ORAL ARGUMENT NOT YET SCHEDULED

Nos. 18-5218, 18-5219

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PLANNED PARENTHOOD OF WISCONSIN, INC., *et al.*,
Plaintiffs-Appellants,

ALEX M. AZAR II, in his official capacity, *et al.*,
Defendants-Appellees

On Appeal from the United States District Court
for the District of Columbia

BRIEF *AMICI CURIAE* OF THE CITIES OF COLUMBUS, OH; CINCINNATI, OH; DAYTON, OH; SEATTLE, WA; AUSTIN, TX; ST. PAUL, MN; DULUTH, MN; ALBANY, NY; PHILADELPHIA, PA MINNEAPOLIS, MN; BALTIMORE, MD; TUCSON, AZ; PROVIDENCE, RI; CHICAGO, IL, NEW YORK, NY; LOS ANGELES, CA; AKRON, OH; DANE COUNTY, WI; AND THE CITY AND COUNTY OF SAN FRANCISCO, CA IN SUPPORT OF PLAINTIFFS

Zach Klein
COLUMBUS CITY ATTORNEY
Lara N. Baker-Morrish
City Solicitor General
Alexandra Pickerill
Assistant City Attorney
77 North Front Street, 4th Floor
Columbus, OH 43215
(614) 645-7388
Lnbaker-morrish@columbus.gov

Sasha Samberg-Champion
RELMAN, DANE & COLFAX PLLC
1225 19th Street, NW, Suite 600
Washington, DC 20036
(202) 728-1888
Ssamberg-champion@relmanlaw.com

Attorneys for Amicus Curiae City of Columbus
Attorneys for other Cities listed separately

September 12, 2018

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1)(A), *Amici* Cities certify that the parties and *amici curiae* in this case are as follows:

A. Parties, Intervenors, and Amici. Except for the following, all parties, intervenors, and amici appearing before the district court and in this Court are listed in the Brief for Appellants:

Additional *Amici Curiae* in this Court are the cities of Columbus, OH; Cincinnati, OH; Dayton, OH; Seattle, WA; Austin, TX; St. Paul, MN; Duluth, MN; Albany, NY; Philadelphia, PA; Minneapolis, MN; Baltimore, MD; Tucson, AZ; Providence, RI; Chicago, IL; New York, NY; Los Angeles, CA; Akron, OH; and Dane County, WI; and the city and county of San Francisco, CA.

B. Rulings Under Review. References to the rulings at issue are listed in Appellants' Certification.

C. Related Cases. Related cases are listed in Appellants' Certification.

CORPORATE DISCLOSURE CERTIFICATE

Pursuant to Fed. R. App. P. 26.1 and D.C. Cir. R 26.1, Counsel certifies that no signatory to this brief has a parent corporation and that no publicly held corporation owns 10 percent or more of the stock of any of the signatories.

CONSENT TO FILE AND SEPARATE BRIEFING

All parties have consented to the filing of this brief. Pursuant to D.C. Circuit Rule 29(d), *Amici* certify that a separate brief is necessary in addition to the one filed by States. *Amici* are not States and do not customarily join States' briefs. Additionally, they play a different role in the Title X process and thus provide this Court with a different perspective. The arguments made herein are not duplicative of those made by the States or by Plaintiffs-Appellants.

STATEMENT OF CONTRIBUTING FUNDS PURSUANT TO FRAP 29(4)(E)

The accompanying amicus brief prepared for the Cities of Columbus, OH *et al.* ("the *Amici* Cities") was drafted entirely by counsel for the *Amici* Cities.

Neither party nor their counsel provided funds for the preparation or submittal of this brief. No individual, organization, or agency other than the *Amici* Cities provided funding in support of this brief, its preparation, or its submittal.

/s/ Sasha Samberg-Champion
Sasha Samberg-Champion

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I. INTRODUCTION

Any significant change to the long-standing regulatory criteria for funding providers of Title X family planning services is of great public interest, given the many stakeholder interests and complex reverberations any such changes will have for the health care options available to low-income women and men. Indeed, the Department of Health and Human Services ("HHS") has received more than 200,000 comments responding to its recently proposed changes to Title X regulations published on June 1, 2018.[1] HHS made the changes at issue here, however, without giving prior notice to or seeking comment from the community of Title X providers and stakeholders, and the quality of its decision-making reflects that unlawful haste. In order to protect their constituents' health and their own financial interests, *Amici*—eighteen cities and two counties whose communities are at risk of losing a portion of the Title X funding currently devoted to their communities and are at risk of seeing the health services currently provided to them distorted by new requirements that are untethered from medical needs—submit this brief in support of Plaintiffs' appeal.

[1] *Compliance with Statutory Program Integrity Requirements*, REGULATIONS.GOV (June 1, 2018), https://www.regulations.gov/document?D=HHS-OS-2018-0008-0001 (last visited Sept. 12, 2018); *see* HHS, *Proposed Rule: Compliance with Statutory Program Integrity Requirements*, 83 Fed. Reg. 25502 (June 1, 2018) ("Proposed Rule").

