

No. 19-35394

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STATE OF WASHINGTON; NATIONAL FAMILY PLANNING AND
REPRODUCTIVE HEALTH ASSOCIATION; FEMINIST WOMEN'S HEALTH
CENTER; DEBORAH OYER, M.D.; TERESA GALL,

Plaintiff-Appellees,

v.

ALEX M. AZAR II, in his official capacity as Secretary of the United States Department of
Health and Human Services; UNITED STATES DEPARTMENT OF HEALTH AND
HUMAN SERVICES; DIANE FOLEY, MD, in her official capacity as Deputy Assistant
Secretary for Population Affairs; OFFICE OF POPULATION AFFAIRS,

Defendants-Appellants,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON

**BRIEF OF AMICI CURIAE NATIONAL CENTER FOR LESBIAN RIGHTS,
EQUALITY FEDERATION, FAMILY EQUALITY COUNCIL, GLMA: HEALTH
PROFESSIONALS ADVANCING LGBTQ EQUALITY, THE HIV MEDICINE
ASSOCIATION, THE NATIONAL CENTER FOR TRANSGENDER EQUALITY,
THE NATIONAL LGBTQ TASK FORCE, THE SEXUALITY INFORMATION
AND EDUCATION COUNCIL OF THE UNITED STATES (SIECUS), THE LGBT
MOVEMENT ADVANCEMENT PROJECT, LAMBDA LEGAL DEFENSE AND
EDUCATION FUND, INC., GLBTQ LEGAL ADVOCATES & DEFENDERS,
THE HUMAN RIGHTS CAMPAIGN, TRANSGENDER LAW CENTER, AND
BAY AREA LAWYERS FOR INDIVIDUAL FREEDOM
IN SUPPORT OF APPELLEES**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, the National Center for Lesbian Rights, Equality Federation, Family Equality Council, GLMA: Health Professionals Advancing LGBTQ Equality, the HIV Medicine Association, the National Center for Transgender Equality, the National LGBTQ Task Force, the Sexuality Information and Education Council of the United States (SIECUS), the LGBT Movement Advancement Project, Lambda Legal, GLBTQ Legal Advocates & Defenders, the Human Rights Campaign, Transgender Law Center, and Bay Area Lawyers for Individual Freedom state that they have no parent corporations. They have no stock, and therefore no publicly held company owns 10% or more of their stock.

Dated: July 3, 2019

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INTEREST OF AMICI CURIAE

Amici Curiae are the National Center for Lesbian Rights, Equality Federation, Family Equality Council, GLMA: Health Professionals Advancing LGBTQ Equality, the HIV Medicine Association, the National Center for Transgender Equality, the National LGBTQ Task Force, the Sexuality Information and Education Council of the United States (SIECUS), the LGBT Movement Advancement Project, Lambda Legal, GLBTQ Legal Advocates & Defenders, the Human Rights Campaign, Transgender Law Center, and Bay Area Lawyers for Individual Freedom. *Amici* are dedicated to protecting the rights and liberties of vulnerable groups, including lesbian, gay, bisexual, transgender, and queer (LGBTQ) people, people of color, women, and people with disabilities. They have substantial expertise related to invocations of spurious moral and health-related rationales to justify unlawful government conduct. Their expertise bears directly on the issues before the Court. Descriptions of individual *Amici* are set out in the Appendix.

No party's counsel authored this brief in whole or in part. No party's counsel contributed money intended to fund preparation or submission of this brief. No one other than the amici curiae, their members or counsel contributed money intended to fund preparation or submission of this brief. Pursuant to Federal Rule of Appellate Procedure 29(a)(2), amici file this brief without an

accompanying motion for leave to file, because all parties have consented to its filing.

SUMMARY OF ARGUMENT

Certain groups encounter obstacles to obtaining health care in the United States. Women seeking reproductive health care, as well as others who are members of the lesbian, gay, bisexual, transgender, and queer (LGBTQ) community, historically have struggled to access essential health care services because of stigma arising from social and political beliefs about sex, gender roles, and childbearing. For LGBTQ people in particular, this stigma, and its detrimental effect on access to basic health care, have led to significant health disparities compared to other populations. Some providers of reproductive health care, including Planned Parenthood affiliates and other Title X grantees, are significantly ameliorating these disparities by providing essential health care to the LGBTQ community. The Department of Health and Human Services's Final Rule threatens this access to basic health care for many LGBTQ people. The Final Rule should be enjoined, not only because it is contrary to law, but also because it would cause irreparable harm to LGBTQ people. The Final Rule would eliminate health care providers essential to the LGBTQ community, increase health care disparities for LGBTQ people, and violate the equal dignity of Title X patients.

