

Reproductive Rights: California vs. Trump

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The reproductive rights of women in the United States are under attack. In less than two years, the current administration has waged war on women's reproductive health options in an unprecedented manner. While the federal government continues to strip away vital rights and protections, California remains committed to ensuring women can make informed decisions about their bodies. The Trump administration's latest target is Title X, enacted in 1970 to ensure poor Americans can receive reproductive health care. This document outlines California's commitment to reproductive rights, the administration's various attacks on women's rights and its current attempt to gut Title X.

California's Commitment

California lawmakers have shown a commitment to saving women's lives and providing meaningful access to the forms of contraception that work best for them. In a 2016 study, California was the only state to have reduced its incidences of maternal mortality.¹ California stands out because it provides coverage for many reproductive needs, from prenatal and postnatal care, to contraception and abortion. California is committed to keeping women and babies healthy and safe.

Here are some of the areas where California has led the nation:

Insurance Coverage of Contraception:

- Medi-Cal, California's Medicaid program, and employment-based private health insurance plans are required to cover all forms of contraception, including emergency contraceptives and intrauterine devices (IUD).²
- Medi-Cal enrollees are free to obtain contraception from any Medi-Cal provider in or out of network.³

Family Planning:

- Medi-Cal covers counseling for family planning as well as treatment for complications from past procedures.⁴ Medi-Cal also covers sterilization, but patient consent and a 30-day waiting period are required to prevent coercion.⁵
- In anticipation of the Trump administration's repeal of the 30-year-old federal rule allowing Medicaid-managed care enrollees to obtain family planning services from any qualified Medicaid provider, even if he or she is outside of the plan's network,

California added Section 14132.07 to the Welfare and Institutions Code.⁶ Named the Protection of Choice for Family Planning Act, the section increases the autonomy of individuals seeking family planning care to select a provider covered by Medi-Cal.

Insurance Coverage of Abortions:

California requires that almost all insurance plans provide abortion coverage.

- Medi-Cal covers abortions regardless of the gestational age of the fetus (up to viability).⁷ There is no need for medical justification or authorization for the abortion.⁸ Abortions under Medi-Cal are paid for using state-only funds.⁹
- California also requires private health insurance plans provide comprehensive care, including abortions, without medical justification.¹⁰ Only multistate plans participating in the Marketplace Exchange and employers who self-fund their plans are not required to cover abortion.¹¹

Abortion and Privacy:

In contrast to the United States Constitution, the California Constitution has an explicit guarantee of the right of privacy.¹²

- As a result, in California, an individual can have an abortion without the consent or involvement of her parent/guardian, partner, or the biological parent of the fetus.
- Teens can receive contraception¹³ and have abortions¹⁴ without parental consent or notice in California.

Increased Access to and Availability of the “Abortion Pill”:

- Senate Bill 320, which is currently in Assembly, would require that California public university student health centers offer abortion by medication.¹⁵

The Trump Administration's Attacks

Since the Trump administration took office in 2017, the following problematic changes affecting women's reproductive health options have been instituted.

Allowing Employers to Deny Employees Birth Control

Under the umbrella of "religious liberty," the Trump administration has taken steps to make birth control coverage optional for employers.

- In May 2017, President Trump issued an executive order ordering greater enforcement of protections of so-called "religious liberty."¹⁶
- Later that year, the Department of Health and Human Services (HHS), published Religious and Moral Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, a set of rules that expanded acceptable exemptions to the Affordable Care Act requirement that health plans cover contraceptives.¹⁷
- Two federal courts have issued an injunction to block this agency action. Appeals are pending in the Third and Ninth Circuits.¹⁸

Permitting Moral or Religious Objections to Medical Procedures

In January 2018, HHS announced the Conscience and Religious Freedom Division in the HHS Office for Civil Rights.¹⁹

- The division "protects" doctors, nurses and other healthcare workers who object to performing services like abortion on moral or religious grounds.²⁰
- These protections are in addition to the exemptions to the Affordable Care Act's contraceptive mandate.²¹

Attacks on Teen Pregnancy Prevention and Sex Education

The Trump administration abruptly cut funding for more than 80 research organizations participating in the Teen Pregnancy Prevention Program. The grants were originally set to expire in 2020.²²

- Several judges have issued injunctions to block HHS from cutting this funding based on "arbitrary and capricious agency action meriting reversal."²³
- More recently, HHS issued updated funding requirements for grant recipients wishing to reapply, shifting the focus from sex education to "sexual risk avoidance."²⁴

