Nos. 19-15974 & 19-15979

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STATE OF CALIFORNIA,

Plaintiff-Appellee,

v.

ALEX M. AZAR II, in his official capacity as Secretary of the United States Department of Health and Human Services; and UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Defendants-Appellants

ESSENTIAL ACCESS HEALTH, INC., 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; and UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Defendants-Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

APPELLANTS' REPLY BRIEF

JOSEPH H. HUNT
Assistant Attorney General

HASHIM M. MOOPPAN
Deputy Assistant Attorney General

BRINTON LUCAS
Senior Counsel

MICHAEL S. RAAB
KATHERINE ALLEN
JAYNIE LILLEY
Attorneys, Appellate Staff
Civil Division
U.S. Department of Justice, Room 7321
950 Pennsylvania Ave., NW
Washington, DC 20530
202-514-3542

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INTRODUCTION AND SUMMARY

Plaintiffs' responses only underscore how extraordinary this injunction is. Like the district court, plaintiffs accept that *Rust v. Sullivan*, 500 U.S. 173 (1991), upheld regulations that, like the ones challenged here, prohibited Title X projects from providing abortion referrals and required those projects to be physically separate from abortion-related activities based on a statutory provision that has not changed. Plaintiffs nevertheless contend that a single district court can effectively overrule the Supreme Court through an injunction based on a clause in an appropriations rider and an obscure provision of the Affordable Care Act (ACA).

A unanimous motions panel of this Court correctly rejected that remarkable position. Dkt.No.25.[1] As the panel explained, Congress did not amend Title X—much less abrogate a high-profile Supreme Court decision—*sub silentio* through a clause in an appropriations rider or a mousehole in the ACA. Nor did HHS act irrationally in adopting regulations over plaintiffs' objections or in making reasonable predictions using its expertise. And plaintiffs' predicted harms do not outweigh injuries to the government that the Supreme Court has already identified—such as preventing

[1] Although this Court ordered these cases to be reheard en banc and instructed that the motions panel's order not be cited as precedential, Dkt.No.49, the panel's order constitutes persuasive authority. Moreover, the en banc panel subsequently denied the plaintiffs' motions for an administrative stay of the panel's order and clarified that this Court had not vacated that order, which remains in effect. Dkt.No.86.

taxpayer dollars from promoting abortion. In any event, nothing justifies enjoining nearly every aspect of the Rule.

ARGUMENT

I. The Rule Is Lawful

The crux of plaintiffs' statutory-authority challenge is that Congress implicitly abrogated the Supreme Court's decision in *Rust* in an appropriations rider and an obscure provision of the ACA. But we previously explained why that facially implausible position is incorrect, and nothing in plaintiffs' responses rehabilitates it.[2]

A. The Rule Falls Well Within The Secretary's Authority

1. The Appropriations Rider

Title X plainly authorizes the Rule's restrictions on referrals and counseling. If a program refers patients for, or otherwise promotes abortion as a method of family planning, then the program is one "where abortion is a method of family planning" and hence is ineligible for funding under § 1008. 42 U.S.C. § 300a-6; *see* 84 Fed. Reg. 7714,

[2] Although plaintiffs suggest that this Court need only find that they have raised "serious questions" on their claims (Cal.Br. 22; EAH.Br. 50), they have not even satisfied this more lenient standard, much less have demonstrated a likelihood of success on the merits, as required under Supreme Court precedent. *See Winter v. NRDC*, 555 U.S. 7, 21 (2008); *Munaf v. Geren*, 553 U.S. 674, 690 (2008). Because that "is an independent, free-standing requirement for a preliminary injunction," a "strong showing of irreparable harm, for example, cannot make up for a failure to demonstrate a likelihood of success on the merits." *Davis v. PBGC*, 571 F.3d 1288, 1296 (D.C. Cir. 2009) (Kavanaugh, J., concurring). Cases holding otherwise are erroneous, and the government preserves this issue for further review. *E.g.*, EAH.Br. 29 (citing *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011)).

7759 (Mar. 4, 2019). Plaintiffs suggest that § 1008 merely "prohibits Title X funds from being used to pay for abortions" (Cal.Br.29; *see* EAH.Br.50), but even the 2000 regulations concluded that is "not … the better reading." 65 Fed. Reg. 41,270, 41,272 (July 3, 2000) (preamble). After all, when Congress wants to prevent only the funding of abortion, it knows how to do so. *See* Pub. L. No. 96-123, § 109, 93 Stat. 923, 926 (1979) ("[N]one of the funds provided by this joint resolution shall be used to perform abortions."). Section 1008, by contrast, reveals "Congress' intent in Title X that federal funds not be used to 'promote or advocate' abortion as a 'method of family planning.'" *Rust*, 500 U.S. at 195 n.4.