This case concerns recently issued regulations from the Department of Health and Human Services (the Department). *Compliance with Statutory Program Integrity Requirements*, 84 Fed. Reg. 7714 (Mar. 4, 2019) (the “Final Rule”). The district court found that provisions of the Final Rule violate the statutes they purport to implement. *First*, the district court found that the Gag Rule, which forces medical providers in the Title X family planning program to direct individuals away from obtaining an abortion, violates a statutory provision requiring that all pregnancy counseling be “nondirective.” *See* Department of Defense and Labor, Health and Human Services, and Education Appropriations Act, 2019 and Continuing Appropriations Act, Pub. L. No. 115-245, Div. B, Tit. II, 132 Stat. 2981, 3070–71 (2018); *Washington v. Azar*, 376 F. Supp. 3d 1119, 1130 (E.D. Wash. 2019); *see also Oregon v. Azar*, No. 6:19-cv-00317-MC, 2019 WL 1897475, at *8–9 (D. Or. Apr. 29, 2019); *California v. Azar*, No. 19-cv-01184-EMC, 2019 WL 1877392, at *19 (N.D. Cal. Apr. 26, 2019). *Second*, the district court found that the physical and financial Separation Requirements, which penalize Title X projects that also provide abortion care, violate a provision in the Affordable Care Act barring the Department from issuing any regulations that create barriers to appropriate medical care or interfere with communications regarding a full range of treatment options between patient and provider. *See* 42

U.S.C. § 18114; *Washington*, 376 F. Supp. 3d at 1130; *see also Oregon*, 2019 WL 1897475, at *12; *California*, 2019 WL 1877392, at *26.

But the Final Rule does more than violate the law. In addition to these legal violations and the irreparable harms the district court identified, the Final Rule’s restrictions will drive qualified providers from a program designed for underserved communities and will exacerbate the serious health disparities LGBTQ people already experience. Those additional, irreparable harms support an injunction barring the Final Rule from taking effect. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008); *see also Recycle for Change v. City of Oakland*, 856 F.3d 666, 669 (9th Cir.), *cert. denied*, 138 S. Ct. 557 (2017) (articulating standard for entering preliminary injunction).

I. THE FINAL RULE WILL CAUSE IRREPARABLE HARM BY JEOPARDIZING THE VIABILITY OF HEALTH CARE PROVIDERS CRITICAL FOR THE LGBTQ COMMUNITY.

In granting the preliminary injunction, the district courts found that the Final Rule was invalid. Under the APA, agency action is unlawful if it is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A). Agencies must “engage in reasoned decisionmaking” before departing from prior policy. *Washington*, 376 F. Supp. 3d at 1125 (cleaned up); *see also Oregon*, 2019 WL 1897475, at *14; *California*, 2019 WL 1877392, at *26. Reasoned decisionmaking, otherwise known as the “reasoned explanation

requirement of administrative law,” the U.S Supreme Court recently explained, “is meant to ensure that agencies offer genuine justifications for important decisions, reasons that can be scrutinized by courts and the interested public. Accepting contrived reasons would defeat the purpose of the enterprise.” *Dep’t of Commerce v. New York*, No. 18–966, 2019 WL 2619473, at *16 (June 27, 2019).

The district court found contrived reasoning in virtually all of the Department’s justifications to break away from past policy governing the Title X program. *See generally Washington*, 376 F. Supp. 3d at 1130–32; *e.g., id.* at 1132 (“[T]he Government’s response in this case is dismissive, speculative, and not based on any evidence presented in the record. . . .”); *see also, e.g., Oregon*, 2019 WL 1897475, at *2 (“Without revealing what evidence, if any, helped shape its opinions, HHS essentially says, ‘trust us, this will work out fine.’”); *California*, 2019 WL 1877392, at *12 (“What *is* speculative is Defendants’ assurance that any gap left by an exodus in current Title X providers will be fully filled by new providers entering the program. . . . [Their argument] defies common sense. . . .”).

In addition to being premised on contrived reasoning, the Final Rule will inflict irreparable harm on individuals whose primary—and in some cases, only—health care comes from Title X recipients.

A. Driving Current Family Planning Providers Out of the Title X Program Would Eliminate Critical Health Care Services Essential to LGBTQ People.

The Final Rule’s Gag Rule and Separation Requirement, working together, would drive the providers of care to the majority of Title X patients out of the program. This would affect many people within the LGBTQ community, including lesbian and bisexual women, as well as transgender, nonbinary, and gender nonconforming individuals who can become pregnant and need affordable access to birth control, treatment for STIs to preserve future fertility, and other reproductive health options.¹ Title X sites also perform screenings for interpersonal violence and conduct Pap tests and breast exams, all of which are critical to the health—and indeed the lives—of LGBTQ people. *See Washington*, 376 F. Supp. 3d at 1126–27; *see also Oregon*, 2019 WL 1897475, at *2; *California*, 2019 WL 1877392, at *1, 9.

