electing judges who will interpret state ERAs fully and effectively. Scholars can also support the enhanced use of state ERAs by additional scholarship that demonstrates their usefulness in advancing sex equality in specific contexts and fully exposes the weaknesses of existing federal equal protection analysis.

Finally, state court judges play a critical role in ensuring the vitality and integrity of state ERAs. In interpreting and applying them, state judges must include a close and independent review of the text of the provision, its history, its doctrinal and political underpinnings, relevant precedent and its relation to earlier state constitutional provisions. Through this kind of *1288 careful, contextualized analysis, reflected in decisions such as the New Mexico Supreme

Court's in New Mexico Right to Choose and others discussed in this Article, state court judges honor the distinctiveness of their state constitutions and respect the political action that led to passage of these amendments.

Appendix

Alaska:

“No person is to be denied the enjoyment of any civil or political right because of race, color, creed, sex or national origin. The legislature shall implement this section.”

[ALASKA CONST. art. I, § 3 \(1972\).](#)

California:

“A person may not be disqualified from entering or pursuing a business, profession, vocation, or employment because of sex, race, creed, color, or national or ethnic origin.”

[CAL. CONST. art. I, § 8 \(1879\).](#)

“The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.”

[CAL. CONST. art. I, § 31\(a\) \(1996\).](#)

Colorado:

“Equality of rights under the law shall not be denied or abridged by the state of Colorado or any of its political subdivisions on account of sex.”

[COLO. CONST. art. II, § 29 \(1973\).](#)

Connecticut:

“No person shall be denied the equal protection of the law nor be subjected to segregation or discrimination in the exercise or enjoyment of his or her civil or political rights because of religion, race, color, ancestry, national origin or sex.”

[CONN. CONST. art. I, § 20 \(1974\).](#)

*1289 Florida:

“All natural persons, female and male alike, are equal before the law and have inalienable rights, among which are the right to enjoy and defend life and liberty, to pursue happiness, to be rewarded for industry, and to acquire, possess and protect property; except that the ownership, inheritance, disposition and possession of real property by aliens ineligible for citizenship may be regulated or prohibited by law. No person shall be deprived of any right because of race, religion, national origin, or physical disability.”

[FLA. CONST. art. I, § 2 \(1998\).](#)

Hawaii:

“Equality of rights under the law shall not be denied or abridged by the State on account of sex. The legislature shall have the power to enforce, by appropriate legislation, the provisions of this section.”

[HAW. CONST. art. I, § 3 \(1972\).](#)

“No person shall be deprived of life, liberty or property without due process of law, nor be denied the equal protection of the laws, nor be denied the enjoyment of the person's civil rights or be discriminated against in the exercise thereof because of race, religion, sex or ancestry.” [HAW. CONST. art. I, § 5 \(1978\)](#).

“There shall be no discrimination in public education institutions because of race, religion, sex or ancestry .”

[HAW. CONST. art. X, § 1 \(1978\)](#).

Illinois:

“The equal protection of the laws shall not be denied or abridged on account of sex by the State or its units of local government and school districts.”

[ILL. CONST. art. I, § 18 \(1971\)](#).

Iowa:

“All men and women are, by nature, free and equal, and have certain inalienable rights—among which are those of enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining safety and happiness.”

[IOWA CONST. art. I, § 1 \(1998\)](#).

*1290 Louisiana:

“No person shall be denied the equal protection of the laws. No law shall discriminate against a person because of race or religious ideas, beliefs, or affiliations. No law shall arbitrarily, capriciously, or unreasonably discriminate against a person because of birth, age, sex, culture, physical condition, or political ideas or affiliations. Slavery and involuntary servitude are prohibited, except in the latter case as punishment for crime.”

[LA. CONST. art. I, § 3 \(1974\)](#).

“In access to public areas, accommodations, and facilities, every person shall be free from discrimination based on race, religion, or national ancestry and from arbitrary, capricious, or unreasonable discrimination based on age, sex, or physical condition.”

[LA. CONST. art. I, § 12 \(1974\)](#).

Maryland:

“Equality of rights under the law shall not be abridged or denied because of sex.”

[MD. CONST. DECL. OF RTS. art. 46](#).

Massachusetts:

“All people are born free and equal and have certain natural, essential and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing and protecting property; in fine, that of seeking and obtaining their safety and happiness. Equality under the law shall not be denied or abridged because of sex, race, color, creed or national origin.”

[MASS. CONST. pt. 1, art. I \(1976\)](#).

Montana:

“The dignity of the human being is inviolable. No person shall be denied the equal protection of the laws. Neither the state nor any person, firm, corporation, or institution shall discriminate against any person in

the exercise of his civil or political rights on account of race, color, sex, culture, social origin or condition, or political or religious ideas.”

[MONT. CONST. art. 2, § 4 \(1972\).](#)

“No person shall be refused admission to any public educational institution on account of sex, race, creed, religion, political beliefs, or national origin.”

[MONT. CONST. art. 10, § 7 \(1889 \(ratified\); 1978 \(amended\)\).](#)

*1291 New Hampshire:

“All men have certain natural, essential, and inherent rights—among which are, the enjoying and defending life and liberty; acquiring, possessing, and protecting, property; and, in a word, of seeking and obtaining happiness. Equality of rights under the law shall not be denied or abridged by this state on account of race, creed, color, sex or national origin.”

[N.H. CONST. pt 1, art. 2 \(1974\).](#)

New Jersey:

“All persons are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness.”

[N.J. CONST. art. I, para. 1 \(1947\).](#)

“Wherever in this Constitution the term ‘person,’ ‘persons,’ ‘people’ or any personal pronoun is used, the same shall be taken to include both sexes.”

[N.J. CONST. art. X, para. 4 \(1947\).](#)

New Mexico:

“No person shall be deprived of life, liberty or property without due process of law; nor shall any person be denied equal protection of the laws. Equality of rights under law shall not be denied on account of the sex of any person. The effective date of this amendment shall be July 1, 1973.”

[N.M. CONST. art. 2, § 18 \(1973\).](#)

Pennsylvania:

“Equality of rights under the law shall not be denied or abridged in the Commonwealth of Pennsylvania because of the sex of the individual.”

[PA. CONST. art. 1, § 28 \(1971\).](#)

Rhode Island:

“All free governments are instituted for the protection, safety, and happiness of the people. All laws, therefore, should be made for the good of the whole; and the burdens of the state ought to be fairly distributed among its citizens. No person shall be deprived of life, liberty or property without due process of law, nor shall any person be denied equal protection of the laws. No otherwise qualified person shall, solely by reason of race, gender or handicap be subject to discrimination by the state, its agents or any person or entity *1292 doing business with the state. Nothing in this section shall be construed to grant or secure any right relating to abortion or the funding thereof.”

[R.I. CONST. art. I, § 2 \(1986\).](#)

Texas:

“Equality under the law shall not be denied or abridged because of sex, race, color, creed, or national origin. This amendment is self-operative.”

[TEX. CONST. art. I, § 3a \(1972\).](#)

Utah:

“The rights of citizens of the State of Utah to vote and hold office shall not be denied or abridged on account of sex. Both male and female citizens of this State shall enjoy equality, all civil, political and religious rights and privileges.”

[UTAH CONST. art. IV, § 1 \(1896\).](#)

Virginia:

“The right to be free from any governmental discrimination upon the basis of religious conviction, race, color, sex, or national origin shall not be abridged, except that the mere separation of the sexes shall not be considered discrimination.”

[VA. CONST. art. I, § 11 \(1971\).](#)

Washington:

“Equality of rights and responsibility under the law shall not be denied or abridged on account of sex.”

[WASH. CONST. art. XXXI, § 1 \(1972\).](#)

Wyoming:

“In their inherent right to life, liberty and the pursuit of happiness, all members of the human race are equal.”

[WYO. CONST. art. I, § 2 \(1890\).](#)

“Since equality in the enjoyment of natural and civil rights is only made sure through political equality, the laws of this state affecting the political rights and privileges of its citizens shall be without distinction of race, color, sex, or any circumstance or condition whatsoever other than individual incompetency, or unworthiness duly ascertained by a court of competent jurisdiction.”

[WYO. CONST. art. I, § 3 \(1890\).](#)

***1293** “The rights of citizens of the State of Wyoming to vote and hold office shall not be denied or abridged on account of sex. Both male and female citizens of this state shall equal enjoy all civil, political and religious rights and privileges.”

[WYO. CONST. art. VI, § 1 \(1890\).](#)

“In none of the public schools so established and maintained shall distinction or discrimination be made on account of sex, race or color.”

[WYO. CONST. art. VII, § 10 \(1890\)](#).

Footnotes

^{a1} Associate Professor of Political Science, Richard Stockton College of New Jersey; Lecturer-in-Law, University of Pennsylvania School of Law (1996-2002); J.D. Rutgers University School of Law-Camden (1981). Many of the ideas in this Article grew out of my past work as the Managing Attorney of the Women's Law Project in Philadelphia, Pennsylvania, where I served as lead counsel or co-counsel in litigation challenging sex discrimination under both the Federal Constitution and Pennsylvania's Equal Rights Amendment. This litigation included several cases in the area of reproductive rights, including [Planned Parenthood v. Casey, 505 U.S. 833 \(1992\)](#). I am deeply grateful for the excellent feedback on drafts of this Article that I received from Pamela Elam, Ann Freedman, Susan Frietsche, Seth Kreimer, Molly Murphy MacGregor and Robert F. Williams. Many thanks also to Debra Franzese for her excellent research assistance and to both my colleagues at Richard Stockton College and my family for their encouragement and support.

¹ [ALASKA CONST. art I, § 3](#); [COLO. CONST. art. II, § 29](#); [CONN. CONST. art. I, § 20](#); [HAW. CONST. art. I, § 21](#); [ILL. CONST. art. I, § 18](#); [MD. CONST. art. I, § 3](#); [MASS. CONST. pt. I, art. 1](#); [MONT. CONST. art. II, § 4](#); [N.H. CONST. pt. I, art. 2](#); [N.M. CONST. art. II, § 1](#); [PA. CONST. art. I, § 28](#); [TEX. CONST. art. I, § 3a](#); [VA. CONST. art. I, § 11](#); [WASH. CONST. art. XXXI, § 1](#). For the full text and date of adoption of each state ERA, see *infra* Appendix.

² Two states—Wyoming and Utah—added sex equality guarantees to their constitutions at the same time that they extended the right of suffrage to women in the late nineteenth century. [UTAH CONST., art. IV, § 1](#); [WYO. CONST. art. I, § 2](#). California added a provision to its constitution that expressly prohibited sex discrimination in employment in 1879. [CAL. CONST. art. I, § 8](#). Some states also explicitly provide protection against sex discrimination in public education in their constitutions. [CAL. CONST. art. I, § 31\(a\)](#); [HAW. CONST. art. X, § 1](#); [WYO. CONST. art. VII, § 10](#); [MONT. CONST. art. 10 § 7](#).

- 3 BARBARA A. BROWN, ANN E. FREEDMAN, HARRIET N. KATZ & ALICE M. PRICE, *WOMEN'S RIGHTS AND THE LAW: THE IMPACT OF THE ERA ON STATE LAWS* 19 (Hazel Greenberg ed., 1977); G. ALAN TARR, *UNDERSTANDING STATE CONSTITUTIONS* 47 (1998).
- 4 [FLA. CONST. art. I, § 1](#); [IOWA CONST. art. I, § 1](#).
- 5 Concurrent resolutions of the Senate and the Assembly of New York to amend New York's constitution to explicitly protect against sex discrimination have been introduced in New York. See S. 1864, 2005-2006 Leg., Reg. Sess. (N.Y. 2005); A. 3465, 2005-2006 Leg., Reg. Sess. (N.Y. 2005). These resolutions would add the word "sex" to the proscribed classifications listed in New York's equal protection clause. See [N.Y. CONST. art. I, § 11](#).
- 6 In addition to the state constitutions cited in footnotes 1, 2 and 4, the Rhode Island and Louisiana Constitutions, like California's, contain protections against sex discrimination that are explicitly limited in scope. See [LA. CONST. art. I, § 3](#) (forbidding sex-based discrimination when it is arbitrary and unreasonable). The Rhode Island Constitution prohibits sex discrimination, but specifically states that it "shall [not] be construed to grant or secure any right relating to abortion or the funding thereof." [R.I. CONST. art. I, § 2](#). In addition, although not commonly listed as one of the state constitutions that has adopted an ERA, the New Jersey Constitution guarantees natural and inalienable rights to all "persons" and defines "person" as meaning both sexes. [N.J. CONST. art. I, para. 1 & art. X, para. 4](#). Although the New Jersey provision does not contain the word "equal," the New Jersey Supreme Court has interpreted it as a prohibition on sex discrimination. See generally Karen J. Kruger, *The New Jersey ERA: The Key to Successful Sex Discrimination Litigation*, 17 *RUTGERS L.J.* 253 (1986); Robert F. Williams, *The New Jersey Equal Rights Amendment: A Documentary Sourcebook*, 16 *RUTGERS WOMEN'S RTS. L. REP.* 69 (1994).
- 7 Congress passed the Federal ERA on March 22, 1972. The proposed amendment read: "Equality of rights under the law shall not be denied or abridged by the United States or by any state on account of sex." H.R.J. Res. 208, 92d Cong. (1972). The ERA failed by three states to gain the approval of three-fourths (38) of the states by the extended congressional deadline of June 30, 1982. Efforts to add the ERA to the Constitution have been reinvigorated in recent years by the work of legal scholars who have suggested that ratification of the Twenty-seventh Amendment in 1992, more than 200 years after it was originally proposed, may allow ratification of the ERA if three more states approve it. See Allison Held et al., *The Equal Rights Amendment: Why the ERA Remains Legally Viable and Properly Before the States*, 3 *WM. & MARY J. WOMEN & L.* 113, 114 (1997). On March 16, 2005, the ERA was reintroduced into Congress. See S.J. Res. 7, 109th Cong. (2005); H.J. Res. 37, 109th Cong. (2005) (proposing a full reintroduction of the ERA). Another resolution, H. Res. 155, 109th Cong. (2005), would verify ratification when three additional state legislatures have passed appropriate legislation.
- 8 See *infra* note 319 and accompanying text.
- 9 See *infra* note 320 and accompanying text.
- 10 Mr. Linton, former General Counsel for Americans United for Life, is the author of three articles on state ERAs. See Paul Benjamin Linton, *Same-Sex "Marriage" Under State Equal Rights Amendments*, 46 *ST. LOUIS U. L.J.* 909 (2002); Paul Benjamin Linton, *State Equal Rights Amendments: Making a Difference or Making a Statement?*, 70 *TEMP. L. REV.* 907 (1997) [hereinafter Linton, *Making a Difference?*]; Paul Benjamin Linton & Ryan S. Joslin, *The Illinois Equal Rights Provision at Twenty-Five: Has It Made a Difference?*, 21 *S. ILL. U. L.J.* 275 (1997).
- 11 See, e.g., Linton, *Making a Difference?*, *supra* note 10, at 940-41; see also *infra* note 374 and accompanying text.
- 12 This Article focuses exclusively on state constitutional provisions that expressly guarantee protection against sex discrimination. Although not the focus of this Article, courts have interpreted various other provisions in state constitutions as providing protection against gender-based discrimination. These provisions include general equal protection guarantees, prohibitions on unequal privileges and immunities, and due process and privacy guarantees.
- 13 Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 *HARV. L. REV.* 947, 949 (2002) [hereinafter Siegel, *She the People*].
- 14 [U.S. CONST. amend. XIV, § 1](#).

- 15 See Erwin Chemerinsky, [Rethinking State Action](#), 80 NW. U. L. REV. 503, 511-16 (1985) [hereinafter Chemerinsky, Rethinking] (explaining that historically the state action requirement made sense because when the Constitution was written it was thought that the common law protected individuals from private infringement of their rights and that therefore the protections of the Constitution need not extend to action by private actors).
- 16 See, e.g., [United States v. Morrison](#), 529 U.S. 598, 619 n.8 (2000) (“[T]he principle that ‘the Constitution created a Federal Government of limited powers,’ while preserving a generalized police power to the States is deeply ingrained in our constitutional history.”); [Lugar v. Edmundson Oil Co.](#), 457 U.S. 922, 936-37 (1982) (“A major consequence [of the state action requirement] is to require courts to respect the limits of their own power as directed against state governments.”); see also ERWIN CHERMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 488, 491-92 (2d ed. 2002) [hereinafter CHERMERINSKY, *CONSTITUTIONAL LAW*] (asserting that a primary public policy justification for the requirement of state action is that it “enhances federalism by preserving a zone of state sovereignty”); Kathleen M. Sullivan, [Constitutionalizing Women's Equality](#), 90 CAL. L. REV. 735, 755 (2002) (“[T]he state action requirement for federal constitutional claims preserves a default of decentralized government. It is principally the states with their plenary powers, not the federal government with its narrower delegated powers, that perform the task of regulating private life.”).
- 17 See, e.g., [Lugar](#), 457 U.S. at 936; see also Kevin Cole, [Federal and State “State Action,” The Undercritical Embrace of a Hypercriticized Doctrine](#), 24 GA. L. REV. 327, 346-47 (1990) (“[T]he federal state-action doctrine preserved individual autonomy by preventing courts from precluding private actors from discriminating in their private lives.”); Sullivan, *supra* note 16, at 755 (“Constitutional immunity for a private sphere fosters normative pluralism; not all associations need to conform to the constitutional norms imposed on government. This view holds that while citizens enjoy robust rights against the state, intimate or expressive groups ought not to be conceived as miniature governments, microcosms of the democratic policy in which members are conceived as rightholders vis-à-vis their groups.”).
- 18 See Cole, *supra* note 17, at 347 (“In some areas, Congress may regulate private activities when the courts may not. Thus, because state action doctrine precludes courts from invoking the Constitution to regulate private conduct that Congress can regulate, the doctrine fosters separation of powers—reserving to the legislative branch the power to regulate private activity.”).
- 19 See, e.g., [Shelley v. Kraemer](#), 334 U.S. 1, 13 (1948) (“Since the decision of the Court in the Civil Rights Cases, the principle has become firmly embedded in our constitutional law that the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. That Amendment erects no shield against merely private conduct.”) (citation omitted); [Civil Rights Cases](#), 109 U.S. 3, 11 (1883) (the “Fourteenth Amendment is prohibitory upon the States. Individual invasion of rights is not the subject-matter of the amendment.”).
- 20 The Supreme Court has recognized: (1) private conduct must meet the requirements of the Constitution “if it involves a task that has been traditionally, exclusively done by the government”; and (2) the Constitution applies where the government affirmatively “authorized, encouraged, or facilitated the unconstitutional conduct.” CHERMERINSKY, *CONSTITUTIONAL LAW*, *supra* note 16, at 495-96. The Supreme Court’s state action jurisprudence has been widely criticized by commentators for a variety of reasons, including its failure to guide concrete cases in a meaningful, coherent fashion; an alternative analysis frequently proposed by scholars is “a balancing test that allows courts to weigh the promotion of racial equality against the intrusion on the privacy interest in preserving a sphere of unregulated action.” Mark Tushnet, [Shelley v. Kraemer and Theories of Equality](#), 33 N.Y.L. SCH. L. REV. 383, 389-91 (1988). See generally Paul Brest, [State Action and Liberal Theory: A Casenote on Flagg Brothers v. Brooks](#), 130 U. PA. L. REV. 1296 (1982); Chemerinsky, *Rethinking*, *supra* note 15.
- 21 While the Court expansively defined state action to encompass private race discrimination and other conduct by private actors in decisions from the early 1940s through the 1960s, see [Burton v. Wilmington Parking Auth.](#), 365 U.S. 715, 717 (1961); [Smith v. Allwright](#), 321 U.S. 649, 657-58 (1944), some decisions from the Burger and Rehnquist Courts have more narrowly construed the state action requirement. See, e.g., [Am. Mfrs. Mut. Ins. Co. v. Sullivan](#), 526 U.S. 40, 50 (1999); [Nat’l Collegiate Athletic Ass’n v. Tarkanian](#), 488 U.S. 179, 192 (1988); [Flagg Bros., Inc. v. Brooks](#), 436 U.S. 149, 156-57 (1978); [Jackson v. Metro. Edison Co.](#), 419 U.S. 345, 350-51 (1974); [Moose Lodge v. Irvis](#), 407 U.S. 163, 172-73 (1972); see also [DeShaney v. Winnebago County Dep’t of Soc. Servs.](#) 489 U.S. 189, 195 (1989) (finding that the Due Process Clause does not “require[] the State to protect the life, liberty, and property of its citizens against invasion by private actors”). See generally CHERMERINSKY, *CONSTITUTIONAL LAW*, *supra* note 16, at 496, 517 (noting that the Burger and Rehnquist Courts have “applied a much narrower definition of state action”). Other opinions, however, indicate signs of a more expansive view of state action. See,

e.g., *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 291 (2001) (finding private entity regulating high school athletics was a state actor based on government's "entwinement" with its activities); *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 621-26 (1991) (finding state action when private parties exercise peremptory challenges in a civil case in a racially discriminatory manner).

