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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

STATE OF CALIFORNIA, by and through ATTORNEY GENERAL XAVIER BECERRA,

Plaintiff,

v.

ALEX AZAR, in his OFFICIAL CAPACITY as SECRETARY of the U.S. DEPARTMENT of HEALTH & HUMAN SERVICES; U.S. DEPARTMENT of HEALTH & HUMAN SERVICES,

Defendants.

3:19-cv-01184-EMC

NOTICE OF MOTION AND UNOPPOSED MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE*

Administrative Procedure Act Case

Date:	April 18, 2019
Time:	12:30 p.m.
Dept:	Courtroom 5, 17th Floor
Judge:	Hon. Edward M. Chen
Trial Date:	Not set
Action Filed:	March 4, 2019

TO THE HONORABLE COURT AND ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on April 18, 2019 at 12:30 p.m. before the Honorable Edward M. Chen in Courtroom 5 of the United States District Court for the Northern District of California, located at 450 Golden Gate Avenue, 15th floor, San Francisco, California 94102, Ohio will move the Court for leave to file a brief as *amici curiae* in this matter. This Motion is brought pursuant to Federal Rule of Civil Procedure 7 and Local Rule 7-1 on the grounds specified below in the Memorandum of Points and Authorities and in the Proposed Brief of *Amici Curiae* Ohio, Alabama, Arkansas, Indiana, Kentucky (by and through its Governor), Louisiana, Oklahoma, South Carolina, South Dakota, and Texas. Both Plaintiff California and Defendant the United States consent to the filing of this amicus.

Amici request that the Court waive Local Rule 7-2(a) and permit this motion to be considered before or during the April 18 hearing set for Plaintiffs' Motion for Preliminary Injunction. Although this is less than the normal 35 days of notice required by Local Rule 7-2(a), *amici* are submitting this motion as soon as possible after learning about the case and the *amici* States' interest in filing.

Thus, *amici* waive oral argument on this Motion, and request that the Court grant it leave to file the attached *amici curiae* brief on the papers before or during the April 18, 2019 hearing on Plaintiffs' Motion for Preliminary Injunction.

STATEMENT OF RELIEF REQUESTED

Ohio, Alabama, Arkansas, Indiana, Kentucky (by and through its Governor), Louisiana, Oklahoma, South Carolina, South Dakota, and Texas request leave to file a brief as *amici curiae* in support of the federal Defendants.

MEMORANDUM OF POINTS AND AUTHORITIES

Although this Court does not have specific rules governing briefs of *amici curiae*, Federal Rule of Appellate Procedure 29(b) provides an appropriate analogy. Under Rule 29(b), a movant must (1) explain its interest, (2) the reason why an *amicus* brief is desirable, and (3) why the matters asserted are relevant to the case. As explained below, *Amici* will provide value to this case by bringing relevant matters to the Court's attention that are not already discussed by the parties.

Proposed *amici* are the States of Ohio, Alabama, Arkansas, Indiana, Kentucky (by and through its Governor), Louisiana, Oklahoma, South Carolina, South Dakota, and Texas. This case implicates significant interests of the *amici* States and their citizens—interests that the *amici* States' attorneys general wish to defend. These interests arise because Ohio and other *amici* states participate in Title X programs, partnering with the federal government to provide family-planning services and related healthcare to their residents. These States fully support Title X's mission. The States therefore support administrative regulations that fulfill that mission by following Congress's mandates.

At the same time, the *amici* states share many of their citizens' growing concerns about providing government support to entities with links to abortion. Thus, many of the *amici* States have enacted laws to ensure that public funds never make their way to abortion providers. These laws are similar to Title X itself, which prohibits the use of its funds "in programs where abortion is a method of family planning." 42 U.S.C. § 300a-6.

The new Title X regulations support Title X's mission—and its express command not to use Title X funds in furtherance of abortion. At the same time, the new rules honor the desire of many citizens in the *amici* States to avoid any involvement with abortion. The *amici* States therefore file this brief in support of the United States, to represent our citizens' interest in supporting Title X, but not abortion, by keeping a healthy distance between the consensus supporting family-planning services and the controversy over abortion.

The *amici* States also have a strong interest in the appropriate scope of the potential remedy if this Court holds that the new rules are invalid. California asks for a national injunction, as do the California-based private plaintiffs in the related case. The *amici* States, by contrast, welcome the new rules, so we wish to offer our view on why California's view, even if successful here, should not be imposed on our States and the rest of the nation.

RESPECTFULLY SUBMITTED this 8th day of April, 2019.

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CERTIFICATE OF SERVICE

I hereby certify that on April 8, 2019 I filed the foregoing document with the Clerk of the Court by CM/ECF, which automatically sends notice of the filing to all counsel of record.