In addition, in recent years, many reproductive health care providers have filled a critical gap in the provision of health care to the LGBTQ community. These clinics have created welcoming spaces and health care services designed to serve LGBTQ people, who otherwise face pervasive discrimination in the health care system. They have created nondiscriminatory environments for LGBTQ

¹ *See generally Queering Reproductive Justice: A Toolkit*, NAT’L LGBTQ TASK FORCE (Mar. 2017), <https://www.thetaskforce.org/wp-content/uploads/2017/03/Queering-Reproductive-Justice-A-Toolkit-FINAL.pdf> [<https://perma.cc/P6WR-SYUE>].

people to receive care, from general wellness services to more specific services for transgender patients, including hormone therapy. These clinics are particularly well-suited to provide LGBTQ care because of their expertise in providing services that are still stigmatized, such as abortion, contraception, and screening and treatment for STIs. These providers recognize that LGBTQ people face bias in the health care system and need competent, affirming services from practitioners who understand the harmful effects of stigma. As stated by Sean Cahill, director of health policy research at the Fenway Institute, “[b]eing able to treat LGBTQ patients means ‘understanding that LGBT people in our society experience discrimination, victimization and bullying.’”² Comprehensive reproductive health care providers occupy a critical niche within the health care system precisely because they provide services that many will not; this forms an important component of the cultural competency that they bring to LGBTQ health care.

One example of such a clinic is Maine Family Planning, which offers primary care, birth control, abortion, and LGBTQ services. Its Transgender Health Services program includes hormonal transition therapy and monitoring, onsite self-injection lessons, referrals to specialty providers (mental, behavioral, and medical) and yearly wellness visits, preventive care, birth control and safer sex supplies, STI

² Alex Berg, *Cuts to Planned Parenthood a Scary Prospect for Some LGBTQ Patients*, NBC NEWS (July 21, 2017, 11:53 a.m.), <https://www.nbcnews.com/feature/nbc-out/cuts-planned-parenthood-scary-prospect-some-lgbtq-patients-n785291> [<https://perma.cc/U56W-VRDR>].

testing and treatment, and abortion for patients of any gender.³ Another example is Cedar River Clinics in Washington, a plaintiff here, *Washington*, 376 F. Supp. 3d 1119, which provides family planning services, abortion care, and a dedicated LGBTQ health care program offering a range of wellness services (annual pelvic and breast exams, cancer screenings, HIV and STI testing, and safer sex education) and services for transgender patients (hormone therapy, surgical referrals, postsurgical follow-up, and clerical services for gender marker changes). Its Transgender Health Care Toolkit has been accessed by providers all over the U.S. and abroad.⁴ In addition, it offers insemination services for those seeking to conceive, in furtherance of its mission to facilitate the full range of choices around family formation.

Planned Parenthood affiliates have similarly provided critical services for the LGBTQ community.⁵ One hundred Planned Parenthood health centers provide hormone therapy for transgender people, many in communities and locales where

³ See *LGBTQ+ Healthcare*, MAINE FAMILY PLANNING (2019), <https://mainefamilyplanning.org/our-services/lgbtq-healthcare/> [<https://perma.cc/KR5B-QSPJ>].

⁴ *Transgender Health Care Toolkit*, CEDAR RIVER CLINICS (2019), <http://www.cedarriverclinics.org/transtoolkit/> [<https://perma.cc/2JAS-P8DC>].

⁵ See *LGBT Services*, PLANNED PARENTHOOD (2019), <https://www.plannedparenthood.org/get-care/our-services/lgbt-services> [<https://perma.cc/C7RC-XM38>].

care is difficult to find.⁶ Dr. Alex Keuroghlian, director of the National LGBT Health Education Center and assistant professor of psychiatry at Harvard Medical School, has recognized the dearth of health care providers for LGBTQ people. “I hear frequently about lesbian and bisexual-identified women and transgender patients who report the only place they can get safe care in areas where there isn’t some kind of designated LGBTQ practice is often Planned Parenthood. . . .”⁷

Given the reality of limited health care access and alienation from the health care system (discussed further below), LGBTQ individuals may suffer from health care conditions that go undiagnosed and untreated for months or even years. Title X sites with LGBTQ-specific programming serve as a critical entry point into the health care system for lesbian, gay, bisexual, and transgender people. While a patient might come seeking a specific service like hormone therapy, the health care practitioner can also identify other health issues that might otherwise go unaddressed, such as high blood pressure or depression. As the court below recognized, many patients of Title X sites have no other source of health care, particularly if they live in a rural area. *See Washington*, 376 F. Supp. 3d at 1131 (“[T]he Final Rule will uniquely impact rural and uninsured patients.”); *see also Oregon*, 2019 WL 1897475, at *14; *California*, 2019 WL 1877392, at *12

⁶ See Leana Wen, *Innovation, Courage, and Social Justice: A Reflection on Baltimore and Looking Forward to Planned Parenthood*, HEALTH AFFAIRS (Nov. 14, 2018), <https://www.healthaffairs.org/doi/10.1377/hblog20181113.237694/full/>.

⁷ BERG, *supra* (quoting Dr. Keuroghlian).