- 22 See *United States v. Guest*, 383 U.S. 745, 782 (1966) (Brennan, J., concurring in part and dissenting in part) ("A majority of the members of the Court expresses the view today that [Section] 5 empowers Congress to enact laws punishing all conspiracies to interfere with the exercise of the Fourteenth Amendment rights, whether or not state officers acting under color of state law are implicated in the conspiracy."); *id.* at 761 (Clark, J., concurring) ("[T]here now can be no doubt that the specific language of [Section] 5 empowers the Congress to enact laws punishing all conspiracies— with or without state action—that interfere with Fourteenth Amendment rights.").
- 23 See *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 368 (2001) ("Just as [Section] 1 of the Fourteenth Amendment applies only to actions committed 'under color of state law,' Congress's [Section] 5 authority is appropriately exercised only in response to state transgressions."); *United States v. Morrison*, 529 U.S. 598, 599 (2000) (" [T]he Fourteenth Amendment places limitations on the manner in which Congress may attack discriminatory conduct. Foremost among them is the principle that the Amendment prohibits only state action, not private conduct.").
- 24 Pub. L. No. 103-322, § 40,302, 108 Stat. 1902 (1994) (codified at 42 U.S.C. § 13,981), invalidated by *United States v. Morrison*, 529 U.S. 598 (2000). In enacting the civil rights provision of VAWA, Congress explicitly found that "existing bias and discrimination in the criminal justice system often deprives victims of crimes of violence motivated by gender of equal protection of the laws" and that therefore "a [f]ederal civil rights action is necessary to guarantee equal protection of the laws." H.R. Conf. Rep. No. 103-711, at 385 (1994), reprinted in 1994 U.S.C.C.A.N. 1839, 1853.
- 25 The Court held that neither the Commerce Clause nor Section 5 of the Fourteenth Amendment authorized Congress to enact the civil rights provision of VAWA. *Morrison*, 529 U.S. at 619, 627. The Court reasoned that the provision was an invalid exercise of Congress's power under Section 5 because it authorized suits against private actors, *id.* at 620-25, and because it was not "congruent and proportional" to the harm it sought to remedy, *id.* at 625-27. For an excellent critique of *Morrison*, see Sally F. Goldfarb, *The Supreme Court, the Violence Against Women Act, and the Use and Abuse of Federalism*, 71 *FORDHAM L. REV.* 57, 109-45 (2002).
- 26 For a detailed discussion of the arguments for and against a federal constitutional sex equality provision that extends to private actors, see Sullivan, *supra* note 16, at 754-59.
- 27 Sally F. Goldfarb, *Violence Against Women and the Persistence of Privacy*, 61 *OHIO ST. L.J.* 1, 38 (2000) (footnote omitted); see also Tracy E. Higgins, *Democracy and Feminism*, 110 *HARV. L. REV.* 1657, 1673-74 (1997). The narrow scope of protection afforded by the Federal Constitution to victims of domestic violence is also illustrated by the Supreme Court's recent decision in *Town of Castle Rock v. Gonzales*, in which the Court held that an individual has no enforceable property interest for due process purposes in police enforcement of a restraining order. 125 *S. Ct.* 2796, 2810 (2005).
- 28 See, e.g., Title IX of the Education Amendments of 1972, 20 *U.S.C. §§* 1681-88 (2000) (prohibiting sex discrimination in educational programs or activities receiving federal funding); Title VII of the Civil Rights Act of 1964, 42 *U.S.C. §* 2000e-2 (2000) (prohibiting, inter alia, discrimination based on sex by certain public and private employers); Equal Pay Act of 1963, 29 *U.S.C. §* 206 (2000) (requiring "equal pay for equal work" in employment). For a detailed discussion of the ways in which Title IX protects students from sex discrimination more comprehensively than the Federal Constitution, see David S. Cohen, *Title IX: Beyond Equal Protection*, 28 *HARV. J.L. & GENDER* 217 (2005). Federal antidiscrimination laws, however, are far from comprehensive. See Deborah L. Brake, *Sex as a Suspect Class: An Argument for Applying Strict Scrutiny to Gender Discrimination*, 6 *SETON HALL CONST. L.J.* 953, 964-65 (1996) (noting, for example, that while protection against discrimination based on race, national origin, and disability extends to all federally funded programs, federal law prohibits sex discrimination in federally-funded education programs only).
- 29 See generally *Morrison*, 529 U.S. 598; JOHN T. NOONAN, JR., *NARROWING THE NATION'S POWER: THE SUPREME COURT SIDES WITH THE STATES* (2002) (discussing various Supreme Court decisions in which the Court has restricted the powers of Congress and expanded the concept of state sovereign immunity). For specific examples of federal statutes invalidated, in whole or in part, by the Rehnquist Court on federalism grounds, see *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000); *Alden v. Maine*, 527 U.S. 706 (1999); *Coll. Sav.*

[Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.](#), 527 U.S. 666 (1999); [City of Boerne v. Flores](#), 521 U.S. 507 (1997); and [Seminole Tribe of Fla. v. Florida](#), 517 U.S. 44 (1996). But see, for example, [Tennessee v. Lane](#), 124 S. Ct. 1978 (2004), which held that Congress had power under [Section 5](#) of the Fourteenth Amendment to authorize lawsuits against states under Title II of the Americans with Disabilities Act of 1990 to force them to provide access for the disabled to courthouses; and [Nevada Dep't of Human Resources v. Hibbs](#), 538 U.S. 721, 728-40 (2003), which held that passage of Family and Medical Leave Act of 1993 was a valid exercise of Congress's power under [Section 5](#) of the Fourteenth Amendment.

30 Following the adoption of the Equal Protection Clause, the Supreme Court explicitly sanctioned race segregation as constitutionally permissible. See [Plessy v. Ferguson](#), 163 U.S. 537, 550-52 (1896), overruled by [Brown v. Bd. of Educ.](#), 347 U.S. 483, 495 (1954). Fifty-eight years passed before the Supreme Court invalidated segregation in public schools in [Brown v. Board of Education](#), 347 U.S. 483, 495 (1954). It was not until 1967 that the Supreme Court finally invalidated antimiscegenation statutes as violative of the Equal Protection Clause. See [Loving v. Virginia](#), 388 U.S. 1, 2 (1967); see also Reva Siegel, [Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action](#), 49 STAN. L. REV. 1111, 1112 (1997) [hereinafter Siegel, *Why Equal Protection No Longer Protects*] (“Only after the Court's decision in *Loving* could it be confidently asserted that the Court had adopted a categorical presumption against race-based regulation.”).

31 Although the Equal Protection Clause now provides protection against explicitly race-based forms of state action, the Supreme Court's application of the Equal Protection Clause to reach other forms of race discrimination has been highly limited, thereby immunizing much race discrimination from review. For example, in the area of school desegregation, the Court's “distinction between de jure and de facto discrimination insulates certain forms of school segregation from judicial remedy because they cannot be traced to forbidden governmental classifications on the basis of race.” Jack M. Balkin, [Plessy, Brown, and Grutter: A Play in Three Acts](#), 26 CARDOZO L. REV. 1689, 1715 (2005). In addition, the Supreme Court has repeatedly held that government policies that have a disparate impact on both minorities and women are constitutional so long as they are not enacted for discriminatory purposes. See discussion *infra* Part II.D. Moreover, over the years, the Supreme Court has closely scrutinized and invalidated affirmative action policies that increase the institutional representation of minorities. See Cheryl I. Harris, [Equal Treatment and Reproduction of Inequality](#), 69 FORDHAM L. REV. 1753, 1766 (2001) (“The Supreme Court's insistence on the extension of strict scrutiny to all uses of race, even when deployed to remediate long-standing patterns of racial inequality, represents the repackaging of the formalist precepts about race implicit in the reasoning and holding of the Court's majority in *Plessy*.”); see, e.g., [Gratz v. Bollinger](#), 539 U.S. 244, 270, 275-76 (2003) (applying strict scrutiny and invalidating University of Michigan's affirmative action policy); [Adarand Constructors, Inc. v. Pena](#), 515 U.S. 200, 229-30, 238-40 (1995) (remanding after concluding strict scrutiny should be applied in reviewing a federal affirmative action program); [Richmond v. J.A. Croson Co.](#), 488 U.S. 469, 493-94, 510-11 (1989) (applying strict scrutiny, and invalidating municipal affirmative action program). But see [Grutter v. Bollinger](#), 539 U.S. 306, 326, 334-44 (2003), *reh'g denied*, 539 U.S. 982 (2003) (applying strict scrutiny, and upholding University of Michigan Law School's affirmative action policy). See generally Siegel, *She the People*, *supra* note 13, at 956-57 (arguing that the Supreme Court's narrow conceptualization of race discrimination ignores the reality that “race inequality in this country was sustained by a complex network of institutions, practices, stories, and reasons that involved both more and less than group-based classifications”).

32 See, e.g., [Johnson v. California](#), 125 S. Ct. 1141, 1146-48 (2005) (finding that strict scrutiny applies to state policy of segregating prisoners by race as they enter new correctional facilities).

33 *Id.* at 1146 (quoting [Croson](#), 488 U.S. at 493) (alteration in original).

34 [Grutter](#), 539 U.S. at 327 (quoting [Adarand](#), 515 U.S. at 229-30).

35 The Court came closest to adopting the strict scrutiny standard in 1973, but fell one vote shy. See [Frontiero v. Richardson](#), 411 U.S. 677, 678, 690-91 (1973) (plurality opinion) (invalidating a rule giving benefits to all spouses of men, but only to economically dependent spouses of women in the Air Force). Four Justices voted for invalidating the provision under the strict scrutiny standard. *Id.* at 688. Four others voted for invalidating it under the rational basis standard. *Id.* at 691 (Stewart, J., concurring); *id.* at 691-92 (Powell, J., concurring). Justice Rehnquist voted to uphold the statute under the rational basis standard. *Id.* at 691 (Rehnquist, J. dissenting).

36 429 U.S. 190 (1976).

37 *Id.* at 197.

- 38 Most recently, for example, in *Nguyen v. INS*, the Supreme Court conceded that Congress could have achieved its goals in a sex-neutral fashion but nonetheless upheld a sex-based classification in a federal immigration law. 533 U.S. 53, 63-64 (2001); see also *id.* at 81 (O'Connor, J., dissenting) (criticizing the majority for “dismiss[ing] the availability of available sex-neutral alternatives as irrelevant”). For additional discussion of *Nguyen*, see *infra* notes 75-90 and accompanying text.
- 39 518 U.S. 515 (1996).
- 40 In *United States v. Virginia*, the Court expressly adhered to the intermediate standard. *Id.* at 532 n.6 (“The Court has thus far reserved the most stringent judicial scrutiny for classifications based on race or national origin .”). However, in an opinion by Justice Ginsburg, the Court emphasized that for sex-based classifications to pass muster under the intermediate standard, the state must demonstrate an “exceedingly persuasive” justification, and “[t]he justification must be genuine, not hypothesized or invented post hoc in response to litigation. It must not rely on overbroad generalizations about the different talents, capacities or preferences of males and females.” *Id.* at 532. Some commentators have argued that Justice Ginsburg's opinion brought the standard closer to strict scrutiny. See, e.g., Jason M. Skaggs, [Justifying Gender-Based Affirmative Action Under United States v. Virginia's “Exceedingly Persuasive Justification” Standard](#), 86 CAL. L. REV. 1169, 1182 (1998) (arguing that *United States v. Virginia* represents “a doctrinal progression towards a higher level of scrutiny”); Cass R. Sunstein, [Foreword: Leaving Things Undecided](#), 110 HARV. L. REV. 4, 75 (1996) (arguing that “the Court did not merely restate the intermediate scrutiny standard but pressed it closer to strict scrutiny”). Some courts have expressly rejected this suggestion. See, e.g., [Eng'g Contractors Ass'n of S. Fla., Inc. v. Metro. Dade County](#), 122 F.3d 895, 908 (11th Cir. 1997) (rejecting argument that *United States v. Virginia* changed the level of scrutiny applied to sex-based classifications, and holding that “[u]nless and until the Supreme Court tells us otherwise, intermediate scrutiny remains the applicable constitutional standard in gender discrimination cases, and a gender preference may be upheld so long as it is substantially related to an important governmental objective”); [Cohen v. Brown Univ.](#), 101 F.3d 155, 183 n.22 (1st Cir. 1996) (“We point out that Virginia adds nothing to the analysis of equal protection challenges of gender-based classifications that has not been part of that analysis since 1979 .”). But see [Montgomery v. Carr](#), 101 F.3d 1117, 1123 (6th Cir. 1996) (citing *Virginia*, 518 U.S. at 531) (noting that Virginia “appear[ed] to create a new standard of review for gender-based classifications, requiring an ‘exceedingly persuasive justification’ on the part of a governmental actor”); [Nabozny v. Podlesny](#), 92 F.3d 446, 456 n.6 (7th Cir. 1996) (noting in dicta that Virginia's “exceedingly persuasive justification standard” differed from traditional intermediate scrutiny formulation).
- 41 See *Nguyen v. INS*, 533 U.S. 53 (2001). Indeed, the Court's opinion in *Nguyen* appears to undermine the analysis of *United States v. Virginia*. See *Nguyen*, 533 U.S. at 74 (O'Connor, J. dissenting) (“While the Court invokes heightened scrutiny, the manner in which it explains and applies this standard is a stranger to our precedents.”). For additional discussion of *Nguyen*, see *infra* notes 75-90 and accompanying text.
- 42 E.g., [Associated Gen. Contractors of Cal., Inc. v. City and County of San Francisco](#), 813 F.2d 922, 939 (9th Cir. 1987) (“The mid-level review that the Court has applied to [sex-based] classifications provides ‘relatively little guidance in individual cases.’” (quoting Note, [A Madisonian Interpretation of the Equal Protection Doctrine](#), 91 YALE L.J. 1403, 1412 (1982))); [Contractors Ass'n of E. Pa., Inc. v. City of Phila.](#), 735 F. Supp. 1274, 1303 (E.D. Pa. 1990) (noting that the various standards of review under the Equal Protection Clause “are at times both difficult to distinguish and to apply,” leading courts “to make defined formulas fit ill-defined circumstances, possibly leading to result oriented decision-making”), *aff'd in part and rev'd in part*, 6 F.3d 990 (3d Cir. 1993).
- 43 E.g., *Brake*, *supra* note 28, at 958 (noting that “[l]ower courts have often complained that the intermediate scrutiny standard provides insufficient guidance and leaves broad discretion with individual judges”); Norman T. Deutsch, [Nguyen v. INS and the Application of Intermediate Scrutiny to Gender Classifications: Theory, Practice, and Reality](#), 30 PEPP. L. REV. 185, 187 (2002) (arguing that “intermediate scrutiny is a ‘made up’ rule that has little effect on the outcome of the decisions”); Joan A. Lukey & Jeffrey A. Smagula, [Do We Still Need a Federal Equal Rights Amendment?](#), 44 B.B.J. 10, 26 (Feb. 2000) (“[I]ntermediate scrutiny’ constituted a malleable, rather indeterminate standard of review, providing little or no guidance for lower courts—or even for future Supreme Court cases.”).
- 44 For example, in his confirmation hearing for the Supreme Court, Justice Souter stated that “[the intermediate test] is not good, sound protection. It is too loose.” Skaggs, *supra* note 40, at 1190 (quoting Ruth Marcus & Michael Isikoff, *Souter Declines Comment on Abortion*, WASH. POST, Sept. 14, 1990, at A1, A16); see also [Craig v. Boren](#), 429 U.S. 190, 221 (1976)

(Rehnquist, J., dissenting) (criticizing intermediate standard for containing phrases “so diaphanous and elastic as to invite subjective judicial preferences or prejudices relating to particular types of legislation, masquerading as judgments”).

45 Brake, *supra* note 28, at 958, 960-61 (citing cases in which lower courts have applied intermediate scrutiny to reach opposite results regarding: the constitutionality of statutes punishing only male rapists who attack females; the constitutionality of criminal statutes distinguishing between male and female perpetrators who commit the same crime; and the constitutionality of criminal statutes imposing different penalties on men and women for nonsupport of spouses and children).

46 Lee Epstein, Andrew D. Martin, Lisa Baldez & Tasina Nitzchke Nihiser, *Constitutional Sex Discrimination*, 1 TENN. J.L. & POL'Y 11, 67 (2004). The authors examined both state court decisions and the decisions of the United States Supreme Court and concluded that their “results underscore the importance of elevating the standard used to adjudicate sex discrimination claims.” *Id.* at 20. The authors found, for example, that when state courts apply the intermediate standard, “the probability that a litigant alleging discrimination will prevail is 47% This is in contrast to the relatively predictable outcomes generated by rational basis (under which a litigant faces only 20% likelihood of winning) and strict scrutiny (with a 73% probability of success).” *Id.* at 49. The authors also emphasized the impact of the ideology of the judges on outcomes under the intermediate standard: “the more left-of-center (‘liberal’) the court, the more likely it was to apply intermediate scrutiny in a way favorable to the party alleging discrimination.” *Id.*

47 In his concurring opinion in *Frontiero v. Richardson*, Justice Powell expressly declined to characterize sex as a suspect classification explaining that this conclusion with its “far-reaching implications” was “unnecessary” given that the sex-based classification could not survive minimal rationale basis review. 411 U.S. 677, 691-92 (1973) (Powell, J., concurring). Justice Powell also emphasized that, given the pendency of the Equal Rights Amendment, “reaching out to pre-empt by judicial action a major political decision which is currently in process of resolution does not reflect appropriate respect for duly prescribed legislative processes.” *Id.* at 692.

48 Siegel, *She the People*, *supra* note 13, at 954-56 (emphasis added) (footnotes omitted). In many respects, the intermediate scrutiny standard represents a political compromise within the Court that creates a loophole for approving different treatment of the sexes in areas viewed by some members of the Court as justifying different treatment. See Sullivan, *supra* note 16, at 742-47 (“Race and sex discrimination are imperfectly analogous. When faced with such analogical crises, the Supreme Court often splits the difference by striking down some but not all types of challenged law.”).

49 In *Frontiero v. Richardson*, Justices Brennan, Marshall, Douglas and White reasoned that sex-based classifications should be subjected to strict scrutiny because: (1) there is long history of sex discrimination against women; (2) sex, like race and national origin, is an immutable characteristic determined solely by birth and bearing “no relation to ability to perform or contribute to society”; (3) sex is a highly visible characteristic that causes women to continue to face pervasive discrimination; and (4) women tend to be underrepresented in the political process. 411 U.S. at 686-87. The Court also observed that Congress, through statutes addressing sex discrimination, had recognized “that classifications based upon sex are inherently invidious,” and that “this conclusion of a coequal branch of Government is not without significance to the question presently under consideration.” *Id.* at 687-88.

50 See, e.g., Ruth Bader Ginsburg, *Let's Have E.R.A. as a Signal*, 63 A.B.A. J. 70, 73 (1977) (“The adoption of the equal rights amendment would relieve the Court's uneasiness in the gray zone between interpretation and amendment of the Constitution.”); Ruth Bader Ginsburg, *Sex Equality and the Constitution: The State of the Art*, 14 WOMEN'S RTS. L. REP. 361, 366 (1992) (“Ratification of the Equal Rights Amendment would give the Supreme Court a clear signal—a more secure handle for its rulings than the [F]ifth and [F]ourteenth [A]mendments.”); LAWRENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW*, 1585-86 (2d ed. 1988) [hereinafter TRIBE, *AMERICAN CONSTITUTIONAL LAW*] (“The Supreme Court's failure to articulate clearer and more sensitive principles in the area of gender discrimination may be explained in part by the Court's reluctance to overstep what it conceives to be the bounds between constitutional interpretation and constitutional amendment [An ERA] would add to our fundamental law a principle under which the judiciary would be encouraged to develop a more coherent pattern of gender-discrimination doctrines.”). See generally Barbara A. Brown, Thomas I. Emerson, Gail Falk, & Ann E. Freedman, *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 YALE L.J. 871 (1971) (providing comprehensive examination and analysis of the meaning, impact and need for the Equal Rights Amendment).

51 *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439 (1985).

- 52 In these instances, the Supreme Court has been highly deferential to the judgment of the governmental actor (usually the state legislature), requiring only a minimal connection between the sex-based classification and the state's asserted objective. See, e.g., [Michael M. v. Superior Court](#), 450 U.S. 464, 468-69 (1981).
- 53 417 U.S. 484, 497 (1974).
- 54 *Id.* at 496-97.
- 55 *Id.* at 496 n.20. The analysis of *Geduldig* was extended to cases under Title VII of the Civil Rights Act, 42 U.S.C. § 2000e-2(a)(1) (2000). See [Gen. Elec. Corp. v. Gilbert](#), 429 U.S. 125, 145-46 (1976) (holding that the failure to cover pregnancy-related disabilities under a disability benefit plan does not violate Title VII). Congress subsequently enacted the Pregnancy Discrimination Act of 1978 ("PDA"), amending Title VII to include pregnancy classifications within the definition of sex discrimination under Title VII. Pregnancy Discrimination Act of 1978, [Pub. L. No. 95-555](#), 92 Stat. 2076 (codified at 42 U.S.C. § 2000e(k) (2000)). While the passage of the PDA ameliorates the practical impact of *Geduldig* in the employment context, its rationale continues to be applicable in challenges to pregnancy discrimination under the Equal Protection Clause and certain federal statutes. In *Bray v. Alexandria Women's Health Clinic*, the Court explicitly relied on *Geduldig's* reasoning in holding that the practice of denying women access to medical services by blockading abortion facilities did not constitute the "class-based, invidiously discriminatory animus" necessary to prove a violation of the civil rights statute, 42 U.S.C. § 1985(3). [Bray](#), 506 U.S. 263, 271 (1993) (noting the continued vitality of *Geduldig*). The Court, in an opinion by Justice Scalia, held that a cause of action was available under § 1985(3) only if private conspirators had discriminated against women as a class. *Id.* at 270. Justice Scalia reasoned that because discrimination on the basis of pregnancy was not discrimination against women "by reason of their sex," but rather an attempt to save fetal life, there was no cause of action under § 1985(3). *Id.*
- 56 KATHLEEN M. SULLIVAN & GERALD GUNTHER, *CONSTITUTIONAL LAW* 803 (15th ed. 2004). See generally Ann E. Freedman, [Sex Equality, Sex Differences and the Supreme Court](#), 92 *YALE L.J.* 913 (1983); Sylvia A. Law, [Rethinking Sex and the Constitution](#), 132 *U. PA. L. REV.* 955 (1984).
- 57 David H. Gans, [Stereotyping and Difference: Planned Parenthood v. Casey and the Future of Sex Discrimination Law](#), 104 *YALE L.J.* 1875, 1883 (1995).
- 58 *Id.* ("[T]he Court stripped the ability to become pregnant of any social meaning, ignoring the ways in which the legal treatment of pregnancy defines the appropriate roles of women and, consequently, dictates women's place in society."); see also Deborah A. Ellis, [Protection for Pregnant Persons: Women's Equality and Reproductive Freedom](#), 6 *SETON HALL CONST. L.J.* 967, 972 (1996) ("[T]he right to control one's reproductive life can be seen as the *sina qua non* of personhood, the precursor to the exercise of all other rights. And because only women can become pregnant, women's equality is violated when reproductive freedom is denied.").
- 59 *TRIBE, AMERICAN CONSTITUTIONAL LAW*, *supra* note 50, at 1584.
- 60 450 U.S. 464 (1981).
- 61 *Id.* at 467.
- 62 As Professor Ann Freedman has pointed out, the State's asserted goal was dubious:
A much more plausible explanation for the [S]tate's choice to penalize only males for sexual intercourse involving teenage girls was the assumption that when such conduct occurs, males are the aggressors and females are their victims. This explanation of the statute is supported not only by historical evidence about the origins of the law in the nineteenth century but also by contemporary evidence about the kinds of situations in which the law is enforced.
Freedman, supra note 56, at 932-33 (footnotes omitted).
- 63 [Michael M.](#), 450 U.S. at 471, 473.
- 64 Law, [Rethinking Sex](#), *supra* note 56, at 1001.
- 65 *Id.* at 1000.
- 66 453 U.S. 57, 67 (1981).

