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Litigation Challenging Title X Regulations

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Introduction

On March 4, 2019, the Trump Administration issued new regulations that makes significant changes to Title X, the federal family planning grant program. The new regulations effectively block the availability of Title X grants to family planning clinics that offer abortion services with other funds, curtail counseling, ban Title X projects from making referrals to abortion services, and require all pregnant patients served by Title X clinics to be referred for prenatal services, regardless of their pregnancy intention. Shortly after the regulations were finalized, the attorneys general from 23 states, major family planning organizations and the American Medical Association filed legal challenges in federal courts to block the implementation of the final Title X regulations.

Box 1: Key Facts–Title X Federal Family Planning Program

- Title X, enacted in 1970, is the only federal program specifically dedicated to supporting the delivery of family planning care.
- Administered by the HHS Office of Population Affairs (OPA), and funded at $286.5 million for Fiscal Year 2018, the program served over 4 million low-income, uninsured, and underserved clients that year.
- In 2017, nearly 4,000 clinics nationwide relied on Title X funding to help serve 4 million people. The sites include specialized family planning clinics such as Planned Parenthood centers, community health centers, state health departments, as well as school-based, faith-based, and other nonprofit organizations.
- Title X grants made up about 19% of revenue for family planning services for participating clinics in 2017, providing funds to not only cover the direct costs of family planning services, but also pay for general operating costs such as staff salaries, staff training, rent, and health information technology.

Although the district courts in Washington, Oregon, California and Maryland initially issued preliminary injunctions blocking the implementation of the new regulations, the Courts of Appeals have blocked these preliminary injunctions, and the regulations are currently in effect pending the outcome of the litigation. The Trump Administration Title X regulations are similar to rules issued by the Reagan Administration that were also challenged by provider groups, but were ultimately upheld in 1991 by the Supreme Court in *Rust v Sullivan*. Ultimately, one or more of these cases may be appealed to the Supreme Court, to decide whether the Trump Administration regulations violate the federal statutes or the Constitution or are within their agency rights. This brief provides an overview of the legal challenges to the Trump Administration final regulations and summarizes the key positions of the plaintiffs and HHS.

What provisions of the final regulations are being challenged?

On March 4, 2019, new final regulations for Title X grants were published in the Federal Register. The Office of Population Affairs, the federal agency that administers the program announced that the regulations would become effective on July 15, 2019 with a full phase in on March 4, 2020. The regulations make many changes to the requirements for Title X projects that are already reshaping the program and provider network available to low-income people through Title X.

Specifically, the regulations:

