

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE

THE FAMILY PLANNING
ASSOCIATION OF MAINE D/B/A
MAINE FAMILY PLANNING, on
behalf of itself, its staff, and its
patients;

and

J. DOE, DO, MPH, individually and on
behalf of Dr. Doe’s patients,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF
HEALTH AND HUMAN SERVICES;

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

OFFICE OF POPULATION AFFAIRS;

and

DIANE FOLEY, M.D., in her official
capacity as the Deputy Assistant
Secretary for Population Affairs,

Defendants.

Case No. 1:19-CV-00100-LEW

**MOTION FOR LEAVE TO FILE
BRIEF OF *AMICI CURIAE* 153
MEMBERS OF CONGRESS AS
AMICI IN SUPPORT OF
DEFENDANTS’ OPPOSITION
TO MOTION FOR
PRELIMINARY INJUNCTION**

Proposed *amici curiae*, 153 Members of Congress, respectfully move this Court for leave to file a Brief as *Amici Curiae* in Opposition to Plaintiffs' Motion for Preliminary Injunction, a copy of which is attached as Exhibit A. In support of the motion, the 153 Members of Congress state as follows:

1. The 153 Members of Congress share an interest in upholding America's longstanding tradition of not using taxpayer money to fund or otherwise subsidize abortion. This case involves the Department of Health and Human Services' (HHS) efforts to ensure compliance with numerous federal laws passed by Congress that preclude recipients of federal funding from co-mingling those funds with the provision of abortion, abortion referrals, or abortion counseling, or with other efforts to further a pro-abortion agenda. On March 4, 2019, HHS revised its regulations of the Title X program to ensure compliance with federal laws that prohibit federal funding of abortion, requiring that none of the federal funds appropriated under Title X be used where abortion is a method of family planning. Compliance With Statutory Program Integrity Requirements, 84 Fed. Reg. 7714 (Mar. 4, 2019) (to be codified at 42 C.F.R. pt. 59). The revision of regulations also protects freedom of conscience by eliminating the Title X requirement that grantees must counsel and refer for abortion, regardless of their deeply held beliefs and convictions. Plaintiffs have filed a request to preliminarily enjoin these regulations. *Amici curiae* support the Defendants' opposition to Plaintiffs' request for a preliminary injunction.

2. The 153 Members of Congress have a vested interest in ensuring that HHS is free to properly implement decades-old rules that Congress has specifically

promulgated to avoid federal funding of abortion. They also have a strong interest in furthering our country's rich heritage of protecting freedom of conscience.

3. This Court "retains the inherent authority to appoint *amicus curiae* to assist it in a proceeding." *All. of Auto. Mfrs. v. Gwadowsky*, 297 F. Supp. 2d 305, 306 (D. Maine 2003) (citations omitted). Moreover, "[i]t remains within the discretion of the court to determine the fact, extent, and the manner of participation by the *amicus*." *Id.* at 307 (citations omitted). Requests to appear *amici curiae* are granted "when there is an issue of general public interest, the *amicus* provides supplemental assistance to existing counsel, or the *amicus* insures a complete and plenary presentation of difficult issues so that the court may reach a proper decision." *Id.* (citations omitted). It is unquestionable that the fulfillment of Congressional intent to avoid funding abortion is in the public interest. Moreover, the proposed *amici* are all members of Congress, and therefore uniquely qualified to comment on the legislative and public interests involved in implementing the Title X program to comply with the rules created by Congress to avoid federal funding of abortion.

4. The parties have filed a blanket consent to the filing of *amicus* briefs. ECF No. 19. Such consent extends to the filing of *amicus* briefs supporting Defendants filed on or before April 19, 2019. *Id.* at 1.

The 153 Members of Congress therefore respectfully that this Court grant leave to file their brief *amici curiae*, attached as Exhibit A.