- 67 Id.
- 68 Id.
- 69 Freedman, *supra* note 56, at 939. In *Parham v. Hughes*, the Supreme Court also relied on a legislatively-created difference to justify a second sex-based statute. 441 U.S. 347, 351 (1979). The Supreme Court upheld a Georgia law denying a father (but not the mother) the right to sue for the wrongful death of his nonmarital child because he had not formally legitimated the child pursuant to another Georgia law that gave only fathers this power. *Id.* at 355-56. The Court reasoned that mothers and fathers of illegitimate children were not similarly situated because under Georgia law only a father “can by voluntary unilateral action make an illegitimate child legitimate.” *Id.* In dissent, Justice White pointed out, Only fathers may resort to the legitimization process cannot dissolve the sex discrimination in requiring them to. Under the plurality’s bootstrap rationale, a state could require that women, but not men, pass a course in order to receive a taxi license, simply by limiting admission to the course to women. *Id.* at 361-62 (White, J., dissenting) (footnote omitted); see also *Lehr v. Robertson*, 463 U.S. 248, 267-68 (1983) (upholding state law allowing a child to be adopted without notice to the father where the father had not lived with the mother and the child or had not registered intent to claim paternity).
- 70 Arnold H. Loewy, *Returned to the Pedestal—The Supreme Court and Gender Classification Cases: 1980 Term*, 60 N.C. L. REV. 87, 95 (1981).
- 71 458 U.S. 718 (1982).
- 72 518 U.S. 515 (1996).
- 73 *Id.* at 533.
- 74 *Id.* at 550.
- 75 533 U.S. 53 (2001); see also *Miller v. Albright*, 523 U.S. 420, 440 (1998) (asserting that “strong governmental interests justify the additional requirement imposed on children of citizen fathers” under a federal immigration law, 8 U.S.C. § 1409, although a majority of the Court did not resolve the issue on the merits).
- 76 Under the statute, 8 U.S.C. § 1409 (2000), which governs the citizenship of out-of-wedlock children born outside of the United States to only one U.S. citizen, an unwed citizen mother automatically conveys citizenship to her foreign-born child so long as she meets certain minimal residency requirements. *Id.* § 1409(c). In contrast, an unwed American father must: (1) prove the existence of a “blood relationship” by “clear and convincing evidence”; (2) provide a written statement that he will provide financial support while the child is a minor; and (3) before the child’s eighteenth birthday, formally recognize paternity via legal legitimation, a declaration of paternity under oath, or a court order of paternity. *Id.* § 1409(a).
- 77 *Nguyen*, 533 U.S. at 62-64.
- 78 *Id.* at 62.
- 79 *Id.* at 63.
- 80 *Id.* at 62.
- 81 *Id.* at 64.
- 82 *Id.* at 64-65.
- 83 *Id.* at 65.
- 84 *Id.*
- 85 *Id.* at 68.
- 86 *Id.* at 78-79 (O’Connor, J., dissenting).

- 87 Id. at 88-89 (quoting [Miller v. Albright](#), 523 U.S. 420, 482-83 (1998) (Breyer, J., dissenting)). As Justice O'Connor pointed out, the facts of the Nguyen case reveal the inaccuracy of the stereotype asserted by the majority as biological fact. Id. The petitioner, Tuan Anh Nguyen, was born in Saigon in 1969. Id. at 57 (majority opinion). After the relationship between his American father and Vietnamese mother ended, Nguyen lived with the family of his father's new Vietnamese partner. Id. At the age of six, he came to the United States and was raised by his father. Id.
- 88 See Manisha Lalwani, [The "Intelligent Wickedness" of U.S. Immigration Law Conferring Citizenship to Children Born Abroad and Out-of-Wedlock: A Feminist Perspective](#), 47 VILL. L. REV. 707, 739-40 (2002) (tracing origins of § 1409(a) to common law doctrine of coverture, which regarded out-of-wedlock children as the sole responsibility of unwed mothers, while marital children were the property of fathers); Kristin Collins, Note, [When Fathers' Rights Are Mothers' Duties: The Failure of Equal Protection in Miller v. Albright](#), 109 YALE L.J. 1669, 1680 (2000) (same).
- 89 533 U.S. at 92 (O'Connor, J., dissenting) (citation omitted). As one commentator has emphasized, the law seriously impacts children born abroad and out-of-wedlock by allowing fathers to opt out of their financial responsibilities: "[I]f a citizen father actively chooses not to fulfill the requirements for conferring citizenship on his foreign-born out-of-wedlock child, the child is precluded from utilizing domestic child support laws. Consequently, section 1409(a)(4) perpetuates the gender schema of sexual irresponsibility for men." Lalwani, supra note 88, at 740-41. The impact on foreign-born, out-of-wedlock children of American servicemen is severe. See, e.g., Joseph M. Ahern, Comment, [Out of Sight, Out of Mind: United States Immigration Law and Policy as Applied to Filipino-Amerasians](#), 1 PAC. RIM. L. & POL'Y J. 105, 112 (1992) (noting that only fifteen percent of Filipino-Amerasian children have acquired U.S. citizenship through their unwed citizen fathers), quoted in Lalwani, supra note 88, at 741 n.202.
- 90 See Law, [Rethinking Sex](#), supra note 56, at 996-97 ("When the Court allows sex-based classifications to be justified by the presumption that fathers are unidentified, absent, and irresponsible, it is more likely that these generalizations will continue to be true. Assertions that it is 'virtually inevitable' that the mother will care for the child, assumptions of her 'unshakable responsibility' are no different from the 'old notion' that motherhood is 'the noble and benign mission' of women. The assumption reinforces stereotypes and degrades women."); see also Lalwani, supra note 88, at 739-40 (arguing that the statute upheld in Nguyen "maintains the gender schemas of unwed women as sexually responsible and unwed men as sexually irresponsible" by automatically conveying citizenship to the foreign-born out-of-wedlock children of American mothers, but requiring American fathers to take affirmative steps to convey citizenship and thereby allowing them to "skirt their financial responsibility for supporting their children").
- 91 442 U.S. 256 (1979).
- 92 Id. at 280-81.
- 93 Id. at 259.
- 94 In [Washington v. Davis](#), which involved an employment exam that excluded four times as many African-Americans as whites, the Court held that race discrimination challenges to facially neutral governmental action require proof of discriminatory purpose to trigger strict scrutiny review under the Equal Protection Clause. 426 U.S. 229, 239 (1976); see also [McClesky v. Kemp](#), 481 U.S. 279, 298 (1987) ("For this claim to prevail, McClesky would have to prove that the Georgia Legislature enacted or maintained the death penalty statute because of an anticipated racially discriminatory effect."); [Mobile v. Bolden](#), 446 U.S. 55, 66 (1980) ("[O]nly if there is purposeful discrimination can there be a violation of the Equal Protection Clause of the Fourteenth Amendment."); [Village of Arlington Heights v. Metro. Hous. Dev. Corp.](#), 429 U.S. 252, 265-66 (1977) ("When there is proof that a discriminatory purpose has been a motivating factor in the decision judicial deference is no longer justified."). In contrast, as noted supra, if governments implement race-conscious affirmative action policies to increase minority representation in institutions, their actions are subject to strict scrutiny. See supra note 31 and accompanying text. But see [United States v. Virginia](#), 518 U.S. 513, 533-34 (1996) (distinguishing sex-based classifications that are designed to compensate for women's economic and social disadvantage, which are permissible, from those that disadvantage women based on impermissible sex-based stereotypes, which are impermissible). State court decisions considering state ERA-based challenges to affirmative action policies are briefly discussed infra at note 377.
- 95 [Feeney](#), 442 U.S. at 274 (emphasis added) (citations omitted).

- 96 *Id.* at 279 (“‘Discriminatory purpose,’ however, implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker selected or reaffirmed a particular course of action at least in part ‘because of,’ not merely ‘in spite of,’ its adverse effects upon an identifiable group.” (emphasis added) (citations omitted)).
- 97 In *Feeney* and other cases, the Court reasoned that the requirement of discriminatory purpose was justified by its commitment to deferring to the policy-making function of the coordinate branches. See, e.g., *McKlesky*, 481 U.S. at 319 (“McClesky’s arguments are best presented to the legislative bodies. It is not the responsibility—or indeed even the right—of this Court to determine the appropriate punishment for particular crimes.”); *Feeney*, 442 U.S. at 272 (“The calculus of effects, the manner in which a particular law reverberates in society is a legislative and not a judicial responsibility.”).
- 98 See Siegel, *Why Equal Protection No Longer Protects*, supra note 30, at 1135-36 (commenting that the Court’s modern equal protection opinions and its doctrines of heightened scrutiny “have created incentives for legislators to explain their policy choices in terms that cannot be so impugned”).
- 99 CHEMERINSKY, *CONSTITUTIONAL LAW*, supra note 16, at 685 (citing Daniel R. Ortiz, *The Myth of Intent in Equal Protection*, 41 *STAN. L. REV.* 1105 (1989)).
- 100 See Siegel, *Why Equal Protection No Longer Protects*, supra note 30, at 1136-37 (citing sociological and psychological studies of racial bias, which demonstrate that, although racial bias is prevalent among white Americans, they are strongly inhibited in expressing it, and their racism is often unconscious).
- 101 Sylvia A. Law & Ann E. Freedman, *Thomas I. Emerson: A Pioneer for Women’s Equality*, 38 *CASE W. RES. L. REV.* 539, 552 (1988).
- 102 See Siegel, *Why Equal Protection No Longer Protects*, supra note 30, at 1136 (citing 1991 study hypothesizing that the discriminatory purpose standard discourages plaintiffs from bringing intent-based claims, and citing statistics that, “on average, just one or two intent claims are filed per federal district per year”); see also Cohen, supra note 28, at 260-71 (comparing the Federal Constitution’s formal equality guarantees to Title IX’s broader protection against sex discrimination in federally-funded education programs and activities).
- 103 Siegel, *She the People*, supra note 13, at 1026-27 & n.255 (citing *Shipp v. McMahon*, 234 F.3d 907, 914-15 (5th Cir. 2000); *Soto v. Flores*, 103 F.3d 1056, 1066 (1st Cir. 1997); *Navarro v. Block*, 72 F.3d 712, 716-17 (9th Cir. 1995); *Hynson v. City of Chester*, Legal Dep’t, 864 F.2d 1026, 1031 (3d Cir. 1988)); see also *Town of Castle Rock v. Gonzales*, 125 S. Ct. 2796 (2005) (holding that a victim of domestic violence has no enforceable property interest for due process purposes in police enforcement of a restraining order).
- 104 *TRIBE, AMERICAN CONSTITUTIONAL LAW*, supra note 50, at 1516-19.
- 105 See, e.g., Paul Brest, *Palmer v. Thompson: An Approach to the Problem of Unconstitutional Legislative Motivation*, 1971 *SUP. CT. REV.* 95, 130-31 (proposing that disparate impact based on race should trigger strict scrutiny); Siegel, *Why Equal Protection No Longer Protects*, supra note 30, at 1144-45 (suggesting that, once disparate impact is demonstrated, the government must justify its policy via proof that it lacked feasible, less discriminatory means for achieving its objectives); see also *TRIBE, AMERICAN CONSTITUTIONAL LAW*, supra note 50, at 1520 (proposing antisubjugation principle in which heightened scrutiny “would be reserved for those government acts that, given their history, context, source, and effect, seem most likely not only to perpetuate subordination but also to reflect a tradition of hostility toward an historically subjugated group, or a pattern of blindness or indifference to the interests of that group”); R.A. Lenhart, *Understanding the Mark: Race, Stigma, and Equality in Context*, 79 *N.Y.U. L. REV.* 803, 887-90 (2004) (proposing four-part test to determine whether racially disparate impact imposes a risk of stigmatic harm); Michael J. Perry, *The Disproportionate Impact Theory of Racial Discrimination*, 125 *U. PA. L. REV.* 540, 563-80 (1977) (proposing that disparate impact based on race should trigger sliding scale scrutiny). But see Charles F. Abernathy, *Legal Realism and the Failure of the “Effects” Test for Discrimination*, 94 *GEO. L.J.* (forthcoming 2006) (finding that lower court judges—across the political spectrum—disfavored effects test as a useful tool, and proposing political solution in form of “adoption of targeted civil rights statutes” as alternative).
- 106 This section highlights examples of selected opinions in which courts have either expanded their sex equality jurisprudence, interpreted it as consistent with federal precedent, or otherwise limited its scope. It does not represent a complete catalogue of all judicial decisions construing state ERAs. For a more thorough review of state ERA opinions and their outcomes, see

JENNIFER FRIESEN, STATE CONSTITUTIONAL LAW: LITIGATING INDIVIDUAL RIGHTS, CLAIMS AND DEFENSES § 3-1 to -5 (3d ed. 2000).

- 107 See Lawrence Gene Sager, [Fair Measure: The Legal Status of Underenforced Constitutional Norms](#), 91 HARV. L. REV. 1212, 1218-20 (1978) (arguing that state court adherence to federal judicial constructs is especially inappropriate where institutional concerns such as federalism and judicial competence prevent federal courts from fully enforcing federal constitutional norms).
- 108 See, e.g., Judith Avner, [Some Observations on State Equal Rights Amendments](#), 3 YALE L. & POL'Y REV. 144, 150 (1984) (arguing that the state action requirement is less necessary at state level because “[t]he narrow construction of the state action requirement by federal courts is intended to protect states' traditional jurisdiction over private actions”); Beth Gammie, [State ERAs: Problems and Possibilities](#), 1989 U. ILL. L. REV. 1123, 1149 (arguing that the federalism concerns underlying federal state action requirement are inapplicable to state ERAs because “[w]hen the citizens and legislature of a state enact an ERA, choosing to prohibit sex discrimination within their state, there is absolutely no invasion of states' rights by the federal government”).
- 109 Professor Kevin Cole argues that separation of powers concerns are “less compelling” in the state context because “state courts resolve private disputes in a nonconstitutional mode more frequently than federal courts do,” and therefore “neither institutional competence nor institutional specialization provides persuasive justification for a state state-action doctrine that preserves separation of powers by relegating private disputes to legislatures.” Cole, *supra* note 17, at 379-80. Professor Friesen argues that separation of powers concerns may be “overstated” given the fact that state legislatures have the ability to pass statutes that “limit and structure remedies for any newly declared rights .” FRIESEN, *supra* note 106, § 9-2(c)(3), at 9-15. Moreover, she notes that if fundamental constitutional interests “are thought to need protection against private invasion, it is appropriate to entrust them to the courts and to inhibit democratic diminution of such rights.” *Id.* § 9-2(c)(3), at 9-16. Other commentators have argued that separation of powers concerns are less relevant at the state level because, in some states, judges are elected and therefore are accountable in the political process. See, e.g., William Wayne Kilgarlin & Banks Tarver, [The Equal Rights Amendment: Governmental Action and Individual Liberty](#), 68 TEX. L. REV. 1545, 1565 (1990) (arguing that in Texas “the separation-of-powers concerns are not nearly as compelling on a state level, because state court judges are politically accountable for their actions in developing civil rights policy: Texas state court judges are elected and their decisions are more readily subject to political modification by the legislature”); David M. Skover, [The Washington Constitutional “State Action” Doctrine: A Fundamental Right to State Action](#), 8 U. PUGET SOUND L. REV. 221, 257-59 (1985) (same with regard to the Washington State Constitution).
- 110 See generally FRIESEN, *supra* note 106, § 9-2(c)(2), at 9-14 to -15 (arguing that frequent references in state charters to “inalienable” rights refer to inherent rights that were intended to be protected from both governmental and private interference); Cole, *supra* note 17, at 369-70 (arguing that, in the state constitutional context, “a state action doctrine fosters individual autonomy in none of the ways that the goal is arguably served on the federal level” because, unlike federal courts, “state courts have primary responsibility for developing a general common law” and therefore “remain obligated to explore the merits of competing private claims, and the outcome of that analysis is not preordained by any state action analysis”; thus, “the broad common-law powers of state courts prevent a state state-action doctrine from achieving the policies of notice-giving or merit-shielding).
- 111 FRIESEN, *supra* note 106, § 9-2(a), at 9-6. See generally Cole, *supra* note 17, at 396 (criticizing “underinformed embrace” by state courts of federal state action doctrine in state constitutional law context).
- 112 Although states have broad power to prohibit sex discrimination by private actors, they are, of course, subject to the “independent federal constitutional constraints such as the freedom of private expressive association.” Sullivan, *supra* note 16, at 756 (noting that under current Supreme Court interpretation “the Boy Scouts or a hypothetical ‘Male Supremacist Society’ might be free to exclude women despite a state law forbidding sex discrimination in public accommodations, but the Rotary Club, or the Jaycees would not”). Compare [Boy Scouts of Am. v. Dale](#), 530 U.S. 640 (2000) (holding that the Boy Scouts' First Amendment expressive associational rights were violated by application of a state public accommodations law prohibiting them from revoking membership of gay scout leader), with [Bd. of Dirs. of Rotary Int'l v. Rotary Club](#), 481 U.S. 537 (1987) (rejecting a First Amendment freedom of association claim challenging law forbidding all-male clubs), and [Roberts v. U.S. Jaycees](#), 468 U.S. 609 (1984) (rejecting First Amendment freedom of association claim challenging a law forbidding all-male organizations).

- 113 MONT. CONST. art. II, § 4 (“Neither the state nor any person, firm, corporation, or institution shall discriminate against any person in the exercise of his civil or political rights on account of sex .”).
- 114 R.I. CONST. art. I, § 2 (prohibiting discrimination based on gender “by the state, its agents or any person or entity doing business with the state”).
- 115 LA. CONST. art. I, § 3 (providing that “[n]o law shall discriminate against a person because of sex”).
- 116 LA. CONST. art. I, § 12 (providing that “[i]n access to public areas, accommodations, and facilities, every person shall be free from arbitrary, capricious, or unreasonable discrimination based on age, sex, or physical condition”). In *Albright v. Southern Trace Country Club of Shreveport, Inc.*, the Louisiana Supreme Court interpreted this provision for the first time and held that it prohibited a country club, deemed a “public facility,” from denying female members access to a dining area for men only. 879 So. 2d 121, 138 (2004).
- 117 VA. CONST. art. I, § 11 (prohibiting “governmental discrimination” on the basis of sex).
- 118 COLO. CONST. art. II, § 29 (prohibiting denial of “[e]quality of rights under the law by the state of Colorado or any of its political subdivisions”).
- 119 ILL. CONST. art. I, § 18 (prohibiting denial of equal protection of the law on account of sex “by the State or its units of local government and school districts”).
- 120 HAW. CONST. art. I, § 3 (prohibiting denial of “[e]quality of rights under the law by the State on account of sex”).
- 121 N.H. CONST. pt. I, art. 2 (prohibiting denial of “[e]quality of rights under the law by this [S]tate on account of sex”).
- 122 MD. CONST. art. XLVI.
- 123 PA. CONST. art. I, § 28.
- 124 MASS. CONST. pt. I, art. 1.
- 125 WA. CONST. art. XXXI, § 1.
- 126 TEX. CONST. art. I, § 3a.
- 127 N.M. CONST. art II, § 1.
- 128 The language of these six ERAs, like those of Colorado, New Hampshire and Hawaii, is modeled on the Federal ERA. See *supra* note 7. However, these six state constitutions, while referring to “equality under the law,” do not contain any explicit reference to deprivation “by the State.” For additional discussion of the language of the Texas ERA, see *infra* note 160 and accompanying text.
- 129 See ALASKA CONST. art. I, § 3 (prohibiting the denial of “any civil or political right” because of sex); CONN. CONST. art. I, § 20 (prohibiting the denial of the “equal protection of the law” and discrimination in the exercise of “civil or political rights” because of sex); UTAH CONST. art. IV, § 1 (providing that males and females “shall enjoy equally all civil, political and religious rights and privileges”); WYO. CONST. art. VI, § 1 (providing both male and female citizens “shall enjoy equally all civil, political and religious rights and privileges”).
- 130 See CAL. CONST. art. I, § 8 (prohibiting disqualification “from entering or pursuing a business, profession, vocation, or employment because of sex”); FLA. CONST. art. I, § 2 (providing that “[a]ll natural persons, female and male alike, are equal before the law” and have certain “inalienable rights”); IOWA CONST. art. I, § 1 (providing “[a]ll men and women are, by nature, free and equal” and have certain “inalienable rights”); N.J. CONST. art. I, para. 1 & art. X, para. 4 (providing that “[a]ll persons are by nature free and independent, and have certain natural and unalienable rights” and defining “all persons” as including both sexes).
- 131 See, e.g., Bruce Altschuler, *State ERAs and Employment Discrimination*, 65 TEMP. L. REV. 1267, 1270 (1992). See generally FRIESEN, *supra* note 106, § 9-2(b)(1), at 9-7 to -10.