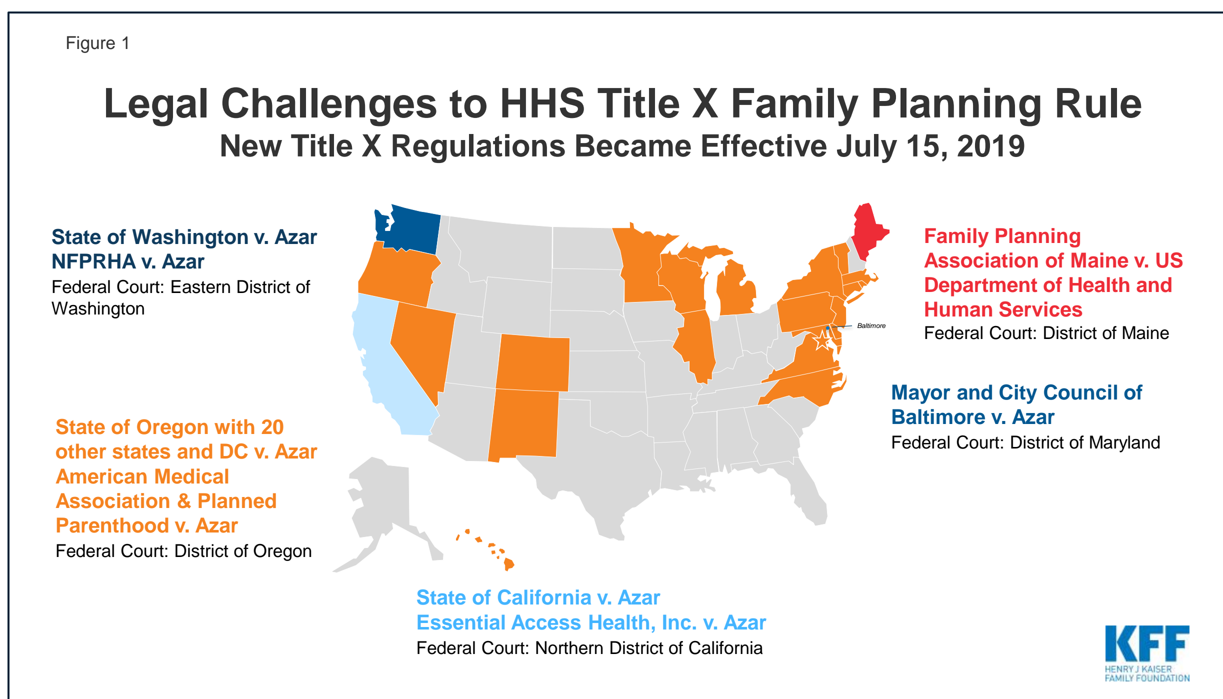
- **Prohibit federal Title X funds from going to any family planning site that also provides abortion services:** The Title X statute specifies that no federal funds appropriated under the program "shall be used in programs where abortion is a method of family planning." While HHS has changed its interpretation of this provision over time, throughout most of the history of the program, the ban has generally been understood to mean that Title X funds cannot be used to pay for or support abortion, as was the policy under the prior regulations.
- **Require that Title X funded activities have full physical and financial separation from abortion-related activities:** In addition to separate accounting (as has been the requirement prior to the new regulations), providers must have separate electronic and paper health records, treatment, consultation, examination and waiting rooms, office entrances and exits, workstations, signs, phone numbers, email addresses, educational services, websites, and staff. This new requirement essentially disqualifies any provider from receiving Title X funds if they also offer or refer patients to abortion services.
- **Ban referrals for abortion services, and mandate referrals to prenatal services:** Under the regulations in place from 2000 to 2019, Title X grantees were required to provide nondirective pregnancy options counseling and referrals upon request. This requirement meant that Title X grantees provided complete, medically accurate and unbiased information and resources for all pregnancy options without steering patients to one option. The new final regulations interpret referrals for abortion to be activities that are considered providing "abortion as a method of family planning" and prohibit Title X grantees and subrecipients from providing, promoting, referring for, supporting, or presenting abortion services to patients. Under the new regulations, a Title X project is permitted—but not required—to provide pregnant people with a list of health care providers that offer comprehensive primary health services (including providers of prenatal care). The rules also stipulate that some—but not the majority—of providers on the list may also provide abortion, but neither the list nor the project staff may indicate which of the listed providers also offer abortion services. The regulations specify that all pregnant clients must be referred to prenatal care, regardless of their stated wishes.
- **Eliminate the requirement for nondirective pregnancy options counseling that also includes discussion of abortion as an option:** Under the previous regulations, Title X grantees were required to offer pregnant women the opportunity to be provided information and counseling regarding prenatal care and delivery; infant care, foster care, or adoption; and pregnancy termination. If asked for

information and counseling, providers were required to provide nondirective counseling on each of the options. Each Title X site can now decide whether or not to offer nondirective pregnancy options counseling to patients, but only a medical doctor or advanced practice provider (defined as including physician assistants and advanced practice registered nurses) is permitted to provide this counseling.

- **Report age and partners for minor clients:** Title X grantees and subrecipients are required to maintain and report records indicating the age of minor clients and the age of their sexual partners as specified under state notification laws.

Who is challenging the Trump Administration regulations?

The attorneys general from 23 states, major family planning organizations, individual providers and the American Medical Association (**Figure 1**) have filed legal challenges in federal courts to block the implementation of the Trump Administration's final Title X regulations claiming the new rules violate the Constitution and federal laws.



The plaintiffs in these lawsuits are challenging these regulations claiming that they would harm the four million low-income people who receive family planning services from Title X sites, would reduce the network of Title X sites, ban providing full medical information and referrals, and potentially decrease the provision of effective medically appropriate contraceptive services. In addition, the rules will create a financial strain on grantees and states that can longer accept the Title X funds, and potentially impact public health.

Although the district courts in Washington, Oregon, California and Maryland initially issued preliminary injunctions blocking the implementation of the new regulations, the Courts of Appeals have subsequently blocked these preliminary injunctions, and the regulations are currently in effect pending the outcome of the litigation. The plaintiffs in the Washington, Oregon and California cases appealed the 9th Circuit Court of Appeals decision (provided by a three Judge panel) staying the preliminary injunction, requesting an *en banc* hearing of a larger panel of Judges. This request was granted but the new regulations remain in effect pending the decision of the *en banc* hearing (which took place on September 23, 2019). The 4th Circuit Court of Appeals (in Maryland) also held a hearing on the appeal of the preliminary injunction issued by the district court on September 18, 2019.

