UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

STATE OF NEW YORK, *et al.*, Plaintiffs, v. U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, *et al.*, Defendants.	No. 1:19-cv-04676-PAE (rel. 1:19-cv-05433-PAE; 1:19-cv-05435-PAE)

SECOND DECLARATION OF CLARE M. COLEMAN

I, Clare M. Coleman, declare and state the following:

1. I am the President and CEO of the National Family Planning & Reproductive Health Association ("NFPRHA"), a Plaintiff in this action. On June 13, 2019, I submitted a declaration ("First Declaration of Clare M. Coleman" or "First Coleman Decl."), *see* Doc. 27-4, in support of Plaintiffs' motion for a preliminary injunction barring enforcement of the Department of Health and Human Services ("HHS") regulation entitled: Protecting Statutory Conscience Rights in Health Care, 84 Fed. Reg. 23,170 (May 21, 2019) (to be codified at 45 C.F.R. pt. 88) (the "Health Care Refusal Rule" or the "Rule").

2. Due to recent changes in the Title X program, I submit this second declaration in support of Plaintiffs' motion for a preliminary injunction barring enforcement of the Rule, and also in support of Plaintiffs' motion for summary judgment.

3. I incorporate by reference my background and experience as set forth in my original declaration. *See* First Coleman Decl. ¶¶ 3–8.

RECENT CHANGES TO THE TITLE X PROGRAM

4. As I explain in my first declaration, one of the cornerstones of the Title X program was its client-centered approach. *Id.* ¶¶ 18–21, 34–46. Client-centered care means starting from the client's own reason for seeking family planning information or services. *Id.* ¶ 40. It is also essential that care "is respectful of, and responsive to, individual client preferences, needs, and values" and that individual "client values guide all clinical decisions." *Id.* Thus, under the national clinical standards for family planning providers, also known as "Providing Quality Family Planning Services" or "the QFP," providers' own preferences do not determine patient care. *Id.* ¶¶ 5, 40. Instead, providers are trained and work hard to provide patients, in a culturally sensitive and individualized way, with the information and assistance each patient needs to make informed decisions consistent with the patient's own priorities and beliefs—not those of an individual provider or the employing agency. *Id.* ¶ 40.

5. In particular, this client-centered approach instructs that pregnancy "test results should be presented to the client, followed by a discussion of options and appropriate referrals." *Id.* ¶ 43. This counseling should be nondirective and include medically accurate discussion about options. *Id.* ¶ 44. "Referral to appropriate providers of follow-up care should be made at the request of the client" and not delayed. *Id.* ¶ 43.

6. Consistent with these principles, since 1996, Congress has mandated that within the Title X program, "all pregnancy counseling shall be nondirective." *Id.* ¶ 21 (citing HHS Appropriations Act, 2019, Pub. L. No. 115-245, 132 Stat. 2981, 3070–71 (2018)). And, until this year, Title X regulations required each Title X project to provide pregnant patients "referral upon request" with respect to prenatal care and delivery; infant care, foster care, or adoption; and/or abortion. *See* 42 C.F.R. § 59.5(a)(5)(i) (2000).

7. On March 4, 2019, HHS finalized new regulations that change the Title X program dramatically. *See* 84 Fed. Reg. 7714. Among other changes, the new Title X regulations (1) amend the existing regulations that require referrals, upon a patient's request, for the full range of pregnancy options to categorically prohibit referrals for abortion *only*, *see id.*; and (2) notwithstanding the statutory mandate that all pregnancy counseling be nondirective, *see supra* ¶ 6, empower providers to foist directive counseling on patients by discussing only continuing the pregnancy and evading the possibility of abortion—even for a patient who solely seeks abortion information and does not want to hear any prenatal information, *see, e.g.*, 42 C.F.R. 59.14(b) (allowing Title X providers to choose to offer only "[i]nformation about maintaining the health of the mother and unborn child"); *id.* (deeming referral to prenatal care "medically necessary" and mandatory for all patients); 84 Fed. Reg. at 7748 (Title X projects are not required to offer "counseling or information on abortion").

8. In April and May 2019, multiple district courts enjoined the new regulations from taking effect. *See Washington v. Azar*, 376 F. Supp. 3d 1119, 1132 (E.D. Wash. 2019); *California v. Azar*, 385 F. Supp. 3d 960, 1022 (N.D. Cal. 2019); *Oregon v. Azar*, 389 F. Supp. 3d 898 (D. Or. 2019); *Mayor & City Council of Baltimore v. Azar*, 2019 WL 2298808, at *14 (D. Md. May 30, 2019). On June 20, 2019, a motions panel of the Ninth Circuit stayed all three preliminary injunctions issued against the new regulations in that circuit. *California v. Azar*, 927 F.3d 1068, 1080–81 (9th Cir. 2019). On July 2, 2019, a divided motions panel of the Fourth Circuit stayed the preliminary injunction issued by a Maryland district court. *Mayor & City Council of Baltimore v. Azar*, No. 19-1614, 2019 WL 3072302, at *1 (4th Cir. July 2, 2019). On July 3, 2019, the Ninth Circuit granted plaintiffs' motion for *en banc* review and ordered that the motions panel's stay order not be cited as precedential, but allowed the stay of the injunction to

remain in effect pending resolution of the appeals. *See California v. Azar*, 927 F.3d 1045, 1046 (9th Cir. 2019).