In February, HHS released the 2018 Funding Opportunity Announcement ("FOA") for Title X family planning grants.[2] To the long-standing and properly promulgated list of scored, mandatory criteria for awarding the grants, HHS unexpectedly added new criteria that do not further any of Title X's purposes—a commitment to emphasizing sexual abstinence and the provision of on-site primary care services—and accorded them disproportionate weight in the scoring process. HHS made these consequential changes without soliciting comment from the public or considering how its action would affect communities in need of the services Title X-funded entities provide.

As Plaintiffs explain in their brief, the need to adhere to these so-called "priorities and key issues" in order to receive continued Title X funding puts traditional recipients such as Planned Parenthood at risk of being defunded or partially defunded, without any assurances that the gap will be filled in a timely manner for people on the ground in cities across America. Further, each program hoping to receive Title X funding will be required to divert a portion of its overall grant from the provision of existing, evidence-based practices and services in furtherance of these newly required and counterproductive program priorities. City

[2] Valerie Huber, DEPARTMENT OF HEALTH AND HUMAN SERVICES, *Announcement of Availability of Funds for a Clinical Training and Technical Assistance Project to Support the Title X Family Planning Program* 15 (April 19, 2018), https://www.hhs.gov/opa/sites/default/files/FY18_OPA_Title_X_Family_Planning_Clinical_Training_Center_FOA_FINAL_NoSignature_508.pdf.

Amici, who were not provided the opportunity to comment on HHS's action, submit this brief to inform this Court of the disruption that HHS's action threatens to cause to the on-the-ground provision of vital reproductive health services in their communities.

Many of *Amici* have municipal health departments that provide Title X services. Their Title X patients, who are predominantly sexually active women seeking contraception, have no interest in being counseled on abstinence. HHS's action thus threatens to disrupt these health department's relationships with their patients by forcing them to emphasize "services" that patients do not want. *Amici*'s and others' municipal health departments have properly focused their efforts on educating their patients/constituents regarding the forms of family planning that evidence demonstrates to be the most effective. HHS's actions threaten to punish them for doing so and force them to emphasize "methods" proven not to be effective.

Not only does HHS's action threaten the continued quality of Title X-funded care, it threatens the availability of these vital services in *Amici*'s communities. Title X clinics are not geographically spread out; they tend to be clustered in predominantly urban areas that have become service hubs for broad regions. Should HHS's action cause existing clinics to close, there is a real risk that family

planning services will be unavailable not only to many of *Amici*'s constituents but to their neighboring communities as well.

HHS should have acknowledged and addressed *Amici*'s concerns before changing its Title X funding criteria, but instead it chose to not even hear them. For these reasons and those stated in Plaintiffs' brief, *Amici* urge this Court to overturn the decision of the trial court and find HHS's FOA to be in violation of the Administrative Procedure Act ("APA").

II. IDENTITY AND INTEREST OF *AMICI CURIAE*

Amici are the cities of Columbus, OH; Cincinnati, OH; Dayton, OH; Seattle, WA; Austin, TX; St. Paul, MN; Duluth, MN; Albany, NY; Philadelphia, PA; Minneapolis, MN; Baltimore, MD; Tucson, AZ; Providence, RI; Chicago, IL; New York, NY; Los Angeles, CA; Akron, OH; the city and county of San Francisco, CA; and Dane County, WI ("the *Amici* Cities"). They have a strong interest in the outcome of this appeal. Their residents are among the more than four million Americans who depend on Title X funding to ensure continued, uninterrupted access to quality reproductive healthcare and are at risk of losing such access as a result of the action challenged here.[3] Collectively, the *Amici* Cities are home to

[3] *Title X Family Planning Annual Report: 2017 National Summary* ES-1, OFFICE OF POPULATION AFFAIRS (2017), https://www.hhs.gov/opa/sites/default/files/title-x-fpar-2017-national-summary.pdf ("*2017 National Summary*").

fifty-two Planned Parenthood clinics,[4] ten city health departments,[5] and over three hundred Title X providers (including county health departments), most of whom have received or are hoping to receive Title X grants.[6]

City health departments often serve as direct administrators of Title X programs. This affords the *Amici* Cities a unique perspective on the likely harm caused by HHS's unlawful policies. Cities would be impacted by HHS's alteration of program requirements in their own health departments' applications for funding. Moreover, these city health departments would also likely be compelled to take on the additional burden of serving those uninsured and underinsured clients who may suddenly find themselves without the ability to access services historically provided by specialized reproductive health providers like Planned Parenthood due to the change in grant criteria. For those cities that rely solely upon these

[4] Chicago is home to seven Planned Parenthood locations; Los Angeles has six. Philadelphia, New York City (including the boroughs), and Seattle have five locations, Cincinnati has four, Columbus and Austin have three, St. Paul, San Francisco and Dane County have two. Albany, Duluth, Dayton, Minneapolis, Baltimore, Providence, Akron, and Tucson each have one clinic. *Find a Health Center*, PLANNED PARENTHOOD, https://www.plannedparenthood.org/health-center (last visited Sept. 8, 2018).

[5] Austin, New York City, Philadelphia, Columbus, Dayton, Cincinnati, Chicago, Minneapolis, Baltimore, and San Francisco have municipal health departments.