Table 1: Plaintiffs Challenging the Legality of the Trump Administration's Title X Regulations

Plaintiffs	Court	Judge	Status (as of Nov 1, 2019)
Essential Access Health Inc.; Melissa Marshall M.D.[1] State of California by and through Attorney General Xavier Becerra	United States District Court Northern District of California	Judge Edward M. Chen	• District Court issued preliminary injunction for CA that was stayed by 9th Circuit Court of Appeals. • District Court has stayed current motions and hearings until after the decision from the 9/23/2019 en banc hearing
OR, NY, CO, CT, DE, DC, HI, IL, MD, MA, MI, MN, NV, NJ, NM, NC, PA, RI, VT, VA, & WI[2] American Medical Association, Oregon Medical Association, Planned Parenthood of Southwestern Oregon, Planned Parenthood Columbia Willamette, Thomas N. Ewing M.D,; Michele Megregian C.N.M.	United States District Court, District of Oregon, Eugene Division	Judge Michael J. McShane	• District Court issued nationwide preliminary injunction that was stayed by 9th Circuit Court of Appeals. • District Court has stayed hearing the case until the decision from the 9/23/2019 en banc hearing
State of Washington[3] National Family Planning & Reproductive Health Association, Feminist Women's Health Center, Deborah Oyer, M.D.and Teresa Gall, F.N.P.	United States District Court For the Eastern District of Washington at Yakima	Judge Stanley A. Bastian	• District Court issued nationwide preliminary injunction that was stayed by 9th Circuit Court of Appeals. • District Court is holding hearing on litigation in February 2020
Family Planning Association of Maine and J.Doe, DO, MPH	United States District Court for the District of Maine	Judge Lance E. Walker	• District Court denied the Plaintiff's motion for a Preliminary Injunction. • Appeal to the 1st Circuit Court of Appeals was withdrawn. • District Court proceeding with the case.
Mayor and City Council of Baltimore	United States District Court for the District of Maryland	Judge Richard D. Bennett	• District Court issued a preliminary injunction for MD which was stayed by the 4th Circuit Court of Appeals pending appeal. • 4th Circuit Court of Appeals held hearing on September 18, 2019 on appeal of preliminary injunction. • District Court is continuing to consider the case, and hearing is scheduled for January 2020.

On what grounds are the plaintiffs suing the federal government?

While the plaintiffs are claiming numerous violations of federal process and law, the interpretation of Section 1008 of the Title X statute is at the heart of this litigation. Section 1008 of specifies that no federal funds appropriated under the program "shall be used in programs where abortion is a method of family planning." HHS has changed its interpretation of this provision over time, but throughout most of the history of the program, the ban has generally been understood to mean that Title X funds cannot be used to pay for or support abortion, as was the policy under the regulations in place before the Trump Administration issued new regulations. At that time, the program required that all clinics that also offered abortion services financially separate their operations but did not have a full physical separation requirement.

> *The heart of the litigation is Section 1008 of Title X, which states that no federal funds appropriated under this program "shall be used in programs were abortion is a method of family planning."*

In the preamble to the regulation, HHS contends that these new regulations are necessary to enforce compliance with the statutory bar on the use of Title X funds for abortions. Many provisions in the Trump Administration's regulation mirror those issued in 1988 by the Reagan Administration. Those regulations were challenged by Title X grantees and doctors in a lawsuit that ultimately reached the U.S. Supreme Court in *Rust v. Sullivan*. In 1991, the Supreme Court held that the regulations reflected one permissible interpretation of the statute and did not violate the First or Fifth Amendments. HHS believes that the Supreme Court ruling in *Rust v. Sullivan* is the controlling legal precedent and that Trump Administration regulations, like the Reagan Administration regulations, are an acceptable interpretation of the statute, and are constitutionally valid.

In *Rust v Sullivan*, the Supreme Court ruled that the government may favor childbirth over abortion and is within its rights to allocate funds consistent with this viewpoint—without violating a woman's right to choose to terminate her pregnancy. After the Supreme Court's decision, Congress voted to repeal the prohibitions on counseling and referring for abortion, but lacked the votes to override President George H.W. Bush's veto.

The Reagan era regulations, however, were never fully implemented. The Clinton Administration issued regulations that have been in effect ever since, permitting Title X providers to refer for abortions and allow sites that also provide abortion services to participate in Title X, so long as there is financial separation between the Title X funds and funds used for abortion services.