Respectfully submitted,

Dated: April 15, 2019

s/ Brett D. Baber

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*Certifications to appear *pro hac vice* submitted
contemporaneously with this motion

CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of April, 2019, I electronically filed the foregoing paper with the Clerk of Court using the ECF system.

s/ Brett D. Baber

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Exhibit A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE

THE FAMILY PLANNING
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and

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INTEREST OF AMICI CURIAE

Amici are 153 Members of Congress. The Appendix to this brief sets forth a complete list of *amici curiae*.

These Members share an interest in upholding America's longstanding tradition of not using taxpayer money to fund or otherwise subsidize abortion. This case involves the Department of Health and Human Services' (HHS) efforts to ensure compliance with numerous federal laws that preclude recipients of federal funds from co-mingling those funds with the provision of abortion, abortion referrals, or abortion counseling, or with other efforts to further a pro-abortion agenda. Also at issue are regulations designed to protect freedom of conscience.

Amici Members of Congress have a vested interest in ensuring that HHS is free to properly implement decades-old rules that Congress has specifically promulgated to avoid funding abortion. They also have a strong interest in furthering our country's rich heritage of protecting freedom of conscience.

ARGUMENT

On March 4, 2019, HHS announced that it revised its Title X regulations to ensure compliance with, and to better enforce, the statutory requirement that none of the funds appropriated for Title X may be used in programs where abortion is a method of family planning. Compliance With Statutory Program Integrity Requirements, 84 Fed. Reg. 7714 (Mar. 4, 2019) (to be codified at 42 C.F.R. pt. 59).

The Integrity Rule, among other things, requires a clear physical and financial separation between Title X programs and programs in which abortion is

presented or provided as a method of family planning, and eliminates the requirement that Title X projects provide abortion referral and counseling.

The Plaintiffs' motion for preliminary injunction primarily focuses on the program integrity requirements. This Court should deny that motion since these provisions are largely identical to a former rule already upheld in *Rust v. Sullivan*, 500 U.S. 173 (1991), and are consistent with similar program integrity requirements many states already have in place.

Plaintiffs also ask this Court to enjoin the entire Integrity Rule, including the freedom of conscience provisions. The broad injunction requested by Plaintiffs would stymie the Rule's attempt to provide much needed greater protection for freedom of conscience.

The motion for preliminary injunction should be denied.

I. Title X's program integrity requirements are consistent with the Supreme Court's decision in *Rust v. Sullivan* affirming similar rules adopted in 1988.

In *Rust*, the Supreme Court upheld Title X regulations (adopted in 1988) which are remarkably similar to those challenged in this lawsuit. 500 U.S. 173. For example, both the 1988 regulations and the recently adopted program integrity requirements specifically provide that "none of the funds" appropriated under Title X may "be used in programs where abortion is a method of family planning." 42 U.S.C. § 300a-6; 42 CFR §59.7(1) (to be codified; available at <https://www.federalregister.gov/documents/2019/03/04/2019-03461/compliance-with-statutory-program-integrity-requirements>). Both also require grantees to physically and financially separate their Title X services from prohibited abortion-

related activities, and prohibit projects funded by Title X from counseling or referring clients for abortion as a method of family planning. 53 Fed. Reg. 2922 (Feb. 2, 1988); 42 CFR §59.5.

The Supreme Court determined that the requirement that Title X recipients separate the facilities, personnel, and records involved in Title X family planning services from those involved in abortion-related services was “based on a permissible construction of the [Title X] statute and [was] not inconsistent with congressional intent.” *Rust*, 500 U.S. at 188. Importantly, the Court noted, “if one thing is clear from the legislative history, it is that Congress intended that Title X funds be kept separate and distinct from abortion-related activities.” *Id.* at 190.

In upholding the prohibition on abortion counseling and referral, the Court noted that it was “designed to ensure that the limits of the [Title X] program [were] observed” and provided assurance that “a [Title X] grantee or its employees [was not] engaging in activities outside of [Title X]’s scope” when providing federally funded family planning services. *Id.* at 193-94.