- 132 482 A.2d 542, 549 (Pa. 1984).
- 133 Id.
- 134 Pennsylvania's ERA provides: "Equality of rights under the law shall not be denied or abridged in the Commonwealth of Pennsylvania because of the sex of the individual." PA. CONST. art. I, § 28.
- 135 Hartford, 482 A.2d at 549.
- 136 Id.
- 137 Welsch, 494 A.2d 409, 412 (Pa. Super. Ct. 1985).
- 138 Id. at 411.
- 139 Id. The court reasoned that "the challenged acts were carried out by the private party on its own initiative under the provisions of the Rate Regulatory Act which permits the fixing of rates based upon measured risk of loss, but were not required by the Commonwealth," and thus did not satisfy the federal state action requirement. Id. (quoting *Murphy v. Harleysville Mut. Ins. Co.*, 422 A.2d 1097, 1102 (Pa. Super. Ct. 1980)). In *Murphy*, the Pennsylvania Superior Court relied on the United States Supreme Court's decision in *Jackson v. Metropolitan Edison Co.*, in which the Supreme Court rejected the claim that state regulation converted the action of a private utility company into that of the State for purposes of the Fourteenth Amendment. *Murphy*, 422 A.2d at 1100-01 (citing *Jackson*, 419 U.S. 345, 350 (1974)).
- 140 Welsch, 494 A.2d at 412.
- 141 Phyllis W. Beck & Patricia A. Daly, Prohibition Against Denial or Abridgment of Equality of Rights Because of Sex, in *THE PENNSYLVANIA CONSTITUTION: A TREATISE ON RIGHTS AND LIBERTIES* 715 (Ken Gormley et al. eds., 2004).
- 142 182 F. Supp. 2d 453 (E.D. Pa. 2002).
- 143 Id. at 458 (citing Welsch, 494 A.2d at 412); see also *Barrett v. Greater Hatboro Chamber of Commerce, Inc.*, No. 02-CV-4421, 2003 WL 22232869, at *4 (E.D. Pa. Aug. 19, 2003) ("[T]here is a purely private right of action under the PERA absent any type of state action ."). But see *Mulligan v. Abington Mem'l Hosp., Inc.*, No. 03-6510, 2004 WL 1047796, at *2 (E.D. Pa. May 4, 2004) (refusing to extend Pennsylvania ERA to purely private actor).
- 144 See N.J. CONST. art. I, para. 1 & art. X, para. 4. For a discussion of the unique language of New Jersey's ERA, see *supra* note 6 and *infra* note 344.
- 145 389 A.2d 465 (N.J. 1978). Peper has been the subject of considerable interest among scholarly commentators. See, e.g., John Devlin, *Constructing an Alternative to "State Action" as a Limit on State Constitutional Rights Guarantees: A Survey, Critique and Proposal*, 21 RUTGERS L.J. 819, 847, 888 (1989); Kruger, *supra* note 6, at 260; Elizabeth A. Sherwin, *Sex Discrimination and State Constitutions: State Pathways Through Federal Roadblocks*, 13 N.Y.U. REV. L. & SOC. CHANGE 115, 124-26 (1984-1985); Robert F. Williams, *Equality Guarantees in State Constitutions*, 63 TEX. L. REV. 1195, 1220 n.166 (1985) [hereinafter Williams, *Equality Guarantees*]. However, in New Jersey, Peper has "only rarely been cited by the New Jersey courts." Williams, *supra* note 6, at 125. For a discussion of the infrequent use of state equality guarantees, see discussion *infra* Part IV.B.
- 146 389 A.2d at 471-76. The court rejected the state statutory claim because, at the time of the alleged violation, the statute exempted private universities. Id. at 474. The court rejected the Title VII claim because the plaintiff had purposefully failed to exhaust her administrative remedies. Id. at 475.
- 147 Id. at 478.
- 148 Id. at 477.
- 149 Id.

- 150 Id. at 476; see also [Rojo v. Kliger](#), 801 P.2d 373, 388 (Cal. 1990) (noting, without deciding, that previous cases had assumed that California's ERA “covers private as well as state action”).
- 151 See FRIESEN, *supra* note 106, § 9-7, at 9-33 (noting that “[m]ost cases in the equality area have required allegations of government involvement to activate the state constitution”). See generally Altschuler, *supra* note 131, at 1269-73 (discussing court decisions and attorneys general opinions holding that state ERAs limited to governmental action).
- 152 See [Lincoln v. Mid-Cities Pee Wee Football Ass'n](#), 576 S.W.2d 922, 926 (Tex. App. 1979); [Junior Football Ass'n v. Gaudet](#), 546 S.W.2d 70, 71 (Tex. App. 1976). For a thorough discussion and critical analysis of these cases, see Kilgarlin & Tarver, *supra* note 109, at 1557-64.
- 153 [Lincoln](#), 576 S.W.2d at 923; [Gaudet](#), 546 S.W.2d at 70.
- 154 [Lincoln](#), 576 S.W.2d at 924 (noting that plaintiff alleged that the teams practiced and played games on fields constructed and maintained by the league on public school grounds); [Gaudet](#), 546 S.W.2d at 71 (noting that plaintiff alleged that players usually practiced on school grounds).
- 155 [Gaudet](#), 546 S.W.2d at 71 (noting that plaintiff alleged that games were played in a park owned by the City).
- 156 [Lincoln](#), 576 S.W.2d at 924 (affirming the trial court's refusal to enter a temporary injunction against the league on ground that there was no abuse of discretion, but noting that the record in the case was still developing); [Gaudet](#), 546 S.W.2d at 71 (reversing trial court's order granting a temporary injunction against the league).
- 157 See Kilgarlin & Tarver, *supra* note 109, at 1557-64.
- 158 Justice Kilgarlin and his co-author, Banks Tarver, also argue that application of the federal state-action doctrine to review Texas ERA cases is unjustified because the federalism and separation of powers purposes underlying the federal requirement “are not at all pertinent to state constitutional discourse.” Id. at 1559; see *supra* notes 107-09 and accompanying text.
- 159 TEX. CONST. art I, § 3a (“Equality under the law shall not be denied or abridged because of sex, race, color, creed, or national origin.”).
- 160 Kilgarlin & Tarver, *supra* note 109, at 1560; see *supra* note 128 and accompanying text. Compare HAW. CONST. art. I, § 3 (prohibiting denial of “equality of rights under the law by the State on account of sex”), with TEX. CONST. art. I, § 3a (prohibiting denial of “equality of rights under the law” with no limiting reference to discrimination by the State).
- 161 Kilgarlin & Tarver, *supra* note 109, at 1561. Justice Kilgarlin emphasizes that, unlike other state constitutions and the Federal Constitution, “[t]he Texas Constitution does not speak solely in terms of proscriptions on governmental authority; instead, it affirmatively recognizes the inalienable or natural rights of its citizenry.” Id.
- 162 Id. at 1562-63. According to Justice Kilgarlin, the Texas Legislative Council's 1971 report on the proposed ERA and statements by the ERA's primary drafter and its primary sponsor in the Texas Senate, all indicate a clear legislative intent to extend its reach to private discrimination. Id.
- 163 Id. at 1559.
- 164 666 P.2d 1008, 1010 (Alaska 1983).
- 165 Id. at 1011. The court rejected the plaintiff's argument that the plain language of the Alaska ERA permitted extension to private actors. Id. [Article I, section 1 of the Alaska Constitution](#) provides that “all persons are equal and entitled to equal rights, opportunities, and protection under the law; and that all persons have corresponding obligations to the people and to the State.” ALASKA CONST. art. I, § 1. [Article I, section 3](#) provides: “No person is to be denied the enjoyment of any civil or political right because of race, color, creed, sex or national origin.” Id. § 3.
- 166 [Richardet](#), 666 P.2d at 1013.
- 167 Id. (citing [Jackson v. Metro. Edison Co.](#), 419 U.S. 345 (1974)).

- 168 See generally FRIESEN, *supra* note 106, § 9-1(c), at 9-5; *id.* § 9-7(a), at 9-33 to -35.
- 169 801 P.2d 373, 375 (Cal. 1990).
- 170 *Id.* at 389 (citations omitted). The California Supreme Court also rejected the defendant's defenses of statutory preemption and failure to exhaust administrative remedies, holding that the state anti-discrimination statute did not supplant the plaintiffs' common law claims, and administrative exhaustion under that statute was not required before asserting nonstatutory causes of action. *Id.* at 383, 387.
- 171 43 Cal. Rptr. 2d 229, 231 (Ct. App. 1995).
- 172 *Id.* at 233. But see *Thibodeau v. Design Group One Assocs., LLC*, 802 A.2d 731, 744-45 (Conn. 2002) (declining to allow pregnancy discrimination claim against a small employer on public policy grounds under the Connecticut ERA and Connecticut statutory law).
- 173 *Badih*, 43 Cal. Rptr. 2d at 233; accord *Merrell v. All Seasons Resorts, Inc.*, 720 F. Supp. 815, 821-22 (C.D. Cal. 1989).
- 174 See, e.g., *Watson v. Peoples Sec. Life Ins. Co.*, 588 A.2d 760, 771-72 (Md. 1991) (Eldridge, J., concurring) (asserting that, although Maryland's ERA may not directly apply to private employers, the ERA nonetheless established a public policy in Maryland that an individual should not be subjected to sex discrimination); *Drinkwater v. Shipton Supply Co.*, 732 P.2d 1335, 1339 (Mont. 1987) (recognizing a tort action for wrongful discharge based on the policy against sex discrimination reflected in Montana ERA, but subsequently superceded by the Montana Legislature's amendment of anti-discrimination statute to make that statute the exclusive remedy for discrimination claims against private employers), superceded by statute, MONT. CODE ANN. § 49-2-509(7); *Clay v. Advanced Computer Applications, Inc.*, 559 A.2d 917, 924 (Pa. 1989) (Zappala, J., concurring) (suggesting that tort of wrongful discharge might expand to encompass sex discrimination based on clear "public policy favoring the equal treatment of employees without regard to sex" expressed in the Pennsylvania ERA); *Roberts v. Dudley*, 993 P.2d 901, 911-12 (Wash. 2000) (Alexander, J., concurring) (asserting that, though the majority relied on a statute to discern a public policy to allow employees to state a common law cause of action for wrongful discharge against small private employer, the Washington ERA was "another and more powerful source of public policy"); cf. *Hennessey v. Coastal Eagle Point Oil Co.*, 609 A.2d 11, 16 (N.J. 1992) (finding that the New Jersey Constitution is the source of public policy in determining whether the firing of a "firing of at-will" employee for failing random urine test constitutes wrongful discharge).
- 175 See, e.g., *Hartford Accident & Indem. Co. v. Ins. Comm'r of the Commonwealth*, 482 A.2d 542, 549 (Pa. 1984) (reading insurance statute "as excluding sex discrimination [that] would contradict the plain mandate of the Equal Rights Amendment to our Pennsylvania Constitution"); cf. Stephen Gardbaum, *The "Horizontal Effect" of Constitutional Rights*, 102 MICH. L. REV. 387, 458 (2003) (arguing that "although private actors are not bound by individual constitutional rights in the United States, they are indirectly subject to (and may be adversely affected by) them because such rights govern the laws that private actors invoke and rely on against each other").
- 176 FRIESEN, *supra* note 106, § 9-7, at 9-33.
- 177 TRIBE, *AMERICAN CONSTITUTIONAL LAW*, *supra* note 50, at 1585.
- 178 While this Article represents a qualitative analysis of the impact of state ERAs, a recent quantitative analysis of state ERAs by Professors Lee Epstein, Lisa Baldez and Andrew Martin concludes that "the presence of an ERA significantly increases the likelihood of a court applying a higher standard of law, which, in turn, significantly increases the likelihood of a decision favoring the equality claim." Lisa Baldez et al., *Does the U.S. Constitution Need an Equal Rights Amendment?*, 35 J. LEGAL STUD. 243, 246 (2006); see also Craig F. Emmert & Carol Ann Traut, *State Supreme Courts, State Constitutions, and Judicial Policymaking*, 16 JUST. SYS. J. 37, 43-45, 47 (1992) (finding both that legal challenges based on state equality provisions have a good likelihood of success when state courts based their decisions solely on state constitutional grounds, and stating "the rate of invalidation is over twice as high as for challenges based on federal or a combination of state and federal grounds"). Importantly, the research of Professors Epstein, Baldez and Martin demonstrates that outcomes in claims under state equality guarantees are also influenced by factors unrelated to judges' selection of legal standards, including the number of women on the bench and the political ideology of judges hearing the cases. Lisa Baldez et al., *supra*, at 268-71. Thus, they conclude that "formal constitutional provisions [i.e. the addition of an ERA to the Federal Constitution] probably will alter the way courts adjudicate claims of sex discrimination [although] other factors—from the fraction of women composing the court

to the position taken by the government over the suit's resolution to the facts it entails—likely will impact the efficacy (or lack thereof) of an ERA.” *Id.* at 272. For additional discussion of the role of external factors, see *infra* notes 370-72 and accompanying text.

- 179 FRIESEN, *supra* note 106, § 3-2(e)(1), at 3-21; see, e.g., *Sail'er Inn, Inc. v. Kirby*, 485 P.2d 529, 541 (Cal. 1971) (“[S]exual classifications are properly treated as suspect.”); *Doe v. Maher*, 515 A.2d 134, 161 (Conn. Super. Ct. 1986) (“At the very least, the standard for judicial review of sex classifications under our ERA is strict scrutiny.”); *Baehr v. Lewin*, 852 P.2d 44, 67 (Haw. 1993) (finding sex to be a “suspect category” subject to strict scrutiny); *People v. Ellis*, 311 N.E.2d 98, 101 (Ill. 1974) (holding that the Illinois ERA “requires us to hold that a classification based on sex is a ‘suspect classification,’ which to be held valid, must withstand ‘strict judicial scrutiny’”); *Attorney Gen. v. Mass. Interscholastic Athletic Ass'n*, 393 N.E.2d 284, 291 (Mass. 1979) (holding that classification on the basis of sex is subject to constitutional scrutiny demands “‘at least as strict as the scrutiny required by the Fourteenth Amendment for racial classifications’”); *LeClair v. LeClair*, 624 A.2d 1350, 1355 (N.H. 1993) (holding that strict scrutiny is applicable to claims based on gender and other suspect classes under New Hampshire equality guarantee); *In re McLean*, 725 S.W.2d 696, 698 (Tex. 1987) (holding that the Texas ERA “elevates sex to a suspect classification” and “does not yield except to compelling state interests”).
- 180 FRIESEN, *supra* note 106, § 3-2(e)(1), at 3-19 to -20 (listing Pennsylvania, Colorado, Washington, Maryland and New Mexico as “absolutist” states); see, e.g., *N.M. Right to Choose/NARAL v. Johnson*, 975 P.2d 841, 853 (N.M. 1998) (holding that classifications based on sex are “presumptively unconstitutional” and will be subject to “searching judicial inquiry”); *Henderson v. Henderson*, 327 A.2d 60, 62 (Pa. 1974) (“The sex of citizens of this Commonwealth is no longer a permissible factor in the determination of their legal rights and legal responsibilities.”); *Sw. Wash. Chapter, Nat'l Elec. Contractors Ass'n v. Pierce County*, 667 P.2d 1092, 1102 (Wash. 1983) (“The ERA absolutely prohibits discrimination on the basis of sex and is not subject to even the narrow exceptions permitted under traditional ‘strict scrutiny.’ The ERA mandates equality in the strongest terms and absolutely prohibits the sacrifice of equality for any state interest, no matter how compelling.”). Despite its stringent standard of review, the Washington Supreme Court has allowed sex-based affirmative action policies “intended solely to ameliorate the effects of past discrimination.” *Sw. Wash. Chapter*, 667 P.2d at 1102; cf. *infra* note 377 and accompanying text.
- 181 540 P.2d 882, 889 (Wash. 1975) (en banc).
- 182 *Id.*
- 183 311 N.E.2d 98, 101 (Ill. 1974); see also *Maier*, 515 A.2d at 160-61 (“To equate our ERA with the [E]qual [P]rotection [C]lause of the [F]ederal [C]onstitution would negate its meaning given that our state adopted an ERA while the federal government failed to do so. Such a construction is not reasonable.”); *Rand v. Rand*, 374 A.2d 900, 905 (Md. 1977) (“[T]he ‘broad, sweeping mandatory language’ of the [state ERA] is cogent evidence that the people of Maryland are fully committed to equal rights for men and women.”); *New Mexico Right to Choose*, 975 P.2d at 851 (“We construe the intent of [the ERA] as providing something beyond that already afforded by the general language of the Equal Protection Clause.”).
- 184 See, e.g., *Pace v. State ex rel. La. State Employee Ret. Sys.*, 648 So. 2d 1302, 1305 (La. 1995) (“When a statute classifies persons on the basis of birth, age, sex, culture, physical condition, or political ideas or affiliations, it is presumed to deny the equal protection of the laws and to be unconstitutional unless the state or other advocate of the classification shows that the classification substantially furthers an important governmental objective.”); see also *Plas v. State*, 598 P.2d 966, 968 (Alaska 1979) (noting that sex discrimination claims under the Alaska Constitution should be assessed “by considering the purpose of the statute, the legitimacy of that purpose, the means used to accomplish the legislative objective, and ‘then determin[ing] whether the means chosen substantially further the goals of the enactment’” (citation omitted)); *B.C. v. Bd. of Educ. Cumberland Reg'l Sch. Dist.*, 531 A.2d 1059, 1064 (N.J. Super. App. Div. 1987) (noting that under the state constitution it is necessary “to balance [the plaintiff's] right not to be discriminated against on the basis of sex with the public need to promote equalization of athletic opportunities and to rectify past discrimination against women in athletics”).
- 185 *Wilkins v. West*, 571 S.E.2d 100, 111 (Va. 2002) (adhering to an earlier decision in *Archer v. Mayes*, 194 S.E.2d 707 (Va. 1973), and noting that “we will continue to apply standards and nomenclature developed under the Equal Protection Clause of the U.S. Constitution”); *Schilling v. Bedford City Mem'l Hosp. Inc.*, 303 S.E.2d 905, 907-08 (Va. 1983) (applying intermediate standard of review to sex-based classification based on federal precedent); *Archer*, 194 S.E.2d at 711 (holding that state equal rights provision will be given “no broader” interpretation than the Federal Equal Protection Clause).

The authors of an early review of state ERAs concluded that this interpretation of Virginia's ERA is inconsistent with legislative intent: "The drafters of the equal rights clause, and the Virginia General Assembly in adopting it, expected that a strict standard of review would be applied by the courts." Lujuana Wolfe Treadwell & Nancy Wallace Page, *Equal Rights Provisions: The Experience Under State Constitutions*, 65 CAL. L. REV. 1086, 1094-95 (1977) (citing JOINT PRIVILEGES & ELECTIONS COMM. OF THE COMMONWEALTH OF THE GEN. ASSEMBLY, COMMONWEALTH OF VIRGINIA, RATIFICATION OF THE EQUAL RIGHTS AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES OF AMERICA 19 (1974)).

186 [Estate of Scheller v. Pessetto](#), 783 P.2d 70, 76-77 (Utah Ct. App. 1989) (applying intermediate standard of review drawn from federal precedent).

187 For a detailed critical analysis of this "prospective lockstepping" approach in which a state court borrows a federal standard and announces that it will apply it in future cases, see generally Robert F. Williams, [State Courts Adopting Federal Constitutional Doctrine: Case-by-Case Adoptionism or Prospective Lockstepping](#), 46 WM. & MARY L. REV. 1499 (2005).

188 612 A.2d 734, 739 (R.I. 1992).

189 Prior to the adoption of [article I, section II](#) in 1986, the Rhode Island Supreme Court adopted the intermediate standard of review in analyzing classifications based on sex. See, e.g., [Waldeck v. Piner](#), 488 A.2d 1218, 1220 (R.I. 1985); [State v. Ware](#), 418 A.2d 1, 3 (R.I. 1980) (citing [Craig v. Boren](#), 429 U.S. 190, 197-98 (1975)).

190 [Kleczek](#), 612 A.2d at 739-40.

191 *Id.* at 741. The Rhode Island Superior Court, relying on the Massachusetts Supreme Court's decision in [Attorney General v. Massachusetts Scholastic Athletic Ass'n](#), 393 N.E.2d 284, 289, 294 (Mass. 1979) (involving identical facts), held that an absolute prohibition of all boys from the sport of field hockey rested on "archaic and overbroad generalizations and assumptions" and that an absolute ban "was totally out of proportion to any danger of girls being displaced from athletics." [Kleczek v. R.I. Interscholastic League, Inc., No. PC 91-5475](#), 1991 WL 789881, at *6 (R.I. Super. Ct. Sept. 27, 1991) (citing [Mass. Scholastic Athletic Ass'n](#), 393 N.E.2d at 294), vacated by 612 A.2d 734 (R.I. 1992).

In [Massachusetts Scholastic Athletic Ass'n](#), the Massachusetts Supreme Court emphasized that under the strict scrutiny standard sex-based classifications were impermissible given the availability of gender-neutral alternatives. 393 N.E. 2d at 294 (noting that absolute ban "represents a sweeping use of a disfavored classification when less offensive and better calculated alternatives appear to exist," and noting alternative of gender-neutral height, weight, skill standards and option of creating separate boys' field hockey team if large number of boys become interested). In contrast, the Rhode Island Supreme Court, though sending the case back to the trial court for its assessment, intimated its belief that the exclusion of boys satisfied the intermediate standard of review. [Kleczek](#), 612 A.2d at 739. The case thus illustrates how the application of different standards of review may be a determinative factor in the ultimate outcome of the case.

192 800 So. 2d 757, 759-60 (Fla. Dist. Ct. App. 2001).

193 FLA. CONST. art. I, § 2 (revisions emphasized). The term "physical handicap" was changed to "physical disability." *Id.*

194 [Frandsen](#), 800 So. 2d at 759.

195 *Id.* at 758.

196 *Id.* at 759 n.4 (first and second alterations in original) (quoting Florida Constitution Revision Commission, Statement of Intent, JOURNAL OF THE FLORIDA CONSTITUTION REVISION COMMISSION (1977-1978)).

197 *Id.* (quoting Florida Constitution Revision Commission, *supra* note 196).

198 *Id.* at 759-60.

199 *Id.*

200 [Choice for Women, Inc. v. Fla. Agency for Health Care Admin.](#), 872 So. 2d 970 (Fla. Dist. Ct. App. 2004), review denied, 885 So. 2d 386 (Fla. 2004).