All of this remains true notwithstanding a subsequent appropriations rider providing that Title X funds "shall not be expended for abortions" and that "all pregnancy counseling shall be nondirective." Pub. L. No. 115-245, div. B, tit. II, 132 Stat. 2981, 3070-71 (2018). If anything, that rider reinforces § 1008 by further ensuring that pregnancy counseling is not used to "direct" patients *toward* abortion. Plaintiffs' contrary arguments do not withstand scrutiny.

a. With respect to the referral restrictions, plaintiffs contend that merely declining to grant a patient's request for an abortion referral is *directive* on the theory that it "steers patients away from abortion." Cal.Br.32; *see* EAH.Br.59. But given the limited, preconceptional nature of the Title X program, "a doctor's silence with regard to abortion cannot reasonably be thought to mislead a client into thinking that the doctor does not consider abortion an appropriate option for her," *Rust*, 500 U.S. at 180,

let alone *direct* her to maintain the status quo. And providers are "always free" to respond to a client's request by explaining that referrals for abortion are "simply beyond the scope of the program." *Id.*

Plaintiffs also contend that the referral restrictions violate the appropriations rider when *combined* with a separate requirement that pregnant patients be referred for prenatal health care. *See* Cal.Br.25; EAH.Br.54-55. But the prenatal-referral requirement does not direct a decision about abortion—it merely requires providers to refer patients for care while they are pregnant, even if they obtain an abortion later. Gov.Br.24. And the Rule permits providers to explain that abortion is outside the scope of the program, and that if a patient wants to seek an abortion she can find information about that elsewhere, but in the meantime, they can provide her with a list of providers who can offer her care while she is pregnant. *See* 42 C.F.R. § 59.14(e)(5). Providers could even include an express disclaimer that the prenatal-care referral is a general requirement and should not be taken as directing the patient's ultimate decision about her pregnancy. And even if the required prenatal-care referral were directive, that would not justify invalidating the prohibition on abortion referrals. The provisions are contained in different subsections, 42 C.F.R §§ 59.16(a), 59.16(b)(1), which are severable, 84 Fed. Reg. at 7725.

In any event, Congress's requirement that "pregnancy counseling" be "nondirective" does not speak to the issue of "referrals," much less require HHS to allow referrals for abortion specifically. Despite conceding that "Congress and the

Department sometimes refer to counseling and referral separately" (Cal.Br.34), plaintiffs insist that in the appropriations rider, Congress must have intended "counseling" to refer to both. But even materials cited by plaintiffs frequently use the terms separately, and if counseling clearly included referrals, then none of these authorities would have needed to discuss referrals at all. For instance, plaintiffs seize on (Cal.Br.26-27; EAH.Br.62) statements in the Rule's preamble indicating that a separate statute, 42 U.S.C. § 254c-6(a)(1), reflects a legislative intent that "adoption information and referrals be included as part of any nondirective counseling," 84 Fed. Reg. at 7733, but that has no bearing on whether Congress considers referrals a *type* of counseling (as opposed to something that may occur *at the same time* as counseling). And given HHS's longstanding position—reflected in this Rule and its predecessors (Gov.Br.26-27)—that referrals and counseling are distinct, plaintiffs place far too much weight on the Department's brief discussion of this separate statute. At most, the few instances they identify as implying that counseling may include referrals suggest the term "nondirective counseling" is ambiguous and thus cannot supply the clear mandate necessary to overcome both the presumption against implied repeals and the judicial deference owed to HHS's reasonable interpretation.

b. Plaintiffs' challenge to the Rule's counseling provisions fares no better. Even though the Rule *permits* "nondirective pregnancy counseling, which may discuss abortion," 42 C.F.R. § 59.14(e)(5), California objects that the Rule's prohibition on "encourag[ing], promot[ing] or advocat[ing] abortion as a method of family planning,"

id. at § 59.16(a), violates the appropriations rider because it "is likely to chill discussions of abortion and thus inhibits neutral and unbiased counseling." Cal.Br.36. The State neglects to mention, however, that under the 2000 regulations they seek to preserve via injunction, "the funding of abortion or activities that promote or encourage abortion with Title X funds has been and will continue to be prohibited." 65 Fed. Reg. at 41,271. In other words, both the 2000 regulations and the challenged Rule permit nondirective counseling—including on abortion—while simultaneously prohibiting any counseling that promotes or encourages abortion. *Compare id.* at 41,273 (2000 regulations) (Title X providers "may not steer or direct clients toward selecting any option, including abortion, in providing options counseling"), *and id.* (2000 regulations) (noting that under the pre-1988 regulations, providers "were not permitted to provide options counseling that promoted abortion or encouraged patients to obtain abortion"), *with* 84 Fed. Reg. at 7746 (Rule) ("Title X projects and service providers must be careful that nondirective counseling related to abortion does not diverge from providing neutral, nondirective information into encouraging or promoting abortion as a method of family planning."). California has yet to explain why the Rule's continuation of that approach violates the appropriations rider.