[6] *Title X Family Planning Directory*, OFFICE OF POPULATION AFFAIRS (July 2018), https://www.hhs.gov/opa/sites/default/files/Title-X-Family-Planning-Directory-July2018.pdf (last visited Sept. 8, 2018).

specialized clinics for provision of Title X services in their community, the impact of the change in grant funding criteria could leave their residents in even more dire straits.

Finally, cities have an interest in a fair and transparent regulatory process, allowing for predictability in funding and long-term budgeting.

III. SUMMARY OF ARGUMENT

Like Plaintiffs, *Amici* Cities submit that the FOA's new application criteria: (1) are reviewable final agency action, (2) constitute legislative rules that only can be promulgated through notice and comment rulemaking, and (3) are contrary to law and arbitrary and capricious. *Amici* Cities fully join Plaintiffs' considered and compelling arguments as pertain to all three of these points.

Amici Cities are particularly concerned about—and thus specifically address in addition to joining Plaintiffs' argument—HHS's failure to undertake notice-and-comment rulemaking before adding additional criteria to the list of factors to be scored, potentially altering both the recipients of Title X funding and the manner in which applicants must provide health services in order to receive such funding. As evidenced by the number of comments received when HHS did open notice-and-comment proceedings with respect to other proposed changes to Title X regulations, many stakeholders are significantly affected by such changes to Title X eligibility requirements and other program rules. The agency's decision here to

make such an important policy modification in a rushed way, outside the required rulemaking process, deprived the Cities and many other stakeholders of the opportunity to comment on—and thus provide the agency with relevant information regarding—an action that threatens to greatly impact the provision of vital health services. As a result, HHS failed to grapple with a substantial risk, as described below, that Title X-funded services in communities such as *Amici* Cities' will be rendered less effective and less available.

IV. ARGUMENT

"Growing recognition of the social, economic and health benefits of enabling women and couples to better control the number and timing of their pregnancies led to the establishment in 1970 of the Title X family planning program." Rachel Benson Gold, et al., *Next Steps for America's Family Planning Program: Leveraging the Potential of Medicaid and Title X in an Evolving Health Care System*, GUTTMACHER INST. (Feb. 2009).[7] Effective family planning and access to contraception is a medical necessity for women during their reproductive years, bearing upon a critically important public health concern: unintended pregnancies. *Id.* HHS recognizes that reducing the rate of unintended pregnancies is of concern to public health, as evidenced by the agency's inclusion in its Healthy

[7] https://www.guttmacher.org/report/next-steps-americas-family-planning-program-leveraging-potential-medicaid-and-title-x (last visited Sept. 12, 2018).

People 2020 campaign of the objective of increasing the proportion of pregnancies that are intended by 10% between 2010 and 2020.[8]

In accordance with these long-standing program objectives, HHS has promulgated seven regulatory criteria for deciding which family planning projects to fund using Title X money. *See* 42 C.F.R. § 59.7(a). Those criteria, which have remained the same for decades, all are related to a funding applicant's ability to provide family planning services and the need for such services in the applicant's community. *See, e.g.*, 42 C.F.R. § 59.7(a)(2) ("The extent to which family planning services are needed locally"); 42 C.F.R. §59.7(a)(5) ("The adequacy of the applicant's facilities and staff"). These regulatory criteria are consistent with those priorities set forth in Title X's authorizing statute. 42 U.S.C. § 300(b).

A. The addition of new criteria to those set forth by regulation constituted rulemaking necessitating notice and comment review.

HHS promulgated through the notice-and-comment process the seven elements it has long considered in awarding Title X funding. Its addition of new criteria—which considerably reorient the agency's funding priorities to favor considerations such as encouraging abstinence and expressing a preference for

[8] *Family Planning*, HEALTHY PEOPLE 2020, https://www.healthypeople.gov/2020/topics-objectives/topic/family-planning/objectives (last visited Sept. 12, 2018).

family planning services provided in the same location as the receipt of primary health care—was unlawful without similar notice-and-comment procedures.

Legislative rules have the "force and effect of law" and may be promulgated only after public notice and comment. *INS v. Chadha*, 462 U.S. 919, 986 n.19 (1983). Further, "an agency issuing a legislative rule is itself bound by the rule until that rule is amended or revoked" and "may not alter [such a rule] without notice and comment." *Clean Air Council v. Pruitt*, 862 F.3d 1, 9 (D.C. Cir. 2017) (quoting *Nat'l Family Planning & Reproductive Health Ass'n v. Sullivan*, 979 F.2d 227, 234 (D.C. Cir. 1992). A rule is legislative when it "supplements a statute, adopts a new position inconsistent with existing regulations, or … effects a substantive change to the statutory or regulatory regime." *Mendoza v. Perez*, 754 F.3d 1002, 1021 (D.C. Cir. 2014) (quoting *Elec. Privacy Info. Ctr. v. U.S. Dep't of Homeland Sec.*, 653 F.3d 1, 6-7 (D.C. Cir. 2011)). "Agency action that creates new rights or imposes new obligations on regulated parties or narrowly limits administrative discretion constitutes a legislative rule." *Ass'n of Flight Attendants-CWA v. Huerta*, 785 F.3d 710, 717 (D.C. Cir. 2015); *accord Ctr. for Auto Safety v. Nat'l Highway Traffic Safety Admin.*, 452 F.3d 798, 806 (D.C. Cir. 2006).