- 201 This conclusion is directly supported by the fact that the original draft revisions placed “sex” in the list of proscribed classes subject to strict scrutiny review along with race, religion, national origin and physical disability. Changes to this proposed wording were made only to ensure that same-sex marriage did not receive protection. In this regard, the drafters were especially concerned with the Hawaii Supreme Court’s interpretation of its state ERA as providing protection against bans on same-sex marriage. See [Baehr v. Lewin](#), 852 P.2d 44, 63-67 (Haw. 1993). Drafting the 1998 revision so that it contained language distinctly different from Hawaii’s was apparently in the mind of the drafters. For a discussion of Baehr and the application of state ERAs in same-sex marriage challenges, see *infra* Part III.E.
- 202 See, e.g., [Kendrick v. Everheart](#), 390 So. 2d 53, 56 (Fla. 1980); [Brown v. Dykes](#), 601 So. 2d 568, 569 (Fla. Dist. Ct. App. 1992).
- 203 Andrea J. Faraone, [The Florida Equal Rights Amendment: Raising the Standard Applied to Gender Under the Equal Protection Clause of the Florida Constitution](#), 1 FLA. COASTAL L.J. 421, 441 (2000).
- 204 *Id.* at 444.
- 205 Formal equality principles have also been rejected in some state ERA challenges involving other issues, including segregation in athletics. See, e.g., [Attorney General v. Mass. Interscholastic Athletic Ass’n](#), 393 N.E.2d 284, 293 (Mass. 1979) (invalidating association rule barring boys from playing on girls’ teams, and stating that “classifications on strict grounds of sex, without reference to actual skill differentials would merely echo ‘archaic and overbroad generalizations’” (citation omitted)); [Commonwealth v. Pa. Interscholastic Athletic Ass’n](#), 334 A.2d 839, 842 (Pa. 1975) (striking down a rule excluding girls from practice or competition with boys in intramural sports, and noting “even where separate teams are offered for boys and girls in the same sport, the most talented girls may still be denied the right to play at that level of competition which their ability might otherwise permit them”); see also [Newberg v. Bd. of Pub. Educ.](#), 26 Pa. D. & C.3d 682, 709 (1983) (invalidating single-sex admission policy of public high school, and noting that “under Pennsylvania’s ERA, the separate-but-equal concept under the [E]qual [P]rotection [C]lause of the Fourteenth Amendment does not have currency”), appeal quashed by 478 A.2d 1352 (Pa. Super. Ct. 1984).
- 206 759 P.2d 1358, 1359 (Colo. 1988) (en banc). The group insurance policy limited coverage to costs relating to the complications of pregnancy, but excluded expenses incurred during a normal pregnancy. *Id.* at 1359 n.2.
- 207 417 U.S. 484 (1974); see *supra* notes 53-59 and accompanying text.
- 208 429 U.S. 125 (1976); see *supra* note 55 and accompanying text.
- 209 [Colo. Civil Rights Comm’n](#), 759 P.2d at 1363.
- 210 *Id.* (citations omitted).
- 211 E.g., [Allison-LeBlanc v. Dep’t of Pub. Safety](#), 671 So. 2d 448, 452-53 (La. Ct. App. 1995) (holding that automatic reassignment of pregnant police officer to administrative duty or leave violates Louisiana ERA).
- 212 E.g., [Merrell v. All Seasons Resorts, Inc.](#) 720 F. Supp. 815, 823 (C.D. Cal. 1989) (rejecting [Geduldig](#), 417 U.S. 484, and concluding “pregnancy-discrimination is a form of sex discrimination under [article I, section 8 of the California Constitution](#)”); [Badih v. Myers](#), 43 Cal. Rptr. 2d 229, 233 (Ct. App. 1995) (same).
- 213 Kathryn Kolbert & David H. Gans, [Responding to Planned Parenthood v. Casey: Establishing Neutrality Principles in State Constitutional Law](#), 66 TEMP. L. REV. 1151, 1167-68 (1993).
- 214 Under the Federal Constitution, the main source of protection from laws restricting abortion is the Due Process Clause of the Fourteenth Amendment. In [Roe v. Wade](#), the Supreme Court held that the right to choose abortion is a fundamental right, protected by the strict scrutiny standard of review. 410 U.S. 113, 154 (1973). Nineteen years later, in [Planned Parenthood v. Casey](#), the Supreme Court cut back on constitutional protection for abortion, adopting a new, more permissive “undue burden” standard to judge the constitutionality of restrictions on abortion. 505 U.S. 833, 837 (1992). See generally Kolbert & Gans, *supra* note 213, at 1151-56.
- 215 See, e.g., [Harris v. McRae](#), 448 U.S. 297, 326 (1980) (holding that a state participating in Medicaid program is not required by the United States Constitution to fund medically necessary abortions even where it funds childbirth); [Maher v. Roe](#), 432

U.S. 464, 474 (1977) (holding that a state participating in Medicaid program is not required by the United States Constitution to pay for non-therapeutic abortions even where it pays for childbirth); see also *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 509 (1989) (upholding bans on performance of abortions in public hospitals).

- 216 Two courts have relied on state ERAs in striking down restrictions on public funding for abortion. See *Doe v. Maher*, 515 A.2d 134, 162 (Conn. Super. Ct. 1986) (invalidating Connecticut's restrictions on funding medically necessary abortion services based on Connecticut's ERA and its due process guarantee); *N.M. Right to Choose/NARAL v. Johnson*, 975 P.2d 841, 859 (N.M. 1998) (invalidating New Mexico's restrictions on funding medically necessary abortion services based on New Mexico's ERA); cf. *Right to Choose v. Byrne*, 450 A.2d 925, 934 (N.J. 1982) (finding that a New Jersey funding restriction constitutes denial of equal protection by discriminating between Medicaid-eligible pregnant women “for whom medical care is necessary for childbirth and those for whom an abortion is medically necessary” and thereby “impinges upon the fundamental right of a woman to control her body”).
- 217 See, e.g., *State v. Planned Parenthood of Alaska*, 28 P.3d 904, 908 (Alaska 2001) (invalidating Alaska's restriction on public funding of abortion based on state constitutional guarantee of “equal rights, opportunities and protection under the law”); *Simat Corp. v. Ariz. Health Care Cost Containment Sys.*, 56 P.3d 28, 32, 37 (Ariz. 2002) (invalidating Arizona's restrictions on public funding of medically necessary abortion services based on the equal privileges and immunities clause of the Arizona Constitution); *Comm. to Defend Reprod. Rights v. Myers*, 625 P.2d 779, 798-99 (Cal. 1981) (invalidating California's restrictions on public funding medically necessary abortion services based on constitutional guarantee of privacy); *Humphreys v. Clinic for Women*, 796 N.E.2d 247, 259-60 (Ind. 2003) (requiring limited additional public funding of certain medically necessary abortions based on state constitution's privileges and immunities clause); *Moe v. Sec'y of Admin.*, 417 N.E.2d 387, 390 n.4, 397 (Mass. 1981) (invalidating a state ban on public funding of medically necessary abortion services based on declaration of rights clause guaranteeing due process of law); *Women of Minn. v. Gomez*, 542 N.W.2d 17, 31-32 (Minn. 1995) (invalidating Minnesota's restrictions on public funding of medically necessary abortion services based on constitutional guarantee of privacy); *Right to Choose v. Byrne*, 450 A.2d 925, 941 (N.J. 1982) (invalidating New Jersey's restrictions on public funding of medically necessary abortion services based on constitutional guarantee of equal protection); *Women's Health Ctr. v. Panepinto*, 446 S.E.2d 658, 665-67 (W. Va. 1993) (invalidating West Virginia's restrictions on public funding of medically necessary abortion services based on express constitutional right to safety and due process of law).
- 218 As recently noted by the Arizona Supreme Court:
The majority of states that have examined [restrictions on Medicaid funding for abortion] have determined that their state statutes or constitutions offer broader protection of individual rights than does the United States Constitution and have found that medically necessary abortions should be funded if the state also funds medically necessary expenses related to childbirth. *Simat Corp.*, 56 P.3d at 35.
- 219 975 P.2d at 859.
- 220 New Mexico's rule prohibited state funding of medically necessary abortions for Medicaid-eligible women except when necessary to save the life of the pregnant woman, when necessary to end an ectopic pregnancy or when the pregnancy was the result of rape or incest. *Id.* at 844.
- 221 *Id.* at 853-55.
- 222 *Id.* at 854.
- 223 *Id.*
- 224 *Id.* (quoting Cass R. Sunstein, *Neutrality in Constitutional Law (with Special Reference to Pornography, Abortion, and Surrogacy)*, 92 COLUM. L. REV. 1, 33 (1992)).
- 225 *Id.* (quoting *Doe v. Maher*, 515 A.2d 134, 159 (Conn. Sup. Ct. 1986)).
- 226 *Id.*
- 227 *Id.* at 856.

- 228 Id. The court began with the premise that sex-based classifications are “presumptively unconstitutional,” and required the State to provide a compelling justification for using one. Id. at 853. The court found that State's asserted interest in reducing the cost of medical assistance was insufficient justification given that the costs of carrying a pregnancy to term (funded under the state Medicaid program) are typically much greater than the expense of providing an abortion. Id. at 856.
- 229 Id. at 852-53.
- 230 Id. at 851-52.
- 231 Id. at 851-54.
- 232 Id. at 851.
- 233 Id. at 857-58.
- 234 See, e.g., *Choice for Women, Inc. v. Fla. Agency for Health Care Admin.*, 872 So. 2d 970, 973 (Fla. Dist. Ct. App. 2004), review denied, 885 So. 2d 386 (Fla. 2004); *Fischer v. Dep't of Pub. Welfare*, 502 A.2d 114, 126 (Pa. 1985).
- 235 95 S.W.3d 253, 266 (Tex. 2002).
- 236 Id. at 258.
- 237 Id. at 258-60 (citing *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256 (1979)).
- 238 Id. at 264.
- 239 Id. at 257 (quoting TEXAS LEGISLATIVE COUNCIL, 14 PROPOSED CONSTITUTIONAL AMENDMENTS ANALYZED FOR ELECTION 24 (1972)). The Texas Supreme Court relied heavily on *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263 (1993), *Harris v. McRae*, 448 U.S. 297 (1980), and *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256 (1979).
- 240 940 P.2d 642, 645 (Wash. 1997).
- 241 441 U.S. 347 (1979); see supra note 69 and accompanying text.
- 242 *Guard*, 940 P.2d at 643.
- 243 540 P.2d 882 (Wash. 1975) (en banc); see supra note 181 and accompanying text.
- 244 *Guard*, 940 P.2d at 645.
- 245 675 N.E.2d 89, 99 (Ill. 1996).
- 246 Id. at 93.
- 247 Id. at 94. The court found that the State's goal could be achieved in a gender-neutral manner by allowing intestate succession by any parent who has acknowledged and supported his child. Id.
- 248 Id.
- 249 725 S.W.2d 696, 698-99 (Tex. 1987); see also *R. McG. & C.W. v. J.W. & W.W.*, 615 P.2d 666, 672 (Colo. 1980) (asserting that Federal Equal Protection Clause and state ERA required that natural fathers be given the same period of years as mothers to assert their paternity).
- 250 *In re McLean*, 725 S.W.2d at 697 (citation omitted).
- 251 Id. at 698.
- 252 It is important to note, however, that, in addition to judicial decisions, state ERAs have inspired legislative and executive action prohibiting sex-neutral rules that disparately impact women. See infra notes 384-85 and accompanying text. Professor

Abernathy's recent findings regarding the reluctance of federal judges to apply disparate impact standards highlight the importance of these political solutions for sex-neutral rules that disproportionately impact women. See Abernathy, *supra* note 105.

253 [331 A.2d 174 \(Pa. 1975\)](#).

254 *Id.* at 179.

255 *Id.*

256 *Id.*

257 *Id.* at 179-80.

258 No. Civ. A. 96-6986, 1999 WL 1012957, at *20 (E.D. Pa. Nov. 8, 1999).

259 *Id.* at *1.

260 *Id.* at *2.

261 *Id.*

262 *Id.* at *20.

263 *Id.* at *19.

264 [442 U.S. 256 \(1979\)](#); see *supra* notes 91-97 and accompanying text.

265 See *supra* note 96 and accompanying text.

266 See, e.g., [Hardy v. Stumpf](#), 112 Cal. Rptr. 739 (Ct. App. 1974) (asserting that a challenge to height and weight requirements in employment under constitutional equality provision need not demonstrate discriminatory intent, and holding that if requirements pose discriminatory impact, such requirements are invalid unless “demonstrably related to job performance”); [Burning Tree Club, Inc. v. Bainum](#), 501 A.2d 817, 826 (Md. App. Ct. 1985) (recognizing that “statute may be couched in gender neutral terms and still have an unconstitutional discriminatory purpose and effect,” but finding no state action sufficient to trigger protection of Maryland ERA); [Buchanan v. Dir. of Div. of Employment Sec.](#), 471 N.E.2d 345, 348 (Mass. 1984) (recognizing availability of claim of disparate impact under Massachusetts ERA, although plaintiffs did not make out requisite proof of disparity); [Snider v. Thornburgh](#), 436 A.2d 593, 601 (Pa. 1981) (noting that “‘facially neutral policies which have the practical effect of perpetuating discriminatory practices’” may violate the ERA, but finding no state action (quoting [Gen. Elec. Corp. v. Human Relations Comm'n](#), 365 A.2d 649, 658 (Pa. 1976))); [Pa. Nat'l Org. for Women v. Commonwealth Ins. Dep't](#), 551 A.2d 1162, 1167 (Pa. Commw. Ct. 1988) (noting in challenge to insurance commissioner's approval of equal automobile insurance rates for men and women that the plaintiff could not “prove ‘de facto’ discrimination by insisting without some support that the insurers' rate-making practices have a discriminatory effect”); [State v. Brayman](#), 751 P.2d 294, 305 (Wash. 1988) (recognizing merits of a disparate impact theory of sex discrimination).

267 [95 S.W.3d 253 \(Tex. 2002\)](#); see discussion *supra* notes 235-39 and accompanying text.

268 *Id.* at 263-64 (quoting [Bray v. Alexandria Women's Health Clinic](#), 506 U.S. 263, 270 (1993)).

269 *Id.* at 264.

270 [975 P.2d 841, 855 \(N.M. 1998\)](#).

271 See, e.g., [State v. Planned Parenthood of Alaska](#), 28 P.2d 904, 915 (Alaska 2001) (“The State, having undertaken to provide health care for poor Alaskans, must adhere to neutral criteria in distributing that care. It may not deny medically necessary services to eligible individuals based on criteria unrelated to the purposes of the public health care program.”); [Simat Corp. v. Ariz. Health Care Cost Containment Sys.](#), 56 P.3d 28, 33 (Ariz. 2002) (“Promoting childbirth is a legitimate state interest,

but it seems almost inarguable that promoting and actually saving the health and perhaps eventually the life of a mother is at least as compelling a state interest.”).

272 517 U.S. 620, 632 (1996).

273 Id.

274 539 U.S. 558 (2003). In *Lawrence*, the Supreme Court overruled its prior decision in *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986), in which it had upheld Georgia's criminal ban on sodomy. *Lawrence*, 539 U.S. at 578; cf. *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 653 (2000) (holding that the Boy Scouts' First Amendment expressive associational rights were violated by application of New Jersey's public accommodations law to prohibit them from revoking membership of gay scout leader).

275 *Lawrence*, 539 U.S. at 578. The Court never reached the question whether to apply heightened scrutiny, finding that “[t]he Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual.” Id.

276 Id. at 574. Justice O'Connor concurred solely on equal protection grounds, but carefully distinguished the marriage question. See id. at 585 (O'Connor, J., concurring). Professor Pamela Karlan has suggested that the majority avoided the Equal Protection Clause because of its

fear[] that if it struck down Texas's statute on the ground that it violated the Equal Protection Clause to treat gay people differently from straight people, this would require it to invalidate all laws that treat gay and straight couples differently, the most obvious of which are laws restricting the right to marry.

Pamela S. Karlan, *Foreword: Loving Lawrence*, 102 MICH. L. REV. 1447, 1460 (2004).

277 The majority of lower court rulings have rejected the argument that sexual orientation deserves heightened scrutiny. See generally Edward Stein, *Evaluating the Sex Discrimination Argument for Lesbian and Gay Rights*, 49 UCLA L. REV. 471, 482 & n.50 (2001) (collecting cases). Federal courts use the rational review standard to scrutinize claims of discrimination based on sexual orientation, sometimes invalidating the challenged governmental action, and sometimes upholding it. Id. at 484-85 nn.68-69 (collecting cases).

278 429 U.S. 190 (1976).

279 *Baker v. State*, 744 A.2d 864 (Vt. 1999). The Vermont Supreme Court held that Vermont's exclusion of same-sex couples from the benefits and protections of marriage violated the common benefits clause of the Vermont Constitution. Id. at 886. The court expressly rejected the argument that restricting marriage to opposite-sex couples established a sex-based classification. Id. at 880 n.13. For additional discussion of the majority opinion in *Baker*, see infra notes 295-300 and accompanying text.

280 *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003). The Massachusetts Supreme Court held that limiting marriage to opposite-sex couples violated the individual liberty and equality guarantees of the Massachusetts Constitution. Id. at 969. While noting that the Massachusetts Constitution specifically forbids sex-based discrimination, the majority declined to decide whether sexual orientation is a suspect classification. Id. at 961 n.21.

281 852 P.2d 44, 67 (Haw. 1993), superseded by constitutional amendment as stated in *Baehr v. Miike*, No. 20371, 1999 Haw. LEXIS 391, at *1 (Haw. Dec. 9, 1999) (holding that the amendment to [article I, section 23 of the Hawaii Constitution](#) rendered the challenge moot).

282 See id. at 60, 67-68.

283 388 U.S. 1 (1967).

284 *Baehr*, 852 P.2d at 68 (“Substitution of ‘sex’ for ‘race’ and [article I, section 5 \[of Hawaii's Constitution\]](#) for the [F]ourteenth [A]mendment yields the precise case before us together with the conclusion that we have reached.”).

285 *Baehr v. Miike*, No. Civ. 91-1394, 1996 WL 694235, at *22 (Haw. Cir. Ct. Dec. 3, 1996).

286 HAW. CONST. art. I, § 23; see *Baehr v. Miike*, No. 20371, 1999 Haw. LEXIS 391, at *1 (Haw. Dec. 9, 1999) (holding that the amendment to the state constitution rendered the challenge moot).

- 287 [Goodridge v. Dep't of Pub. Health](#), 798 N.E.2d 941, 971 (Mass. 2003) (Greaney, J., concurring) (relying on the Massachusetts ERA).
- 288 [Baker v. State](#), 744 A.2d 864, 904-12 (Vt. 1999) (Johnson, J., concurring in part and dissenting in part) (relying on Vermont's common benefits clause). For additional discussion of this opinion, see *infra* notes 306-08 and accompanying text.
- 289 [Deane v. Conaway](#), No. 24-C-04-005390, 2006 WL 148145, at *3-7 (Md. Cir. Ct. Jan. 20, 2006) (holding that Maryland's same-sex marriage prohibition constitutes discrimination based on sex in violation of Maryland's ERA).
- 290 [Brause v. Bureau of Vital Statistics](#), No. 3AN-95-6562 CI, 1998 WL 88743, at *5-6 (Alaska Super. Ct. Feb. 27, 1998) (finding a fundamental right to choose a "life partner" under the Alaska Constitution, and noting, in dicta, that the restriction of marriage to opposite-sex couples also "implicate [s] the Constitution's prohibition of classifications based on sex or gender" in violation of the Alaska ERA). The case was subsequently dismissed after the Alaska Constitution was amended to define marriage as a union between a man and a woman. ALASKA CONST. art I, § 25; see [Brause v. State](#) 21 P.3d 357, 358 (Alaska 2001).
- 291 [Li v. State](#), No. 0403-03057, 2004 WL 1258167, at *6 (Or. Cir. Ct. Apr. 20, 2004) (holding that the effect of Oregon's denial of marriage to same-sex couples "is to impermissibly classify on the basis of gender," as well as sexual orientation, in violation of the privileges or immunities clause of the Oregon Constitution). The ruling was subsequently reversed after the Oregon Constitution was amended, effective December 2, 2004, to define marriage as a union between a man and a woman. See [Li v. State](#), 110 P.3d 91, 102 (Or. 2005).
- 292 [Snetsinger v. Mont. Univ. Sys.](#), 325 Mont. 148, 173 (2005) (Nelson, J., concurring) (asserting that denial of health benefits to same-sex partners of employees by state university is sex-based discrimination in violation of Montana ERA). For additional discussion of this opinion, see *infra* note 309-10 and accompanying text.
- In other cases, lower court opinions accepted the sex discrimination argument, but the decisions were subsequently overruled or affirmed on other grounds by higher courts. See., e.g., [Picado v. Jegley](#), No. CV-99-7048 (Ark Cir. Ct. Mar. 23, 2001) (accepting sex discrimination argument as basis for invalidating Arkansas sodomy ban), available at <http://www.lambdalegal.org/sections/library/decisions/picadodecision.pdf>, aff'd on other grounds, 80 S.W.3d 332, 334 (Ark. 2002) (striking Arkansas sodomy ban on privacy and equal protection grounds and, finding that Arkansas statute impermissibly discriminates on the basis of sexual orientation and fails rationality review); [Lawrence v. State](#), Nos. 14-99-00109-CR & 14-99-00111-CR, 2000 WL 729417 (Tex. Ct. App. June 8, 2000) (accepting sex discrimination argument applied to Texas sodomy ban), withdrawn and overruled, 41 S.W.2d 349 (Tex. Ct. App. 2001) (en banc), rev'd by [Lawrence v. Texas](#), 539 U.S. 558 (2003).
- 293 See Andrew Koppelman, [Defending the Sex Discrimination Argument for Lesbian and Gay Rights: A Reply to Edward Stein](#), 49 UCLA L. REV. 519, 534 & n.84 (2001) (noting that "[t]he sex discrimination argument has usually been rejected by the courts," and citing federal and state cases).
- 294 See [Baker v. State](#), 744 A.2d 864, 880 n.13 (Vt. 1999); [Singer v. Hara](#), 522 P.2d 1187, 1191 (Wash. Ct. App. 1974).
- 295 See [Baker](#), 744 A.2d at 880 n.13.
- 296 [Singer](#), 522 P.2d at 1195. The court reasoned that "marriage exists as a protected legal institution primarily because of societal values associated with the propagation of the human race," and that "it is apparent that no same-sex couple offers the possibility of the birth of children by their union." *Id.* Accordingly, Washington's denial of same-sex marriage fell within the "unique physical characteristics" exception to that state's ERA. *Id.*; see also [Baker v. Nelson](#), 191 N.W.2d 185, 186 (Minn. 1971) (upholding Minnesota's prohibition on same-sex marriage because "[t]he institution of marriage as a union of man and woman, uniquely involve[s] the procreation and rearing of children within a family" (citation omitted)), appeal dismissed, 409 U.S. 810, 810 (1972).
- 297 [Singer](#), 522 P.2d at 1191. In 2004, two lower courts ruled that Washington's prohibition on same-sex marriage violated its state constitution. See [Castle v. State](#), No. 04-2-00614-4, 2004 WL 1985215, at *16 (Wash. Super. Ct. Sept. 7, 2004) (prohibiting same-sex couples from marrying violates the privileges and immunities clause of the [Washington Constitution](#)); [Anderson v. King County](#), No. 04-2-04964-4, 2004 WL 1738447, at *7 (Wash. Super. Ct. Aug. 04, 2004) (prohibiting same-sex couples from marrying violates the privileges and immunities and due process clauses of the [Washington Constitution](#)). Appeals in these

cases are pending before the Washington Supreme Court. In *Anderson*, the court noted that “[t]he Equal Rights Amendment argument presented by plaintiffs is an intriguing one,” but noted that it was bound by the Washington Court of Appeals’s rejection of the argument in *Singer*. *Anderson*, 2004 WL 1738447, at *11. In *Castle*, the court likewise noted that it was bound by the *Singer* decision, but referred to it as a “weak reed” and emphasized that it “cries out for reexamination by a higher court.” 2004 WL 1985215, at *2-3.