For their part, private plaintiffs challenge the Rule on the theory that the appropriations rider requires presentation of all options on an "equal basis" (EAH.Br.54)—in essence, a fairness doctrine for pregnancy counseling. But when Congress wishes specific pregnancy options to be given equal treatment, it knows how

to say so explicitly, as 42 U.S.C. § 254c-6(a)(1) reveals. *See* Gov.Br.29. Indeed, if "nondirective" already required that all pregnancy options—adoption included—be treated equally, then Congress's explicit instruction in § 254c-6(a)(1) that adoption be treated "on an equal basis" with other pregnancy options would be gratuitous, a problem plaintiffs never address.

More generally, plaintiffs complain that the Rule *does not require* counseling on abortion. *See, e.g.*, Cal.Br.19. But in providing that "all pregnancy counseling shall be nondirective," the appropriations rider does not require *any* pregnancy counseling at all—especially in a "*preconceptional* family planning program" such as Title X, *Rust*, 500 U.S. at 202. Nor does a provider's choice to omit counseling about abortion specifically "direct" anything: The Rule's preamble contemplates that any counseling will present more than one option, *see, e.g.*, 84 Fed. Reg. at 7716, and even offering childbirth-only counseling or adoption-only counseling would not "direct" a patient to choose that option, so long as the provider did not advise a patient to do so. At most, such counseling would (implicitly) "promote" that option over the others, but nothing in the appropriations rider prohibits the promotion of childbirth or adoption. Section 1008, by contrast, does prohibit the use of Title X funds "to 'promote or advocate' abortion as a 'method of family planning,'" *Rust*, 500 U.S. at 195 n.4, which is why the Rule forbids counseling where "abortion [is] the only option presented," 84 Fed. Reg. at 7747.

Plaintiffs object that HHS remarked that "present[ing]" abortion as "the only option" in counseling would violate the appropriations rider in addition to § 1008. Cal.Br.25; EAH.Br.55. But it is immaterial whether, under the appropriations rider, abortion-only counseling is distinguishable from childbirth-only counseling, *see* 84 Fed. Reg. at 7747, because abortion-only counseling is already prohibited under § 1008, and thus the agency's discussion of whether it is also prohibited by the appropriations rider was beside the point. *See, e.g.*, *WildEarth Guardians v. Provencio*, 923 F.3d 655, 678 (9th Cir. 2019) (concluding that agency's "inappropriate" "references" to an exemption "at most amounted to harmless error" under the APA, "as they had no effect" on the challenged agency action). And in all events, if permitting Title X providers to refrain from counseling on abortion were somehow unlawful, the remedy would merely be to invalidate and sever that aspect of the Rule. *See* 84 Fed. Reg. at 7725. But this Court need not and should not consider that question, because these plaintiffs (as opposed to Title X patients) have no standing to complain about—and are certainly not irreparably harmed by—what the Rule "allow[s]" other providers to do. Cal.Br.19.

c. Even if this were a closer question, settled interpretive principles would dispose of plaintiffs' construction of the appropriations rider. Plaintiffs do not dispute that there is a heightened presumption against implied repeals through appropriations legislation (Gov.Br.23), but contend that the presumption is inapplicable here. Yet their responses confirm that plaintiffs believe the rider changed the law by "narrow[ing] the Secretary's authority" under Title X. EAH.Br.54; *see* Cal.Br.29-30. By definition, that

is a repeal of § 1008 in relevant respect. *See National Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 663 n.8 (2007) ("Every amendment of a statute effects a partial repeal to the extent that the new statutory command displaces earlier, inconsistent commands"). If § 1008 explicitly delegated HHS authority "to prohibit Title X projects from referring their patients for abortion as a method of family planning," for instance, no one would dispute that subsequent legislation stripping the Department of that authority would constitute a repeal. That § 1008, combined with the express rulemaking authority granted under § 1006, *implicitly* delegated the same authority is irrelevant under *Chevron*. Gov.Br.33. And that is especially true where the Supreme Court has already authoritatively construed § 1008 to contain that delegation, a scenario none of plaintiffs' authorities address. *See* Antonin Scalia & Brian A. Garner, *Reading Law* 331 (2012) (Even when an "earlier ambiguous provision has already been construed by the jurisdiction's high court to have a meaning that does not fit as well with a later statute as another meaning," any "[l]egislative revision of law clearly established by judicial opinion ought to be by express language or by unavoidably implied contradiction.").