Prior FOAs have included program priorities and key issues to guide grantees in grant administration. This has been done without notice-and-comment rulemaking, and properly so, because such guidance has been consistent with the

legislative and regulatory criteria. This year's FOA is different. It sets out priorities that find no purchase in the long-standing legislative and regulatory criteria. Moreover, it elevates them to the same level as the application criteria that HHS applies in accordance with its promulgated regulations. In other words, HHS has effectively promulgated a new rule regarding application criteria.

To be competitive under this year's FOA and achieve a satisfactory score, applicants must incorporate the goals of the "program priorities and key issues" into their grant application plans to the same extent as the seven promulgated criteria. To continue accepting and administering these grant awards, Title X program providers must substantively alter their existing programming, deviating from existing service models as well as evidence-based best practices. Whatever one's views of the policy merits of this action, it constitutes a substantive change to the regulatory regime, imposing new obligations upon those applying for and administering Title X grants. This HHS cannot do, consistent with the APA, without an opportunity for notice and comment. *Amici* Cities agree with, and adopt by reference, Plaintiffs' arguments that this Court's precedents compel that result.

B. HHS's failure to engage in notice and comment rulemaking deprived *Amici* Cities of the opportunity to provide comment regarding important consequences of its action.

This agency action illustrates why the APA's notice-and-comment requirements are vital to proper agency decision-making. "The purposes of according notice and comment opportunities were twofold: 'to reintroduce public participation and fairness to affected parties after governmental authority has been delegated to unrepresentative agencies,' and to 'assure[] that the agency will have before it the facts and information relevant to a particular administrative problem, as well as suggestions for alternative solutions.'" *American Hospital Ass'n v. Bowen*, 834 F.2d 1037, 197 (D.C. Cir. 1987) (quoting *Batterton v. Marshall*, 648 F.2d 694, 703 (D.C. Cir. 1980); *Guardian Federal Savings & Loan Ass'n v. Loan Insurance Corp.*, 589 F.2d 658, 664 (D.C. Cir. 1978)). Both purposes were disserved by HHS's failure to follow notice-and-comment procedures. HHS deprived *Amici* Cities (and others) of a fair opportunity to participate in its decision-making and deprived itself of information material to that decision.

If able to comment, *Amici* Cities would have informed HHS of at least two issues that should have been material to any rulemaking, and HHS would have had to explain why it nonetheless was going forward with this action. Instead, HHS's action does not acknowledge, or demonstrate any consideration of, the likely

impact on *Amici* Cities of changing the traditional Title X funding criteria in this manner.

I. HHS's new criteria will have a negative impact on the provision of family planning services at city health departments.

A number of *Amici* Cities with city health departments are past recipients of Title X awards and, like Plaintiffs, are subject to the 2018 FOA criteria for future awards. For instance, in the State of Ohio, the Ohio Department of Health applies yearly for Title X funding. It then distributes this money among various in-state agencies, including the Columbus Public Health Department ("CPH").[9] All sub-grantees, such as CPH, must conform their program administration to the conditions placed upon them by the Ohio Department of Health and to the conditions of the awarded Title X grant. The new conditions that HHS has imposed, however, run contrary to the needs of the Title X patients being served by city health departments.

For example, HHS now requires a Title X plan to contain "meaningful emphasis on education and counseling" pertaining to "the benefits of avoiding sexual risk or returning to a sexually risk-free status."[10] HHS makes clear that this

[9] *Title X in Ohio Improving Public Health and Saving Taxpayer Dollars*, NATIONAL FAMILY PLANNING & REPRODUCTIVE HEALTH ASSOCIATION (December 2016), https://www.nationalfamilyplanning.org/file/documents---policy--communication-tools/state-snapshots/Title-X-in-Ohio.pdf.

[10] Huber, *Announcement of Availability of Funds*.

requirement to emphasize abstinence[11] applies to adult patients, stating that sexual risk avoidance is to be given "meaningful emphasis" "especially **(but not only)** when communicating with adolescents" (emphasis added). *Id.* This requirement conflicts with patient needs and undermines the ability of Title X grant recipients to accomplish the program's core goals.