/s/David J. Hacker
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IN THE UNITED STATES DISTRICT COURT
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ALEX AZAR, in his OFFICIAL CAPACITY as SECRETARY of the U.S. DEPARTMENT of HEALTH & HUMAN SERVICES; U.S. DEPARTMENT of HEALTH & HUMAN SERVICES,

Defendants.

3:19-cv-01184-EMC

***AMICI CURIAE* BRIEF OF THE STATES OF OHIO, ALABAMA, ARKANSAS, INDIANA, KENTUCKY (by and through its Governor), LOUISIANA, OKLAHOMA, SOUTH CAROLINA, SOUTH DAKOTA, and TEXAS OPPOSING INJUNCTION**

Administrative Procedure Act Case

Date:	April 18, 2019
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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

INTRODUCTION AND STATEMENT OF AMICI INTEREST

Ohio and other *amici* states participate in Title X programs, partnering with the federal government to provide family-planning services and related healthcare to their residents. These States fully support Title X's mission. The States therefore support administrative regulations that fulfill that mission by following Congress's mandates.

At the same time, the *amici* states share many of their citizens' growing concerns about providing government support to entities with links to abortion. That is why Ohio law, for example, makes entities that provide abortions, or that are affiliated with entities that do, ineligible for funding under certain public-health programs—programs that are outside of, but similar to, Medicaid and Title X. *Planned Parenthood of Greater Ohio v. Hodges*, No. 16-4027, 2019 U.S. App. LEXIS 7200 (6th Cir. 2019) (en banc) (per Sutton, J.). Many other States have similar laws designed to ensure that public funds never make their way to abortion providers. These various laws are comparable to Title X itself, which likewise prohibits the use of its funds "in programs where abortion is a method of family planning." 42 U.S.C. § 300a-6.

The new Title X regulations support Title X's mission—including its express command not to use Title X funds in furtherance of abortion. And the new rules accomplish this while continuing to honor the desire of many citizens in the *amici* States (and in California, for that matter) to avoid any involvement with abortion. That is why the *amici* States are filing this brief in support of the United States. This brief will not address all the statutory arguments supporting the new regulations; the federal government will ably handle that. Instead, this brief focuses on two important-yet-underappreciated considerations supporting HHS's "reasoned explanation" for the rule change. *See F.C.C. v. Fox Television Stations*, 556 U.S. 502, 515 (2009). *First*, the new rules help preserve broad support for Title X by keeping a healthy distance between the consensus supporting family-planning services and the controversy over abortion. Without the new rules, public confusion regarding Title X's link to abortion will erode support for the law's uncontroversial and statutorily permissible applications. *Second*, because the new rules ensure that

funds will be spent only on programs for which there is consensus support, they promote the intrinsic, democratic interest in governing in a manner that the largest number of people can get behind.

The *amici* States address one other point, too—the appropriate remedy if this Court holds that the new rules are invalid. California asks for a national injunction. So do the California-based private plaintiffs in the related case. But neither California nor the private plaintiffs offer a sound reason to enjoin the new rules in Ohio or in other States that welcome the updated regulations. Courts are beginning to express "uncertainty about the propriety of universal injunctions." *E. Bay Sanctuary Covenant v. Trump*, 909 F.3d 1219, 1255 (9th Cir. 2018); *see also Trump v. Hawaii*, 138 S. Ct. 2392, 2424–29 (2018) (Thomas, J., concurring); Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 Harv. L. Rev. 417, 425 (2017). But even assuming national injunctions are ever appropriate, such relief is not appropriate here. What business does California or any of the California-based private plaintiffs have suing to block the new regulations thousands of miles away? Surely they cannot show that *they* will be irreparably harmed by the application of the new rules in the *amici* States. What is more, to the extent other States or private groups and individuals share California's view of the new rules' validity, they can sue in their home venues to make the new rules inapplicable there. There is no good reason why one court should decide the issue for an entire nation.

ARGUMENT

I. The new regulations better promote Title X's mission by separating the controversy over abortion from the consensus support for funding family-planning services.

Americans disagree passionately about abortion. But they can all agree that abortion has long been among the country's most divisive issues. These opposing views make public expenditure in support of abortion highly controversial. And as a result, the federal and most state governments avoid funding the practice. *See Rust v. Sullivan*, 500 U.S. 173, 201–02 (1991); *Harris v. McRae*, 448 U.S. 297, 315–17 (1980); *Maher v. Roe*, 432 U.S. 464, 474 (1977). To be sure, some States (including California) provide such funding. And many advocates would like to see more public funding. But the broader national consensus

against funding elective abortion remains. *See* Pub. L. No. 115-31, §§ 613–14, 131 Stat. 135, 372 (2017) (barring certain federal funds from elective abortion).