Plaintiffs similarly misfire (EAH.Br.63) in contending that the government "conceded" below that the appropriations rider and § 1008 "can be read in harmony." Of course that is true, and the Rule reflects a reading that preserves both provisions. It is *plaintiffs'* reading of the appropriations rider, by contrast, that "displaces earlier, inconsistent commands" in § 1008 (and § 1006), *Home Builders*, 551 U.S. at 663 n.8 (2007)—namely, the implicit delegation of authority to the Secretary to prohibit

abortion referrals within the Title X program. *Contra* Cal.Br.31-32. Nor is it correct that *Republic of Iraq v. Beaty*, 556 U.S. 848 (2009), held that "[t]he presumption against implied repeal[s] does not apply when, as here, the later-enacted statute '*expressly*' addresses the question at issue and 'the only question is its scope.'" Cal.Br.31. In that case, the subsequent statute "*expressly* allowed the President to render certain statutes inapplicable; the only question [was] its scope. And it did not repeal anything, but merely granted the President authority to waive the application of particular statutes to a single foreign nation." *Beaty*, 556 U.S. at 861. Here, by contrast, the appropriations rider does not expressly address § 1008, *Rust*, or referrals, and the scope of its effect on § 1008 (if any) is fully governed by the presumption. *See United States v. United Cont'l Tuna Corp.*, 425 U.S. 164, 169 (1976) (Courts should be "hesitant … to infer that Congress intended to narrow the scope of a statute," as such a "'repeal' … involve[s] the compromise or abandonment of previously articulated policies, and we would normally expect some expression by Congress that such results are intended.").

More generally, plaintiffs double down on the facially implausible theory that in 1996, Congress smuggled into an appropriations rider providing that Title X funds "shall not be expended for abortions" an implied repeal of § 1008 and silent abrogation of *Rust*, after it had tried, and failed, to do so expressly, in the vetoed Family Planning Amendments Act of 1992. *See* Gov.Br.25-26, 29. California dismisses this history, contending that "legislation that an earlier Congress passed but a prior President vetoed" is no evidence of "the intent of a later Congress." Cal.Br.35. But the Congress

responsible for the 1996 appropriations rider declined to enact the Family Planning Amendments Act of 1995, which, like its 1992 predecessor, would have required Title X projects to include "termination of pregnancy" within their "nondirective counseling and referrals." *Compare* H.R. 833, 104th Cong. § 2 (1995), *with* S. 323, 102d Cong. § 2 (1991). "Few principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language," *INS v. Cardoza-Fonseca*, 480 U.S. 421, 442-43 (1987), and that principle alone should put an end to plaintiffs' fanciful theory.

2. Section 1554 Of The Affordable Care Act

Plaintiffs are on no firmer ground in contending that § 1554 of the ACA implicitly eliminated HHS's authority to adopt the referral and counseling restrictions.

a. To start, plaintiffs do not deny that they failed to raise this argument before HHS, and they never respond to our explanation that statutory-authority arguments are subject to waiver at least with respect to facial challenges, because agencies "have no obligation to anticipate every conceivable argument about why they might lack such statutory authority." Gov.Br.33 (quoting *Koretoff v. Vilsack*, 707 F.3d 394, 398 (D.C. Cir. 2013) (per curiam)); *cf.* EAH.Br.57 n.21. Instead, plaintiffs ask this Court to excuse their waiver because they made generic objections containing language that happened to resemble language in § 1554. *See* Cal.Br.39-40; EAH.Br.57-58. But merely notifying HHS of *substantive* objections did not give the agency a chance to address a question of *statutory interpretation* implicating various rules of construction. *See*

infra Pt. I.A.2.b. Accordingly, HHS plainly did not have an opportunity to apply its expertise in administering the ACA with respect to this issue. By contrast, when HHS received comments relying on § 1554 in a different rulemaking, it responded by invoking its authority to administer § 1554 and provided interpretive arguments in addition to policy ones. *See* 83 Fed. Reg. 57,536 57,551-52 (Nov. 15, 2018). And none of the generalized statements from this Court's precedents that plaintiffs cite establish the requisite proposition that a litigant can preserve a challenge to an agency's statutory authority without ever citing the relevant statutory provision. *See* Gov.Br.32-33.

b. In any event, plaintiffs' § 1554 argument is meritless, which is presumably why none of the 500,000-plus comments on the proposed Rule raised it. The Rule merely limits what the government chooses to fund and thus does not, for example, "create[] any unreasonable barrier" to obtaining health care. 42 U.S.C. § 18114(1). As the Supreme Court explained in *Rust*, there is a fundamental distinction between impeding something and choosing not to subsidize it, 500 U.S. at 201-02; *see* Gov.Br.33-34, and that reasoning disposes of this claim, whether it is packaged as a constitutional or statutory one.

Indeed, accepting plaintiffs' expansive construction of terms such as "creates," "impedes," or "interferes" to include a refusal to provide government subsidies would have dramatic consequences for Title X and the government's authority more generally. Under plaintiffs' theory, for instance, HHS could not even adopt a rule permitting Title X providers with conscience objections to decline to provide abortion referrals, since

that rule has the effect of reallocating some funds from grantees who provide abortion referrals to ones who do not, and thus likewise presumably deprives Title X patients of "relevant information" about how and where to obtain abortion services. Cal.Br.38; *see* Cal.Br.43 (suggesting that Title X providers with conscience objections can decline to provide abortion referrals). More generally, plaintiffs' expansive reading would halt HHS from making even minor changes to the Title X program—as well as many others—any time that a provider or patient arguably was adversely affected. If Congress had actually taken the momentous step of requiring HHS to continue devoting federal funds to particular Title X providers in perpetuity, Essential Access and others presumably would have known about that decision and immediately raised the objection in the comment period.