(“[N]ationwide, in one-fifth of U.S. counties, including rural counties in California, the only safety-net family planning center is a Title X site. . . . It defies common sense to assume that in these regions, new health care centers will simply materialize and seamlessly assume the client load of exiting grantees [leaving Title X because of the Final Rule].”). This holds true for LGBTQ patients as well, who are disproportionately low-income.⁸

If the Final Rule goes into effect, it will decimate the Title X program—many providers will exit. *See Washington*, 376 F. Supp. 3d at 1131; *see also Oregon*, 2019 WL 1897475, at *15; *California*, 2019 WL 1877392, at *9–10, 11. The results will be devastating not only for the country as a whole, but for LGBTQ people in particular. There will be a sharp reduction in family planning services, as well as the concomitant loss of critical health care services that these sites have developed to serve the LGBTQ community. These health-related consequences

⁸ *See LGBT Proportion of Population: United States*, WILLIAMS INST. ON SEXUAL ORIENTATION AND GENDER IDENTITY LAW AND PUBLIC POLICY, UCLA SCHOOL OF LAW (Jan. 2019), <https://williamsinstitute.law.ucla.edu/visualization/lgbt-stats/?topic=LGBT#density> [<https://perma.cc/6EVM-6EGT>] (interactive map providing aggregated and disaggregated data and statistics); Lourdes A. Hunter et al., *Intersecting Injustice: A National Call to Action*, SOCIAL JUSTICE SEXUALITY PROJECT, GRADUATE CENTER, CITY UNIV. OF NEW YORK 11 (Mar. 2018), https://static1.squarespace.com/static/5a00c5f2a803bbe2eb0ff14e/t/5aca6f45758d46742a5b8f78/1523216213447/FINAL+PovertyReport_HighRes.pdf [<https://perma.cc/YW6P-VPZR>] (“LGBTQ people—especially LGBTQ people of color and transgender and gender nonconforming people—are more likely to be living at or near the poverty level.”).

support the lower court's finding that enforcement of the Final Rule would cause irreparable harm.

B. Permitting the Final Rule to Take Effect Would Eliminate Many Competent, Non-Discriminatory Providers, Worsening Health Care Disparities for LGBTQ People.

LGBTQ people of all ages face widespread discrimination in health care on the basis of their sexual orientation and gender identity. The Department's own Healthy People 2020 Initiative recognizes that "LGBT individuals face health disparities linked to societal stigma, discrimination, and denial of their civil and human rights."⁹ This surfaces in a wide variety of contexts, including physical and mental health care services.¹⁰ LGBTQ people of color are particularly vulnerable to discrimination, which often results in their having either significantly reduced access or no access at all to health care.¹¹

⁹ *Lesbian, Gay, Bisexual, and Transgender Health*, U.S. DEPT. HEALTH & HUMAN SERV., <https://www.healthypeople.gov/2020/topics-objectives/topic/lesbian-gay-bisexual-and-transgender-health> (last updated July 1, 2019) [<https://perma.cc/4WUD-5ARV>].

¹⁰ See Ryan Thoreson, *All We Want Is Equality: Religious Exemptions and Discrimination against LGBT People in the United States*, HUMAN RIGHTS WATCH 18–19 (Feb. 2018), https://www.hrw.org/sites/default/files/report_pdf/lgbt0218_web_1.pdf [<https://perma.cc/7HP6-8QFS>].

¹¹ See generally Ning Hsieh & Matt Ruther, *Despite Increased Insurance Coverage, Nonwhite Sexual Minorities Still Experience Disparities In Access To Care*, 36 HEALTH AFFAIRS 1786 (Oct. 2017), available at <https://www.ncbi.nlm.nih.gov/pubmed/28971924> [<https://perma.cc/4FTV-7A92>].

LGBTQ people disproportionately encounter barriers in the health care system. In 2010, Lambda Legal found that 56 percent of lesbian, gay, and bisexual survey respondents experienced health care discrimination, including refusals of care, excessive precautions used by health care professionals, and physically rough or abusive behavior by those professionals.¹² The survey also found that 70 percent of transgender and gender nonconforming respondents and 63 percent of respondents living with HIV/AIDS had experienced health care discrimination. Additionally, the National Center for Transgender Equality's 2015 U.S. Transgender Survey indicated that 23 percent of respondents did not see a provider for needed health care because of fears of mistreatment or discrimination.¹³

In another more recent survey, the Center for American Progress (CAP) found that among transgender people who had visited a doctor or health care provider's office in the past year, 29 percent reported that a doctor or other health care provider refused to see them because of their actual or perceived gender

¹² *When Health Care Isn't Caring: Lambda Legal's Survey of Discrimination Against LGBT People and People with HIV*, LAMBDA LEGAL 5 (2010), https://www.lambdalegal.org/sites/default/files/publications/downloads/whcic-report_when-health-care-isnt-caring.pdf [<https://perma.cc/G27B-7A68>] (4,916 total respondents).