298 See *Baker*, 744 A.2d at 880 n.13.

299 *Id.*

300 *Id.* (emphasis added).

301 See, e.g., Nan D. Hunter, *The Sex Discrimination Argument in Gay Rights Cases*, 9 J.L. & POL’Y 397, 406-12 (2001); Cass R. Sunstein, *Homosexuality and the Constitution*, 70 IND. L.J. 1, 18-23 (1994).

302 Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination*, 69 N.Y.U. L. REV. 197, 234-36 (1994) (first emphasis added) (citations omitted); see also ANDREW KOPPELMAN, *THE GAY RIGHTS QUESTION IN CONTEMPORARY AMERICAN LAW* 53 (2002); Andrew Koppelman, *The Miscegenation Analogy: Sodomy Laws as Sex Discrimination*, 98 YALE L.J. 145, 158-60 (1988).

303 Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, 1988 WIS. L. REV. 187, 187.

304 *Id.* at 210, 218.

305 See, e.g., WILLIAM N. ESKRIDGE, JR., *THE CASE FOR SAME-SEX MARRIAGE* 153-72 (1996) [hereinafter ESKRIDGE, *THE CASE FOR SAME-SEX MARRIAGE*]; WILLIAM N. ESKRIDGE, JR., *GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET* 218-28 (1999) [hereinafter ESKRIDGE, *GAYLAW*]; Sunstein, *supra* note 301, at 17-23.

306 744 A.2d 864, 904-12 (Vt. 1999) (Johnson, J., concurring in part and dissenting in part).

307 *Id.* at 906.

308 *Id.* at 908-09.

309 325 Mont. 148, 173-74 (2005) (Nelson, J., concurring).

310 *Id.* at 173 (citing KOPPELMAN, *supra* note 302, at 53-54).

311 E.g., Stein, *supra* note 277, at 515. Professor Stein argues that the sex discrimination argument is sociologically and theoretically flawed because “there are actual and significant differences between sexism and homophobia in contemporary America” in that homophobia, unlike sexism, “remains entrenched in our society.” *Id.* at 499. He further reasons that the sex discrimination argument is morally flawed because it “mischaracterizes the core wrong” of laws that restrict the rights of gays and lesbians by failing to recognize that they “violate principles of equality primarily because [they] discriminate on the basis of sexual orientation, not because they discriminate based on sex.” *Id.* at 503. While conceding that the sex discrimination argument has certain practical advantages, he reasons that it is unlikely to persuade judges and could lead to backlash that would weaken protections against sex discrimination. *Id.* at 507-14. For a detailed response to Professor Stein, see KOPPELMAN, *THE GAY RIGHTS QUESTION*, *supra* note 302, at 534-38.

For other criticisms of the sex discrimination argument, see, for example, J.M. Balkin, *The Constitution of Status*, 106 YALE L.J. 2313, 2362 (1997); Craig M. Bradley, *The Right Not to Endorse Gay Rights: A Reply to Sunstein*, 70 IND. L.J. 29, 31-38 (1994); David Orgon Coolidge, *Playing the Loving Card: Same-Sex Marriage and the Politics of Analogy*, 12 BYU J. PUB. L. 201, 217-20 (1998); Richard F. Duncan, *From Loving to Romer: Homosexual Marriage and Moral Discernment*, 12 BYU J. PUB. L. 239, 240-45 (1998); and Lynn Wardle, *A Critical Analysis of Constitutional Claims for Same-Sex Marriage*, 1996 BYU L. REV. 1, 62-94.

312 KOPPELMAN, *THE GAY RIGHTS QUESTION*, *supra* note 302, at 538; see also ESKRIDGE, *GAYLAW*, *supra* note 305, at 218-28; ESKRIDGE, *THE CASE FOR SAME-SEX MARRIAGE*, *supra* note 305, at 153-72.

- 313 KOPPELMAN, THE GAY RIGHTS QUESTION, *supra* note 302, at 534-38.
- 314 Professor Koppelman suggests that the argument has frequently been rejected by judges for three reasons: (1) it is “simply not understood”; (2) it strikes observers as a “mere trick”; and (3) its potential impact is too broad for judges to accept. *Id.* at 536.
- 315 See generally Altschuler, *supra* note 131; Avner, *supra* note 108; Phyllis W. Beck, Equal Rights Amendment: The Pennsylvania Experience, 81 DICK. L. REV. 395 (1977); Phyllis W. Beck & Joanne Alfano Baker, An Analysis of the Impact of the Pennsylvania Equal Rights Amendment, 3 WIDENER J. PUB. LAW 743 (1993); Susan Crump, An Overview of Equal Rights Amendments in Texas, 11 HOUS. L. REV. 136 (1973); Dawn-Marie Driscoll & Barbara J. Rouse, Through a Glass Darkly: A Look at State ERAs, 12 SUFFOLK U. L. REV. 1282 (1977); Gammie, *supra* note 108; Leo Kanowitz, The New Mexico Equal Rights Amendment, 3 N.M. L. REV. 1 (1973); Kilgarlin & Tarver, *supra* note 109; Kolbert & Gans, *supra* note 213; Kruger, *supra* note 6; Awilda Marquez, [Comparable Worth and the Maryland ERA](#), 47 MD. L. REV. 1129 (1988); Mary McCausland, [Washington's Equal Rights Amendment and Law Against Discrimination](#), 58 WASH. L. REV. 465 (1983); Dawn Nunziato, [Gender Equality: States as Laboratories](#), 80 VA L. REV. 945 (1994); Kevin Francis O'Neill, The Road Not Yet Taken: State Constitutions as an Alternative Source of Protection for Reproductive Rights, 11 N.Y.L. SCH. J. HUM. RTS. 5 (1993); Peter Saucier, The Maryland Equal Rights Amendment: Eight Years of Application, 9 U. BALT. L. REV. 342 (1980); Rodic Schoen, The Texas Equal Rights Amendment After the First Decade: Judicial Developments, 1978-1982, 20 HOUS. L. REV. 1321 (1983); Sherwin, *supra* note 145; G. Alan Tarr & Mary Cornelia Porter, Gender Equality and Judicial Federalism, 9 HASTINGS CONST. L.Q. 919 (1982); Treadwell & Page, *supra* note 185; Williams, Equality Guarantees, *supra* note 145; Williams, *supra* note 6.
- 316 See, e.g., Phyllis W. Beck & Patricia A. Daly, [Pennsylvania's Equal Rights Amendment Law: What Does It Portend for the Future?](#), 74 TEMP. L. REV. 579, 582-89 (2001) (surveying recent cases decided under Pennsylvania ERA); Faraone, *supra* note 203, at 432-42 (analyzing legislative history of 1998 Florida ERA, and concluding that strict scrutiny standard of review is applicable); Wolfgang P. Hirczy de Mino, [Does an Equal Rights Amendment Make a Difference?](#), 60 ALB. L. REV. 1581, 1588-93 (1997) (surveying cases decided under Texas ERA); see also Beck & Daly, *supra* note 141, at 707 (providing comprehensive survey and analysis of history and impact of the Pennsylvania ERA).
- 317 See, e.g., Risa E. Kaufman, [State ERAs in the New Era: Securing Poor Women's Equality by Eliminating Reproductive-Based Discrimination](#), 24 HARV. WOMEN'S L.J. 191, 209 (2001) (proposing the use of state ERAs in challenging welfare provisions that deny incremental benefits to children born into families receiving welfare benefits); Marsha L. Levick & Francine T. Sherman, [When Individual Differences Demand Equal Treatment: An Equal Rights Approach to the Special Needs of Girls in the Juvenile Justice System](#), 18 WIS. WOMEN'S L.J. 9, 35 (2003) (arguing that state ERAs “present a potentially powerful tool” for challenging disparities female offenders face in the juvenile justice system); Linton, Same-Sex Marriage Under State Equal Rights Amendments, *supra* note 10, at 961-62 (reviewing potential application of state ERAs to prohibitions on same-sex marriage, and concluding “[n]othing in the text, history or interpretation of state equal rights provisions even remotely suggests that those provisions should invalidate [them] [S]uch laws are gender neutral and do not have a discriminatory impact on either men or women.”); Rachel Weissmann, [What “Choice” Do They Have?: Protecting Pregnant Minors' Reproductive Rights Using State Constitutions](#), 1999 ANN. SURV. AM. L. 129, 166 (arguing that state ERAs and other state constitutional provisions “provide a unique legal landscape that is well worth cultivating” in crafting challenges to restrictions on minors' access to abortion).
- 318 See, e.g., Beck & Daly, *supra* note 316, at 594 (concluding that the Pennsylvania ERA provides both genders with important tangible and intangible benefits, including rigorous scrutiny of sex-based classifications and formal recognition in the Commonwealth that “women and men are equal partners who share both the benefits and burdens of society,” but noting that “the state ERA has not markedly changed the social fabric of the Commonwealth”); Hirczy de Mino, *supra* note 316, at 1607-09 (evaluating judicial interpretation of the Texas ERA in variety of contexts, and concluding that the Texas ERA has been an effective tool in challenging sex discrimination); Kaufman, *supra* note 317, at 193 (“[S]tate ERAs can be effective in eradicating the sex discrimination that will survive scrutiny under the Federal Constitution.”). For a comprehensive quantitative study of state ERAs, see Lisa Baldez et al., *supra* note 178.
- 319 See, e.g., Beck & Daly, *supra* note 316, at 583 (noting diminishing use of ERA in Pennsylvania); Hirczy de Mino, *supra* note 316, at 1588 (citing twenty-seven cases decided over two decades, and noting that “the volume of significant precedent setting litigation engendered by adoption of the ERA in Texas is rather moderate”); Kaufman, *supra* note 317, at 193 (“[State ERAs]

offer a fruitful, yet underutilized, foundation for enforcing women's rights where federal protections fail.”); Levick & Sherman, supra note 317, at 35 (noting state ERAs are “not used frequently”).

- 320 See, e.g., Beck & Daly, supra note 316, at 594 (noting that Pennsylvania has not issued “bold rulings” in area of abortion rights or same-sex marriage).
- 321 Linton, *Making a Difference?*, supra note 10, at 940-41 (describing outcomes in litigation under state ERAs throughout the country, and concluding that ERAs have been “[ineffective] except as a symbol” because “women have brought relatively few cases,” and most cases have involved discrimination against men (citation omitted)); Linton & Joslin, supra note 10, at 284 (concluding that the Illinois ERA has mainly been used to challenge “statutes, ordinances or common law doctrines that discriminated against men in favor of women”).
- 322 For a comprehensive survey and analysis of state ERAs, including recent decisions, see FRIESEN, supra note 106, § 3-2; see also Jeffrey Shaman, *The Evolution of Equality in State Constitutional Law*, 34 RUTGERS L.J. 1013, 1063-70 (2003) (reviewing decisions under state ERAs).
- 323 See supra notes 132-50, 170-75 and accompanying text.
- 324 See supra notes 179-83 and accompanying text.
- 325 See supra notes 206-12 and accompanying text.
- 326 See supra notes 216-33 and accompanying text.
- 327 See supra notes 240-48 and accompanying text.
- 328 See supra notes 252-66 and accompanying text.
- 329 See generally Randall T. Shepard, *The Maturing Nature of State Constitution Jurisprudence*, 30 VAL. U. L. REV. 421 (1996); TARR, supra note 3; G. Alan Tarr, *The New Judicial Federalism in Perspective*, 72 NOTRE DAME L. REV. 1097 (1997); Robert F. Williams, Foreword: Looking Back at the New Judicial Federalism's First Generation, 30 VAL. U. L. REV., at xiii (1996).
- 330 The new judicial federalism emerged during the early 1970s and was encouraged by U.S. Supreme Court Justice William Brennan. See Tarr, *New Judicial Federalism*, supra note 329, at 1097. In a frequently cited article in the Harvard Law Review, Justice Brennan admonished: “[S]tate courts cannot rest when they have afforded their citizens the full protections of the [F]ederal Constitution. State constitutions, too, are a font of individual liberties, their protections often extending beyond those required by the Supreme Court's interpretation.” William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491 (1977). Justice Brennan subsequently called the new judicial federalism “[t]he most important development in constitutional jurisprudence of our times.” William J. Brennan, Jr., Special Supplement, *State Constitutional Law*, Nat'l L.J., Sept. 29, 1986, at S1.
- 331 See, e.g., Williams, *Equality Guarantees*, supra note 145, at 1213 (noting that despite the powerful mandate of state ERAs “most jurisprudence under these new provisions is dominated by federal equal protection analysis”); see also Tarr & Porter, supra note 315, at 950 (“Even when litigants have raised claims in state courts, those courts tend to rely on federal law either explicitly, by basing decisions on relevant federal statutes or cases, or indirectly, by using the Supreme Court's equal protection methodology when interpreting the state constitution[s].”).
- 332 See supra notes 164-67 and accompanying text.
- 333 See supra notes 235-39 and accompanying text.
- 334 See, e.g., FRIESEN, supra note 106, § 3-1(c), at 3-8 (“The federal method of equal protection analysis has greatly influenced state judges applying various state equality guarantees, even when state texts have a radically different text and history than the [F]ourteenth [A]mendment's clause.”); TARR, supra note 3, at 208 (“[T]oo many states continue to rely automatically on federal law when confronted with rights issues. Even when they interpret state guarantees, too many frame their analysis in federal doctrinal categories, making state constitutional law merely a poor relation, stuck with ill-fitting hand-me-downs.”). Scholars have been especially critical of the “unreflective adoptionism” or “kneejerk lockstepping” approach in which state

courts apply “federal analysis to a state clause without acknowledging the possibility of a different outcome, or considering arguments in favor of such a different, or more protective, outcome.” Williams, *Case-by-Case Adoptionism or Prospective Lockstepping?*, supra note 187, at 1505.

335 See supra notes 107-08 and accompanying text.

336 Lawrence Gene Sager, *Foreword: State Courts and the Strategic Space Between the Norms and Rules of Constitutional Law*, 63 *TEX. L. REV.* 959, 975-76 (1985) (“State judges confront institutional environments and histories that vary dramatically from state to state, and that differ, in any one state, from the homogenized, abstracted, national vision from which the Supreme Court is forced to operate. It is natural and appropriate that in fashioning constitutional rules the state judges’ instrumental impulses and judgments differ.”).

337 Hans S. Linde, *E Pluribus—Constitutional Theory and State Courts*, 18 *GA. L. REV.* 165, 179 (1984).

338 FRIESEN, supra note 106, § 1-6, at 1-40. See generally Robert F. Williams, In the *Glare of the Supreme Court: Continuing Methodology and Legitimacy Problems in Independent State Constitutional Rights Adjudication*, 72 *NOTRE DAME L. REV.* 1015, 1063-64 (1997) (“State constitutional provisions need not, and should not, be reduced to a ‘row of shadows’ through too much reliance on federal precedent. Swinging the pendulum in the other direction, however, where too little reliance on federal precedent will ‘render State practice incoherent,’ is also unnecessary.”).

339 See supra notes 181-83 and accompanying text.

340 Williams, *Equality Guarantees*, supra note 145, at 1213.

341 Linde, supra note 337, at 195; see also Hans S. Linde, *Judges, Critics, and the Realist Tradition*, 82 *YALE L.J.* 227, 253 (1972) (“[C]onstitution [is] directly obligatory on government, with judicial review as a consequence rather than as a source of obligation.”); Hans S. Linde, *Without “Due Process”: Unconstitutional Law in Oregon*, 49 *OR. L. REV.* 125, 131 (1970) (“[W]hat the judicial decision [making] applies was first a political decision that others deemed worthy of constitutional magnitude.”).

342 Given the text and distinct history of many state ERAs, this will likely be the outcome in the vast majority of cases. However, the language of state ERAs vary and the legislative history is not the same in every state.

343 TARR, supra note 3, at 209.

344 Dr. G. Alan Tarr has pointed out, for example, that if New Jersey’s equality guarantee were viewed in the abstract, without reference to its preceding constitutional provision, one would not understand its language or significance: “Whereas the 1844 version acknowledged that ‘men’ possessed various natural rights, the 1947 version recognized that the rights pertain to all ‘persons.’ By substituting the gender-neutral ‘persons’ for the gendered ‘men,’ the constitution emphasized that women enjoyed the same rights as men.” Tarr, supra note 3, at 202.

345 *Id.* at 189-209.

346 See supra notes 218-34 and accompanying text.

347 See supra note 243 and accompanying text.

348 See supra notes 206-10 and accompanying text.

349 Analysis of, and reliance on, the text and history of state constitutions “has been an integral part of the New Judicial Federalism.” Robert F. Williams, *Old Constitutions and New Issues: National Lessons from Vermont’s State Constitutional Case on Marriage of Same-Sex Couples*, 43 *B.C. L. REV.* 73, 86 (2001) [hereinafter Williams, *Old Constitutions*]; see also Stephen E. Gottlieb, *Foreword: Symposium on State Constitutional History: In Search of a Usable Past*, 53 *ALB. L. REV.* 255, 258 (1989) (noting analysis of state constitutional history “is valuable whether or not one subscribes to a jurisprudence of original intent”). Dr. G. Alan Tarr has pointed out that, in contrast to federal constitutional history, “given the frequency of amendment and revision,” many state constitutional provisions are “relatively recent”; the greater availability of their documentary record facilitates the discovery of the drafters’ intentions. TARR, supra note 3, at 196. Moreover, examination of the history and text of state constitutions is often used “to justify an interpretation of the state constitution that was more

protective, or recognized greater rights, than those available at the federal level.” Williams, *Old Constitutions*, supra, at 86. For example, Professor Williams points out that in the majority opinion in *Baker v. State*, 744 A.2d 864 (Vt. 1999) (holding Vermont’s constitution entitled same-sex couples to the same benefits and protections as opposite-sex couples), Chief Justice Amestoy used state constitutional history not “as an attempt to discover original intent in its strict sense [but] rather; as a wide-ranging survey of the egalitarian impulses of the Revolution.” Williams, *Old Constitutions*, supra, at 79-80.

- 350 See *Baker*, 744 A.2d at 874 (“Out of the shifting and complicated kaleidoscope of events, social forces, and ideas that culminated in the Vermont Constitution of 1777, our task is to distill the essence, the motivating ideal of the framers. The challenge is to remain faithful to that historical ideal, while addressing contemporary issues that the framers undoubtedly could never have imagined.”).
- 351 See supra note 319 and accompanying text.
- 352 See, e.g., Beck & Daly, supra note 316, at 579.
- 353 See FRIESEN, supra note 106, § 3-2(a), at 3-12 to -13. Professor Friesen also points out that “because issues of legal equality for women have gained a meaningful amount of political attention in recent times, outmoded, discriminatory statutes and regulations have often been repealed or modified without the need for a court challenge.” *Id.* (footnotes omitted). As discussed infra, much of this reform of statutes and administrative regulations came about as the result of the passage of state ERAs. See infra notes 384-86 and accompanying text.
- 354 The number of sex discrimination cases brought under the Equal Protection Clause has likewise diminished over time. See MARY BECKER, CYNTHIA GRANT BOWMAN & MORRISON TORREY, *FEMINIST JURISPRUDENCE: TAKING WOMEN SERIOUSLY, CASES AND MATERIALS* 83 (2d ed. 2001) (“[T]he number of cases brought under the formal equality standard applicable in sex cases—which thus far recognized sex discrimination only when overt—has declined over time.”).
- 355 Tarr & Porter, supra note 315, at 950 (noting “paucity” of sex discrimination claims brought under state ERAs in 1970s as compared to cases brought under the United States Constitution, and finding that “litigant preference for federal law and forums has led to federal dominance in the field of gender discrimination”).
- 356 Robert F. Williams, *The Third Stage of the New Judicial Federalism*, 59 ANN. SURV. AM. L. 211, 220 (2003) (noting that “[d]espite the development of the New Judicial Federalism nearly two generations ago, lawyers still fail to properly argue the state constitutional grounds where available” and that, as a result, many state courts fail to reach the state constitutional argument).
- 357 TARR, supra note 3, at 167 (citing Craig F. Emmert & Carol Ann Traut, *State Supreme Courts, State Constitutions, and Judicial Policymaking*, 16 JUST. SYS. J. 37, 44 (1992)). This study showed that “[i]n over half the courts’ civil liberties cases, litigants continued to challenge state laws exclusively on the basis of the [F]ederal Constitution, and in only 17 percent of those cases did they challenge state laws exclusively on state constitutional grounds.” *Id.*
- 358 Jennifer Friesen, *Adventures in Federalism: Some Observations on the Overlapping Spheres of State and Federal Constitutional Law*, 3 WIDENER J. PUB. L. 25, 31-34 (1993) (citing relatively small percentage of law professors who teach a course in state constitutional law and small number of legal texts and other state constitutional law resources, but noting trend of increasing awareness of the importance of state constitutions in law schools and greater availability of textbooks and law journal resources).
- 359 *Id.* at 31.
- 360 See Jennifer Friesen, *Recovering Damages for State Bills of Rights Claims*, 63 TEX. L. REV. 1269, 1272 (1985).
- 361 See FRIESEN, supra note 106, §§ 7-1 to 7-7-7(b)(22); Friesen, supra note 360, at 1269-70; see also *Dorwart v. Caraway*, 58 P.3d 128, 133 (Mont. 2002) (noting that by 1998, twenty-nine states either by statute or implied judicial cause of action had recognized causes of action for violation of state constitutional rights; seven states have specifically rejected such causes of action).

