

No. 19-35386(L)

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

STATE OF OREGON, ET AL.

Plaintiff-Appellee,

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, ET AL.

Defendants-Appellants.

AMERICAN MEDICAL ASSOCIATION, ET AL.,

Plaintiffs-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, ET AL.

Defendants-Appellants.

On Appeal from for the District of Oregon
Nos. 6:19-cv-00317-MC; 6:19-cv-00318-MC (McShane, J.)

**BRIEF OF *AMICI CURIAE* PUBLIC HEALTH AND HEALTH POLICY
DEANS, CHAIRS, AND SCHOLARS AND THE AMERICAN PUBLIC
HEALTH ASSOCIATION IN SUPPORT OF PLAINTIFFS-APPELLEES'
EMERGENCY MOTION FOR RECONSIDERATION EN BANC**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rules of Appellate Procedure 26.1 and 29(a)(4)(A), *amicus curiae* American Public Health Association certifies that it has no parent corporations or any publicly held corporations owning 10% or more of its stock.

Dated: June 26, 2019

By: /s/ Philip Shecter

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STATEMENT OF INTEREST OF *AMICI CURIAE*¹

This brief is submitted on behalf of the American Public Health Association and the following academic department chairs, academic scholars and academic deans of educational institutions (together, “Public Health Amici”), in support of Plaintiffs’ emergency motion for reconsideration en banc:

1. Lynn A. Goldman, MD, MPH, MS, Michael and Lori Milken Dean of Public Health, Milken Institute School of Public Health, The George Washington University;
2. Jane Hyatt Thorpe, JD, Associate Professor, Vice Chair for Academic Affairs and Interim Chair, Department of Health Policy and Management, Milken Institute School of Public Health, The George Washington University;
3. Susan F. Wood, PhD, Professor, Department of Health Policy and Management, Director, Jacobs Institute of Women’s Health, Milken Institute School of Public Health, The George Washington University;
4. Leighton Ku , PhD, MPH, Professor, Department of Health Policy and Management, Director, Center for Health Policy Research, Milken Institute School of Public Health, The George Washington University;

¹ No counsel for a party has authored this brief in whole or in part, and no party or counsel for a party has made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici* or their counsel has made a monetary contribution to the preparation or submission of this brief. Fed. R. App. P. 29(a)(4)(E).

5. Jeffrey Levi, PhD, Professor of Health Policy and Management, Milken Institute School of Public Health, The George Washington University;

6. Maureen Byrnes, Lead Research Scientist, Department of Health Policy and Management, Milken Institute School of Public Health, The George Washington University; and,

7. Sara Rosenbaum, JD, Harold and Jane Hirsh Professor of Health Law and Policy, Department of Health Policy and Management, Milken Institute School of Public Health, The George Washington University.

The Public Health Amici are affiliated with educational institutions that focus on matters of public health policy, spanning policies that promote the health of individuals and populations and affect the accessibility and quality of care as well as health system performance. They are among the nation's leading experts in the field of health policy, with particular expertise in reproductive health and health care and access to reproductive health and other health care services within medically underserved communities and by medically vulnerable populations. The Public Health Amici seek to ensure the highest standard of sexual and reproductive health care for all people by promoting evidence-based policies and by conducting research according to the highest standards of methodological rigor.

Pursuant to Federal Rule of Appellate Procedure 29(a), the Public Health Amici submit this brief without an accompanying motion for leave to file or leave of court because all parties have consented to its filing.

ARGUMENT

In certain of the lower court actions that are on appeal in this action (Case Nos. 19-cv-00317 & 19-cv-00318, D. Or.), Amici Curiae Public Health and Health Policy Deans, Chairs, and Scholars and the American Public Health Association (hereafter, “Public Health Amici”) filed a Memorandum in Support of the Plaintiffs’ Motion for Preliminary Injunction (ECF No. 70 in No. 19-cv-318). Following Defendants-Appellants’ appeal of the lower court rulings, the Public Health Amici have been diligently working to prepare a motion for leave to file their proposed amicus brief in support of the Plaintiffs-Appellees on appeal. In the interim, certain of the Public Health Amici, as identified in the Statement of the Identity of the Amici Curiae, have reviewed this Court’s June 20, 2019 *Per Curiam* Order granting the Defendants-Appellants’ Motions for Stay Pending Appeal and now file this brief to express their strong and fundamental support for the Plaintiffs-Appellees’ emergency motion for reconsideration en banc (Dkt. No. 61). All parties consented to the filing of this brief.