The program integrity requirements have exactly the same purposes as their 1988 predecessors and are constitutionally sound.

II. The Integrity Rule is consistent with numerous state laws.

Numerous states have already taken legislative action to ensure that recipients of Title X and/or state family planning funding are complying with program integrity requirements. Ten states have enacted laws ensuring that Title X

funding is kept separate and distinct from the provision of abortion.¹ This objective has been accomplished through a variety of means (with some states enacting more than one related requirement):

- Four states restrict the allocation of Title X family planning funding to entities that do not provide abortions, do not contract or affiliate with abortion providers, and/or do not counsel or refer for abortions.²
- Three states prohibit the allocation of Title X family planning funding to private providers that focus or specialize in “reproductive health” (*i.e.*, abortion providers).³
- Four states maintain priority systems for distributing Title X family planning funding that places “reproductive health” programs (*i.e.*, providers that most commonly perform abortions) in the lowest priority tier.⁴

Further, 16 states have enacted program integrity requirements that apply to state-funded family planning programs (with some states enacting more than one related requirement):⁵

- Thirteen states restrict the allocation of state family planning funding to entities that do not provide abortion.⁶
- Eight states restrict the allocation of state family planning funding to entities that do not contract or affiliate with abortion providers.⁷

¹ Arizona, Kansas, Kentucky, Louisiana, Mississippi, Nebraska, Ohio, Oklahoma, South Carolina, and Wisconsin.

² Louisiana, Mississippi, Nebraska, and Wisconsin.

³ Arizona, Kansas, and Oklahoma.

⁴ Kentucky, Ohio, South Carolina, and Wisconsin.

⁵ Arizona, Arkansas, Colorado, Indiana, Iowa, Kentucky, Louisiana, Michigan, Mississippi, Missouri, North Carolina, Ohio, Oklahoma, Tennessee, Texas, and Wisconsin. Louisiana’s requirements for its state-funded family planning programs are not being enforced pending the outcome of litigation.

⁶ Arizona, Arkansas, Colorado, Indiana, Iowa, Louisiana, Michigan, Mississippi, Missouri, North Carolina, Ohio, Texas, and Wisconsin.

⁷ Arizona, Arkansas, Iowa, Louisiana, Mississippi, Missouri, Texas, and Wisconsin.

- Four states restrict the allocation of state family planning funding to entities that do not counsel or refer for abortion.⁸
- Two states prohibit the allocation of state family planning funding to private providers that focus or specialize in “reproductive health” (*i.e.*, abortion providers).⁹
- Three states maintain priority systems for distributing state family planning funding that places “reproductive health” providers (*i.e.*, providers that most commonly perform abortions) in the lowest priority tier.¹⁰

These laws represent a growing consensus that program integrity requirements like those at issue in this case are necessary to ensure both quality and accessible patient care, and the proper administration of taxpayer dollars.

III. The Integrity Rule recognizes the importance of and provides protection for the First Amendment freedom of conscience.

A current requirement that Title X grantees must, regardless of their deeply held beliefs and convictions, counsel and refer for abortion violates our Nation’s longstanding commitment to protecting freedom of conscience.¹¹ It is just one example of the many threats to the freedom of conscience that medical professionals across the country are currently experiencing.¹² The Integrity Rule’s elimination of this requirement comports with America’s history, tradition, and laws, and affirms

⁸ Arkansas, Michigan, Ohio, and Wisconsin.

⁹ Kentucky and Oklahoma.

¹⁰ South Carolina, Tennessee, and Texas.

¹¹ 65 Fed. Reg. 41270 (July 3, 2000).

¹² Kevin Theriot & Ken Connelly, *Free to Do No Harm: Conscience Protections for Healthcare Professionals*, 49 Ariz. St. L.J. 549 (2017) (listing examples of governmental restriction of healthcare professionals’ freedom of conscience and the grounds for protecting them).

that no one should be forced to commit an act that violates his or her moral, religious, or conscientious beliefs.