First, the vast majority of Title X patients served by city health departments—like those served by Planned Parenthood—are single, female adults who wish to remain sexually active and are seeking contraception. That is, most adult Title X patients come to city health clinics for services incompatible with the "counseling" that HHS now requires reproductive health clinics to emphasize, undermining the trust between clinic and patient. That experience is consistent with numbers recently reported in HHS's own Title X Family Planning Annual

[11] While the FOA does not use the term "abstinence," the terms "avoiding sexual risk" and "returning to a sexually risk-free status" are terms of art that HHS and others use to connote a sexually abstinent lifestyle outside of marriage. *See*, *e.g.*, *Sexual Risk Avoidance Education Program: Fact Sheet*, FAMILY AND YOUTH SERVICES BUREAU (2017), https://www.acf.hhs.gov/sites/default/files/fysb/srae_facts_20170217.pdf ("The purpose of the Sexual Risk Avoidance Education (SRAE) Program is to fund projects to implement sexual risk avoidance education that teaches participants how to voluntarily refrain from non-marital sexual activity"); *see also* Grossu, Arina et. al., *Sexual Risk-Avoidance Education*, FAMILY RESEARCH COUNCIL, 1 (April 2014), https://www.frc.org/SexualRiskAvoidance (last visited Sept. 12, 2018) ("Sexual Risk-Avoidance (SRA) education is an approach to sex education that focuses on risk-avoidance instead of Sexual Risk-Reduction (SRR) or 'comprehensive sex education' when it comes to sexual activity. The term 'Sexual Risk-Avoidance' is now used more commonly than the older term 'abstinence'").

Report for 2017 ("FPAR").[12] Therein, data accumulated across all Title X regions showed that 80% of all female patients adopted or continued use of a contraceptive method with a recognized effectiveness rating; 9% indicated no use for contraception, as they were pregnant/seeking to become pregnant; and 5% indicated they were sexually active but, for whatever reason, departed from their clinic encounter without any contraceptive.[13] *Id*. at 27. Of all female users, only 3% reported they were abstinent. *Id.* at 29.

Amici Cities have had similar experiences. For example:

- In Baltimore, city health clinics served 7,670 Title X clients in 2017. Only 19.6% were under the age of 18. Females accounted for 6,437; 376 of them were pregnant or seeking to get pregnant. Of the remaining 6,061 women, 88% reported using some form of contraception.[14]

[12] *2017 National Summary*

[13] Some of these patients did not need contraceptive methods because one or both partners were sterile or the sexual relationship otherwise was not one that could result in pregnancy.

[14] *AHLERS Report – All Baltimore City Clinics, January 1, 2017 – December 31, 2017*, BALTIMORE CITY HEALTH DEPARTMENT (on file with Columbus City Attorney's Office).

- San Francisco city health clinics served 5,773 Title X clients in 2017, with only 13% under 18. 5,223 of the clients were females, 85% of whom reported using some form of contraception.[15]
- In Seattle, Public Health Seattle & King County (PHSKC) served 6,217 clients in 2016, 5,531 of whom were women. An estimated 85% of those women of reproductive age were on some form of contraception.[16]

The HHS action, issued without notice and comment, demonstrates no awareness of these facts or explanation as to why Title X service must be reoriented to the provision of services that are not sought. Nor does it explain how city health clinics can "counsel" adult women who are sexually active and come seeking birth control about the "benefits" of abstinence without undermining their patient relationships.

Second, sexual-risk avoidance education has proven to be ineffective as a family planning tool.[17] Had notice-and-comment rulemaking been engaged in, city

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[15] *Summary of Patients/Residents Served 2016*, SAN FRANCISCO HEALTH NETWORK (provided September 6, 2018) (original copy on file with the Columbus City Attorney's Office).

[16] Washington State Title X Family Planning Network, *Public Health Seattle & King County Profile 2015-16*, WASHINGTON STATE DEPARTMENT OF HEALTH, https://www.doh.wa.gov/Portals/1/Documents/Pubs/930-140-FamilyPlanningDataPHSKC-part1.pdf.

[17] *See, e.g.*, Debra Hauser, *Five Years of Abstinence-Only-Until-Marriage Education: Assessing the Impact*, ADVOCATES FOR YOUTH (2004) ("Evaluation of

health departments, as well as other experts in the field of reproductive health, would have informed HHS of studies demonstrating the ineffectiveness of abstinence as a family planning method. Placing unwarranted emphasis on the use of these ineffective methods runs contrary to one of the primary objectives of HHS's Healthy People 2020 campaign—the reduction of unintended pregnancies—as well as Title X's own dictates.

HHS categorizes contraceptive methods into three broad categories: most effective, moderately effective, and less effective. *2017 National Summary*. "Most effective" methods include both permanent (vasectomy, female sterilization) and long-acting reversible contraception, or "LARC," such as IUDs and implants. *Id.* at ES-2. While natural family planning methods—which, unlike abstinence counseling, are specifically recognized by Title X's text, *see* 42 U.S.C. § 300(a)—are categorized as a "less effective" form of contraception, they are considered effective to *some* extent. Abstinence counseling, on the other hand, falls outside of all recognized categories of effective contraception. It therefore is categorized separately, whether used to describe one who is simply not sexually active or one who has chosen abstinence as a family planning method. *2017 National Summary* at ES-2.

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these 11 programs showed few short-term benefits and no lasting, positive impact.").