- 362 At the federal level, fee-shifting is permitted for prevailing parties under numerous statutes. The primary federal fee-shifting statute is the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988 (2004), which permits the award of attorneys' fees to a party, other than the United States, who prevails under certain federal statutes, including § 1983, which allows civil rights suits against the state or a person acting under the authority of state laws.
- 363 See generally FRIESEN, supra note 106, §§ 10-1 to -6; Friesen, supra note 360.
- 364 See FRIESEN, supra note 106, § 10-3, at 10-5 to -7. In addition, plaintiffs who bring claims under both state constitutional law and federal law may be able to obtain fees under the Civil Rights Attorney's Fee Awards Act, 42 U.S.C. § 1988. FRIESEN, supra note 106, § 10-1, at 10-2. Where suits combine claims under § 1983 and state constitutional law, the prevailing practice in the federal courts is to award fees pursuant to § 1988 as long as plaintiff's claims under § 1983 were "substantial" enough to confer subject matter jurisdiction on the federal court. Id. State courts vary in whether they adhere to this practice. Id. §§ 10-3, 10-6. Some state courts follow the "relatively generous" federal practice. Id. § 10-1, at 10-3. Other state courts "may either reach out to decide and reject the federal claim, thus erasing the presumed justification for section 1988 fees, or they may treat an adjudicated federal claim as superfluous ., thus finding no justification for an award of federally based attorneys fees." Id.
- 365 See supra notes 219-33 and accompanying text.
- 366 N.M. Right to Choose/NARAL v. Johnson, 986 P.2d 450, 451 (N.M. 1999).
- 367 Id. at 452-53; see Allison Crist, No Private Attorney General Exception to the American Rule in New Mexico: New Mexico Right to Choose/NARAL v. Johnson, 31 N.M. L. REV. 585, 593 (2001).
- 368 Crist, supra note 367, at 599.
- 369 Of course, in some cases, state ERA claims may be successfully brought in federal court as supplemental claims allowing fees under federal law. This is not an option, however, in cases in which past United States Supreme Court precedent has rendered a claim under the Federal Constitution insubstantial, such as New Mexico Right to Choose/NARAL v. Johnson. Thus, in the very cases in which relief under a state ERA is most needed, fees are likely not available.
- 370 See Lisa Baldez et al., supra note 178, at 268-71.
- 371 In Pennsylvania, for example, where the state ERA has otherwise been extremely effective in advancing sex equality in many areas, a challenge brought in the mid-1980s to the cut-off of public funding for abortion was unsuccessful. See Fischer v. Dep't of Pub. Welfare, 502 A.2d 114 (Pa. 1985).
As popular support for abortion rights and gay marriage increases, courts are more likely to issue favorable opinions. Indeed, in the area of abortion funding, the number of favorable state court decisions has increased significantly since the 1980s. See supra notes 216-17 and accompanying text.
- 372 See Lisa Baldez et al., supra note 178 ("[W]hile ERAs do not have a direct effect on judicial decisions, they do, even after controlling for other relevant factors, increase the probability of a court applying a higher standard of law to adjudicate claims of sex discrimination. And the application of a higher standard of law, even after controlling for other relevant factors, increases the probability of a court reaching a disposition favorable to litigants alleging a violation of their rights.").
- 373 Beck & Daly, supra note 316, at 594 (noting that "[t]he judicial decisions under the [Pennsylvania] ERA continue, at least in part, to have the pragmatic effect of improving the condition of men more than women," but concluding that "[t]he ERA provides both genders with tangible and intangible benefits"); Hirczy de Mino, supra note 316, at 1608-09 (noting that Texas ERA has protected men against sex discrimination sometimes "at the expense of women," but concluding that "[r]ecognizing men's parental rights claims to be on par with those of women is entirely consistent with the idea of jettisoning the separate sphere doctrine and ceasing to define women in terms of their reproductive function").
- 374 Linton, Making A Difference?, supra note 10, at 941 ("The ultimate irony of the adoption of equal rights amendments is that in many respects women have given up 'privileges' they always enjoyed in exchange for 'rights' that never were in jeopardy. Whether the symbolism of having enshrined a statement of equal rights under law in the constitutions of eighteen states was worth this price is a question women who live in those states must answer for themselves."); Linton & Joslin, supra note 10, at 284 (noting that courts have invalidated a range of statutes and common law rules that traditionally favored women over men).

- 375 Linton & Joslin, *supra* note 10, at 284.
- 376 Mr. Linton does not provide comprehensive quantitative data to support his conclusion that “most of the litigation brought under state equal rights provisions to date has involved statutes [or] ordinances that discriminated against men in favor of women.” Linton, *supra* note 10, at 940. Assuming that this assertion is correct, the litigation track record of claims by men under the Federal Equal Protection Clause is similar. The majority of the sex discrimination cases heard by the Supreme Court under the Equal Protection Clause have been brought by men. See BECKER ET AL., *supra* note 354, at 81 (noting that from 1971 through the end of 2000, of the twenty-nine constitutional sex discrimination cases that the Supreme Court decided, men brought eighteen, and women brought eleven). The predominance of male litigants thus reflects not an inherent defect in ERAs, but rather, more likely, the practical reality that men have greater economic resources than women to bear the costs of litigation. The unavailability of attorneys' fee awards under most state ERAs may exacerbate the imbalance between male and female litigants. See *supra* notes 362-69 and accompanying text (discussing court-awarded attorneys' fees). Moreover, a recent quantitative analysis of state ERA decisions found that when women do bring claims, they are more likely to prevail in state ERA claims than men. See Lisa Baldez et al., *supra* note 178, at 268 (“[T]he probability of the court finding discrimination is nearly .50 when a woman brings the suit; it dips to about a third for all other litigants.”).
- 377 KATHARINE T. BARTLETT, ANGELA P. HARRIS & DEBORAH L. RHODE, *GENDER AND THE LAW: THEORY, DOCTRINE, COMMENTARY* 118 (3d ed. 2002). In contrast, some policies, such as affirmative action policies in the employment context, explicitly advantage women solely to ameliorate the effects of past discrimination and increase female representation in institutions. Although few cases have considered the validity of sex-based affirmative action policies under state ERAs, the Washington Supreme Court has refused to invalidate these policies under its state ERA. See Sw. *Wash. Chapter, Nat'l Elec. Contractors Ass'n v. Pierce County*, 667 P.2d 1092, 1103 (Wash. 1983) (finding that a county affirmative action plan that gave preferences to businesses owned by minorities and women does not violate the Washington ERA); *Marchioro v. Chaney*, 582 P.2d 487, 492-93 (Wash. 1978) (finding that statutes mandating that both men and women hold responsible positions in state political parties do not violate the Washington ERA).
- 378 See *supra* notes 240-51 and accompanying text.
- 379 Law, *supra* note 56, at 996 (footnote omitted).
- 380 While some state ERAs provided a legal basis for invalidating the tender years presumption in some states, see, e.g., *Commonwealth ex rel. Spriggs v. Carson*, 368 A.2d 635, 639-40 (Pa. 1977), the complex social and political changes of the 1960s and beyond made abandonment of the maternal preference inevitable. Today, the vast majority of explicit sex-based custody preferences have been eliminated from the law via legislative action or judicial decision-making. BARTLETT ET AL., *supra* note 377, at 487.
- 381 BARBARA A. BABCOCK, ANN E. FREEDMAN, SUSAN DELLER ROSS, WENDY WEBSTER WILLIAMS, RHONDA COPELON, DEBORAH L. RHODE & NADINE TAUB, *SEX DISCRIMINATION AND THE LAW: HISTORY, PRACTICE AND THEORY* 1223-24 (2d ed. 1996) (citing DEBORAH L. RHODE, *JUSTICE AND GENDER* 155 (1989)).
- 382 *Id.* at 1224.
- 383 There is considerable thoughtful debate among legal scholars, including feminist scholars, about what standard should be applied in determining child custody. Many scholars have criticized the best-interests of the child standard. See, e.g., Mary Ann Glendon, *Fixed Rules and Discretion in Contemporary Family Law and Succession Law*, 60 TUL. L. REV. 1165, 1181-82 (1986); Robert H. Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 LAW & CONTEMP. PROBS. 226, 229-30 (Summer 1975). Most feminist scholars support sex-neutral alternatives, including, for example, a primary caretaker presumption, see, e.g., Martha Albert Fineman, *Dominant Discourse, Professional Language, and Legal Change in Child Custody Decisionmaking*, 101 HARV. L. REV. 727, 770-74 (1988), or a standard that allocates custodial responsibility in proportion to the share of responsibilities each parent assumed before the divorce, see, e.g., Katharine T. Bartlett, *Child Custody in the 21st Century: How the American Law Institute Proposes to Achieve Predictability and Still Protect the Individual Child's Best Interests*, 35 WILLIAMETTE L. REV. 467, 478-82 (1999); Elizabeth S. Scott, *Pluralism, Parental Preferences, and Child Custody*, 80 CAL. L. REV. 615, 639-41 (1992). Professor Mary Becker has argued for a maternal deference standard, not based on the original justification that women's caretaker role is biologically

determined, but because such a standard recognizes women's greater emotional commitment to children and better protects women's economic interests. See Mary Becker, [Maternal Feelings: Myth, Taboo, and Child Custody](#), 1 S. CAL. REV. L. & WOMEN'S STUD. 133, 142-58 (1992).

384 PENNSYLVANIA COMMISSION FOR WOMEN, IMPACT OF THE PENNSYLVANIA STATE EQUAL RIGHTS AMENDMENT: A REPORT ON THE IMPACT OF THE STATE EQUAL RIGHTS AMENDMENT IN PENNSYLVANIA SINCE 1971, at 11-16 (1980). The nineteen new laws mandated that all existing Pennsylvania statutes should be interpreted as “sex-neutral”; amended the Pennsylvania Human Relations Act by adding the word “sex” to those classes protected in public accommodations; and corrected inequities in various areas, including divorce, criminal law, treatment of rape victims, the military code, probate and estates, and tax assistance and rebates. *Id.* For a detailed history of Pennsylvania's Equal Rights Amendment, see SUSAN RUBINOW GORSKY, MARCH TO EQUALITY: WOMEN IN PENNSYLVANIA'S 300 YEAR HISTORY 16-36 (1982). Moreover, the Pennsylvania Supreme Court has held that ambiguities in all statutes must be read in light of the public policy against sex discrimination expressed in Pennsylvania's ERA. See [Hartford Accident & Indem. Co. v. Ins. Comm'r of the Commonwealth](#), 482 A.2d 542, 549 (Pa. 1984).

385 PENNSYLVANIA COMMISSION FOR WOMEN, *supra* note 384, at 4-7.

386 *Id.* at 7-8.

387 MICHAEL W. MCCANN, RIGHTS AT WORK: PAY EQUITY REFORM AND THE POLITICS OF LEGAL MOBILIZATION 6 (1994).

388 Hans S. Linde, Without “Due Process”: Unconstitutional Law in Oregon, 49 OR. L. REV. 125, 131 (1970).

389 Ginsburg, *supra* note 50, at 73.

390 Reva B. Siegel, [Text in Contest: Gender and the Constitution from a Social Movement Perspective](#), 150 U. PA. L. REV. 297, 345 (2001).

391 In the area of pay equity, for example, Professor McCann has argued that “legal norms significantly shaped the terrain of the struggle over wage equity; and, concurrently, that litigation and other legal tactics provided movement activists an important resource for advancing their cause.” McCann, *supra* note 387, at 4.

392 For a thoughtful reflection on the issues and challenges currently arising in the “third stage” of the New Judicial Federalism, see Williams, *supra* note 356, at 219-23.

393 FRIESEN, *supra* note 106, § 1-8(c), at 1-60 to -61; see also Friesen, *supra* note 358, at 28 (“Even when state constitutional claims are briefed, they are often wrapped in the recycled language of balancing ‘tests’ or other federally inspired formulas for judicial review .”).

394 500 A.2d 233 (Vt. 1985).

395 *Id.* at 235; see also [Commonwealth v. Edmunds](#), 586 A.2d 887, 894-95 (Pa. 1991) (urging counsel to engage in a detailed and specific independent analysis of the Pennsylvania Constitution).

396 FRIESEN, *supra* note 106, § 1-(c), at 1-61.

397 See, e.g., Kolbert & Gans, *supra* note 213; O'Neill, *supra* note 315; Weissman, *supra* note 317.

398 See, e.g., Kaufman, *supra* note 317.

399 See, e.g., Altschuler, *supra* note 131; Marquez, *supra* note 315.

400 See, e.g., Levick & Sherman, *supra* note 317.

401 See, e.g., [Newberg v. Bd. of Pub. Educ.](#), 26 Pa. D. & C.3d 682, 707-11 (1983), appeal quashed by 478 A.2d 1352 (Pa. Super. Ct. 1984) (finding that denying girls admission to a public high school in Philadelphia violated both the Federal Equal Protection Clause and the state ERA, and explicitly rejecting “the separate-but-equal concept” as violative of the state ERA). See

generally Nancy Levit, [Separating Equals: The Educational Research and the Long-Term Consequences of Sex Segregation](#), 67 GEO. WASH. L. REV. 451 (1999) (arguing against single-sex schooling); Valorie K. Vojdik, [Girls' Schools After VMI: Do They Make the Grade?](#), 4 DUKE J. GENDER L. & POL'Y 69 (1997) (same).

402 For a discussion of the choices “a hypothetical set of feminist drafters face if they were to constitutionalize women's equality,” see Sullivan, *supra* note 16, at 747-62.

36 RULJ 1201

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BACKGROUND

Vermont (VT) is considering doing a state equal rights amendment (ERA). They have already passed one bill through the state senate and this year they are considering adding some abortion-specific language to the original language that was drafted. However, it is possible that those behind the change are not planning to add language that expressly mentions abortion.

The current language and one proposal for additional language are as follows:

[Current] *“Equal protection under the law shall not be denied or abridged because of race, sex, age, religion, creed, color, familial status, disability, sexual orientation, gender identity, or national origin.”*

[Proposal] *“Sex” includes but is not limited to the capacity to become pregnant, pregnancy, and the prevention and termination of pregnancy.”*

If abortion-specific language is left out of the ERA, we would like to argue that sex discrimination includes abortion/pregnancy.

QUESTION PRESENTED

Is there any precedent of VT state courts considering legislative history when construing the meaning of constitutional amendments/provisions? If so, what types of legislative history have been considered—debates, analysis by a legislative committee, etc.?

BRIEF ANSWER

The Vermont Supreme Court has used “historical analysis” to construe the meaning of constitutional text. But after reviewing around 20 Vermont cases, I did not see the Court specifically refer to typical sources of legislative history such as committee hearings or debates. Instead, in many cases the Court conducted a historical analysis on how the particular provision came into being. And the provision at issue was typically a constitutional provision, not an amendment.

Of note is the Court’s frequent reference to how courts in other states have construed similar constitutional provisions. So, a sister-state court’s broad interpretation of its ERA could be an additional source in support of a broader reading of the term “sex.”

DISCUSSION

The Vermont Supreme Court is open to using “a number of different approaches in construing the Vermont Constitution,” including, “historical analysis, examination of the text, constructions of identical or similar provisions in other state constitutions, and use of sociological materials.” *State v. DeLaBruere*, 577 A.2d 254, 268 (1990). *But see Chittenden Town Sch. Dist. v. Dep’t of Educ.*, 738 A.2d 539, 549 (1999) (limiting consideration of extrinsic aids to sister-state provisions with only “slightly variant phraseology” that can be easily reconciled).

The Court has repeatedly stated that the interpretation of a constitutional provision or amendment begins by first looking “to the plain meaning of the [constitutional] language in question.” *See Turner v. Shumlin*, 163 A.3d 1173, 1183 (Vt. 2017) (quoting *State v. Madison*, 658 A.2d 536, 541–42 (Vt. 1995)); *see also Petition of Twenty-Four Vermont Utilities*, 618 A.2d 1295, 1308 (1992) (beginning first with the plain language of the constitutional text, then comparing how the Florida Supreme Court construed a similar provision, and then looking at other historical materials). In the Court’s view, “[i]f the constitutional language, in and of itself, unambiguously furnishes answers to the questions for decision, it prevails over extraneous aids to interpretation. *Peck v. Douglas*, 530 A.2d 551, 554 (Vt. 1987) (citing *Hartness v. Black*, 114 A. 44, 47 (Vt. 1921)). Therefore, if the issue can be resolved from the plain meaning of the constitutional text, it is unlikely that the court will consider outside resources, including legislative history.

Moreover, the Court has expressly questioned whether legislative history or “intent” adds any value when interpreting constitutional language because of the “elaborate adoption procedures” involved in adopting constitutional amendments. *Peck*, 530 A.2d at 554. The Court notes that “the workings of constitutional commissions and subsequent submission of the proposals to the people of [the] state” considerably dissipate the value of legislative intent alone. *Id.*

On the other hand, the Court has suggested that it is sometimes appropriate to go beyond plain meaning. In *Turner v. Shumlin*, the Court stated that “applying the plain meaning of [an ancient] provision’s language without considering its historical context” would give it pause. 163 A.3d at 1184. So, the Court comfortably refers to historical context to help determine the meaning of provisions written many years ago, i.e. the late 1700s. *See, e.g., Chittenden Town*

Sch. Dist. v. Dep't of Educ., 738 A.2d 539, 552 (Vt. 1999) (“One of our most useful tools to determine the meaning of a constitutional provision is an understanding of its historical context, and we have often relied upon history to illuminate the meaning of our constitution.”); *Daye v. State*, 769 A.2d 630, 638 (Vt. 2000) (“Plaintiffs are well served . . . in seeking guidance from the historical and ideological forces surrounding the framing of the constitutional provision at issue.”).

To note, the Court does not expressly state that “legislative history” is a resource, but its use of “historical context” is very similar to exploring legislative intent. *See State v. Jewett*, 500 A.2d 233, 236 (Vt. 1985) (internal citations omitted) (“Historical argument may also touch upon the legislative history of a particular provision, or on the social and political setting in which it originated, or on the fate of the [provision] in subsequent constitutions.”); *see also Daye*, 769 A.2d at 638 (quoting *Baker v. State*, 744 A.2d 864, 874 (Vt. 1999)) (“[T]he motivating ideal of the framers” must continually inform our analysis of contemporary issues.”).

When construing more recent amendments, the Court has often found no basis for “straying from the plain meaning” of constitutional language. *Turner*, 163 A.3d at 1184 (finding that historical context was not an issue in construing a provision enacted 43 years prior). But it has left open the possibility of considering extrinsic sources, such as the “intent of the voters” and “an official voter’s pamphlet that indicates the meaning of the language at issue,” when an amendment contains a legal term of art that exceeds the “average voter’s understanding” of the term. *See State v. Madison*, 658 A.2d 536, 542 (Vt. 1995) (discussing the legal term “*de novo*”).

Construing constitutional language versus statutory language:

The approach to interpreting constitutional language and meaning is different from that used to interpret “ordinary statutes.” *Peck v. Douglas*, 530 A.2d at 554. “[T]he purpose of any constitutional enactment is to delineate the framework of government, [and] the working details are frequently left . . . for legislative definition. Interpretation must, therefore, not be so narrow as to present an obstacle to that function.” *Id.* Still, for constitutional language, canons of construction are used “more cautiously and sometimes differently . . . because a constitutional provision, unlike a statute, usually operates to limit or direct legislative action.” *Id.* (citing *Dresden School District v. Norwich Town School District*, 203 A.2d 598, 600 (1964)). *Cf. Baker*

v. State, 744 A.2d 864, 868 (Vt. 1999) (“It is axiomatic that the principal objective of statutory construction is to discern the legislative intent.”).

The first step for the Court when interpreting a statute is the same as interpreting a constitutional provision: examine the statute’s language with the presumption that the “Legislature intended the plain, ordinary meaning of the statutory language.” *Shires Hous., Inc. v. Brown*, 172 A.3d 1215, 1219 (Vt. 2017). If the language is clear on its face, the Court accepts its plain meaning. *Id.* “But where the language creates ambiguity or uncertainty, [the Court] resort[s] to statutory construction to ascertain the legislative intent.” *Id.* At this point, the Court’s approach differs because the Court openly embraces the use of legislative history, noting that “[l]egislative history, circumstances surrounding a statute’s enactment, and evidence of the legislative policy at which the statute was aimed are indications of the Legislature’s intent.” *Id.*; *see also State v. Pellerin*, 996 A.2d 204, 209 n.3 (Vt. 2010) (“[P]olicy considerations are a helpful tool in discerning legislative intent.”).

The Court utilizes various types of legislative history but remains cognizant of the quality of the evidence in proving legislative intent. *See In re Dep’t of Bldgs. & Gen. Servs.*, 838 A.2d 78 (Vt. 2003). For example, in *In re Dep’t of Bldgs. & Gen. Servs.*, the Court found “committee testimony and discussion much more weighty in determining legislative intent than the remarks of a witness at a committee hearing.” *Id.* at 85 (internal quotations omitted). In addition, the Court considers committee statements that directly address the issue before the court, statements about an amendment’s purpose, and statements made by the bill’s sponsor to be persuasive. *Id.* *But see Madison*, 658 A.2d at 545 (“while statements in committee report concerning purpose of proposed law are used by courts in determining legislative history, courts are hesitant to resort to similar statements made by [individual] committee members or other persons at the committee’s hearings.”).

