Nos. 19-1614, 20-1215

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

MAYOR AND CITY COUNCIL OF BALTIMORE,

Plaintiff-Appellee,

v.

ALEX M. AZAR II, *ET AL.*,

Defendants-Appellants.

On Appeal from the United States District Court
District of Maryland

AMICUS CURIAE BRIEF OF AMERICAN MEDICAL ASSOCIATION IN SUPPORT OF PLAINTIFF-APPELLEE AND AFFIRMANCE

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DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

Pursuant to FRAP 26.1 and Local Rule 26.1, the American Medical Association, *amicus curiae*, hereby discloses that it has no parent corporation, and no corporation holds 10% or more of an ownership interest in the American Medical Association.

April 28, 2020

s/ Leonard A. Nelson
Leonard A. Nelson

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INTEREST OF *AMICUS CURIAE*

Amicus, the American Medical Association (AMA), submits this brief in support of Plaintiff-Appellee, Mayor and City Council of Baltimore.[1] The AMA is a plaintiff-appellee in *California v. Azar* (9th Cir. Nos. 19-15974, 19-15979, and 19-35386), a companion suit to the one at bar. It has an interest in establishing ethical standards for the medical profession and in protecting the right of physicians to practice in accordance with those standards.

The AMA is the largest professional association of physicians, residents, and medical students in the United States. Additionally, through state and specialty medical societies and other physician groups seated in its House of Delegates, substantially all U.S. physicians, residents and medical students are represented in the AMA's policy making process. The AMA was founded in 1847 to promote the art and science of medicine and the betterment of public health, and these remain its core purposes. AMA members practice in every state and in every medical specialty.

The AMA is the author and publisher of the *Code of Medical Ethics*, which is the first national medical ethics code in the world and is widely recognized as the most comprehensive and authoritative ethical code for physicians. The *Code* is

[1] *Amicus curiae* hereby certifies that no party's counsel authored this brief in whole or in part, no party or party's counsel contributed money intended to fund preparation or submission of this brief, and no person other than *amicus* and its counsel contributed money intended to fund preparation or submission of the brief. The parties have consented to the filing of this brief.

rooted in an understanding of the goals of medicine as a profession: to relieve suffering and promote well-being in a relationship of fidelity with the patient. The *Code* is not bound to a particular time, and it is a living document that is updated to evolve with changes in medicine and society. Ethical opinions are developed after deep study by medical ethicists and the AMA Council on Ethical and Judicial Affairs and often contentious debate by the AMA House of Delegates – the ultimate AMA policy-making body.

As the district court in *Oregon v. Azar*, 389 F. Supp. 3d 898, 915-916 (D. Ore. 2019), now on appeal to the Ninth Circuit, observed:

> To call the AMA the leading organization regarding medical ethics is practically an understatement. The AMA literally wrote the book on medical ethics.

The United States Supreme Court has repeatedly cited the *Code of Medical Ethics*.[2]

Numerous states have also recognized its authoritative stature. For example, ORC Ann. § 4731.22(B)(18) provides that the Ohio Medical Board can discipline an Ohio physician for "violation of any provision of a code of ethics of the American

[2] *See, e.g.*, *Lilly v. Commissioner*, 343 U.S. 90, 97 n.9 (1952); *Roe v. Wade*, 410 U.S. 113, 144 n.39 (1973); *Bates v. State Bar of Ariz.*, 433 U.S. 350, 369 n.20 (1977); *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 288, 308 (1990) (O'Connor, J., concurring & Brennan, J., dissenting); *Rust v. Sullivan*, 500 U.S. 173, 214 (1991) (Blackmun, J., dissenting); *Washington v. Glucksberg*, 521 U.S. 702, 731 (1997); *Vacco v. Quill*, 521 U.S. 793, 800 n.6, 801 (1997); *Ferguson v. City of Charleston*, 532 U.S. 67, 81 (2001); *Baze v. Rees*, 553 U.S. 35, 64, 112 (2008) (Alito, J., concurring); *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 592-93 (2012) (Ginsburg, J., dissenting).