¹³ S. E. James et al., *Report of the 2015 U.S. Transgender Survey*, NAT'L CTR. FOR TRANSGENDER EQUALITY 5 (2016), <https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf> [<https://perma.cc/8GDT-3ZAJ>] (surveying 27,715 respondents from all fifty states).

identity.¹⁴ CAP also found that 12 percent were denied care related to gender transition, 21 percent were subjected to harsh or abusive language, and 29 percent experienced unwanted physical contact from a doctor or other health care provider (such as fondling, sexual assault, or rape).

When LGBTQ patients are turned away or refused treatment, it is much harder—and sometimes simply not possible—for them to find a viable alternative. In the CAP study, nearly one in five LGBTQ people, including 31 percent of transgender people, said that it would be very difficult or impossible to get the health care they need at another hospital if they were turned away. That rate was substantially higher for LGBTQ people living in non-metropolitan areas, with 41 percent reporting that it would be very difficult or impossible to find an alternative provider. For these patients, being turned away by a medical provider is not just an inconvenience. It often means being entirely denied care with nowhere else to go.

Health care disparities in general are often more pronounced in rural areas in the United States, and this is further compounded for LGBTQ individuals. In rural areas, if care is restricted, there may be no other resources for health and life-

¹⁴ Shabab Ahmed Mirza & Caitlin Rooney, *Discrimination Prevents LGBTQ People from Accessing Health Care*, CTR. FOR AM. PROGRESS (Jan. 18, 2018, 9:00 a.m.), <https://www.americanprogress.org/issues/lgbt/news/2018/01/18/445130/discrimination-prevents-lgbtq-people-accessing-health-care/> [<https://perma.cc/D6D2-DSFF>].

preserving medical care. Since 2010, 83 rural hospitals have closed.¹⁵ Medically underserved areas already exist in every state, with over 75 percent of chief executive officers of rural hospitals reporting physician shortages.¹⁶ Many rural communities already experience a wide array of shortages in mental health, dental health, and primary care health professional coverage. The Final Rule leaves individuals in rural communities with even less access to care that is close, affordable, and high quality.¹⁷ The Final Rule's mandate to withhold care from patients would therefore leave many LGBTQ individuals in rural communities with no health care options at all.

LGBTQ youth are also at particular risk. Due to pressures to prove they are heterosexual, lesbian and bisexual youth are at higher risk of experiencing

¹⁵ See *Rural Hospital Closures: January 2010 – Present*, THE CECIL G. SHEPS CTR. FOR HEALTH SERVS. RES., <http://www.shepscenter.unc.edu/programs-projects/rural-health/rural-hospital-closures/> (last visited July 2, 2019).

¹⁶ See *Quick Maps – Medically Underserved Areas/Populations*, U.S. DEP'T HEALTH & HUM. SERV. (2019) <https://data.hrsa.gov/hdw/Tools/MapToolQuick.aspx?mapName=MUA>; M. MacDowell et al., *A National View of Rural Health Workforce Issues in the USA*, 10 RURAL REMOTE HEALTH 1531 (2010), available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3760483/> [<https://perma.cc/W4XT-6NSG>] (visualizing medically underserved areas and populations).

¹⁷ See generally Carol Adaire Jones et al., *Health Status and Health Care Access of Farm and Rural Populations*, U.S. DEPT. AGRIC. (Aug. 2009), https://www.ers.usda.gov/webdocs/publications/44424/9371_eib57_1_.pdf?v=0 [<https://perma.cc/6B6T-7X3T>].

unintended pregnancies than are heterosexual youth.¹⁸ Access to family planning is therefore essential for this group of young people. A lack of connection to competent, nondiscriminatory health care resources also isolates LGBTQ youth, making them more susceptible to self-destructive behavior patterns.¹⁹ Isolation often continues into adulthood, when LGBTQ populations are more likely to experience depression and engage in high-risk behaviors as a result.²⁰

If allowed to take effect permanently, the Final Rule will cause irreparable harm by eliminating competent, non-discriminatory providers and worsening these health care disparities. Such harm supports the district court's injunction barring the Final Rule from taking effect. *Winter*, 555 U.S. at 20; *Recycle for Change*, 856 F.3d at 669.

¹⁸ See generally Lisa L. Lindley & Katrina M. Walsemann, *Sexual Orientation and Risk of Pregnancy Among New York City High-School Students*, 105 AM. J. PUB. HEALTH 1379 (2015); Karen Schantz, *Pregnancy Risk Among Bisexual, Lesbian, and Gay Youth: What Does Research Tell Us?*, ACT FOR YOUTH CTR. OF EXCELLENCE (Apr. 2015), http://www.actforyouth.net/resources/rf/rf_lgb-prg_0415.pdf (summarizing research).

¹⁹ See Colleen S. Poon & Elizabeth M. Saewyc, *Out Yonder: Sexual-Minority Adolescents in Rural Communities in British Columbia*, 99 AM. J. PUB. HEALTH 118 (Mar. 28, 2008), available at <http://doi.org/10.2105/AJPH.2007.122945>.

²⁰ See Trish Williams et al., *Peer Victimization, Social Support, and Psychosocial Adjustment of Sexual Minority Adolescents*, 34 J. YOUTH & ADOLESCENCE 471 (Oct. 2005), available at <https://doi.org/10.1007/s10964-005-7264-x>.