This new requirement to emphasize what HHS itself does not consider to be an effective method of family planning undermines the efforts of Title X grantees, such as municipal health departments, to promote increased usage of more effective methods, consistent with the goals of both Title X and Healthy People 2020. *Amici* Cities properly have focused their efforts on encouraging the use of most effective methods of family planning, and now are at risk of being punished for having done so. For example, in 2018, the Cincinnati Health Department's Reproductive Health and Wellness Program (RHWP) plan application for 2018/19 funding emphasized the Program's continued success in meeting the goal of increasing the number of clients using long-acting reversible contraception (particularly for women at high risk of having unintended pregnancy).[18] Similarly, the Baltimore City Health Department reinforced its mission to employ the Healthy People 2020 goal and reduce unintended pregnancies by providing same-day LARCs with Title X funding.[19] Pursuant to HHS's new criteria, these health departments must begin emphasizing family planning "methods" that do not work or risk losing their Title X funding.

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[18] *Hamilton County Reproductive Health and Wellness Program Grant Application*, CINCINNATI HEALTH DEPARTMENT (November 21, 2017) (original on file with Columbus City Attorney's Office).

[19] *Categorical Grant Proposal Program Plan 7/1/17 through 6/30/18 – Family Planning and Reproductive Health Programs*, BALTIMORE CITY HEALTH DEPARTMENT (original on file with Columbus City Attorney's Office).

II. A sudden change in criteria undermining the ability of existing, specialized reproductive health providers such as Planned Parenthood to continue to obtain Title X funding will detrimentally impact city health departments and city residents.

If able to comment, *Amici* Cities also would have told HHS that, even if there were good reason for imposing these new criteria for Title X funding over time (and there is not), suddenly imposing them in this fashion unnecessarily destabilizes the provision of reproductive health services. Threatening existing providers such as Planned Parenthood with a loss of funding will not just harm those providers. It will harm communities such as *Amici* Cities' that will find themselves lacking service options, as well as those who must pick up the slack—such as city health departments. Although the initial release of grant awards by HHS in August 2018 did not significantly alter the recipient list, it is far from certain that will remain the case going forward. This issue remains of concern to *Amici* Cities, as the awards were shortened from three-year to seven-month grants and necessitate amendment of applications to conform to the additional requirements contained in the eighth criterion.[20]

[20] Sub-grantees in Ohio were told by grantee Ohio Department of Health: "In addition to the funding change, the Addendum will contain other limited changes to the RHWP to align RHWP more closely with new Title X requirements . . . Once you provide a response to the Addendum, you may receive additional special conditions as appropriate." E-mail from Lori Deacon, Administrator, Ohio Department of Health, to Johanna Taylor, Columbus Public Health (Sept. 5, 2018) (original on file with Columbus City Attorney's Office).

This problem is magnified by the uneven distribution of Title X service centers by geography and provider, making many regions vulnerable to complete or almost-complete loss of service should Planned Parenthood clinics ("PPCs") or other specialized reproductive health centers be forced to close. In many regions of the country, including the metropolitan areas in which some *Amici* Cities are located, one city serves as the hub of Title X Family Planning providers in the region.

For example, Tucson is home to six Title X service sites, including one PPC, constituting fully one-fifth of the 30 Title X sites in all of Arizona. Eighteen of those 30 (and four of the five PPCs in the state) are found in the three most populated of Arizona's 15 counties: Maricopa, Pimal and Pima (where Tucson is located).[21] To its east, Pima County is bordered by Santa Cruz, Cochise, and Graham Counties, and to its west, by Yuma County. Those four counties bordering Pima to the east and west have only one Title X service site in operation among them. *Title X Family Planning Directory*. This means that the six service sites (including one PPC) in Tucson are serving not only clients from Pima County (population of roughly 1 million) but also residents of these four surrounding counties (total population approximately 400,000). *Id.*

[21] *Arizona Counties by Population*, ARIZONA DEMOGRAPHICS BY CUBIT, https://www.arizona-demographics.com/counties_by_population (last visited Sept. 12, 2018).

Meanwhile, there are 13 Title X service sites in the Albany/Schenectady region of upstate New York, including one in Albany, the state capital. *Id.* However, all 13 of these sites are PPC locations, meaning the area would be left with no Title X service providers should PPCs be denied funding.

Of the 87 counties in Minnesota, only 22 contain Title X service sites, with 11 served only by PPCs. *Id.* For Duluth, located in St. Louis County and served only by a PPC, loss of the PPCs in each of St. Louis, Itasca, and Beltrami Counties would eliminate Title X services from northern Minnesota in its entirety. For Minneapolis and St. Paul, should PPCs be unable to remain open in their region, the St. Paul/Ramsey County Health Department would become the sole Title X provider not only for the Twin Cities but for the entire east-central Minnesota region. *Id.*

In other parts of the country, Planned Parenthood serves as the sole family planning provider for counties neighboring *Amici* Cities that have city health departments receiving Title X funding and that provide Title X-funded services. For example, in nine counties in Ohio, Planned Parenthood serves as the sole local provider of Title X Family Planning care.[22] For one of these Counties—Athens,

[22] Seema Iyer, *Columbus City Council Passes Resolution to Protect Planned Parenthood Funding*, FOX 28 (2018), https://myfox28columbus.com/news/local/columbus-city-council-passes-resolution-to-protect-planned-parenthood-funding (last visited Sept. 12, 2018).

home to Ohio University—none of its five bordering counties (all located in Appalachian Ohio) have any Title X service providers. Columbus (home to both a city health department and three PPCs) is located in Franklin County, two counties over from Athens, and is itself surrounded by four counties with no Title X service sites.[23]

Loss of Planned Parenthood as a provider would result in a complete lack of local options for health care in these areas. That would have cascading effects, including an increased demand for services at the remaining city public health clinics in neighboring counties. There is no reason to think that this void could be filled immediately by new service providers (or even by city health departments themselves) because it takes time for such providers to ramp up service even after receiving funding.