In addition, while plaintiffs dismiss as irrelevant (Cal.Br.44-45) the fact that § 1554 applies "[n]otwithstanding any other provision of this Act," 42 U.S.C. § 18114—thereby signaling that this provision may implicitly displace otherwise-applicable provisions *in the ACA*—they never explain why Congress used that language when it repeatedly used the common phrase "notwithstanding any other provision of law" elsewhere in the ACA. *See* Gov.Br.36-37. And California's reliance on a law review article opining that § 1554 is "an important provision for consumers" (Cal.Br.44) (brackets omitted) does not make § 1554 any less of a mousehole or plaintiffs' theory any less of an elephant: "Congress … does not alter the fundamental details of a

regulatory scheme in vague terms or ancillary provisions," *Whitman v. American Trucking Ass'ns*, 531 U.S. 457, 468 (2001), and § 1554 qualifies as both.

c. Plaintiffs' remaining arguments only underscore how sweeping (and thus implausible) their reading of § 1554 is. For example, plaintiffs contend that the Rule's requirement that Title X providers encourage family participation in minors' decisions to seek family planning services, 42 C.F.R. § 59.5(a)(14), "violates ethical standards" in contravention of § 1554. EAH.Br.53. Although plaintiffs concede that Title X itself provides that "[t]o the extent practical, entities which receive grants or contracts under this subsection shall encourage family participation in projects assisted under this subsection," 42 U.S.C. § 300(a), they insist that the Rule's requirement that providers document the "specific actions" they have taken to encourage such family participation could, in some cases, "force the provider to breach their ethical obligation and 'drive some minors away from returning for critical health services.'" EAH.Br.53. But plaintiffs never explain how that documentation requirement (or the statute it reflects) would violate medical ethics in certain instances, or why, even if true, that would justify facial invalidation of this provision of the Rule.

Plaintiffs are no more persuasive in contending that the Rule's referral and counseling restrictions violate medical ethics. *See* Cal.Br.39; EAH.Br.52-53. Plaintiffs suggest that it is irrelevant that federal and state conscience laws permit "medical providers" with conscience objections "to refuse to provide" abortion referrals (Cal.Br.43), but those statutes demonstrate that Congress and state legislatures do not

believe that medical ethics require that all medical providers *must* refer for abortion. Plaintiffs also do not deny that the Supreme Court in *Rust* upheld more restrictive regulations against a First Amendment challenge in the face of a dissent arguing that they compelled doctors to violate medical ethics (*see* Gov.Br.35).

Like the district court, plaintiffs instead contend that the Rule's restrictions on the list of providers that may be given in conjunction with a required referral for prenatal care for pregnant women "go far beyond anything in the 1988 regulations." EAH.Br.57 (quoting ER50); *see* Cal.Br.42. But plaintiffs never even identify the relevant differences, much less argue that the current restrictions would have exceeded HHS's statutory authority before the enactment of the ACA (or the appropriations rider), rendering these assertions beside the point. In any event, plaintiffs' apparent understanding of the 1988 regulations is incorrect. Those regulations similarly prohibited providers "from referring a pregnant woman to an abortion provider, even upon specific request," and directed that "[t]he list may not be used indirectly to encourage or promote abortion, 'such as by weighing the list of referrals in favor of health care providers which perform abortions, by including on the list of referral providers health care providers whose principal business is the provision of abortions, by excluding available providers who do not provide abortions, or by steering clients to providers who offer abortion as a method of family planning.'" *Rust*, 500 U.S. at 180 (internal quotation marks and citation omitted). Notwithstanding those restrictions, the Court explained that a doctor was "always free to make clear that advice regarding

abortion is simply beyond the scope of the program," *id.* at 200, and the same is true under the present Rule, *see* 42 C.F.R. § 59.14(e)(5).

More fundamentally, plaintiffs' grievance is with the limited nature of the Title X program itself. Plaintiffs assert that the Rule violates medical ethics because it prevents Title X providers from giving "patients *all* information relevant to their treatment options" (EAH.Br.53), but that theory contravenes the Supreme Court's reasoning in *Rust*. Title X creates a limited program, focused on preconception services, and in that context, the doctor-patient relationship is not "sufficiently all encompassing so as to justify an expectation on the part of the patient of comprehensive medical advice." 500 U.S. at 200. And because Title X "does not provide post conception medical care, … a doctor's silence with regard to abortion cannot reasonably be thought to mislead a client into thinking that the doctor does not consider abortion an appropriate option for her." *Id.* Congress's limitations on the program no more violate a physician's ethical responsibilities than her First Amendment rights.[3]

[3] Private plaintiffs also object that the Rule's referral and counseling restrictions "contradict HHS's own Quality Family Planning ('QFP') Guidelines" (EAH.Br.48), referring to a 2014 publication containing clinical recommendations for providing quality family-planning services. HHS continues to expect Title X providers to follow QFP guidelines to the extent they are consistent with the Rule. *See* HHS, Announcement of Availability of Funds for Title X Family Planning Services Grants, at 14-15 (2019), https://www.hhs.gov/opa/sites/default/files/FY2019-FOA-FP-services-amended.pdf. To the extent those guidelines conflict with the Rule, HHS acknowledged it was departing from its prior approach under the 2000 regulations, and the QFP guidelines in place at the time of the Rule did not (and indeed could not) substantively go beyond the 2000 regulations. *See, e.g.*, 84 Fed. Reg. at 7715.