Title X reflects this consensus. Since its 1970 enactment, the law has funded *non-abortion* family planning. All the while, it has banned the use of Title X funds "in programs where abortion is a method of family planning." 42 U.S.C. § 300a-6. Needless to say, HHS's regulations must adhere to this congressional mandate.

Here, HHS explained that it updated the rules to better satisfy Congress's mandate—and concerned citizens' expectations. 84 Fed. Reg. 7714 (Mar. 4, 2019). It thus offered "reasoned explanations" for the policy change, and the change is therefore not "arbitrary and capricious" in violation of the Administrative Procedure Act. *F.C.C. v. Fox Television Stations*, 556 U.S. 502, 515 (2009). California is mistaken to insist otherwise. *See* California PI Mot. at 15–16; 5 U.S.C. § 706(2)(A).

Strict separation of Title X funding and abortion serves two important purposes that are of particular interest to the *amici* States, and thus a focus of this brief. *First*, strict separation preserves public support for Title X by preventing it from becoming associated with abortion. *Second*, strict separation advances the federal government's interest in adopting policies that large numbers can support. The new rules better promote these two interests because they better promote Title X's mandate to segregate abortion services and Title X programs. Part B elaborates on that point. But first, Part A puts the new rules in historical context. That context illustrates that the rules function in much the same way as earlier regulations that the Supreme Court already upheld.

A. The new regulations largely restore the regulatory scheme that the Supreme Court upheld as a valid implementation of Title X in *Rust v. Sullivan*.

Title X bans recipients from using its funds "in programs where abortion is a method of family planning." 42 U.S.C. § 300a-6. It always has. *See* Family Planning Services and Population Research Act of 1970, Pub. L. 91-572 § 6(c), 84 Stat. 1504, 1508 (1970). Over the years, HHS has repeatedly changed its regulatory approach to enforcing this congressional mandate.

Begin in 1988, when HHS issued regulations similar to those now at issue. It took this step because it determined that the pre-1988 regulations had failed to "preserve the distinction between Title X programs and abortion as a method of family planning." 53 Fed. Reg. 2922, 2923–24 (Feb. 2, 1988). To better promote that distinction, the agency adopted new rules that, among other things, barred recipients from making abortion referrals and *required* recipients to maintain a strict financial and physical separation between their non-abortion services and their abortion services (if indeed they provided any).

The Supreme Court, in *Rust v. Sullivan*, determined that these regulations properly enforced Title X, and thus upheld them against regulatory challenges. 500 U.S. 173, 191 (1991). It upheld them against constitutional challenges too, rejecting free-speech and Due Process Clause arguments. *Id.* at 192–200, 201–13.

The regulations did not last. In 1993, just two weeks into a new administration, the agency rescinded the just-upheld regulations after determining that they would "inappropriately restrict grantees." 58 Fed. Reg. 7462 (Feb. 5, 1993). The agency settled on a new tack, which it promulgated through interim rules. Once finalized in 2000, those rules required grantees to provide "information and counseling regarding" abortion, and required grantees to provide this information in "nondirective" terms. 42 C.F.R. § 59.5(a)(5)(i-ii) (July 3, 2000). In essence, the HHS replaced the ban on abortion referrals with its polar opposite. HHS justified this requirement by claiming that the *Rust*-approved rules had not been shown to work (even though they were in effect for just a short time), and that grantees preferred looser restrictions. Specifically, HHS said the looser rules were "generally acceptable to the grantee community, in contrast to" the rules that *Rust* upheld. Those standards, HHS said, "were generally unacceptable to the grantee community." 65 Fed. Reg. 41,270, 41,271 (Jul. 3, 2000).

The regulations HHS promulgated in 2000 remain in effect. The agency's new rules will soon displace them, however. These new rules—which largely mirror the 1988 rules that *Rust* upheld—differ from the current rules both in the procedure by which they were adopted and their substance. Begin with the procedural difference. In 1993, just days after the new administration entered office, HHS rescinded

the rules that *Rust* had upheld. Here, in contrast, HHS worked on the issue for significantly longer, announcing its proposed rules only on June 1, 2018. 83 Fed. Reg. 25502 (June 1, 2018). HHS followed notice and comment procedures before any immediate action, and has now issued the updated regulations, explaining its reasons for the changes. 84 Fed. Reg. 7714 (Mar. 4, 2019).