Had the *Amici* Cities been given the opportunity to comment, HHS would have learned, for instance, that the preference in the program priorities for the provision of family planning services in the same location as the receipt of primary health care would work against the funding of specialized reproductive health care clinics like Planned Parenthood. That, in turn, harms residents of both the cities where the clinics are located and residents of surrounding areas who, in the absence of their own clinics, also rely on these clinics. Disrupting this complex

[23] *Title X Family Planning Directory*.

service web that has evolved over decades with a new, un-studied emphasis on funding clinics that also provide primary health care may well reallocate the geographical distribution of clinics in a way that threatens the continuity of service availability.

In June 2018, HHS did submit a separate Title X Proposed Rule "Compliance with Statutory Program Integrity Requirements" for comment. *See Proposed Rule*, 83 Fed. Reg. 25502. The comments received further demonstrate that HHS should similarly have taken comment prior to adopting the 2018 FOA additional criteria. Cities, in particular, urged HHS not to change long-standing Title X funding requirements in a way that would unsettle their constituents' access to vital family planning health services.

A letter signed by mayors of over 80 cities across the United States—including nine mayors from the *Amici* Cities—warned of the "disastrous" consequences occasioned by the loss of specialized reproductive health care providers such as Planned Parenthood should these additional rules be adopted: "Making it impossible for Planned Parenthood to keep seeing Title X patients and preventing all Title X-funded providers from offering critical information to

patients would have serious consequences and an extraordinarily harmful impact on communities in our cities and across the nation."[24]

Another comment, from the San Francisco Department of Health, apprised HHS:

> Health experts have raised concern as to whether other providers from other clinics could absorb these patients if Planned Parenthood clinics [were] forced to close or reduce services, and whether those providers could offer the same degree of accessible, quality contraceptive care offered by Planned Parenthood."[25]

Finally, the New York City Deputy Mayor for Health and Human Services, concerned that the proposed rule would lead to the loss of specialized reproductive health providers in the Title X program, had these words of warning:

> These provisions completely ignore that specialized providers have for decades played an important – and irreplaceable role – in the Title X program.… Federally Qualified Health Centers (FQHCs) as well as other women's health centers throughout the country themselves have said there is no way they could fill the gap if providers currently receiving Title X funding were no longer allowed to serve these patients.… Providers that have even less experience and capacity to

[24] Letter from Mayor Bill de Blasio, City of New York, signed by over 80 U.S. mayors to The Honorable Secretary Alex Azar in response to requests for comments (June 8, 2018); *Compliance with Statutory Program Integrity Requirements*, REGULATIONS.GOV (July 31, 2018), https://www.regulations.gov/document?D=HHS-OS-2018-0008-0001 (last visited Sept. 12, 2018); *see also* Letter from Mayor Rahm Emanuel, City of Chicago, in response to request for comments (June 15, 2018).

[25] Letter from Barbara A. Garcia, MPA, Director, Department of Public Health, San Francisco, to The Honorable Secretary Alex Azar in response to requests for comments (July 31, 2018).

> provide a broad range of family planning care will be even less able to fill this gap, and patients will be left without the services they need.[26]

Unfortunately, HHS took the action at issue here, which has the potential to cause similar effects, without first soliciting comment, from cities or anyone else. This Court should find that doing so was unlawful.

V. CONCLUSION

For the reasons stated above, and those stated in Plaintiffs' brief, the district court's judgment should be reversed.

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Respectfully submitted,

/s/ Sasha Samberg-Champion
Sasha Samberg-Champion
RELMAN, DANE & COLFAX PLLC
1225 19th Street, N.W., Suite 600
Washington, D.C. 20036
(202) 728-1888
(202) 728-0848 (facsimile)

Zach Klein
COLUMBUS CITY ATTORNEY
Lara N. Baker-Morrish
City Solicitor General
Alexandra Pickerill
Assistant City Attorney
77 North Front Street, 4th Floor
Columbus, OH 43215
(614) 645-7388 Phone
(614) 645-6949 Fax

[26] Letter from Herminia Palacio, MD, MPH, Deputy Mayor for Health and Human Services, The City of New York, to The Honorable Secretary Alex Azar in response to requests for comments (July 30, 2018).

Attorneys for Amicus Curiae City of Columbus[27]

[27] Counsel for other signatories listed on signature page.