II. THE FINAL RULE WILL CAUSE IRREPARABLE HARM BY UNDERMINING THE EQUAL DIGNITY OF TITLE X PROGRAM BENEFICIARIES.

The U.S. Supreme Court has long recognized that to realize full autonomy and dignity, individuals must be allowed to make fundamental decisions about family, marriage, and procreation free from undue interference by the government. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2597 (2015) (“The fundamental liberties protected by [the Fourteenth Amendment’s Due Process Clause]. . . extend to certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs.”); *Lawrence v. Texas*, 539 U.S. 558, 574 (2003) (“Persons in a homosexual relationship may seek autonomy for these purposes [marriage, procreation, contraception, family relationships, child rearing, and education], just as heterosexual persons do.”); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992) (“These matters [personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education], involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment.”); *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (explaining that the Constitution protects an individual’s right to be “free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the

decision whether to bear or beget a child.”); *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (“The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men.”).

Health care providers are key partners in this process, facilitating fully informed decision making about the medical and health care aspects of these fundamental decisions. Those providers must operate according to established principles of medical ethics, including informed consent. *See AMA Principles of Medical Ethics*, American Medical Association ch. 2 § 1.3, available at <https://www.ama-assn.org/system/files/2019-06/code-of-medical-ethics-chapter-2.pdf> (“Truthful and open communication between physician and patient is essential for trust in the relationship and for respect for autonomy.”); *Washington*, 376 F. Supp. 3d at 1130 (“[Plaintiffs] have also presented facts and argument that the Final Rule likely violates Section 1554 of the ACA because the Final Rule . . . violates the principles of informed consent and the ethical standards of health care professions.”); *see also Oregon*, 2019 WL 1897475, at *16 (“The unrebuted evidence demonstrates, at this stage of the proceedings, that the Final Rule would force medical providers to violate their ethical and professional obligations.”); *California*, 2019 WL 1877392, at *24 (recognizing the Final Rule as “squarely at odds with established ethical standards. . . .”). To be sure, both LGBTQ equality and access to abortion are subjects of extensive social and political debate, and

health care providers are entitled to form their own opinions and views about these issues. Those opinions, however, must not interfere with patients' fundamental rights to make informed, personal health care decisions for themselves, consistent with their own values, choices, and beliefs. Patients' health and desires must be prioritized. For that reason, family planning providers should offer patients counseling around all options concerning birth control and abortion, and make appropriate referrals upon the patient's request.

This is why the Title X program requires non-directive counseling. A patient who clearly indicates they wish to end a pregnancy should not be unwillingly steered toward a different choice. They should be given complete and accurate information about where they can obtain appropriate health and abortion care. As the court below recognized, the "central purpose of Title X" is to "equalize access to comprehensive, evidence-based, and voluntary family planning[]." *Washington*, 376 F. Supp. 3d at 1130; *see also California*, 2019 WL 1877392, at *2 (Congress's "purpose in enacting Title X was [among other things]. . . to assist in making comprehensive voluntary family planning services readily available to all persons desiring such services."); *Oregon*, 2019 WL 1897475, at *2 ("The stated purpose of Title X is to promote positive birth outcomes and healthy families by allowing individuals to decide the number and spacing of their children."). The Final Rule violates this basic promise of Title X.

See Washington, 376 F. Supp. 3d at 1130; *see also Oregon*, 2019 WL 1897475, at *9 (“The Gag Rule is the very definition of directive counseling.”); *California*, 2019 WL 1877392, at *18 (“[The Final Rule] mandates that every pregnant patient be referred to ‘prenatal health care,’ even a patient who has expressly stated that she does not want prenatal care. This differential treatment is not ‘nondirective.’”).

The Final Rule distorts the role of family planning providers, conscripting them to further a political goal that cuts off access to even basic information about abortion—all in violation of the law and fundamental rights, and at the expense of patients when they are in a critical time of need. The court below saw this clearly. *See Washington*, 376 F. Supp. 3d at 1130 (“[Plaintiffs have] presented facts and argument that the Final Rule likely violates [the ACA] because the Final Rule creates unreasonable barriers for patients to obtain appropriate medical care; impedes timely access to health care services; interferes with communications regarding a full range of treatment options between the patient and the health care provider[;] restricts the ability of health care providers to provide full disclosure of all relevant information to patients making health care decisions[;] and violates the principles of informed consent and the ethical standards of health care professions.”); *see also Oregon*, 2019 WL 1897475, at *10 (explaining that the “Gag Rule is remarkable in striving to make professional health care providers” incapable of hearing the requests clients make or providing pertinent information

in response); *California*, 2019 WL 1877392, at *8 (citation omitted); *see also id.* at *8 (“[The Final Rule’s] pregnancy counseling process is thus. . . a ‘charade’ from beginning to end.”) (citing Rabinobitz Decl. ¶ 50).