The substantive differences between the current rules and the new ones are more relevant to this case. HHS sought to better comply with Title X's text, and with the expectation of citizen taxpayers, by clearly segregating abortion services and Title X funds. *Id.* at 7714–15. In its own words, the new rules "will ensure compliance with, and enhance implementation of, the statutory requirement that none of the funds appropriated for Title X may be used in programs where abortion is a method of family planning and related statutory requirements." *Id.* at 7714. How? For one thing, by eliminating the requirement that Title X recipients make abortion referrals, and replacing it with a rule that permits (but does not require) non-directive consulting about the availability of abortion. *Id.* at 7716–17. For another, by requiring Title X recipients to maintain stricter physical and financial separation between abortion services and programs that spend Title X money. *Id.* at 7763–77; 42 C.F.R. § 59.15. The new rule says that "to be physically and financially separate, a Title X project must have an objective integrity and independence from prohibited activities. Mere bookkeeping separation of Title X funds from other monies is not sufficient." 42 C.F.R. § 59.15.

HHS will review programs for "objective integrity" based on factors listed in the rule:

(a) The existence of separate, accurate accounting records;

(b) The degree of separation from facilities (*e.g.*, treatment, consultation, examination and waiting rooms, office entrances and exits, shared phone numbers, email addresses, educational services, and websites) in which prohibited activities occur and the extent of such prohibited activities;

(c) The existence of separate personnel, electronic or paper-based health care records, and workstations; and

(d) The extent to which signs and other forms of identification of the Title X project are present, and signs and material referencing or promoting abortion are absent.

42 C.F.R. § 59.15.

Together, these requirements "protect against the unintentional commingling of Title X resources with non-Title X resources of programs." 84 Fed. Reg. at 7715. Preventing such comingling is necessary to give effect to Congress's prohibition on using Title X funds "in programs where abortion is a method of family planning." 42 U.S.C. § 300a-6. And by addressing "the potential for ambiguity between approved Title X activities and non-Title X activities and services," the new rules eliminate what would otherwise be the "significant risk" of "public confusion over the scope of Title X services, including whether Title X funds are allocated for, or spent on, non-Title X services, including abortion." 84 Fed. Reg. at 7715.

The agency additionally supported its financial-and-physical-separation rule by citing numerous sources illustrating the failure of the current rule to support Congress's mandate. Those sources showed that, "under the current arrangement, it is often difficult for patients, or the public, to know when or where Title X services end and non-Title X services involving abortion begin." 84 Fed. Reg. at 7764. "Even with the strictest accounting . . . , a shared facility greatly increases the risk of confusion." *Id.* The agency noted that this concern sharpened over the years because abortion was increasingly being performed in "nonspecialized clinics"—in other words, clinics that focus on non-abortion services (such as Title X contraception services) but that also provide abortions. *Id.* at 7765. HHS noted that "[a]ccording to the Guttmacher Institute, nonspecialized clinics accounted for 24% of all abortions in 2008, 31% in 2011, and 36% in 2014." *Id.* (citations omitted). That increased the likelihood of confusion about whether Title X supported abortion services.

B. Strictly segregating Title X funds and abortion is critical for preserving public support for the otherwise-popular program, and for reflecting the values and policy preferences of millions of Americans coast to coast.

The new rules strictly segregate Title X funding and abortion services. These rules are valuable both instrumentally and intrinsically. Their instrumental value lies in preventing "public confusion" regarding Title X's connection to abortion. If people begin to suspect that Title X is funding abortion even indirectly, the program will lose public support. The new rules stop that loss of support. The rules' intrinsic value is that they can gain broad support in a pluralistic country made up of millions of individuals with radically different views. In a representative democracy like ours, a law that can gain wide support is, all else equal, better than one that cannot. Since nearly everyone can get behind Title X so long as it has no connection to abortion, the revised rules promote this democratic ideal.

California's brief fails to appreciate either point—perhaps because it fails to appreciate the concerns of citizens who do not share its views of the issue. This brief aims to fill the gap.

1. Because many citizens oppose abortion, federal and state laws have long banned the public funding of abortion facilities and services. *See Harris*, 448 U.S. at 315-17; *Maher*, 432 U.S. at 474. For millions of Americans, these laws do not go far enough. For one thing, money is fungible. Thus, giving money to abortion providers for purposes unrelated to abortion is often no different from funding abortion itself; if the government doles out $100 to spend on STD tests, an abortion provider can accept the money, buy the tests, and use $100 that it would have spent on the same tests to support its abortion services. *See Holder v. Humanitarian Law Project*, 561 U.S. 1, 31 (2010). In addition to their concern with fungibility, many Americans believe that prohibitions on direct funding do too little to express a legitimate policy preference against government-endorsed elective abortion. These citizens believe that permitting abortion providers or advocates to participate in providing a government-funded service implies a public imprimatur on abortion—an imprimatur that citizens legitimately seek to withhold. *See Planned Parenthood,* 2019 U.S. App. LEXIS 7200 at *4.