A. America's Founders affirmed freedom of conscience.

At the very root of the First Amendment's promise of the Free Exercise of Religion is the guarantee that the government cannot force a person to commit an act in violation of his or her religious faith or beliefs. The signers to the religion provisions of the First Amendment were united in a desire to protect freedom of conscience.

For example, Thomas Jefferson made it clear that freedom of conscience is not to be subordinate to the government: "[O]ur rulers can have authority over such natural rights only as we have submitted to them. The rights of conscience we never submitted, we could not submit. We are answerable for them to our God." Thomas Jefferson, *Notes on the State of Virginia* (1785). Jefferson also stated that no provision in the Constitution "ought to be dearer to man than that which protects the rights of conscience against the enterprises of civil authority." Thomas Jefferson, *Letter to New London Methodists* (1809).

Likewise, James Madison, considered the Father of the Bill of Rights, was deeply concerned that the freedom of conscience of all Americans be protected. He stated that "[t]he Religion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate. This right is in its nature *unalienable right*." James Madison, *Memorial and Remonstrance Against Religious Assessments* ¶ 1 (1785) (emphasis added). In

fact, Madison described conscience as “the most sacred of all property.” Buckner F. Melton Jr., *The Quotable Founding Fathers; A Treasury of 2,500 Wise and Witty Quotations from the Men and Women Who Created America* 36-37 (2005).

B. The U.S. Supreme Court affirms freedom of conscience.

The Supreme Court has consistently ruled in favor of protecting the freedom of conscience of every American. It has clearly stated that “[f]reedom of conscience . . . cannot be restricted by law.” *Cantwell v. Conn.*, 310 U.S. 296, 303 (1940). In fact, “freedom of conscience” is referenced explicitly throughout the Supreme Court’s more than two centuries of jurisprudence.¹³

C. Federal and State Laws protect freedom of conscience.

The federal government and the states have enacted numerous measures expressing their commitment to protecting the First Amendment freedom of conscience of healthcare providers – such as Title X family planning grantees – not to participate in abortion (such as through mandated abortion counseling and referral).

¹³ See, e.g., *Baird v. State Bar of Ariz.*, 401 U.S. 1, 6 (1971) (“This conjunction of liberties is not peculiar to religious activity and institutions alone. The First Amendment gives freedom of mind the same security as freedom of conscience.”); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 n.2 (1969) (referencing “constitutionally protected freedom of conscience”); *Nat’l Inst. of Family & Life Advocates v. Beccera*, 138 S. Ct. 2361, 2379 (2018) (Kennedy, J. concurring) (“Governments must not be allowed to force persons to express a message contrary to their deepest convictions. Freedom of speech secures freedom of thought and belief. This law imperils those liberties.”).

Federal laws, including the “Church Amendments,”¹⁴ the Coats-Snowe Amendment to the Public Services Act,¹⁵ and the Weldon Amendment,¹⁶ protect the right of both individual and institutional healthcare providers to decline to participate in abortion.

¹⁴ 42 U.S.C. §300a-7(b), *et. seq.* The first “Church Amendment” was adopted in 1973, the year *Roe v. Wade* was decided. 410 U.S. 113 (1973). It provides that the receipt of funding through three federal programs cannot be used as a basis to compel a hospital or individual to participate in an abortion to which the hospital or individual has a moral or religious objection.

¹⁵ 42 U.S.C. § 238n. This provision prohibits the federal government and state or local governments that receive federal financial assistance from discriminating against individual and institutional healthcare providers, including participants in medical training programs, who refuse to receive training in abortion; require or provide such training; perform abortions; or provide referrals or make arrangements for such training or abortions.