SIGNATURE PAGE
(* denotes not admitted to the D.C. Circuit)

/s/ Zach Klein *
Columbus City Attorney
77 North Front Street
Columbus, Ohio 43215-9013
(614) 645-7385
ZMKlein@columbus.gov
Attorney for City of Columbus

/s/ Paula Boggs Muething *
City Solicitor for Cincinnati
John Cranley, Mayor of Cincinnati
City Hall, 801 Plum Street, Room 214
Cincinnati, Ohio 45202
(513) 352-3320
Paula.BoggsMuething@cincinnati-oh.gov
Attorney for City of Cincinnati

/s/ Barbara J. Doseck *
City Attorney for Dayton
101 W. Third St.
P.O. Box 22
Dayton, OH 45402
(937) 333-4100
Barbara.Doseck@daytonohio.ogv
Attorney for City of Dayton

/s/ Peter S. Holmes *
Seattle City Attorney
701 Fifth Avenue, Suite 2050
Seattle, WA 98104-7097
(206) 684-8200
peter.holmes@seattle.gov
Attorney for City of Seattle

/s/ Anne L. Morgan *
City of Austin Attorney
P.O. Box 1546

Austin, Texas 78701-1546
(512) 974-2268
Anne.morgan@austintexas.gov
Attorney for City of Austin

/s/ Lyndsey MD Olson *
City of St. Paul Attorney
15 W. Kellogg Boulevard, Suite 400
Saint Paul, MN 55102
(651) 266-8716
Lyndsey.Olson@ci.st.paul.mn.us
Attorney for City of St. Paul

/s/ Gunnar Johnson *
City Attorney, City of Duluth
411 W 1st St., Room 403
Duluth, MN 55802
(218) 730-5490
gjohnson@duluthmn.gov
Attorney for the Mayor for the City of Duluth, Emily Larson

/s/ William Kelly, Jr. *
Corporation Counsel, City of Albany
City Hall, 24 Eagle Street
Albany, NY 12207
(518) 434-5050
bkelly@albanyny.gov
Attorney for City of Albany

/s/ Marcel S. Pratt *
City Solicitor
1515 Arch St., 17th Fl.
Philadelphia, PA 19102
(215) 683-5001
Marcel.pratt@phila.gov
Attorney for City of Philadelphia

/s/ Susan L. Segal *
City Attorney, Minneapolis
310 S. 5th Street, Rm. 210

Minneapolis, MN 55415
(612) 385-0659
Susan.Segal@minneapolismn.gov
Attorney for City of Minneapolis

/s/ Andre M. Davis *
City Solicitor, City of Baltimore
100 N. Holliday Street, Suite 101
Baltimore, MD 21202
(410) 396-3297
Andre.davis@baltimorecity.gov
Attorney for the Mayor and City Council of Baltimore

/s/ Mike Rankin *
City Attorney for City of Tucson
255 W. Alameda St.
P.O. Box 27210
Tucson, AZ 85726-7210
(520) 791-4221
Mike.Rankin@tucsonaz.gov
Attorney for City of Tucson

/s/ Edward N. Siskel
Corporation Counsel of the City of Chicago
121 N. LaSalle Street, Suite 600
Chicago, IL 60602
(312) 742-6238
Edward.siskel@cityofchicago.org
Counsel for City of Chicago

/s/ Jeffrey Dana *
City Solicitor, City of Providence
444 Westminster Street, Suite 220
Providence, RI 02903
(401) 680-5333
jdana@providenceri.gov
Attorney for City of Providence

/s/ Dennis J. Herrera *
City Attorney, City and County Of San Francisco

Jaime M. Huling Delaye
1390 Market St., 7th Floor
San Francisco, CA 94102
(415) 554-3957
jaime.hulingdelaye@sfcityatty.org
Attorneys for the City and County of San Francisco

/s/ Marcia MacKenzie *
Corporation Counsel, Dane County
419 City-County Building, 210 Martin Luther King, Jr. Blvd.
Madison, Wisconsin 53703
(608) 266-4355
MacKenzie.Marcia@countyofdane.com
Attorney for the County of Dane

/s/ Zachary W. Carter *
Corporation Counsel of the City of New York
100 Church St.
New York, NY 10007
(212) 356-0800
zcarter@law.nyc.gov
Attorney for the City of New York and NYC Health + Hospitals

/s/ Michael N. Feuer *
City Attorney of the City of Los Angeles
200 N. Main Street, 800 CHE
Los Angeles, CA 90012
(213) 978-8100
Mike.n.feuer@lacity.org
Attorney for the City of Los Angeles

/s/ Eve V. Belfance *
City of Akron, Director of Law
161 S. High St., Suite 202
Akron, OH 44308
(330) 375-2030
ebelfance@akronohio.gov
Attorney for City of Akron

CERTIFICATE OF COMPLIANCE

I hereby certify that:

(1) This brief complies with the type-volume limitation of Fed. R. App. P. 29(d) & 32(a)(7)(B) because it contains 5,354 words, excluding the parts of the brief exempted by 32(a)(7)(B)(iii), and

(2) This brief complies with the requirements of Fed. R. App. P. 32(a)(5) and the typestyle requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using MS Word in 14-point Times New Roman font.

/s/ Sasha Samberg-Champion
Sasha Samberg-Champion

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing Brief of *Amici Curiae* was electronically filed on September 12, 2018, with the Clerk of the Court using the CM/ECF system, which will send notifications of such filing to all counsel of record.

/s/ Sasha Samberg-Champion
Sasha Samberg-Champion