The fungibility and public-imprimatur concerns led many citizens to call for laws putting a greater distance between public funding and abortion-performing entities. Their representatives listened, and passed laws doing just that. Ohio, for example, enacted a law barring public funds under several non-Title X programs from going to entities affiliated with abortion providers. This law is designed to "promote childbirth over abortion, to avoid 'muddl[ing]' that message by using abortion providers as the face of state healthcare programs, and to avoid entangling program funding and abortion funding." *Id.* at *4 (citing Ohio's brief at 39–41). In upholding the law, the en banc Sixth Circuit, in an opinion by Judge Sutton, recognized the validity of Ohio's interest: "Governments generally may do what they wish with public funds," so they may "subsidize some organizations but not others and [] condition receipt of public funds on compliance with certain obligations." *Id.* at *6 (citing *Rust*, 500 U.S. at 192–94). So when a State's citizens do not wish to promote abortion, that State may choose not to spend its citizens' money doing so. *See id.* The Sixth Circuit's en banc ruling thus establishes the legitimacy of, and confirms the desire for, laws putting a greater distance between public funds and abortion.

Ohio is not alone. In 2011, Indiana enacted a law providing that state agencies "may not[] enter into a contract with, or make a grant to, any entity that performs abortions or maintains or operates a facility where abortions are performed," other than hospitals and ambulatory surgical centers. The same law cancelled existing contracts with covered abortion providers. *Planned Parenthood of Ind., Inc. v. Comm'r of the Ind. State Dep't of Health*, 699 F.3d 962, 969–70 (7th Cir. 2012). Arizona passed a similar law in 2012, barring state agencies and subdivisions from entering family-planning services contracts with, or awarding family-planning services grants to, any person performing "nonfederally qualified abortions" or maintaining or operating a facility in which those abortions were performed. *Planned Parenthood Ariz., Inc. v. Betlach*, 727 F.3d 960, 964 (9th Cir. 2013). The pace of such laws is increasing: the Guttmacher Institute reports that, while State have sought for decades to bar family-planning funds from going to those who perform abortions or even referrals or counseling, at least eighteen States adopted new fungibility-based restrictions between 2011 and 2016. *See* "Fungibility": The Argument at the Center of a 40-

Year Campaign to Undermine Reproductive Health and Rights at www.guttmacher.org/gpr/2016/10/fungibility-argument-center-40-year-campaign-undermine-reproductive-health-and-rights.

These laws do not even count the executive actions terminating funding. Between 2015 and 2016, officials in Arkansas, Kansas, and Utah all sought to terminate funding for non-abortion services to Planned Parenthood affiliates. *See Doe v. Gillespie*, 867 F.3d 1034, 1037–38 (8th Cir. 2017) (Arkansas); *Planned Parenthood of Kan. & Mid-Mo. v. Anderson*, 882 F.3d 1205, 1212–14 (10th Cir. 2018) (Kansas); *Planned Parenthood Ass'n of Utah v. Herbert*, 828 F.3d 1245 (10th Cir. 2016) (Utah). And in 2015, the Louisiana Department of Health and Hospitals terminated Planned Parenthood of Gulf Coast's Medicaid provider agreements, apparently in response to concerns related to particular aspects of Planned Parenthood's abortion practices. It canceled these agreements even though Planned Parenthood claimed also to be providing various public-health services, including pregnancy testing and counseling, contraception and contraceptive counseling, testing and treating specified sexually transmitted diseases, and more. *Planned Parenthood of Gulf Coast, Inc. v. Gee*, 862 F.3d 445, 450–52 (5th Cir. 2017), *cert. denied*, 139 S. Ct. 408 (2018).

These laws and executive acts have no direct bearing on Title X; each involves a change to a program receiving no Title X funds. They are nonetheless significant because they reflect a common, concrete reality: many Americans are concerned that public family-planning funding or other public-health funding is linked to abortion. Even the *impression* that a law steers money to abortions can stir intense voter passion. In 2010, an advocacy group in Ohio "issued a press release announcing its plan to 'educat[e] voters that their representative voted for a health care bill that includes taxpayer-funded abortion.'" The same group "sought to display a billboard in [a representative's] district condemning that vote." *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 153–54 & n.2 (2014). The public's concerns may be based on the fungibility of funds. They may rest on a desire to withhold the government's "stamp of approval" for organizations connected to abortion. But whatever motivates these concerns, there is no doubt they are deeply held and here to stay. The many laws and executive actions discussed above leave no doubt about that.