¹⁶ Consolidated Appropriations Act 2008, Pub. L. No. 110-161, § 508(d), 121 Stat. 1844, 2209 (2007) (formerly known as the Hyde-Weldon Amendment). The Weldon Amendment provides that no federal, state, or local government agency or program that receives funds in the Labor, Health and Human Services (LHHS) appropriations bill may discriminate against a healthcare provider because the provider refuses to provide, pay for, provide coverage of, or refer for abortion.

Similarly, 48 states protect the right of individual healthcare providers to decline to participate in abortion,¹⁷ while 43 states provide similar protections to healthcare institutions.¹⁸

The elimination of the requirement that family planning services funded by Title X provide abortion counseling and referral similarly protects the fundamental freedom of conscience and is in keeping with the letter and spirit of dozens of federal and state laws.

CONCLUSION

Plaintiffs' motion requesting the Court to preliminarily enjoin all provisions of the Rule should be denied.

Respectfully submitted this 15th day of April, 2019.

¹⁷ Forty-eight states protect (to varying degrees) the freedom of conscience of certain healthcare providers to decline to participate in abortion: Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, Wisconsin, West Virginia, and Wyoming.

Only New Hampshire and Vermont failed to protect healthcare freedom of conscience.

¹⁸ Forty-three states protect healthcare institutions that decline to participate in abortion: Alaska (private), Arizona, Arkansas, California (religious), Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana (private), Iowa (private), Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts (private), Michigan, Minnesota (private), Mississippi, Missouri, Montana (private), Nebraska, Nevada (private), New Jersey (private), New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon (private), Pennsylvania (private), South Carolina (private), South Dakota, Tennessee, Texas (private), Utah, Virginia, Washington, Wisconsin, and Wyoming (private).

s/ Brett D. Baber

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Attorneys for Amici Curiae

*Certifications to appear *pro hac vice* submitted contemporaneously with this motion

APPENDIX – LIST OF *AMICUS CURIAE*

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Marsha Blackburn (TN)	Kevin Cramer (ND)
James Risch (ID)	James Inhofe (OK)
Pat Roberts (KS)	James Lankford (OK)
Roy Blunt (MO)	Rick Scott (SC)
Cindy Hyde-Smith (MS)	Mike Enzi (WY)
Steve Daines (MT)	

U.S. House of Representatives

Kevin McCarthy (CA-23), House Republican Leader

Steve Scalise (LA-01), House Republican Whip

Liz Cheney (WY-AL), House Republican Conference Chair

Bradley Byrne (AL-01)	Duncan Hunter (CA-50)
Martha Roby (AL-02)	Doug Lamborn (CO-05)
Robert B. Aderholt (AL-04)	Matt Gaetz (FL-01)
Gary Palmer (AL-06)	Ted S. Yoho, DVM (FL-03)
French Hill (AR-02)	Michael Waltz (FL-06)
Steve Womack (AR-03)	Daniel Webster (FL-11)
Bruce Westerman (AR-04)	Gus Bilirakis (FL-12)
Paul A. Gosar, D.D.S. (AZ-04)	Ross Spano (FL-15)
Andy Biggs (AZ-05)	W. Gregory Steube (FL-17)
Debbie Lesko (AZ-08)	Francis Rooney (FL-19)
Doug LaMalfa (CA-01)	Earl L. “Buddy” Carter (GA-01)
Tom McClintock (CA-04)	A. Drew Ferguson, IV DMD (GA-03)
Paul Cook (CA-08)	Rob Woodall (GA-07)
Ken Calvert (CA-42)	Austin Scott (GA-08)