Medical Association." Similarly, KRS § 311.597(4) states that Kentucky physicians can be disciplined for "failure to conform to the principles of medical ethics of the American Medical Association." Utah Code Ann. § 76-7-305 1(a) requires that physicians conform to the informed consent standards of "Section 8.08 of the American Medical Association's Code of Medical Ethics, Current Opinions."[3]

The AMA has a strong interest in the Title X program, which so effectively advances the AMA's core purpose of bettering public health. Title X provides a broad range of family planning services to patients with financial need. Patients may be teenagers, identify as LGBTQ, have limited English proficiency, or have been unable to complete significant formal education. The patients may be experiencing homelessness, or they may reside in foster care. Their sole contact with the health care system may come through the Title X program. Rarely will they have the literacy (including health literacy and electronic literacy) or other social supports to search the internet for a narrowly specialized provider of medical services, such as a physician who performs abortions for indigent patients. *See California v. Azar*, 950 F.3d 1067, 1106-09 (9th Cir. 2020) (en banc) (R. Paez, J. dissenting).

[3] Ohio, Kentucky, and Utah, among other states, have argued that private medical associations, particularly the AMA, are owed no special deference in defining medical ethics. *See Supplemental En Banc Brief of Amici Curiae Ohio, et al.*, Dkt. No. 112.

Though the AMA has no special knowledge of Baltimore's Title X program, most Title X facilities are run on a financial shoestring. Physicians are compensated nominally, if at all, for their efforts. They choose to serve in this program out of compassion and devotion to their patients – not for monetary gain. The AMA applauds their selfless generosity, which the AMA considers in fulfillment of the highest ethical purpose. The AMA also submits this brief to support those physicians.

ARGUMENT

Based on 42 U.S.C. § 18114 (§ 1554 of the Affordable Care Act (ACA)), 42 C.F.R. Part 59.14 should be held invalid as it applies to physicians. This follows from the plain wording of Section 18114. If this Court disagrees, however, and finds the language ambiguous, the invalidity of Part 59.14 follows from a consideration of those policies long recognized by the Supreme Court and the medical profession to be in the public interest.

This is not to suggest that the invalidity of Part 59.14 depends solely on Section 18114. It is invalid for other reasons, too, as the City of Baltimore has ably argued. Part 59.14 is likewise invalid as applied to non-physician practitioners, and

other portions of the Final Rule are also invalid. Again, though, this brief focuses on § 18114 and Part 59.14, as applied to physicians.

I. 42 U.S.C § 18114 Unambiguously Requires That Part 59.14 Be Held Invalid.

Under Part 59.14(a), if a pregnant Title X patient asks her physician for information, including a referral, in order to secure an abortion, the physician cannot do so. Part 59.14(b) requires a physician to refer a pregnant patient for prenatal care, even if she has told the physician that she wants to terminate her pregnancy. Under Part 59.14(e)(4), if the patient requests that the physician provide her contact information for abortion providers in the area and the physician then hands her a list of hospitals, clinics, and other providers who provide comprehensive primary health care, the list must include providers who do not provide abortions.

Part 59.14 violates 42 U.S.C. § 18114. Section 18114 bars the Department of Health and Human Services (HHS) from promulgating any regulation that:

> (1) creates any unreasonable barriers to the ability of individuals to obtain appropriate medical care;
>
> (2) impedes timely access to health care services;
>
> (3) interferes with communications regarding a full range of treatment options between the patient and the provider;
>
> (4) restricts the ability of health care providers to provide full disclosure of all relevant information to patients making health care decisions;
>
> (5) violates the principles of informed consent and the ethical standards of health care professionals.

In passing § 18114, Congress decided that HHS administrators should not be tasked with deciding what is medically ethical. Instead, Congress established practice standards that are consistent with, and incorporate, the AMA *Code of Medical Ethics*. *See* AMA Ethical Opinions 1.1.1, *Patient-Physician* Relationships; 1.1.3, *Patient Rights*; 1.2.3, *Consultations, Referral, & Second Opinions*; 2.1.3, *Withholding Information from Patients*; and 2.3.4, *Political Communications*.[4] These opinions stand for the propositions that proper medical care depends on the trust that patients invest in their physicians and that physicians should enhance this trust by providing information responsive to patient inquiries, including information on referrals. Moreover, physicians should not mislead or confuse patients. These same considerations undergird Section 18114. Congress determined these minimal standards for patient-physician communications in programs under the aegis of HHS, and it made clear that HHS should have no latitude to infringe these standards.