As detailed in Public Health Amici’s lower court brief, implementation of the government’s final rule will have an immediate and devastating effect on Title

X health care providers nationwide, which in turn will cause irreparable harm to patients, with a disproportionate impact on low-income and rural Americans. In order to avoid this irreparable harm, the Court should grant Plaintiffs-Appellees' emergency motion for reconsideration en banc and maintain the status quo by halting the implementation of the final rule pending full and final appeal of the issues presented by this case.

The final rule put forth by the government will serve to immediately and irrevocably alter and dismantle the Title X provider network in the United States that has taken decades to develop. The final rule effectively requires providers to refer patients for maternity care, while prohibiting them from providing referrals should patients wish to terminate their pregnancy. The combination of these provisions is highly directive in nature and fundamentally conflicts with providers' ethical obligations to disclose all relevant information when providing care to patients. Faced with this dilemma, numerous Title X providers will have no choice but to end their participation in the Title X program, which will require many providers to stop providing medical care to patients. This was precisely what occurred in Texas following that state's exclusion of full-spectrum reproductive health providers from its state-funded women's health program, with enrollments dropping and an increase in the teen birth rate and in Medicaid-insured pregnancies.

The existing national network of Title X providers serves a particularly acute health care need for rural and low-income Americans. It will take many years for health care providers to fill the gaps left by the Title X providers that are forced to close due to the final rule. Among other immediate and harmful results, the implementation of the final rule will undeniably decrease access to health care, including not only family planning services, but also preventative cancer screenings and testing and treatment for sexually transmitted infections. Rural communities will be acutely affected, as they are already lacking in sufficient qualified medical providers. Ultimately, the health care safety net for family planning and related services that has been slowly and painstakingly constructed nationwide over decades will be severely diminished by adoption of the final rule.

The lower courts' injunctive rulings served to maintain the status quo and avoid the irreparable harm that would result from implementation of the rule, namely the rapid shuttering of numerous health care providers nationwide. As also detailed in Public Health Amici's brief, implementation of the final rule will have cascading effects, including a major increase in state and federal Medicaid expenditures that will result from the reduced availability of preventative and cost-effective care currently provided by Title X providers who will be forced into closure by the final rule. Without the preventative health care currently provided by Title X providers, more patients will suffer the consequences of undiagnosed

cancer and sexually transmitted infections, resulting in more severe and costly health care needs down the line. The health, economic, and social consequences flowing from the rule are potentially enormous, yet defendants have failed to consider these issues at all.

Public Health Amici respectfully urge the Court to grant the motion for reconsideration en banc immediately. This will serve to minimize the harm to all involved pending final resolution of this appeal. Should Defendant-Appellants be successful upon appeal, they will be free to implement their final rule at that time. But if the lower court injunctions are upheld on appeal, as Public Health Amici believe they will be, this Court's temporary grant of permission to the government to implement an unlawful rule will have served to inflict serious damage, likely irreparable, on the Title X provider network. For the sake of all patients – but particularly low-income and rural patients – and the public health care providers who care for them, Public Health Amici respectfully urge this Court to grant the motion as soon as possible to expeditiously resolve this issue.

Dated: June 26, 2019

By: /s/ Philip Shecter

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CERTIFICATE OF COMPLIANCE

I certify pursuant to Circuit Rule 29-2 that the foregoing Brief in Support of Plaintiffs-Appellants' Emergency Motion for Reconsideration En Banc is proportionately spaced, has a typeface of 14 points or more, and contains 1,284 words.

Dated: June 26, 2019

/s/ Philip Shecter

Philip Shecter

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing 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 June 26, 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: June 26, 2019.

/s/ Philip Shecter _____
Philip Shecter