9. HHS has declared the new Title X regulations in effect as of July 15, 2019. On July 20, 2019, HHS directed all grantees to submit an action plan by August 19, 2019, describing the steps each was taking to come into compliance with the new regulations. It further directed each grantee to provide a signed written statement by September 18, 2019, that its grant complies with all aspects of the new regulations, except for certain requirements (not discussed here) that do not require compliance until 2020.

10. To date, a number of our members[1] that had been Title X providers—including two of the plaintiffs in this case, Planned Parenthood of Northern New England (along with all Planned Parenthood Title X grantees) and Public Health Solutions—have exited the Title X program as a result of the new regulations and are no longer using Title X funds to provide care to their patients. Others of our members—particularly those that are constrained by limited budgets and rely on these federal funds to provide contraceptive and other essential care to low-income patients with nowhere else to turn—remain in the program.

11. In short, the situation is in flux and will likely remain so until all appeals have been resolved.

IMPACT OF THE HEALTH CARE REFUSAL REGULATION ON OUR MEMBERS

12. For those of our members who remain in the Title X program and are able to continue to provide nondirective options counseling and abortion referrals to patients using non-Title X funds and physically and financially separate from their Title X projects, the Refusal

[1] Both Public Health Solutions and Planned Parenthood of Northern New England remain NFPRHA members. NFPRHA's membership, while including more than 70% of all Title X grantees operating or funding a network of more than 3,500 health centers, is not premised on participation in Title X. NFPRHA represents the broad spectrum of family planning administrators and clinicians serving the nation's low-income and uninsured women and men; NFPRHA's core members are federally funded family planning organizations serving those without access to care.

Rule continues to pose the same threats that I described in my original declaration. *See* First Coleman Decl. ¶¶ 53–60. This is because, under subsections (c)(1) of the Church Amendments, the mere fact of receiving any Public Health Services Act ("PHSA") funds, such as Title X funds, triggers the recipient's obligations under that provision throughout its operations—not solely with respect to PHSA-funded care. The same is true for our members who leave the Title X program but receive other PHSA funds, such as Public Health Solutions.

13. Thus, the Health Care Refusal Rule continues to place these members in an untenable situation, even as they newly constrain Title X-funded activities in ways that their non-Title X funded activities need not be constrained: the members will still lose the ability to manage religious accommodations for employees in a manner that balances the religious beliefs of the employee with the business operation needs of the employer, First Coleman Decl. ¶ 55; they will still be prohibited from asking job applicants whether they have any objections to performing core aspects of their job, *id.* ¶ 56; and the Rule still provides no meaningful guidance on how these members are supposed to ensure patients continue to receive care in the face of an employee's objection to performing a core job function and still comply with the Rule, *id.* ¶ 58. And, to the extent the Rule forces Title X providers to hire and employ individuals who actively withhold information and services from clients, the Rule will continue to harm the providers' reputations and the provider-patient relationship of trust. *Id.* ¶ 60. Moreover, these already untenable circumstances will continue to be felt even more acutely by those of our members without many employees, located in sparsely populated or rural areas, and/or who are the only publicly funded family planning provider in their area. *See id.* ¶ 59.

14. In addition to the ongoing harms caused by the Rule's unlawful expansion of the Church Amendments, virtually all of our governmental members, *see id.* ¶ 11, receive federal

financial aid (thus triggering the Coats-Snowe Amendment) and HHS-appropriated funds (thus triggering the Weldon Amendment) other than Title X. Thus, even if some of our governmental members leave the Title X program, they will continue to face the same harm from the Rule's dramatic and unlawful expansion of the scope of those statutes. *See, e.g.*, *id.* ¶¶ 53–55.

15. Further, as I explain in my original declaration, the Rule's compliance and enforcement mechanisms still threaten the critical funding our members rely on to provide essential health care services. *See, e.g.*, *id.* ¶¶ 15–17, 71–78, 80–82. The loss of this funding would, in turn, have a profoundly harmful impact on our members' patients, the majority of whom are low-income and rely on our members for their health care. *See, e.g.*, *id.* ¶¶ 13, 27–28, 77.

CONCLUSION

16. Notwithstanding the changes to the Title X program, many of our members—including Plaintiffs Planned Parenthood of Northern New England and Public Health Solutions—will continue to provide their patients with truly nondirective options counseling and abortion referrals upon request—even if their ability to do so *within* the Title X program has been compromised, for the time being. Thus, based on my knowledge and experience, it is my firm belief that if this Rule takes effect it will have a devastating impact on our members and the patients they serve.

I declare under penalty of perjury that the foregoing is true and correct. This declaration was executed on September 4, 2019, in Washington, D.C.

Clare M. Coleman