B. The Secretary Provided A Reasoned Explanation.

1. The Referral And Counseling Restrictions Are Reasonable

HHS reasonably adopted the prohibitions on promoting and referring for abortion because they implement the best reading of § 1008—namely, that a program that refers patients for or promotes abortion as a method of family planning is by definition a program "where abortion is a method of family planning." *See* 84 Fed. Reg. at 7759. The Supreme Court held in *Rust* that such "justifications are sufficient to support the Secretary's revised approach," 500 U.S. at 187, which is "plainly allow[ed]" by Title X, *id.* at 184. The conclusion remains true today, and HHS adequately explained its reasons for adopting the Rule over plaintiffs' objections.

Plaintiffs offer no meaningful response to HHS's justifications for the restrictions. Private plaintiffs repeat the district court's assertion that the restrictions are unreasonable because the "prior regulations" did not "conflict with federal conscience laws" (EAH.Br.68), but never dispute that requiring all Title X providers, regardless of their objections, to provide such referrals would violate these statutes. *See* 84 Fed. Reg. at 7716. More fundamentally, plaintiffs ignore that compliance with these conscience laws was merely one, non-essential factor justifying the referral and counseling restrictions. HHS's core rationale was simply that the best reading of § 1008 is that a program that refers patients for, or otherwise promotes or encourages, abortion as a method of family planning is a program "where abortion is a method of family planning." *Id.* at 7759.

For its part, California simply contends that HHS's reading of § 1008 is not compelled by *Rust*. Cal.Br.51. But whether or not HHS could adopt a different interpretation of § 1008, *Rust* held that the Department's current reading of the statute is sufficient to justify referral and counseling restrictions materially indistinguishable from, or less restrictive than, the ones adopted in the Rule. While California claims that such an approach is unjustified now because these "restrictions will cause many existing providers to leave the program" (Cal.Br.52), it cites no authority for the extraordinary proposition that an agency administering a competitive grant program—and interpreting a federal statute providing that "[n]one of the funds appropriated [in that program] shall be used in programs where abortion is a method of family planning," 42 U.S.C. § 300a-6—must either accede to the wishes of a subset of current grantees or identify in advance those entities who will take their place. Indeed, similar threats did not alter the outcome in *Rust*—which likewise involved "a sharp break from the Secretary's prior construction of the statute," 500 U.S. at 186—and plaintiffs offer no reason why this case should be different. *See* Planned Parenthood Amicus Br. at 14 n.45, *Rust* (No. 89-1391), 1990 WL 10012649 (S. Ct. July 27, 1990) ("Since many providers will not accept Title X funds under the unethical restrictions imposed by the regulations, they will be forced to close or drastically curtail services … .").

2. The Physical-Separation Requirement Is Reasonable

Plaintiffs fare no better in arguing that the Rule's physical-separation requirement is arbitrary and capricious. The 2000 regulations already mandate financial separation,

see 84 Fed. Reg. at 7715; 65 Fed. Reg. at 41,276, and HHS reasonably determined that physical separation is also warranted to address the risk that taxpayer funds will be used to fund abortion—the same rationale approved in *Rust*.

Plaintiffs disagree with that conclusion, but the Supreme Court held in *Rust* that HHS's predictive judgment about how best to comply with § 1008 was a reasonable basis for the same requirement. 500 U.S. at 187. As in *Rust*, HHS justified its policy by explaining that the prior regulations "failed to implement properly the statute." *Id.* And HHS considered and discussed reliance interests, comments received, and the previous approaches, ultimately "reaffirm[ing the] reasoned determination" it made in 1988. 84 Fed. Reg. at 7724. Indeed, plaintiffs do not even meaningfully address HHS's conclusion that the collocation of Title X clinics and abortion clinics has the effect of subsidizing abortion in violation of § 1008. *See id.* at 7766. And California misses the point in suggesting that Title X participants' abortion services "may be subsidizing Title X programs" through collocation (Cal.Br.51), thereby admitting that sharing the same physical space creates economic benefits. Whether the savings of collocation are attributed to Title X services, abortion services, or both, HHS reasonably determined that such arrangements violate § 1008.