Defunding Women's Healthcare Coverage Globally

Days after taking office, Trump reinstated the Global Gag Rule, officially named the Protecting Life in Global Health Assistance Policy, a more expansive version of the Mexico City Policy.²⁵

- The rule stipulates that non-U.S. nongovernmental organizations receiving U.S. family planning funding cannot inform the public or educate their government on the need to make safe abortion available, provide legal abortion services, or provide advice on where to get an abortion.²⁶
- This version of the gag rule targets all global health assistance funds, greatly expanding the number of NGOs affected compared to past iterations.²⁷

The Trump administration also ended U.S. funding to the U.N. Population Fund (UNFPA), a fund that supports women's rights, maternal health, family planning, and gender equity programs around the world.²⁸

- The U.S. State Department has withheld funding for two consecutive years, claiming that the UNFPA violates the 1985 Kemp-Kasten Amendment, which prohibits U.S. aid to foreign organizations that have coercive abortion or involuntary sterilization practices.²⁹
- UNFPA maintains that it does not fund coercive abortion or involuntary sterilization.³⁰

Ongoing Efforts to Undermine Medicaid

Medicaid enables scores of women to access critical reproductive health care, family planning services, prenatal, and delivery care.³¹ Yet the Trump administration has taken the following actions to undermine access to Medicaid as well as the program's reach:

- Encouraging states to impose work requirements as a prerequisite to receiving Medicaid benefits.³²
- Approving state proposals, like the Kentucky HEALTH waiver, that impose premiums on Medicaid enrollees.³³
- Committing to repeal Obama-era Medicaid expansion in the proposed budget for Fiscal Year 2019.³⁴

The Threats to Title X

The Title X Family Planning Act was introduced in 1970 to provide low-income people access to free or low-cost family planning services, including contraception. Title X funds have never been authorized to pay for abortions. On June 1, 2018, the Department of Health and Human Services released the following proposed—and problematic—changes to Title X.

Non-Comprehensive and Potentially Biased Counseling: A Domestic Gag Rule

Providers would be given authority to deny patients information on abortion.³⁵

- There would no longer be a guarantee that all pregnant women at Title X-supported health centers would receive neutral, factual, and nondirective information on all pregnancy options: delivery, adoption or termination.³⁶
- When patients independently decide to get an abortion, a doctor may provide nondirective counseling. However, doctors will be limited to providing a list of providers that provide comprehensive prenatal care, *only some of which* provide abortion.³⁷ Doctors would be barred from distinguishing between those that provide abortion and those that do not.³⁸
- Where women are unsure about the course of action they would like to take, doctors may not refer patients to abortion counseling or provide counsel themselves.³⁹

More Stringent Requirements for Physical and Financial Separation from Title X Clinics and Abortion Providers

Under the current rules, an organization may provide Title X services as well as abortion, so long as it maintains clear financial separation between the two categories. Under the proposed changes:

- Abortion providers and Title X-funded clinics would be required to maintain separate physical and structural spaces, in addition to separating them financially. This would include accounting records, phone numbers, email addresses, staff and personnel, patient health records, educational programs, and websites.⁴⁰
- The administration is seeking public comment on whether or not they should additionally require organizational separation, i.e. prohibit organizations from operating separate facilities under the same name.⁴¹
 - This would bar an organization like Planned Parenthood, whose centers serve 41% of women who rely on Title X sites for contraceptive care, from providing both abortion and Title X care, even with separate facilities for each service.⁴²

Shift in the Definition of “Family Planning”

- “Family planning” under the proposed regulations would be defined as “the voluntary process of identifying goals and developing a plan for the number and spacing of

children and the means by which those goals may be achieved,” including a requirement to provide various “acceptable and effective choices.”⁴³

- This is distinct from the current regulatory requirement that Title X clinics provide a range of *medically approved* means of family planning.⁴⁴
- This shifts the focus away from contraceptive care to fertility awareness-based methods of family planning, such as abstinence and adoption.⁴⁵ By providing a less comprehensive range of family planning options, Title X clinics will not be able to ensure that patients are choosing whatever contraceptive method they feel will work best for them and will be offering methods that as a practical matter have proven ineffective on an individual level.

Less Confidentiality for Adolescent Clients

Proposed changes undermine the confidentiality of minors who seek care from Title X clinics.