Interpreting “Sex”

In most of the cases where the Court interpreted a statute prohibiting discrimination on the basis of “sex,” the alleged discrimination was unequal treatment of men and women. So, the Court was not tasked with deciding whether to read “sex” broadly. One case, however, did prompt the Court to consider whether “sex” discrimination included discrimination because of

pregnancy. See *Lavalley v. E.B. & A.C. Whiting Co.*, 692 A.2d 367 (Vt. 1997). The Court decided in the affirmative. Below are conclusions and quotations from the opinion.

Discrimination because of pregnancy can constitute sex discrimination in violation of Fair Employment Practices Act (FEPA), 21 V.S.A. § 495(a)(1). See *Lavalley v. E.B. & A.C. Whiting Co.*, 692 A.2d 367, 369 (Vt. 1997).

“We are more persuaded by the decisions of the courts of our sister states, which have overwhelmingly found in interpreting similar or identical statutes that pregnancy discrimination can be sex discrimination.” *Lavalley*, 692 A.2d at 370.

“We agree with the reasoning of the Massachusetts Supreme Judicial Court that “[p]regnancy is a condition unique to women, and the ability to become pregnant is a primary characteristic of the female sex. Thus any classification which relies on pregnancy as the determinative criterion is a distinction based on sex.” *Lavalley*, 692 A.2d at 370 (citing *Massachusetts Elec. Co. v. Massachusetts Comm’n Against Discrimination*, 375 N.E.2d 1192, 1198 (Mass. 1978)).

The last quotation is likely the most helpful to our potential argument if “sex” is included in the ERA text but abortion-specific language is not. The Court’s view of pregnancy aligns with the proposed language in the Background section (above).

Codifying Protection for Women's Reproductive Rights

Council Adopted Policy, October 28, 2018

The VMS supports protecting women's reproductive rights, including the right to contraception and to safe legal abortion, through Vermont law and/or through a Vermont Constitutional amendment.

From: [Leriche, Lucy Rose](#)
To: [Diamond, Joshua](#); [Spottswood, Eleanor](#); [JKrowinsk](#) [REDACTED]; [beccabalin](#) [REDACTED]; [jlyal](#) [REDACTED]; [cwhite](#) [REDACTED]; [Levasseur, Katherine](#); [jill_krowinski](#)
Subject: Fwd: VMS Adopts Policy to Protect Women's Reproductive Rights
Date: Tuesday, October 30, 2018 10:41:04 AM
Attachments: [2018 Women's Reproductive Rights.docx](#)
[ATT00001.htm](#)

Please see below some good news from VMS! Looking forward to our meeting tomorrow.
Lucy

Sent from my iPhone

Begin forwarded message:

From: Jill Sudhoff-Guerin <[jsudhoffguerin](#) [REDACTED]>
Date: October 30, 2018 at 10:25:25 AM EDT
To: "Leriche, Lucy Rose" <[Lucy.Leriche](#) [REDACTED]>, Jessa Barnard <[jbarnard](#) [REDACTED]>, Stephanie Winters <[swinters](#) [REDACTED]>
Subject: VMS Adopts Policy to Protect Women's Reproductive Rights

Hi Lucy,

I am happy to report that we brought your proposal to our Council this past weekend and they voted in support of joining the coalition with Planned Parenthood to put protections for a women's right to safe abortion into statute and/or into the Vermont Constitution.

They also went a step further and created and adopted a new Council policy to provide more explicit support called, "**Codifying Protection for Women's Reproductive Rights.**" This policy states: *The VMS supports protecting women's reproductive rights, including the right to contraception and to safe legal abortion, through Vermont law and/or through a Vermont Constitutional amendment.*

We look forward to working with you on this important effort and welcome next steps.

All the best,
Jill, Jessa and Stephanie
Jill Sudhoff-Guerin
Policy and Communications Manager
Vermont Medical Society

[REDACTED]

[REDACTED]

Montpelier, VT 05601

[REDACTED]

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From: [Leriche, Lucy Rose](#)
To: [Diamond, Joshua](#); [Spottswood, Eleanor](#); [Jill Krowinski](#); [jill.krowinsk\[REDACTED\]](#); [cwhite\[REDACTED\]](#);
[jlyal\[REDACTED\]](#); [Becca Balint](#)
Subject: Reproductive Rights

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From: [Diamond, Joshua](#)
To: [Leriche, Lucy Rose](#)
Subject: Accepted: Reproductive Rights

From: [Spottswood, Eleanor](#)
To: [cwhite](#); [Diamond, Joshua](#); [Jill Krowinski](#); [Leriche, Lucy Rose](#); [jlyal](#); [Becca Balint](#); [Levasseur, Katherine](#)
Subject: RE: Doodle poll for next repro rights meeting
Date: Monday, November 26, 2018 10:08:49 AM
Attachments: [image001.png](#)
[image002.png](#)
[image003.png](#)

I will need to participate by phone, but otherwise that time is fine with me.

Ella

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

From: cwhite@aclvt.org <cwhite>
Sent: Monday, November 26, 2018 10:06 AM
To: [Diamond, Joshua](mailto:Joshua.Diamond@vermont.gov) <Joshua.Diamond@vermont.gov>; Spottswood, Eleanor <Eleanor.Spottswood@vermont.gov>; [Jill Krowinski](mailto:JKrowinski@leg.state.vt.us) <JKrowinski@leg.state.vt.us>; [Leriche, Lucy Rose](mailto:Lucy.Leriche) <Lucy.Leriche>; jlyal; [Becca Balint](mailto:beccabalint) <beccabalint>; [Levasseur, Katherine](mailto:klevasseur@leg.state.vt.us) <klevasseur@leg.state.vt.us>
Subject: RE: Doodle poll for next repro rights meeting

Hello all,

Hope you had a relaxing holiday.

An update – all of us but Rep. Krowinski and Senator Balint have replied to the Doodle, and this Thursday from 10-11 seems to work the best (Ella, you were a ‘yes, if need be’ on that time). How does that sound now that the holiday is behind us?

All the best,

Chloé

From: [cwhite](#)
Sent: Thursday, November 15, 2018 10:44 AM
To: [Diamond, Joshua](mailto:Joshua.Diamond@vermont.gov) <Joshua.Diamond@vermont.gov>; Spottswood, Eleanor <Eleanor.Spottswood@vermont.gov>; [Jill Krowinski](mailto:JKrowinski@leg.state.vt.us) <JKrowinski@leg.state.vt.us>; [Leriche, Lucy Rose](mailto:Lucy.Leriche) <Lucy.Leriche>; [Duff](mailto:jlyal) <jlyal>; [Becca Balint](mailto:beccabalint) <beccabalint>; KLevasseur@leg.state.vt.us

Subject: Doodle poll for next repro rights meeting

Hi everyone,

Pleasure seeing/speaking with most of you today. Here is a link to a Doodle poll for our next meeting. Please let me know if none of the dates or times work for you – we can always try for the week after.

<https://doodle.com/poll/x7v2cfusg9vctmc6>

Thank you, and have a happy holiday,

Chloé

—

Chloé White

Pronouns: she/her

Policy Director

American Civil Liberties Union of Vermont

[REDACTED], Montpelier, VT 05601

acluvt.org  



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From: [Becca Balint](#)
To: [Jill Krowinski](#)
Cc: [Diamond, Joshua](#); cwhite@aclvt.org; [Spottswood, Eleanor](#); [Leriche, Lucy Rose](#); [jlyal](#); [Levasseur, Katherine](#)
Subject: Re: Doodle poll for next repro rights meeting
Date: Tuesday, November 27, 2018 3:15:08 PM
Attachments: [image001.png](#)
[image002.png](#)
[image003.png](#)

I'll be joining by phone.
Becca

Sent from my iPad

On Nov 27, 2018, at 3:06 PM, Jill Krowinski <JKrowinski@leg.state.vt.us> wrote:

Hey all,

I can be there on Thursday.

Thanks,
Jill

From: Diamond, Joshua <Joshua.Diamond@vermont.gov>
Sent: Monday, November 26, 2018 10:42:46 AM
To: [cwhite](#); [Spottswood, Eleanor](#); [Jill Krowinski](#); [Leriche, Lucy Rose](#); [jlyal](#); [Becca Balint](#); [Katherine Levasseur](#)
Subject: RE: Doodle poll for next repro rights meeting

Folks,

I will be out of state on business and need to call in for a meeting this Thursday.

Regards, Josh

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

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From: cwhite [REDACTED] <cwhite [REDACTED]>
Sent: Monday, November 26, 2018 10:06 AM
To: Diamond, Joshua <Joshua.Diamond@vermont.gov>; Spottswood, Eleanor <Eleanor.Spottswood@vermont.gov>; Jill Krowinski <JKrowinski@leg.state.vt.us>; Leriche, Lucy Rose <[Lucy.Leriche \[REDACTED\]](mailto:Lucy.Leriche [REDACTED])>; jlyal [REDACTED]; Becca Balint <[beccabalint \[REDACTED\]](mailto:beccabalint [REDACTED])>; Levasseur, Katherine <klevasseur@leg.state.vt.us>
Subject: RE: Doodle poll for next repro rights meeting

Hello all,

Hope you had a relaxing holiday.

An update – all of us but Rep. Krowinski and Senator Balint have replied to the Doodle, and this Thursday from 10-11 seems to work the best (Ella, you were a 'yes, if need be' on that time). How does that sound now that the holiday is behind us?

All the best,

Chloé

From: cwhite [REDACTED]
Sent: Thursday, November 15, 2018 10:44 AM
To: Diamond, Joshua <Joshua.Diamond@vermont.gov>; Spottswood, Eleanor <Eleanor.Spottswood@vermont.gov>; Jill Krowinski <JKrowinski@leg.state.vt.us>; Leriche, Lucy Rose <[Lucy.Leriche \[REDACTED\]](mailto:Lucy.Leriche [REDACTED])>; Duff <[jlyal \[REDACTED\]](mailto:jlyal [REDACTED])>; Becca Balint <[beccabalint \[REDACTED\]](mailto:beccabalint [REDACTED])>; KLevasseur@leg.state.vt.us
Subject: Doodle poll for next repro rights meeting

Hi everyone,

Pleasure seeing/speaking with most of you today. Here is a link to a Doodle poll for our next meeting. Please let me know if none of the dates or times work for you – we can always try for the week after. <https://doodle.com/poll/x7v2cfusg9vctmc6>

Thank you, and have a happy holiday,

Chloé

—

Chloé White

Pronouns: she/her

Policy Director

American Civil Liberties Union of Vermont

[REDACTED], Montpelier, VT 05601

acluvt.org



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From: [Jill Krowinski](#)
To: [Diamond, Joshua](#); [cwhite \[REDACTED\]](#); [Spottswood, Eleanor](#); [Leriché, Lucy Rose](#); [jlyal \[REDACTED\]](#); [Becca Balint](#); [Levasseur, Katherine](#)
Subject: Re: Doodle poll for next repro rights meeting
Date: Tuesday, November 27, 2018 3:06:09 PM
Attachments: [image001.png](#);
[image002.png](#);
[image003.png](#)

Hey all,

I can be there on Thursday.

Thanks,
Jill

From: Diamond, Joshua <Joshua.Diamond@vermont.gov>
Sent: Monday, November 26, 2018 10:42:46 AM
To: [cwhite \[REDACTED\]](#); [Spottswood, Eleanor](#); [Jill Krowinski](#); [Leriché, Lucy Rose](#); [jlyal \[REDACTED\]](#); [Becca Balint](#); [Katherine Levasseur](#)
Subject: RE: Doodle poll for next repro rights meeting

Folks,

I will be out of state on business and need to call in for a meeting this Thursday.

Regards, Josh

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

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From: cwhite@acluvt.org <cwhite[REDACTED]>

Sent: Monday, November 26, 2018 10:06 AM

To: Diamond, Joshua <Joshua.Diamond@vermont.gov>; Spottswood, Eleanor <Eleanor.Spottswood@vermont.gov>; Jill Krowinski <JKrowinski@leg.state.vt.us>; Leriche, Lucy Rose <Lucy.Leriche[REDACTED]>; jlyall@acluvt.org; Becca Balint <beccabalint[REDACTED]>; Levasseur, Katherine <klevasseur@leg.state.vt.us>

Subject: RE: Doodle poll for next repro rights meeting

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All the best,

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From: cwhite[REDACTED]

Sent: Thursday, November 15, 2018 10:44 AM

To: Diamond, Joshua <Joshua.Diamond@vermont.gov>; Spottswood, Eleanor <Eleanor.Spottswood@vermont.gov>; Jill Krowinski <JKrowinski@leg.state.vt.us>; Leriche, Lucy Rose <[Lucy.Leriche\[REDACTED\]](mailto:Lucy.Leriche[REDACTED])>; Duff <[jlyall\[REDACTED\]](mailto:jlyall[REDACTED])>; Becca Balint <[beccabalint\[REDACTED\]](mailto:beccabalint[REDACTED])>; KLevasseur@leg.state.vt.us

Subject: Doodle poll for next repro rights meeting

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<https://doodle.com/poll/x7v2cfusg9vctmc6>

Thank you, and have a happy holiday,

Chloé

—

Chloé White

Pronouns: she/her

Policy Director

American Civil Liberties Union of Vermont

[REDACTED], Montpelier, VT 05601
[REDACTED]

acluvt.org  



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From: [Diamond, Joshua](#)
To: [Donovan, Thomas](#)
Subject: On call with Planned Parenthood
Date: Thursday, November 29, 2018 10:22:00 AM

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

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From: [cwhite](#) [REDACTED]
To: [jlyal](#) [REDACTED]; [Diamond, Joshua](#); [Spottswood, Eleanor](#); [Jill Krowinski](#); [Leriche, Lucy Rose](#); [Levasseur, Katherine](#); [Baird of Brattleboro](#)
Subject: Repro Rights Meeting
Start: Thursday, November 29, 2018 10:00:00 AM
End: Thursday, November 29, 2018 11:00:00 AM
Location: ACLU Offices, 90 Main St, Montpelier, VT

We will send out a call-in number for Josh and Ella and whoever else tomorrow.

From: [Becca Balint](#)
To: [cwhite \[REDACTED\]](#)
Cc: [Jill Krowinski](#); [Leriche, Lucy Rose](#); [Diamond, Joshua](#); [jlyal \[REDACTED\]](#); [Spottswood, Eleanor](#); [Levasseur, Katherine](#)
Subject: Re: Doodle for next reproductive rights meeting
Date: Monday, December 10, 2018 10:48:58 AM

Wednesday at 1 is best for me. And I will need a call in number.
Thank you!

Sent from my iPad

On Dec 9, 2018, at 10:19 PM, "[cwhite \[REDACTED\]](#)" <[cwhite \[REDACTED\]](#)> wrote:

No problem. Let's meet, and I'll send a conference number out if there's more than one who need to call in

Chloé White
Pronouns: she/her

Policy Director
American Civil Liberties Union of Vermont
[REDACTED], Montpelier, VT 05601
[REDACTED]
[REDACTED]

acluvt.org

From: Diamond, Joshua <Joshua.Diamond@vermont.gov>
Sent: Sunday, December 9, 2018 10:17:23 PM
To: [cwhite \[REDACTED\]](#); Jill Krowinski; Leriche, Lucy Rose
Cc: jlyall@acluvt.org; Spottswood, Eleanor; Becca Balint; Levasseur, Katherine
Subject: RE: Doodle for next reproductive rights meeting

I may be running a few minutes late.

Josh

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

joshua.diamond@vermont.gov

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From: [cwhite](#) <[cwhite](#)>
Sent: Friday, December 7, 2018 12:52 PM
To: Jill Krowinski <JKrowinski@leg.state.vt.us>; Leriche, Lucy Rose <[Lucy](#)>
Cc: Diamond, Joshua <Joshua.Diamond@vermont.gov>; [jlyal](#); Spottswood, Eleanor <Eleanor.Spottswood@vermont.gov>; Becca Balint <bbalint@leg.state.vt.us>; Levasseur, Katherine <klevasseur@leg.state.vt.us>
Subject: RE: Doodle for next reproductive rights meeting

Thank you for that – will we have enough to talk about without updated language, all, or should we try to shoot for another, later time?

From: Jill Krowinski <JKrowinski@leg.state.vt.us>
Sent: Friday, December 07, 2018 10:46 AM
To: Leriche, Lucy Rose <[Lucy.Leriche](#)>
Cc: [cwhite](#); Diamond, Joshua <Joshua.Diamond@vermont.gov>; [jlyal](#); Spottswood, Eleanor <Eleanor.Spottswood@vermont.gov>; Becca Balint <bbalint@leg.state.vt.us>; Katherine Levasseur <KLevasseur@leg.state.vt.us>
Subject: Re: Doodle for next reproductive rights meeting

Hi all,

That time works for me but I'll have to call in. Also, I'm not sure I'll have updated language by then.

Chat soon,
Jill

Sent from my iPhone

On Dec 7, 2018, at 10:06 AM, Leriche, Lucy Rose <[Lucy.Leriche](#)> wrote:

I can make either of those times.
Lucy

Sent from my iPhone

On Dec 7, 2018, at 9:56 AM, "[cwhite \[REDACTED\]](#)" <[cwhite \[REDACTED\]](#)> wrote:

Hello everyone,

Based on the Doodle, it seems that Wednesday the 12th at 1pm is the best so far. Any objections to scheduling that as our time? Noon on Wednesday seems to also be a good time, if that would work better for those who haven't yet participated.

Have a wonderful weekend,

Chloé

From: [cwhite \[REDACTED\]](#)
Sent: Friday, November 30, 2018 2:07 PM
To: 'Diamond, Joshua' <Joshua.Diamond@vermont.gov>; Duff <[jlval \[REDACTED\]](#)>; 'Jill Krowinski' <JKrowinski@leg.state.vt.us>; 'Spottswood, Eleanor' <Eleanor.Spottswood@vermont.gov>; 'Balint of Brattleboro' <bbalint@leg.state.vt.us>; 'Leriche, Lucy Rose' <[Lucy.Leriche \[REDACTED\]](mailto:Lucy.Leriche [REDACTED])>; 'KLevasseur@leg.state.vt.us' <klevasseur@leg.state.vt.us>
Subject: Doodle for next reproductive rights meeting

Hello all,

It was a pleasure seeing and/or speaking with you yesterday. As promised, [here is the Doodle link](#) for setting up our next meeting, which folks indicated should be late week in two weeks. Please let me know if you'd prefer alternate dates or times.

Best,

Chloé

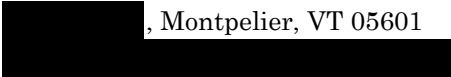
—

Chloé White

Pronouns: she/her

Policy Director

American Civil Liberties Union of Vermont

 , Montpelier, VT 05601

acluvt.org  



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From: [cwhite](#) [REDACTED]
To: [Leriche, Lucy Rose](#)
Cc: [Jill Krowinski](#); [Diamond, Joshua](#); jlyall@acluvt.org; [Spottswood, Eleanor](#); [Becca Balint](#); [Levasseur, Katherine](#)
Subject: RE: Doodle for next reproductive rights meeting
Date: Tuesday, December 11, 2018 9:43:11 AM

Hi all,

Here's the call-in number for tomorrow: [REDACTED]. The participant access code is [REDACTED]. Talk to/see you all tomorrow at 1 here at the ACLU.

Chloé

From: Leriche, Lucy Rose <Lucy.Leriche [REDACTED]>
Sent: Friday, December 07, 2018 2:13 PM
To: cwhite [REDACTED]
Cc: Jill Krowinski <JKrowinski@leg.state.vt.us>; Diamond, Joshua <Joshua.Diamond@vermont.gov>; jlyal [REDACTED]; Spottswood, Eleanor <Eleanor.Spottswood@vermont.gov>; Becca Balint <bbalint@leg.state.vt.us>; Katherine Levasseur <KLevasseur@leg.state.vt.us>
Subject: Re: Doodle for next reproductive rights meeting

I think we should meet.

Lucy

Sent from my iPhone

On Dec 7, 2018, at 12:52 PM, "[cwhite](#) [REDACTED]" <[cwhite](#) [REDACTED]> wrote:

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Sent: Friday, December 07, 2018 10:46 AM
To: Leriche, Lucy Rose <[Lucy.Leriche](#) [REDACTED]>
Cc: [cwhite](#) [REDACTED]; Diamond, Joshua <Joshua.Diamond@vermont.gov>; [jlyal](#) [REDACTED]; Spottswood, Eleanor <Eleanor.Spottswood@vermont.gov>; Becca Balint <bbalint@leg.state.vt.us>; Katherine Levasseur <KLevasseur@leg.state.vt.us>
Subject: Re: Doodle for next reproductive rights meeting

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Chat soon,
Jill

Sent from my iPhone

On Dec 7, 2018, at 10:06 AM, Leriche, Lucy Rose <Lucy.Leriche> wrote:

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Lucy

Sent from my iPhone

On Dec 7, 2018, at 9:56 AM, "cwhite" <cwhite> wrote:

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Have a wonderful weekend,

Chloé

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Sent: Friday, November 30, 2018 2:07 PM
To: 'Diamond, Joshua' <Joshua.Diamond@vermont.gov>; Duff <jlyal>; 'Jill Krowinski' <JKrowinski@leg.state.vt.us>; 'Spottswood, Eleanor' <Eleanor.Spottswood@vermont.gov>; 'Balint of Brattleboro' <bbalint@leg.state.vt.us>; 'Leriche, Lucy Rose' <Lucy.Leriche>; 'KLevasseur@leg.state.vt.us' <klevasseur@leg.state.vt.us>
Subject: Doodle for next reproductive rights meeting

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Best,

Chloé

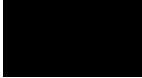
—

Chloé White


Pronouns: she/her

Policy Director

American Civil Liberties Union of Vermont

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From: [cwhite](#) [REDACTED]
To: [Diamond, Joshua](#); [Leriché, Lucy Rose](#); [Becca Balint](#); [Jill Krowinski](#); [Levasseur, Katherine](#); [Spottswood, Eleanor](#); [jlyal](#) [REDACTED]
Subject: Repro rights meeting