Plaintiffs observe that the 1988 regulations partially relied upon reports from the Office of Inspector General (OIG) and the General Accounting Office (GAO). EAH.Br.64. In issuing the Rule, HHS did not rely on those reports, but rather the basic economic principle that collocation of Title X and abortion clinics necessarily results in

financial support for abortion-related activities and the perception that Title X clinics offer abortion-related services—an explanation plaintiffs have yet to meaningfully refute. That justification is no less reasonable now than it was thirty years ago. Nor is there any indication that *Rust* would have come out differently had HHS not relied on the OIG and GAO reports in issuing the 1988 regulations. To the contrary, in the lead-up to *Rust*, the First Circuit rejected an arbitrary-and-capricious challenge to the 1988 regulations, notwithstanding its conclusion that those "reports provide[d] a very slim reed of support." *Massachusetts v. HHS*, 899 F.2d 53, 63 (1st Cir. 1990) (en banc), *abrogated on other grounds by Rust*, *supra*.

Plaintiffs also argue that HHS underestimated compliance costs for incumbent Title X grantees (Cal.Br.48-49; EAH.Br.67), but HHS, which administers the Title X program, is best situated to consider the potential effects on that program and it expressly did so. *See* 84 Fed. Reg. at 7781-82. Although commenters "provided extremely high cost estimates based on assumptions that they would have to build new facilities" to comply with the physical-separation requirement, HHS reasonably anticipated "that entities will usually choose the lowest cost method to come into compliance," such as "shift[ing] their abortion services" to one of their multiple "distinct facilities." *Id.* at 7781. And in any event, HHS "acknowledg[ed] that there is substantial uncertainty regarding the magnitude of the[] effects" of the physical-separation requirement, and provided an "estimate" of "an average" that was an increase from [the] averaged estimate … in the proposed rule." *Id.* at 7781-82. Thus,

in considering compliance costs and the possibility that some incumbent providers might withdraw from the program, HHS simply made a different judgment than plaintiffs, which it of course was permitted to do. *See Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

Regardless, the Secretary sensibly predicted that any incumbent providers that withdraw likely will be replaced by new providers who were previously discouraged from joining the program by the abortion-referral requirement in the 2000 rule, or who will otherwise be willing to compete for and accept federal funds under the Rule. HHS explained that it "expects that honoring statutory protections of conscience in Title X may increase the number of providers in the program," 84 Fed. Reg. at 7780, and it pointed to data showing that a substantial number of medical professionals would limit the scope of their practice if conscience protections were not put in place, *id.* at 7781 n.139. In addition, HHS had received input from "supportive commenters not[ing] that the 2000 regulations stand in the way of some organizations applying for Title X funds, or participating in Title X projects, due to the requirement for abortion referrals and information." *Id.* at 7744. HHS also expected the Rule's new application criteria favoring innovative approaches for underserved populations to "encourag[e] broader and more diverse applicants." *Id.* at 7718. Accordingly, the Department predicted that the Rule may "lead to an increase in the number of health care providers who apply and receive funding under the Title X program, thus decreasing current gaps in family planning services in certain areas of the country." *Id.* at 7780.

Those predictions have been borne out, with new providers emerging as a result of the Rule's new referral provisions, as evidenced by recent challenges to the abortion-referral requirement in the 2000 regulations brought by current and prospective Title X grantees on the basis of statutory and constitutional protections for religious beliefs. *See Obria Group, Inc. v. HHS*, No. 19-905 (C.D. Cal.) (voluntarily dismissed June 13, 2019); *Vita Nuova, Inc. v. Azar*, No. 19-532 (N.D. Tex.) (filed July 3, 2019). And, HHS explained, it could not precisely "anticipate future turnover in grantees"—which hinges on the decisions of various independent actors—meaning any such "calculations would be purely speculative, and, thus, very difficult to forecast or quantify." 84 Fed. Reg. at 7782. In all events, HHS concluded that "compliance with statutory program integrity provisions is of greater importance" than the "cost" of departing from the status quo, *id.* at 7783, and the APA does not permit courts to second-guess that policy judgment.

Nothing in the APA requires an agency to defer to the views of any particular commenter over the agency's own views. Rather, the agency must consider significant comments and provide a reasoned response. *See Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1203 (2015). Having considered the Rule's effects on incumbent Title X providers, including reliance interests, HHS concluded that the Rule was warranted to comply with Title X notwithstanding those predicted costs. That decision was not irrational simply because plaintiffs disagree with HHS's predictive judgments or ultimate conclusion that the benefits outweighed the costs. To the contrary, an agency's predictive judgments "are entitled to particularly deferential review," *Trout Unlimited v.*

Lohn, 559 F.3d 946, 959 (9th Cir. 2009), and that is true with respect to an "agency's predictive judgments about the likely economic effects of a rule," no less than its scientific ones, *National Tel. Co-op. Ass'n v. FCC*, 563 F.3d 536, 541 (D.C. Cir. 2009) (Kavanaugh, J.); *cf.* Cal.Br.47 (suggesting deference is appropriate only when "scientific" judgments are involved).

