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Sent by electronic submission: www.regulations.gov

Re: America First Legal Foundation Comments on HHS Proposed Rulemaking, "Ensuring Access to Equitable, Affordable, Client-Centered, Quality Family Planning Services," 86 Fed. Reg. 19,812, Docket ID 0937–AA11 (April 15, 2021)

Dear Ms. Scott:

America First Legal Foundation ("AFL") is a national, nonprofit organization. AFL works to promote the rule of law in the United States, prevent executive overreach, ensure due process and equal protection for all Americans, and promote knowledge and understanding of the law and individual rights guaranteed under the Constitution and laws of the United States.

We submit these comments regarding the proposed rule that the Department of Health and Human Services announced on April 15, 2021, entitled "Ensuring Access to Equitable, Affordable, Client-Centered, Quality Family Planning Services." 86 Fed. Reg. 19,812. This proposal will amend the rules governing the recipients of Title X funding. But it does so in manner directly contrary to law.

The Department's current rules prohibit Title X recipients from not only performing abortions, but also from aiding or abetting abortions by providing abortion referrals or providing counseling that encourages patients to abort their unborn children. *See* 42 C.F.R. § 59.14(e)(5). The Department intends to replace this rule with a regime that not only permits but *requires* Title X programs to provide abortion referrals upon demand. *See* 86 Fed. Reg. 19,812, 19,830 (text of proposed 42 C.F.R. § 59.5(a)(5)). The Department's proposed rule is "not in accordance with law," and it will be held unlawful and set aside under 5 U.S.C. § 706(2)(A) unless your Department changes its proposal.

I. Compelling Title X Programs To Provide Abortion Referrals Violates The Coates–Snowe Amendment (42 U.S.C. § 238n) And The Religious Freedom Restoration Act

The text of proposed 42 C.F.R. § 59.5(a)(5) requires *all* Title X projects to provide abortion referrals upon demand, and it makes no exceptions or accommodations for projects that oppose abortion for religious or conscientious reasons:

> **§ 59.5 What requirements must be met by a family planning project?**
>
> (a) *Each project* supported under this part *must*:
>
> (5) Not provide abortion as a method of family planning. A project must:
>
> (i) Offer pregnant clients the opportunity to be provided information and counseling regarding each of the following options:
>
> (A) Prenatal care and delivery;
>
> (B) Infant care, foster care, or adoption; and
>
> (C) Pregnancy termination.
>
> (ii) If requested to provide such information and counseling, provide neutral, factual information and nondirective counseling on each of the options, *and referral upon request*, except with respect to any option(s) about which the pregnant client indicates they do not wish to receive such information and counseling.

86 Fed. Reg. at 19,830 (text of proposed 42 C.F.R. § 59.5) (emphasis added). The requirement to provide abortion referrals violates the Coates–Snowe amendment, 42 U.S.C. § 238n, which prohibits the government from discriminating against any "health care entity" that refuses to provide abortion referrals:

> The Federal Government, and any State or local government that receives Federal financial assistance, *may not subject any health care entity to discrimination on the basis that*—
>
> (1) the entity refuses to undergo training in the performance of induced abortions, to require or provide such training, to perform such abortions, *or to provide referrals for such training or such abortions*; [or]
>
> (2) the entity refuses to make arrangements for any of the activities specified in paragraph (1);

42 U.S.C. § 238n(a) (emphasis added). In addition, the rule's failure to exempt Title X projects that oppose abortion for religious reasons violates the Religious Freedom Restoration Act. *See* 42 U.S.C. § 2000bb-1 *et seq.*; *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014).

The Department acknowledges that a compulsory abortion-referral regime is incompatible with federal conscience-protection statutes, although it does not mention RFRA or the Coates–Snowe amendment in its discussion. *See* 86 Fed. Reg. at 19,817 ("The Department

. . . recognizes Congress has passed several laws protecting the conscience rights of providers, particularly in the area of abortion."). The Department also concedes that Title X projects have a statutory right *not* to provide abortion referrals or counseling on account of these conscience-protection laws. *See id.* ("Under these statutes, objecting providers or Title X grantees are not required to counsel or refer for abortions."). Yet the text of the proposed rule inexplicably says that "each" Title X project "must" provide abortion referrals upon request—without recognizing any exceptions or allowances for anyone. *See* 86 Fed. Reg. at 19,830 (text of proposed 42 C.F.R. §§ 59.5(a) and 59.5(a)(5)(ii)). The text of the proposed 42 C.F.R. § 59.5(a) should be amended to make clear that abortion referrals are *not* required, and the rule should explicitly reaffirm the protections of the Coates–Snowe amendment and the Religious Freedom Restoration Act.