While there are many plaintiffs represented in the cases against HHS, the cases present similar challenges. The plaintiffs contend that Title X funds have never been available for abortion services, and the defendant (HHS) fails to identify any evidence suggesting that any Title X funds are being used for abortion services.

The plaintiffs contend that the Administration violated the Administrative Procedures Act by not stating a valid reason for the rule or following proper notice and comment procedures. While *Rust v. Sullivan* held that the regulations were one acceptable interpretation of Section 1008 at that time, the plaintiffs argue that the applicable law has changed. Every year since 1996 (after *Rust*), Congress has passed an Appropriations Act for Title X requiring that all pregnancy counseling be nondirective. In particular, the plaintiffs contend that the requirement to refer all pregnant patients to pre-natal services and the ban on abortion referrals is violation of this section which requires all pregnancy counseling to be nondirective.

Box 2: Section 1554 of the Affordable Care Act (ACA)

Section 1554 of the ACA provides that the Secretary "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 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.

In addition, they are claiming that HHS has violated Section 1554 of the ACA (**Box 2**), which states that the agency shall not promulgate any regulations that creates any unreasonable barriers to the ability of individuals to obtain appropriate medical care or restricts communications between a doctor and a patient. They charge that these regulations create barriers to care by requiring physical and financial separation for clinics that provide abortion services with non-Title X funds, only permitting doctors and advanced practice providers to provide counseling, and requiring additional documentation for minors. They also claim that the regulations restrict the speech of doctors who work at Title X clinics by banning referrals to abortion services, and requiring referrals to pre-natal service even if that is not what the patient seeks.

All of the lawsuits challenging the Title X final rule are based on similar legal arguments. Listed below are some of the common claims.

<table>
<tr><th colspan="2">Table 2: Litigation Challenging Trump Administrations Final Title X Regulations:
Summary of the Plaintiffs’ and Government’s Position</th></tr>
<tr><td colspan="2">Claim: Violation of the Administrative Procedure Act (APA) which governs the process by which federal agencies develop and issue regulations. It includes requirements for notice, public comment, and standards for judicial review</td></tr>
<tr><td>Plaintiffs’ Position:

• HHS exceeded the scope of its statutory authority and acted in a manner that is arbitrary and capricious
• HHS did not comply with notice and comment requirements.
• The final rule is significantly different from the proposed rule.
• The final rule does not address any identified problem.
• The final rule is contrary to law because it violates the Health and Human Services Appropriations Act Section 1554 of the Affordable Care Act (ACA), the First and Fifth Amendments of the U.S. Constitution. (See below for more on these claims.)</td><td>Government’s Position:

• The regulations are necessary to enforce compliance with the statutory bar on the use of Title X funds for abortions.
• Rust v. Sullivan confirmed that this rule is a valid exercise of HHS authority.
• The final rule is a “logical outgrowth” of the proposed rule</td></tr>
<tr><td colspan="2">Claim: Violation of Section 1554 of the Affordable Care Act (ACA) which states that the Secretary “shall not promulgate any regulation that”:
• Creates any unreasonable barriers to the ability of individuals to obtain appropriate medical care;
• Impedes timely access to health services;
• Interferes with communications regarding a full range of treatment options between the patient and the provider;
• Restricts the ability of health care providers to provide full disclosure of all relevant information to patients making health care decisions;
• Violates the principles of informed consent and the ethical standards of health care professionals; or
• Limits the availability of health care treatment for the full duration of a patient’s medical needs.</td></tr>
<tr><td>Plaintiffs’ Position:

The following provisions of the Final Rule violate Section 1554 of the ACA:

• Prohibition on abortion counseling and referral
• Requirement that nondirective counseling only be provided by a physician or advance practice provider
• Physical and financial separation
• Documentation for minors</td><td>Government’s Position:

• The Plaintiffs have waived any argument based on Section 1554 because HHS did not receive any comments on the proposed rule about Section 1554 during the comment period.
• Section 1554 does not apply to Title X; it only applies to provisions of the ACA.
• Even if Section 1554 applies, the Title X regulations do not impede access to care.</td></tr>
<tr><td colspan="2">Claim: Violation of Continuing Appropriations Act, 2019, Pub. L. 115–245, 132 Stat. 2981, 3070–71 (2018), “That amounts provided to said projects under such title shall not be expended for abortions, that all pregnancy counseling shall be nondirective. . .” Congress has consistently included this language with respect to Title X appropriations funding every year since 1996.</td></tr>
<tr><td>Plaintiffs’ Position:

• The Title X requirement to refer all pregnant women to prenatal services and the ban on abortion referrals violates the Appropriations Act.
• Counseling and referral are inextricably linked.</td><td>Government’s Position:

• The rule requires all counseling to be nondirective. “Referral” is different from, and not a part of, “counseling.”</td></tr>
</table>

Claim: Violation of First Amendment (freedom of speech)[4] "Congress shall make no law… abridging the freedom of speech." The First Amendment applies equally to the actions and regulations of Executive agencies	
Plaintiffs' Position: • The ban on abortion referrals and the requirement to refer all pregnant women to prenatal appointments violates doctors' and patients' First Amendment rights. The ban on abortion referrals and requirement to refer pregnant patients to prenatal appointments is an impermissible viewpoint-based restriction and forces providers to speak a view they do not hold (that prenatal care is appropriate). In addition, the regulations imposes a speaker-based ban, only allowing medical doctors and advanced practitioners to provide pregnancy options counseling. Recent Supreme Court decisions have confirmed that medical speech is deserving of First Amendment protection of the highest order. • The final rule requires grantee states and other Title X grantees to infringe on the free speech rights of health care providers as a condition of securing Title X funds.	*Government's Position*: • The Supreme Court upheld similar provisions in *Rust v. Sullivan*. Doctors are free to tell patients that abortion is not a method of family planning supported by Title X. The government is permitted to fund some activities and not others. The Supreme Court ruled in *Rust v. Sullivan*, "*The Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternate program… In doing, the Government has not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of the other.*"

Claim: Violation of Fifth Amendment: The Due Process Clause of the Fifth Amendment prohibits the federal government from denying equal protection of the laws. when "vagueness permeates the text" of a law it violates the due process clause of the Fifth Amendment	
Plaintiffs' Position: • The Rule specifically targets and harms women because it discriminates based on pregnancy and gender. The Rule is not substantially related to an important government interest or rationally related to a legitimate government interest. • The Rule does not give Title X grantees and sub-recipients sufficient guidance and invites inconsistent or biased enforcement. • The physical and financial separation requirement provides the Secretary with excessive latitude to determine whether a Title X project has met this provision. • The Final Rule is ambiguous on whether Title X providers may refer patients for abortion in case of medical necessity, and what a Title X provider may discuss with respect to abortion if she provides nondirective pregnancy options counseling. • The Final Rule's prohibition on actions that "encourage, promote or advocate abortion as a method of family planning" is vague and invites arbitrary and discriminatory enforcement by the Secretary.	*Government's Position*: • The Rule is perfectly clear and just as specific as the materially identical provisions sustained in *Rust v. Sullivan*. The Due Process Clause tolerates greater imprecision when government subsidies are involved.

Looking Forward

Grantees were required to submit action plans to show compliance with the new regulations on August 19, 2019, and a certificate of compliance on September 19, 2019. Some of the nonprofits and states (IL, ME, OR, WA) challenging the regulations have decided to withdraw from Title X or put a hold on drawing down funds as the cases move through the federal district courts. In addition, Planned Parenthood, also a litigant in the cases, formally withdrew from the program. In addition to the 400 Parenthood sites, over 600 additional clinics, composed of state health departments, federally qualified health centers, and nonprofit organizations are no longer using Title X funds to support services for low-income and uninsured individuals. These decisions affect all of the Title X clinics in Hawaii, Maine, Oregon, Utah, Vermont, and Washington and the majority of Title X clinics in Alaska, Connecticut, Illinois, Maryland, Massachusetts, Minnesota, New Hampshire and New York.

The new regulations are currently in effect and the plaintiffs are awaiting the rulings from the 9th Circuit and 4th Circuit Court of Appeals regarding whether the regulations can be blocked until the cases make their way through the federal district courts. On March 4, 2020, Title X sites are required to physically separate the abortion services they provide with non-Title X funds. If this part of the regulations is implemented as scheduled in March 2020, it is expected that many more Title X grantees and sites will withdraw from the Title X network. While Supreme Court may eventually hear these cases, the 2020 presidential election may take place before these cases reach the Supreme Court.

Endnotes

[1] Essential Access Health et al. and the State of California filed two separate lawsuits challenging the final regulations. These two cases have been related to one another at the district court.

[2] State of Oregon et al. and the American Medical Association et al. filed two separate lawsuits challenging the final regulations. These two cases have been consolidated for pretrial purposes.

[3] State of Washington and the National Family Planning & Reproductive Health et al. filed two separate lawsuits challenging the final regulations. These two cases have been consolidated for pretrial purposes.

[4] California does not include a violation of the First Amendment it its legal challenge.