While it is true that prefatory language in Section 18114 specifies that its dictates are to be "notwithstanding any other provision" of the ACA, in *N.L.R.B. v.*

[4] *Available at*: Opinion 1.1.1, https://www.ama-assn.org/delivering-care/ethics/patient-physician-relationships; Opinion 1.1.3, https://www.ama-assn.org/delivering-care/ethics/patient-rights; Opinion 1.2.3, https://www.ama-assn.org/delivering-care/ethics/consultation-referral-second-opinions; Opinion 2.1.3, https://www.ama-assn.org/delivering-care/ethics/withholding-information-patients; Opinion 2.3.4, https://www.ama-assn.org/delivering-care/ethics/political-communications.

SW General, Inc., 137 S. Ct. 929 (2017), the Supreme Court held that "notwithstanding" provisions in federal laws are meant to expand the reach of the following statute, not to contract it. So here, the restriction on HHS authority should apply to all regulations, not just those specifically arising from the ACA.

42 U.S.C § 300a-6 is not to the contrary. Indeed, in *Rust v. Sullivan*, 500 U.S. 173 (1991), the Court construed 42 U.S.C. § 300a-6 as authority for HHS to adopt regulations that would restrict physicians from providing Title X patients with contact information for abortion providers. *Rust* made clear, though, that Section 300a-6 did not command this restriction. *See Rust*, 500 U.S. at 185 ("At no time did Congress directly address the issue of abortion counseling, referral, or advocacy); *id.* at 186 ("the legislative history is ambiguous and unenlightening" on the issue of abortion referrals). *Rust* held only that the 1988 interpretation was permissible. Section 18114 has now foreclosed this option.

Part 59.14 prevents physicians from providing full disclosure of relevant information to their pregnant patients who are considering an abortion. It also requires physicians to provide irrelevant and even misleading information to patients. This restriction forces Title X physicians to violate the ethical standards of the medical profession and degrade the care they provide for their patients, a clear violation of 42 U.S.C. § 18114.

II. Even if the Language of Section 18114 is Deemed Ambiguous, Any Uncertainties Should be Resolved in Favor of Maintaining Open Communication Between Physicians and Patients.

This Court need not go beyond the plain language of 42 U.S.C. § 18114 to ascertain that Part 59.14 is invalid. If, however, this Court finds that language ambiguous, then, based on more general considerations of public policy, the ambiguity should be resolved in favor of open communication.

As the Supreme Court recognized in *Washington v. Glucksberg*, 521 U.S. 702, 731 (1997), "trust . . . is essential to the doctor-patient relationship." Moreover, in *Sorrell v. IMS Health, Inc.*, 564 U.S. 552 (2011), the Court noted that "in the fields of medicine and public health, . . . information can save lives." Similarly, *National Institute of Family and Life Advocates v. Becerra*, 138 S. Ct. 2361, 2374 (2018) (*NIFLA*), observed: "Doctors help patients make deeply personal decisions, and their candor is crucial" and "[t]hroughout history, governments have 'manipulat[ed] the content of doctor-patient discourse' to increase state power and suppress minorities." These concepts underlie the *Code of Medical Ethics*, just as they underlie Section 18114.

Title X physicians help their patients make deeply personal decisions. If they are to receive optimal care, they must trust that their physicians are acting in their best interests and not instead in the interests of the federal government. Thus, there

is a strong national interest in guaranteeing that Title X patients receive complete, unvarnished messages from their physicians.

Of course, it is not only the judiciary that has recognized the importance of protecting open discourse between patients and physicians. Even if this Court should find that Section 18114 does not squarely dictate the outcome of this case, it surely means *something*. Namely, Congress has determined that at least in *some* situations physician-patient speech is worth protecting, and it is more important to protect that speech than it is to allow HHS free rein to promulgate regulations without reference to any professional standards, or worse, contrary to professional standards.

This case falls outside the holding of *Chevron v. National Resources Defense Council*, 467 U.S. 837 (1984). The Supreme Court there deferred to the considered judgment of the pertinent administrative agency. However, the record in this case shows that, as far as Section 18114 is concerned, HHS had no considered judgment.

Whether it believes Section 18114 controls the outcome of this case or not, HHS should surely have noted it in the administrative record, particularly when every major medical association in the United States that submitted comments argued about the importance of preserving the very freedoms that are memorialized in that statute. *See Mayor and City Council of Baltimore v. Azar*, 2020 WL 758145, at *8 (D. Md. Feb. 14, 2020). That is, HHS would have referenced Section 18114 if it had been aware that the law existed – but it did not. To drive the point home, HHS

has argued to this Court (and to numerous other courts) that it was disadvantaged because, although HHS knew of the substantive objections to Part 59.14, no one had brought the specific statutory citation to its attention until suit was filed. *See Appellants' Opening Brief*, Dkt. No. 18 at 34.