2. All of this matters to Title X. Many Americans—perhaps a hundred million or more —do not want their money going to fund abortions, directly or indirectly. If Title X provides such funding, or *appears to* provide such funding, support for the program will erode. HHS properly accounted for that.

The updated rules, once implemented, will assure concerned citizens that their tax money is following Title X's mandate and not being "used in programs where abortion is a method of family planning." 42 U.S.C. § 300a-6. They will also address distinct citizen concerns. The enhanced financial-separation requirement addresses concerns about fungibility of funds. Higher figurative walls between any entity's Title X funds and abortion-related funds ensure that no indirect subsidy occurs. The physical-separation requirement addresses the "imprimatur" or approval concern, as it assures citizens that their Title X dollars are not indirectly supporting abortions by attracting patients to a facility that performs abortions on the other side of a literal wall. These assurances ultimately help to preserve and promote public support for Title X itself. That support might be threatened if the strong, continued sentiment against abortion combines with a growing concern that Title X funds abortion indirectly. Keeping Title X funds far away from abortion ensures that the consensus support for Title X is not eroded by any connection to the controversial practice of abortion.

The agency recognized all this. As explained above, *see above* 6–7, HHS explained how the previous administrative regime did not adequately reassure citizens of the separation they expect, and that Congress's mandate requires. The new rules do.

3. The agency's new rules are important for another reason: they reflect the virtues of government of the People, by the People, for the People. California speaks as though the federal government could please everyone by simply giving the States block grants through Title X and allowing them to send that money to whomever they wish. But as the above shows, that is wrong. Many American do not want to fund abortion, and the block-grant model would force them to do so.

Most people, whether they are pro-life or pro-choice or neither, support funding family-planning services *unrelated to* abortion. The new rules assure the public that Title X will continue providing that support, but that it will do so without indirectly supporting abortion. For example, the new rules bar

recipients from making abortion referrals, in contrast to the old rules which *required* referral. The rules will no longer require "nondirective pregnancy counseling" (though they will permit it). The rules will also encourage family participation in family-planning decisionmaking, and will require training regarding compliance with State and local sexual-abuse reporting requirements. 84 Fed. Reg. at 7715–18. These and other changes reflect (in addition to Congress's mandate) the consensus position that public funding for services unrelated to abortion is appropriate, while keeping the government from funding abortion even indirectly.

The new rules are hardly unique in funding priorities that can achieve greater consensus. Indeed, funding limits of this sort are quite common. Voters may, through their representatives, sometimes fund "all comers" in a certain category. But they may do the opposite too, even in areas that touch on constitutional rights. Thus, for example, the federal government may issue grants to promote art projects that are consistent with the "general standards of decency and respect for the diverse beliefs and values of the American public." 20 U.S.C. § 954(d)(1); *see also Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 580 (1998). In a pluralistic society, it is fully appropriate for a government to spend its taxpayers' money on art that many will deem worthy of funding—and not, for example, a photograph of a crucifix submerged in urine. *See Finley*, 524 U.S. at 574. Supreme Court precedent further establishes that when a government elects to fund education, it may elect not to fund religious studies if many of its citizens object to the public funding of religious training. *Locke v. Davey*, 540 U.S. 712, 720–22 (2004). The fact of the matter is that funding decisions require policy choices. In a constitutional democracy, one reasonable way to make such choices is to fund the projects that can gain broad support.

California's brief seems to rest on an assumption that pro-life views, despite being shared by millions in and outside of its borders, are illegitimate—and that the federal government may not accommodate or advance such views. The Supreme Court disagrees. The very same case that created the modern abortion-rights framework acknowledged that States may pass legislation to "express profound respect for the life of the unborn." *Planned Parenthood v. Casey,* 505 U.S. 833, 877 (1992) (plurality op.). The federal government may likewise "use its voice and its regulatory authority to show its profound respect

for the life within the woman." *Gonzales v. Carhart*, 550 U.S. 124, 157 (2007). The federal ban on partial-birth abortion serves precisely that purpose: it bans a gruesome procedure, "'disturbing'" in its "'similarity to the killing of a newborn infant,'" because the procedure is "laden with the power to devalue human life" and "implicates additional ethical and moral concerns that justify a special prohibition." *Id.* at 158 (citation omitted). If the federal government can pass laws to prevent the devaluation of human life, so can the States. They can do so by declining to fund elective abortions, *Harris*, 448 U.S. at 315-17 and *Maher*, 432 U.S. at 474, or by ensuring that non-abortion funding is insulated from abortion activities, *Rust*, 500 U.S. at 201–02. Or they may do so by cutting abortion providers off from state funds altogether. *See Planned Parenthood,* 2019 U.S. App. LEXIS 7200 at *3, 20–21.