- Though proposed 42 CFR § 59.17 focuses on compliance with state reporting laws regarding crimes involving sexual abuse and human trafficking, it would also require clinicians to screen any teenager visiting a Title X clinic found to be pregnant or to have an STD. These “victimization” screenings would stigmatize sexually active adolescents.⁴⁶
- Providers would be required to document efforts to encourage adolescent patients to involve parents or guardians in their decision making, or document why such participation was not encouraged.⁴⁷

¹ Dalia Sofer, *Maternal Mortality in the United States Is on the Rise*, American Journal of Nursing, Nov. 2016, at 14.

² *Reproductive Health Care Coverage in Medi-Cal*, NHeLP, <http://www.healthlaw.org/storage/documents/NHeLP-ReproHC-MediCal-Web-F.pdf>.

³ *California Abortion Coverage in Medi-Cal and Private Insurance*, NHeLP, <https://accesswhj.org/sites/default/files/docs/NHeLP-CAAbortionCoverageFactSheet-Web.pdf>.

⁴ *Reproductive Health Care Coverage in Medi-Cal*, NHeLP, <http://www.healthlaw.org/storage/documents/NHeLP-ReproHC-MediCal-Web-F.pdf>.

⁵ *Id.*

⁶ S.B. 743, 2017-18 Reg. Sess. (Cal. 2017).

⁷ Cal. Dep’t of Health Care Servs., *Abortions*, Medi-Cal Provider Manual, at 1, http://files.medi-cal.ca.gov/publications/masters-mtp/part2/abort_m00o03.doc.

⁸ An exception is inpatient hospitalization: “Inpatient hospitalization for the performance of an abortion requires prior authorization under the same criteria as other medical procedures.” (see California Code of Regulations [CCR], Title 22, Section 51327).” *Id.*

⁹ *California Abortion Coverage in Medi-Cal and Private Insurance*, NHeLP, <https://accesswhj.org/sites/default/files/docs/NHeLP-CAAbortionCoverageFactSheet-Web.pdf>.

¹⁰ *Id.*

¹¹ *Id.*

¹² Cal. Const., art. I, § 1.

¹³ Cal. Fam. Code § 6925.

¹⁴ See *Am. Acad. of Pediatrics v. Lungren*, 16 Cal. 4th 307 (1997).

¹⁵ S.B. 320, 2017-18 Reg. Sess. (as amended in Assembly, June 14, 2018).

¹⁶ Exec. Order No. 13798, 82 Fed. Reg. 21675 (May 4, 2018).

¹⁷ *Moral Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act*, 82 Fed. Reg. 47838 (Oct. 13, 2017), <https://www.gpo.gov/fdsys/pkg/FR-2017-10-13/pdf/2017-21852.pdf> [hereinafter *Moral Exemptions*]; *Religious Exemptions and Accommodations for Coverage of Certain Preventive Services Under the*

Affordable Care Act, 82 Fed. Reg. 47,792 (Oct. 13, 2017), <https://www.gpo.gov/fdsys/pkg/FR-2017-10-13/pdf/2017-21851.pdf> [hereinafter *Religious Exemptions*].

¹⁸ See *California v. Health & Human Servs.*, 281 F. Supp. 3d 806, 817 (N.D. Cal. 2017), *appeal docketed*, No. 18-15255 (9th Cir. Feb. 16, 2018); *Pennsylvania v. Trump*, 281 F. Supp. 3d 553, 560 (E.D. Pa. 2017), *appeal docketed*, No. 18-1253 (3rd Cir. Feb. 15, 2018).

¹⁹ *HHS Announces New Conscience and Religious Freedom Division*, U.S. Dept. of Health and Human Services (Jan. 18, 2018), <https://www.hhs.gov/about/news/2018/01/18/hhs-ocr-announces-new-conscience-and-religious-freedom-division.html>

²⁰ *Conscience Protections for Health Care Providers*, U.S. Dept. of Health and Human Services (Mar. 22, 2018), <https://www.hhs.gov/conscience/conscience-protections/index.html>

²¹ *Moral Exemptions*, *supra* note 17; *Religious Exemptions*, *supra* note 17.

²² Nate Raymond, *U.S. Judge Blocks Cuts to Teen Pregnancy Prevention Grants*, Reuters (Apr. 26, 2018), <https://www.reuters.com/article/us-usa-teens-pregnancy/u-s-judge-blocks-cuts-to-teen-pregnancy-prevention-grants-idUSKBN1HX2FK>.