There is no reason to think that Part 59.14 was promulgated after due consideration of the Section 18114 requirements, but there is every reason to think it was not. Ignorance of the law, for the federal government as for everyone else, is no excuse, especially where, as here, *these statutory restrictions are specifically directed to HHS's regulatory authority*. *Chevron* does not apply to this case. Thus, even if Section's 18114 language is deemed ambiguous, Part 59.14 should be found invalid.

III. HHS's remaining arguments do not change the fact that Part 59.14 Violates Section 18114.

In order to downplay these serious statutory concerns, HHS has raised three arguments, all of which are irrelevant to the legality of Part 59.14. HHS has argued that: (1) physicians have continued to participate in the Title X program following adoption of Part 59.14; (2) the AMA's *Code of Medical Ethics* does not have an opinion directly addressing the legal right to obtain abortion services; and (3) no physicians have been disciplined by a medical licensure body or by a professional medical association for adherence to Part 59.14. *Appellants' Supplemental Opening Brief*, Dkt. No. 108 at 33-36. These arguments, whether taken separately or

collectively, are irrelevant to whether Part 59.14 violates Section 18114 (and other statutes).

First, according to HHS, physicians continue to participate in the Title X program. HHS argues that because physicians have been able to swallow their ethical qualms and have persevered despite the HHS restrictions, those ethical objections are unimportant. However, HHS's purported argument can be applied to numerous elements of fundamental liberty, including the freedoms listed in the First Amendment. If those liberties are infringed, most people will continue to go about their lives more or less in the usual fashion, and they will accommodate to their loss of freedom. HHS cannot be excused because its legal violations only affect a small subset of Title X medical practice. What this argument really proves is that the courts should be especially vigilant in protecting open discourse between patients and physicians – else that freedom will be lost.

The second HHS argument is that the AMA does not have clear ethical policies concerning the right to obtain abortion services. But the *Code of Medical Ethics* does indeed address abortion in Opinion 4.2.7, which states: "The Principles of Medical Ethics of the AMA do not prohibit a physician from performing an abortion in accordance with good medical practice and under circumstances that do

not violate the law."[5] More importantly, though, the *Code* does not take a position on the legal right to an abortion, because that is not its purpose.

Abortion services are medical services, and the ethical principles of the medical profession should therefore apply as much to abortions as to any other aspect of health care. Medical care should be rendered in accordance with patient-centric ethical standards, and the patient-physician relationship is paramount regardless of the type of care. The issue in this case is not whether abortion services should be legal, but instead, whether Congress has given HHS latitude to restrain physicians' speech to their patients.

The final HHS argument is that the violations imposed under 59.14 are of only minor consequence. Title X physicians have not been disciplined by either their state medical licensure boards or by medical associations for their adherence to Part 59.14. The AMA will respond to this argument on its own behalf, but it will not presume to speak for state licensure boards or for other medical organizations.

HHS purports to determine what is or is not medically ethical. Yet, this final argument shows a profound misunderstanding of the *Code of Medical Ethics.* The primary function of the *Code of Medical Ethics* is to provide thoughtful and considered guidance to physicians on how they should resolve difficult problems

[5] *Available at*: https://www.ama-assn.org/delivering-care/ethics/abortion.

that arise in medical practice. While, as observed *supra*, licensure boards may use the *Code* in various ways, the *Code* itself is not a regimen for physician discipline.

Title X physicians share a desire to provide care to patients who are desperately in need, often doing so for little or no pay. For some physicians, that desire may mean that they will continue to provide such care, even if doing so under HHS's current rule means they will not meet the utmost medical ethical standards. But providing this type of care does not warrant discipline, certainly not by the AMA.

HHS's argument completely misses the point, as these physicians are simply continuing to serve their patients as best they can under difficult circumstances. Whether state licensure boards or medical organizations are inclined to punish Title X physicians for a situation that HHS has created is irrelevant to this case. Indeed, the AMA would be proud to have any of the Title X physicians as members.

CONCLUSION

Congress wisely decided that HHS administrators should not decide what is medically ethical. Part 59.14 should not stand.

Amicus curiae American Medical Association respectfully requests that this Court affirm the district court's decision.

April 28, 2020

Respectfully submitted,

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April 28, 2020

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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