If the People can ban entire procedures in order to express their preference for life, surely they can also take the much smaller step of ensuring that abortions do not happen on their dime, or with seeming public approval.

4. Critically, the new rules will serve these instrumental and intrinsic purposes without posing any threat to the vitality of Title X programs. We know this because many States administer their own public-health programs without funding abortion providers. *See above* 8–10. And we also know this because many States administer Title X programs themselves, they do so effectively, and they do so without providing abortions. This confirms that there is no necessary connection between the success of Title X's family-planning mission and the comingling of abortion and Title X funds.

To understand this, start with the fact that it is unusual for a State to rely heavily on private parties to provide Title X-funded services. Most Title X funds go to fund services at state agencies and county health departments. *See* Title X Family Planning Directory at https://www.hhs.gov/opa/sites/default/files/Title-X-Family-Planning-Directory-December2018.pdf (last visited April 4, 2019); *see also* Title X Family Planning Service Grants Award by State at https://www.hhs.gov/opa/grants-and-funding/recent-grant-awards/index.html (last visited April 4, 2019). Several States have laws that express a preference that Title X funds be prioritized for public entities, even if it is possible for leftover funds to be subgranted to private organizations. *See, e.g.*, Kan. Stat. Ann. § 65-103b; Ky. Rev. Stat. Ann. § 311.715; Wis. Stat.

§ 253.07(5)(a). These public programs of course provide no abortion services. They are nonetheless able to serve the public by providing precisely the services that Title X is designed to fund.

Other States do not subgrant federal Title X funds to private parties *at all*. Consider, for example, the State of Alabama. The State Department of Public Health is the sole Title X grantee in Alabama. See Title X Family Planning Directory at https://www.hhs.gov/opa/sites/default/files/Title-X-Family-Planning-Directory-December2018.pdf (last visited April 4, 2019). It uses Title X funds to support more than 80 health centers across the state, all of which are operated by state and local county health departments. *See id.* These local health centers provide contraceptive services, pelvic exams, screening for STDs, infertility services, and health education. The Department's 2019 grant award is over $5,000,000, which it will use to provide services to roughly one hundred thousand people. *See* Title X Family Planning Service Grants Award by State at https://www.hhs.gov/opa/grants-and-funding/recent-grant-awards/index.html (last visited April 4, 2019).

Finally, some States that subgrant Title X funding to private organizations already do so subject to state laws that mirror the challenged regulations. At least thirteen States—Arizona, Arkansas, Colorado, Indiana, Iowa, Louisiana, Michigan, Mississippi, Missouri, North Carolina, Ohio, Texas, and Wisconsin—have laws that also prevent federal pass-through family planning funds from being used to pay for abortions. See Ariz. Rev. Stat. Ann. § 35-196.02; Colo. Rev. Stat. Ann. § 25.5-3-106; La. Rev. Stat. § 40:1061.6; Iowa Code Ann. § 217.41B; Miss. Code. Ann. § 41-41-91; Mich. Comp. Laws Ann. § 400.109a; Mo. Ann. Stat. § 188.205; N.C. Gen. Stat. Ann. § 143C-6-5.5; Ohio Rev. Code § 5101.56; Tex. Health & Safety Code Ann. § 32.005; Wis. Stat. Ann. § 20.927. Several of these States have further restricted family-planning funds from any organizations that provide abortion, that contract with abortion providers, or that refer patients to get abortions. See Ark. Code Ann. § 20-16-1602; La. Rev. Stat. § 49:200.51; Ind. Code Ann. § 5-22-17-5.5; Wis. Stat. Ann. § 253.07(5). The upshot is that the challenged regulations will help—not hinder—these States administer Title X programs.

* * *

In a country of more than 300 million people, no one gets his way all the time. Everyone has to compromise a bit. Title X reflects that compromise, by funding the services that large number of Americans support while withholding that funding from services that large numbers oppose. The new federal rules promote that compromise, by helping to ensure that Title X provides no direct or indirect funding to abortion services. In so doing, the rules merely respect Congress's promise from 1970, which perhaps will finally be met.

II. Any potential injunction should be limited to California and should not be imposed on the *amici* States.

If the Court does enjoin HHS's new rules, it should limit its injunction to California. California seeks a nationwide injunction, but there is no good reason to award one here.