The Constitution’s guarantee of equal dignity is betrayed when the government manipulates the patient-provider relationship and constrains choices around intensely personal, intimate, and ultimately life-changing matters, especially the choice to become or remain pregnant. The Final Rule would cause irreparable harm by restricting the free flow of medically accurate and relevant information in the health care context, thereby compromising the equal dignity of Title X patients.

CONCLUSION

For the foregoing reasons, the injunction against the Final Rule should be upheld, as the Final Rule would cause irreparable harm to LGBTQ people by undermining the patient-provider relationship, threatening the continued existence of health care providers essential to the LGBTQ community, and eroding the equal dignity of all Title X patients.

Dated: July 3, 2019

MORRISON & FOERSTER LLP
JAMES E. HOUGH

By: /s/ James E. Hough
James E. Hough

Attorney for Amici Curiae

APPENDIX LIST OF AMICI

National Center for Lesbian Rights

National Center for Lesbian Rights (NCLR) is a national legal nonprofit organization founded in 1977 and committed to advancing the rights of lesbian, gay, bisexual, and transgender (LGBT) people and their families through litigation, public policy advocacy, and public education. NCLR represented six plaintiffs in the 2015 cases before the U.S. Supreme Court that resulted in the recognition of marriage equality for same-sex couples. NCLR is cognizant of invocations of spurious moral and health-related rationales to justify unlawful government conduct and to be used to undermine the fundamental rights of disfavored groups. NCLR is dedicated to ensuring the rights of all people to reproductive and bodily autonomy, as well as access to essential reproductive health care services.

GLMA: Health Professionals Advancing LGBTQ Equality

GLMA: Health Professionals Advancing LGBTQ Equality (“GLMA”) is the largest and oldest association of lesbian, gay, bisexual, transgender, and queer (LGBTQ) healthcare professionals, including physicians, physician assistants, nurses, psychologists, social workers, and other health disciplines. Founded in 1981, GLMA (formerly known as the Gay & Lesbian Medical Association) works to ensure health equity for LGBTQ and all sexual and gender minority (SGM) individuals, and equality for LGBTQ/SGM health professionals in their work and learning environments. To achieve this mission, GLMA utilizes the scientific expertise of its diverse multidisciplinary membership to inform and drive advocacy, education, and research.

The LGBT Movement Advancement Project

The Movement Advancement Project (MAP) works to ensure that all people have a fair chance to pursue health and happiness, earn a living, take care of the ones they love, be safe in their communities, and participate in civic life. MAP provides independent and rigorous research, insight and communications that help speed equality and opportunity for all.

National LGBTQ Task Force

Since 1973, the National LGBTQ Task Force has worked to build power, take action, and create change to achieve freedom and justice for lesbian, gay, bisexual,

transgender, and queer (LGBTQ) people and our families. As a progressive social justice organization, the Task Force works toward a society that values and respects the diversity of human expression and identity and achieves equity for all.

Equality Federation

Equality Federation is the strategic partner to state-based equality organizations advocating on behalf of LGBTQ people. Since 1997, we have worked throughout the country with our member organizations to make legislative and policy advances on critical issues including marriage, nondiscrimination, safe schools, and healthy communities

Sexuality Information and Education Council of the United States

The Sexuality Information and Education Council of the United States (SIECUS) was founded in 1964 to provide education and information about sexuality and sexual and reproductive health. SIECUS affirms that sexuality is a fundamental part of being human, one that is worthy of dignity and respect. SIECUS advocates for the right of all people to accurate information, comprehensive education about sexuality, and access to sexual health services.

Family Equality Council

Family Equality (formerly "Family Equality Council") is a national organization that advances lived and legal equality for LGBTQ families and those who wish to form them. Since its founding in 1979, Family Equality has worked to change attitudes, laws, and policies through advocacy and public education to ensure that all families, regardless of creation or composition, are respected, loved, and celebrated in all aspects of their life. Given the profound impact that health care has on an individual and their family, Family Equality has an ongoing interest in ensuring that LGBTQ people have equal access to quality health care services and are able to receive health care from welcoming and affirming providers.

The National Center for Transgender Equality

The National Center for Transgender Equality (NCTE) was founded in 2003 to advance justice, opportunity, and well-being for transgender people through education and advocacy. NCTE works with policymakers and communities around the country to develop fair and effective public policy on issues that affect transgender people's daily lives, including health care.

HIV Medicine Association

The HIV Medicine Association represents more than 5,000 physicians, researchers and other healthcare professionals who work on the frontlines of the HIV epidemic providing prevention and care and conducting research in communities across the U.S. HIVMA's mission is to advance a comprehensive response to the HIV epidemic informed by science and social justice, which includes ensuring access to affordable screening, prevention and care services for all Americans, including women and LGBTQ individuals.