Doug Collins (GA-09)
Jody B. Hice (GA-10)
Barry Loudermilk (GA-11)
Rick W. Allen (GA-12)
Tom Graves (GA-14)
Russ Fulcher (ID-01)
Mike Bost (IL-12)
John Shimkus (IL-15)
Adam Kinzinger (IL-16)
Darin LaHood (IL-18)
Jackie Walorski (IN-02)
Jim Banks (IN-03)
Jim Baird (IN-04)
Greg Pence (IN-06)
Larry Bucshon, M.D. (IN-08)
Roger Marshall, M.D. (KS-01)
Ron Estes (KS-04)
James Comer (KY-01)
Brett Guthrie (KY-02)
Thomas Massie (KY-04)
Andy Barr (KY-06)
Clay Higgins (LA-03)
Mike Johnson (LA-04)
Ralph Abraham, M.D. (LA-05)
Garret Graves (LA-06)
Andy Harris, M.D. (MD-01)
Jack Bergman (MI-01)

Bill Huizenga (MI-02)
John Moolenaar (MI-04)
Tim Walberg (MI-07)
Paul Mitchell (MI-10)
Jim Hagedorn (MN-01)
Tom Emmer (MN-06)
Pete Stauber (MN-08)
Ann Wagner (MO-02)
Blaine Luetkemeyer (MO-03)
Vicky Hartzler (MO-04)
Sam Graves (MO-06)
Billy Long (MO-07)
Jason Smith (MO-08)
Trent Kelly (MS-01)
Michael Guest (MS-03)
Steven Palazzo (MS-04)
Greg Gianforte (MT-AL)
George Holding (NC-02)
Virginia Foxx (NC-05)
Mark Walker (NC-06)
David Rouzer (NC-07)
Richard Hudson (NC-08)
Patrick McHenry (NC-10)
Mark Meadows (NC-11)
Ted Budd (NC-13)
Kelly Armstrong (ND-AL)
Adrian Smith (NE-03)

Christopher H. Smith (NJ-04)	Mark Green (TN-07)
Peter King (NY-02)	Louie Gohmert (TX-01)
Chris Collins (NY-27)	John Ratcliffe (TX-04)
Steve Chabot (OH-01)	Ron Wright (TX-06)
Brad Wenstrup (OH-02)	Kevin Brady (TX-08)
Jim Jordan (OH-04)	K. Michael Conaway (TX-11)
Robert E. Latta (OH-05)	Kay Granger (TX-12)
Bill Johnson (OH-06)	Randy K. Weber (TX-14)
Bob Gibbs (OH-07)	Bill Flores (TX-17)
Troy Balderson (OH-12)	Jodey Arrington (TX-19)
Anthony Gonzalez (OH-16)	Chip Roy (TX-21)
Warren Davidson (OH-8)	Pete Olson (TX-22)
Kevin Hern (OK-01)	Kenny Marchant (TX-24)
Tom Cole (OK-04)	Michael C. Burgess, M.D. (TX-26)
Lloyd Smucker (PA-11)	Michael Cloud (TX-27)
John Joyce, M.D. (PA-13)	Brian Babin, D.D.S (TX-36)
Guy Reschenthaler (PA-14)	Lance Gooden (TX-05)
Mike Kelly (PA-16)	Rob Bishop (UT-01)
Joe Wilson (SC-02)	Chris Stewart (UT-02)
Jeff Duncan (SC-03)	John Curtis (UT-03)
Ralph Norman (SC-05)	Ben Cline (VA-06)
Dusty Johnson (SD-AL)	H. Morgan Griffith (VA-09)
David P. Roe, M.D. (TN-01)	Jaime Herrera Beutler (WA-03)
Tim Burchett (TN-02)	Dan Newhouse (WA-04)
Chuck Fleischmann (TN-03)	Cathy McMorris Rodgers (WA-05)
Scott DesJarlais (TN-04)	F. James Sensenbrenner, Jr. (WI-05)
John Rose (TN-06)	Glenn Grothman (WI-06)

Sean Duffy (WI-07)

Carol D. Miller (WV-03)

Alex X. Mooney (WV-02)

CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of April, 2019, I electronically filed the foregoing paper with the Clerk of Court using the ECF system. The following participants in the case who are registered CM/ECF users will be served by the CM/ECF system:

s/ Brett D. Baber
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