²³ *King Cty. v. Azar*, No. C18-0242-JCC, 2018 WL 2411759, at *7 (W.D. Wash. May 29, 2018); see also *Healthy Teen Network v. Azar*, No. CV CCB-18-468, 2018 WL 1942171, at *7 (D. Md. Apr. 25, 2018); *Planned Parenthood of Greater Washington & N. Idaho v. U.S. Dep't of Health & Human Servs.*, No. 2:18-CV-0055-TOR, 2018 WL 1934070, at *11 (E.D. Wash. Apr. 24, 2018); *Healthy Futures of Texas v. Dep't of Health & Human Servs.*, No. 1:18-CV-992 (KBJ), 2018 WL 2471266, at *6 (D.D.C. June 1, 2018).

²⁴ *Fact Sheet: FY 2018 Funding Opportunity Announcements for Teen Pregnancy Prevention Program*, Department of Health and Human Services (Apr. 20, 2018), <https://www.hhs.gov/ash/about-ash/news/2018/fy-2018-funding-opportunity-announcements-tpp-factsheet.html>

²⁵ See *The Mexico City Policy*, 82 Fed. Reg. 8495 (Jan. 23, 2017), <https://www.gpo.gov/fdsys/pkg/FR-2017-01-25/pdf/2017-01843.pdf>

²⁶ *Protecting Life in Global Health Assistance* (May 2017), <https://www.state.gov/documents/organization/271867.pdf>

²⁷ *Impact of Expanded Global Gag Rule on Women's Health*, Change Center for Health and Gender Equity (Feb. 2018), http://www.genderhealth.org/files/uploads/change/publications/CHANGE_global_gag_rule_fact_sheet.pdf

²⁸ About Us, UNFPA, <https://www.unfpa.org/about-us> (last visited June 22, 2018).

²⁹ *Statement on the United States Decision to Again Withhold Funding from UNFPA*, UNFPA (Mar. 12, 2018), <https://www.unfpa.org/press/statement-united-states-decision-again-withhold-funding-unfpa>; *US Ends Funding for Global Women's Health Agency*, Human Rights Watch (Apr. 5, 2017), <https://www.hrw.org/news/2017/04/05/us-ends-funding-global-womens-health-agency>.

³⁰ *Statement by UNFPA on U.S. Decision to Withhold Funding*, UNFPA (Apr. 4, 2017), <https://www.unfpa.org/press/statement-unfpa-us-decision-withhold-funding>.

³¹ *Medicaid and Reproductive Health*, Planned Parenthood Action Fund, <https://www.plannedparenthoodaction.org/issues/health-care-equity/medicaid-and-reproductive-health>.

³² Policy Guidance Letter from Brian Neale, Director, CMS, to State Medicaid Directors (Jan. 11, 2018), <https://www.medicaid.gov/federal-policy-guidance/downloads/smd18002.pdf>.

³³ MaryBeth Musumeci et al., *Approved Changes to Medicaid in Kentucky*, KFF (Jan. 17, 2018), <https://www.kff.org/medicaid/issue-brief/approved-changes-to-medicaid-in-kentucky/>.

³⁴ Office of Mgmt. & Budget, Exec. Office of the President, Proposed Budget of the United States Government, Fiscal Year 2019 (2018) at 53.

³⁵ *Compliance with Statutory Program Integrity Requirements*, 83 Fed. Reg. 25502, 25518 (proposed June 1, 2018), <https://www.gpo.gov/fdsys/pkg/FR-2018-06-01/pdf/2018-11673.pdf> [hereinafter Proposed Requirements].

³⁶ 42 C.F.R. § 59.5.

³⁷ Proposed Requirements, *supra* note 35, at 25,531.

³⁸ Kinsey Hasstedt, "A Domestic Gag Rule and More: The Administration's Proposed Changes to Title X," Guttmacher Institute (June 18, 2018), <https://www.guttmacher.org/article/2018/06/domestic-gag-rule-and-more-administrations-proposed-changes-title-x>.

³⁹ See Proposed Requirements, *supra* note 35, at 25,518.

⁴⁰ *Id.* at 25,519.

⁴¹ *Id.*

⁴² Hasstedt, *supra* note 38.

⁴³ Proposed Requirements, *supra* note 35, at 25513.

⁴⁴ *Id.* at 25,515.

⁴⁵ Hasstedt, *supra* note 38.

⁴⁶ Proposed Requirements, *supra* note 35, at 25,520.

⁴⁷ *Id.* at 25,525.