GLBTQ Legal Advocates & Defenders

Through strategic litigation, public policy advocacy, and education, GLBTQ Legal Advocates & Defenders (GLAD) works in New England and nationally to protect and advance the rights of lesbians, gay men, bisexuals, transgender individuals, and people living with HIV and AIDS. GLAD regularly litigates in state and federal courts and with policy makers to ensure access to health care for the LGBTQ communities. GLAD has an enduring interest in ensuring that individuals are able to receive health care without regard to their sexual orientation, gender identity or HIV status.

Lambda Legal Defense and Education Fund, Inc.

Lambda Legal Defense and Education Fund, Inc. ("Lambda Legal") is the nation's oldest and largest legal organization working for full recognition of the civil rights of lesbian, gay, bisexual, and transgender ("LGBT") people and people living with HIV through impact litigation, policy advocacy, and public education. Lambda Legal has an interest in this litigation because many members of the LGBT community need and use the contraception and other family planning services funded through the Title X program, as well as abortion services, however funded. Due to persistent discrimination, LGBT people experience disproportionate poverty and under-insurance, together with alienation from too-prevalent health providers who lack LGBT cultural competence, especially in rural and low-income areas. Health providers that are able to function due to Title X funding play an essential role in alleviating the otherwise unmet needs of this vulnerable population, which include screening for sexually transmitted infections and cancer as well as sexual and reproductive health services. Because millions of LGBT people and people living with HIV potentially will be affected by the outcome of this litigation, including up to 250,000 Lambda Legal members nationwide,

Lambda Legal has a particular interest in assisting the Court through the information in this brief.

The Human Rights Campaign

The Human Rights Campaign (“HRC”), the largest national lesbian, gay, bisexual, transgender, and queer (“LGBTQ”) advocacy organization, envisions an America where LGBTQ people are ensured of their basic equal rights, and can be open, honest and safe at home, at work and in the community. Equal treatment when seeking healthcare is among these basic rights.

Transgender Law Center

Transgender Law Center (“TLC”) is the largest national trans-led organization advocating self-determination for all people. Grounded in legal expertise and committed to racial justice, TLC employs a variety of community-driven strategies to keep transgender and gender non-conforming (“TGNC”) people alive, thriving, and fighting for liberation. TLC believes that TGNC people hold the resilience, brilliance, and power to transform society at its root, and that the people most impacted by the systems TLC fights must lead this work. TLC builds power within TGNC communities, particularly communities of color and those most marginalized, and lays the groundwork for a society in which all people can live safely, freely, and authentically – regardless of gender identity or expression. TLC works to achieve this goal through leadership development and by connecting TGNC people to legal resources. It also pursues impact litigation and policy advocacy to defend and advance the rights of TGNC people, transform the legal system, minimize immediate threats and harms, and educate the public about issues impacting our communities.

Bay Area Lawyers for Individual Freedom

Bay Area Lawyers for Individual Freedom (“BALIF”) is a bar association of almost 500 lesbian, gay, bisexual, transgender and queer (“LGBTQ”) members of the San Francisco Bay Area legal community. As the nation’s oldest and largest LGBT bar association, BALIF promotes the professional interests of its members and the legal interests of the LGBTQ community at large. To accomplish this mission, BALIF actively participates in public policy debates concerning the rights of LGBTQ individuals and families. BALIF frequently appears as amicus curiae in cases, like this one, where it believes it can provide valuable perspective and argument that will inform court decisions on matters of broad public importance.

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

Form 17. Statement of Related Cases Pursuant to Circuit Rule 28-2.6

Instructions for this form: <http://www.ca9.uscourts.gov/forms/form17instructions.pdf>

9th Cir. Case Number(s)

The undersigned attorney or self-represented party states the following:

- I am unaware of any related cases currently pending in this court.
- I am unaware of any related cases currently pending in this court other than the case(s) identified in the initial brief(s) filed by the other party or parties.
- I am aware of one or more related cases currently pending in this court. The case number and name of each related case and its relationship to this case are:

State of California v. Azar, et al. Case No. 19-15974. That case involves similar claims and the defendants as here.

Essential Access Health, Inc., et al. v. Azar, et al. Case No. 19-15979. That case involves similar claims and the defendants as here.

State of Oregon, et al., v. Azar, et al., and National Family Planning & Reproductive Health Ass'n, et al., v. Azar, et al.

Case No. 19-35386. That case involves similar claims and the same defendants as here.

Signature

Date

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

CERTIFICATE OF COMPLIANCE

I hereby certify that:

1. This brief complies with the type-volume limitation of Federal Rules Appellate Procedure 29(a)(5) and 32(a)(7)(B) because: This brief contains 4,403 words, excluding the parts of the brief exempted by Federal Rule Appellate Procedure 32(f).
2. This brief complies with the typeface requirements of Federal Rule Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule Appellate Procedure 32(a)(6) because: This brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

Dated: July 3, 2019

MORRISON & FOERSTER LLP
JAMES E. HOUGH

By: /s/ James E. Hough
James E. Hough

Attorney for Amici Curiae

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing *Brief of Amici Curiae National Center for Lesbian Rights in Support of Appellees* with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on July 3, 2019.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: July 3, 2019

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