The first problem with California's request is that it is doubtful district courts have any authority to award such relief. The Ninth Circuit recently recognized the "uncertainty" surrounding the propriety of nationwide injunctions. *E. Bay Sanctuary Covenant*, 909 F.3d at 1255. As Justice Thomas explained in a concurrence last year, such injunctions are a relatively recent development unrelated to traditional understandings of jurisdiction and equity. *Trump*, 138 S. Ct. at 2424–29 (Thomas, J., concurring). Recent, widely read scholarship supports this skepticism. *See* Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 Harv. L. Rev. at 425.

But assume that national injunctions can be appropriate in some cases. Even then, there is no reason to award such relief here. California wants relief for California and its citizens. That is why California supports its request for an injunction with evidence of alleged harms that *California and its citizens* will suffer if the law is not enjoined *with respect to California*. *See, e.g.,* Calif. Mot. at 2–3, 7 (discussing California providers). It has no cognizable interest in the new regulations' application to Ohio or any other State. Certainly it will not suffer "irreparable harm" if the new regulations are allowed to go into effect halfway or all the way across the continent. Rule 65 requires injunctions to be tailored to address the situation at hand, and go no further than needed. California has not, and cannot, show that it needs a nationwide injunction to prevent itself or its citizens from being injured.

The California-only grantees in the related matter cannot show that *they* need a nationwide injunction either. They speculate that HHS *might* redirect funds away from states where the new rules are enjoined. Assuming for the sake of argument that such speculation could support an injunction, this Court can prevent HHS from redirecting funds away from the plaintiffs in a California-specific injunction. So that concern does not justify imposing an injunction that applies throughout the entire country.

On top of this, the *amici* States *support* the updated regulations; they do not want to assist in the funding of entities linked to abortion. What interest does California have in forcing its values upon Ohio? To be sure, people and entities *in Ohio* may have an interest in enjoining the new regulations' operation in that State. But if they do, they can sue in Ohio to achieve that result. The same goes for the other *amici* States. For proof, look no further than Washington, Oregon, and Maine, where suits identical to this one are pending already. Indeed, to the extent that universal injunctions might be urged to avoid "multiplicity of suits," *Trump,* 138 S. Ct. at 2427 (Thomas, J., concurring) (citing Bray, *Multiple Chancellors*, 131 Harv. L. Rev.at 426), that rationale cuts against that practice here. Multiple cases already exist, so a nationwide injunction here risks conflict with the outcomes in those cases.

Beyond that, the availability of nationwide injunctions in cases like this one, where there is no pressing need for national uniformity, creates the potential for forum shopping. This is not to say that any party to this case *is* forum shopping—certainly California has all the right in the world to sue in California. But if courts set a precedent of awarding nationwide injunctions, they will give advocates great incentive to structure their litigation strategies to pick out what they perceive to be the most favorable fora to obtain invalidation of whatever federal law they dislike. "Few exercises of the judicial power are more likely to undermine public confidence in the neutrality and integrity of the Judiciary than one which casts the Court in the role of a Council of Revision, conferring on itself the power to invalidate laws at the behest of anyone who disagrees with them." *Arizona Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 145–46 (2011). That is precisely the role that courts assume when they issue national injunctions in case where narrower relief will suffice.

CONCLUSION

For the above reasons, the amici States urge the Court to deny California's request for a preliminary injunction, or alternatively, to limit any injunction to California.

RESPECTFULLY SUBMITTED this 8th day of April, 2019.

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CERTIFICATE OF SERVICE

I hereby certify that on April 8, 2019 I filed the foregoing document with the Clerk of the Court by CM/ECF, which automatically sends notice of the filing to all counsel of record.

/s/David J. Hacker
DAVID J. HACKER

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

STATE OF CALIFORNIA, by and through ATTORNEY GENERAL XAVIER BECERRA,

Plaintiff,

v.

ALEX AZAR, in his OFFICIAL CAPACITY as SECRETARY of the U.S. DEPARTMENT of HEALTH & HUMAN SERVICES; U.S. DEPARTMENT of HEALTH & HUMAN SERVICES,

Defendants.

3:19-cv-01184-EMC

[PROPOSED] ORDER GRANTING UNOPPOSED MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE*

Administrative Procedure Act Case

Date:	April 18, 2019
Time:	12:30 p.m.
Dept:	Courtroom 5, 17th Floor
Judge:	Hon. Edward M. Chen
Trial Date:	Not set
Action Filed:	March 4, 2019

THIS MATTER CAME TO BE HEARD on the motion of Ohio, et al. for leave to file a brief as *amici curiae*, the Court being fully advised, it is HEREBY ORDERED:

1. Ohio's motion is GRANTED; and
2. The Clerk of Court shall FILE the *amici curiae* brief on the docket.

SO ORDERED.

Date: _____

_____
HON. EDWARD M. CHEN
UNITED STATES DISTRICT JUDGE