The Department seems to think that it can "interpret" its proposed language to allow Title X projects to refuse to provide abortion referrals—even though the text of the proposed rule says that "each" Title X project "must" provide abortion referrals upon request. *See* 86 Fed. Reg. at 19,817 & n.22. That is untenable. Agency rules mean what they say, and agencies cannot "interpret" rules in a manner that contradicts the unambiguous text. *See Kisor v. Wilkie*, 139 S. Ct. 2400, 2415 (2019) ("[A] court should not afford *Auer* deference unless the regulation is genuinely ambiguous."). And there is no ambiguity in the text of 42 C.F.R. § 59.5(a) as proposed. It says that "each" Title X project "must" provide abortion referrals upon request, and the rule does not hedge this requirement in any way. Agencies are not allowed to make words mean whatever they choose them to mean. *See Bostock v. Clayton County*, 140 S. Ct. 1731, 1737 (2020) ("Only the written word is the law"); Oliver Wendell Holmes, *The Theory of Legal Interpretation*, 12 Harv. L. Rev. 417, 417 (1899) ("Thereupon we ask, not what this man meant, but what those words would mean in the mouth of a normal speaker of English.").

II. Providing Referrals For Elective Abortions Is A Criminal Act In Many States, And Nothing In 42 U.S.C. § 300a-6 Purports To Preempt State Laws That Criminalize Abortion Referrals

In many states, aiding or abetting an elective abortion is a criminal act. The State of Texas, for example, has never repealed its pre–*Roe v. Wade* statutes that criminalize abortion unless the mother's life is in danger. *See* West's Texas Civil Statutes, articles 4512.1–4512.6 (1974).[1] Many other states have left their pre-*Roe* criminal abortion bans on the books, and Alabama, Arkansas, and Louisiana have enacted post–*Roe v. Wade* statutes that impose criminal liability on abortion providers and their enablers. In these states, it is a criminal offense to aid or abet elective abortions by providing referrals.

1. Texas recently passed legislation that reaffirms the continued existence of its pre-*Roe* criminal abortion statutes. *See* Senate Bill 8, 87th Leg., § 2 ("The legislature finds that the State of Texas never repealed, either expressly or by implication, the state statutes enacted before the ruling in *Roe v. Wade*, 410 U.S. 113 (1973), that prohibit and criminalize abortion unless the mother's life is in danger."), available at https://bit.ly/3byxGR4 (last visited on May 17, 2021).

Nothing in the Supreme Court's abortion pronouncements prevents state officials from prosecuting individuals who provide abortion referrals in violation of a state's criminal abortion statutes. The court-invented right to abortion is implicated only when a State imposes an "undue burden" on a woman seeking an abortion. *See Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 874 (1992) (plurality opinion) ("Only where state regulation imposes an undue burden on a woman's ability to make this decision does the power of the State reach into the heart of the liberty protected by the Due Process Clause."). Yet there is no conceivable "undue burden" that will be imposed on any abortion patient if Title X participants refuse to provide abortion referrals, as has been the case since the Trump Administration's Protect Life rule took effect in February 2019. And the Supreme Court's edict in *Roe v. Wade*, 410 U.S. 113 (1973), did not erase or formally revoke any of these criminal abortion prohibitions, which continue to exist as state law until repealed by the legislature that enacted them. The courts have no power to cancel or "strike down" statutes; they decide only whether or not to *enforce* a statute when resolving cases or controversies between litigants. *See Texas v. United States*, 945 F.3d 355, 396 (5th Cir. 2019) ("The federal courts have no authority to erase a duly enacted law from the statute books, [but can only] decline to enforce a statute in a particular case or controversy." (citation and internal quotation marks omitted)). The courts' present-day unwillingness to allow abortion *providers* to be prosecuted under a state's criminal abortion statutes does not shield individuals or entities who violate these statutes by providing abortion *referrals*—especially when abortion will remain easily attainable in the absence of those referrals.

Title X participants also remain obligated to obey the laws of the state in which they operate—regardless of whether they will ultimately face criminal prosecution for their violations of state law. If an unrepealed state statute says that it is crime to aid or abet an abortion, then Title X programs operating in that state must comply with the law and refrain from providing abortion referrals. And the Department cannot instruct or invite Title X programs to flout state laws that criminalize abortion referrals unless it believes that the Title X statute preempts those laws. Yet the Department does not argue that the Title X statute preempts state laws that criminalize abortion referrals, and there is nothing in 42 U.S.C. § 300a-6 that purports to preempt those laws. Indeed, 42 U.S.C. § 300a-6 was enacted in 1970—at a time when nearly every state criminalized elective abortions (as well as acts that aid or abet those abortions)—yet the statute contains no language that exempts Title X participants from those requirements of those pre-*Roe* criminal abortion laws.

The Department should therefore amend its proposed rule to make clear that Title X participants remain obligated to obey the abortion laws of the states in which they operate, and that neither the Title X statute nor the Department's rule can be interpreted to require or authorize abortion referrals in states that continue to define abortion (and acts that aid or abet abortion) as criminal offenses.

III. The Language of 42 U.S.C. § 300a-6 Prohibits Title X Programs From Providing Referrals For Elective Abortions

The Department insists that 42 U.S.C. § 300a-6 can be interpreted to allow Title X programs to provide abortion referrals—so long as the abortion itself is performed outside the scope of the Title X program. This is not a permissible interpretation of the statutory language. A person or entity that provides abortion referrals is participating in the process that leads to an abortion, and it is fully complicit in the abortions that are ultimately performed. And a Title X program that provides the first step in the abortion process is allowing abortion to serve as a "method of family planning" within that program.

Consider once again the text of 42 U.S.C. § 300a-6:

> None of the funds appropriated under this title shall be used in programs where abortion is a method of family planning.

42 U.S.C. § 300a-6. The Department takes the view that this language merely prohibits Title X programs from *performing* the abortion, while leaving them free to initiate the process of abortion by referring their patients to someone else who will perform the procedure. But a person who aids or abets an abortion is as responsible as the person who performs it—and that is especially true in states (such as Texas) where abortion is defined as a criminal act.

The statute, properly construed, prohibits Title X programs from doing *anything* that participates in the process of an abortion. That includes paying for their patients' abortions, providing transportation to or from an abortion clinic, and referring their patients to an abortion provider.

The Department correctly observes that *Rust v. Sullivan*, 500 U.S. 173 (1991), held that the language of 42 U.S.C. § 300a-6 was "ambiguous" on whether it prohibits abortion referrals, which indicates that courts should defer to the Department's proposed interpretation under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). But recent decisions of the Supreme Court have turned a more skeptical eye toward *Chevron* deference, insisting that the courts must exhaust all possible textual and structural arguments—and every imaginable canon of construction—before pronouncing a statute "ambiguous" and deferring to the government's favored interpretation. *See Niz-Chavez v. Garland*, 141 S. Ct. 1474, 1480 (2021) ("The people who come before us are entitled . . . to have independent judges exhaust all the textual and structural clues bearing on that meaning. When exhausting those clues enables us to resolve the interpretive question put to us, our sole function is to apply the law as we find it, not defer to some conflicting reading the government might advance." (citations and internal quotation marks omitted)); *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612, 1630 (2018) ("Where . . . the canons supply an answer, *Chevron* leaves the stage." (citation and internal quotation marks omitted)). And in this situation, the Department's proposed interpretation cannot overcome the presumption against preemption, as it purports to preempt state laws that criminalize abortion referrals despite the absence of preemptive language in the Title X

statute. *See Maryland v. Louisiana,* 451 U.S. 725, 746 (1981) ("Consideration under the Supremacy Clause starts with the basic assumption that Congress did not intend to displace state law."). In this situation, the presumption against preemption should trump any deference that might be claimed under *Chevron*, and it nixes any interpretation of 42 U.S.C. § 300a-6 that allows for abortion referrals in the Title X program.