3. The Other Challenged Provisions Are Reasonable

Plaintiffs' remaining objections fail. As we explained (Gov.Br.41-42), HHS adequately discussed and supported the medical-qualifications requirements for those providing certain counseling, the elimination of the confusing "medically appropriate" language, and HHS's cost-benefit analysis. While the district court disagreed with that reasoning, that was not a permissible basis for striking down the Rule. In suggesting that the Department now must "rebut th[e] [district court's] conclusion[s]" (Cal.Br.54), plaintiffs have it backwards: HHS provided a reasoned explanation of its conclusions, and no more was required.

II. Merits Aside, The Preliminary Injunction Must Be Vacated

A. The Balance Of The Equities Precludes Injunctive Relief

1. Plaintiffs' asserted injuries to public health are, as a unanimous motions panel of this Court acknowledged, speculative and "minor relative to the harms to the Government." Dkt.No.25, at 26. To start, their warnings of dire public-health consequences depend on crediting their own "predictions about the effect of implementing the Final Rule[] over HHS's predictions that implementation of the final

rule will have the *opposite* effect." *Id.* at 25. Specifically, they depend on plaintiffs' view that only the existing network of Title X providers can provide effective care. *See, e.g.*, EAH.Br.41. HHS, however, came to the opposite conclusion: that public health would benefit from the Rule, which would "contribute to more clients being served, gaps in service being closed, and improved client care." 84 Fed. Reg. at 7723. While the net effect of the Rule is necessarily "difficult to quantify," *id.* at 7783, HHS's predictions about changes to the Title X provider landscape are entitled to greater deference than plaintiffs' speculation that no one other than existing providers could serve Title X patients. Contrary to plaintiffs' contention (EAH.Br.38-39), deference to the agency's "'specific, predictive judgment[]" in an area of HHS's "unique expertise" is appropriate and consistent with *Sierra Forest Legacy v. Sherman,* 646 F.3d 1161 (9th Cir. 2011). As that decision explained, deference is "appropriate when considering a broad equitable question" if "the government has unique expertise," such as "'senior Navy officers' specific, predictive judgments about how the preliminary injunction would reduce the effectiveness of the Navy's ... training exercises.'" *Id.* at 1185 (quoting *Winter*, 555 U.S. at 27). The same is true with respect to HHS's expert judgments made in administering a competitive funding program.

In any event, plaintiffs' predictions are necessarily predicated on their views of the merits. Plaintiffs' assertion that incumbent providers who remain in the program will be forced to "obstruct and delay patients with pressing medical needs in violation of their medical obligations" (EAH.Br.41), depends on their claim that those

restrictions in fact force providers to violate medical ethics. To the extent that plaintiffs suggest these objections are independent of medical ethics, such preferences cannot overcome the government's significant interest in enforcing its reasonable interpretation of § 1008. Similarly, plaintiffs' assertion that the physical-separation requirement is "cost-prohibitive" (EAH.Br.41), depends on both accepting their construction of § 1008—as the loss of savings associated with a statutory violation is not cognizable—as well as crediting their predictions as to those costs over HHS's reasoned judgment. And their claim that the Rule's referral and counseling restrictions may result in "delayed" abortions (Cal.Br.55) overlooks that any such delay stems from Congress's choice to exclude programs "where abortion is a method of family planning" from Title X, a choice the Rule implements. *See* 84 Fed. Reg. at 7748.

Finally, plaintiffs' suggestion (EAH.Br.42-43) that this Court must review the district court's alleged findings of harm under the clear-error standard is beside the point. These assertions of harm were predicated on a legally erroneous view of the merits and, in any event, are clearly outweighed by the significant harms to the government and the public from enjoining the Rule.

2. On the other side of the ledger, the government has a significant interest in enforcing statutes, *see Maryland v. King*, 567 U.S. 1301 (2012) (Roberts, C.J., in chambers) —an interest that is heightened when the Supreme Court has already upheld the government's construction of a statute now reflected in a regulation that plaintiffs seek to enjoin. The government also has a weighty interest in declining to promote

abortion through federal funds, *see, e.g.*, *Rust*, 500 U.S. at 192-93, particularly when the Supreme Court has already upheld HHS's judgment that certain activities would do so and sanctioned the remedial steps HHS proposes to ensure that taxpayer dollars are not being used for that purpose. Indeed, plaintiffs' asserted harms—the closure of certain clinics and curtailment of lawful Title X services—confirm that, under the 2000 regulations, Title X funds were being used to promote abortion.[4]

B. The Preliminary Injunction Is Overbroad

Finally, plaintiffs offer little defense of the district court's decision to enjoin almost every provision of the Rule after analyzing only some of them. Gov.Br. 46-47. Although they suggest it is the government's duty to justify severability (Cal.Br.59-60; EAH.Br.71), it is *plaintiffs'* burden to justify why an injunction is necessary with respect to each provision of the Rule, and they have failed to do so. *Cf. Printz v. United States*, 521 U.S. 898, 935 (1997) (courts "have no business answering" questions about the validity of provisions that concern only "the rights and obligations of parties not before [them]"). Even though only "strong evidence" can overcome the presumption that the valid provisions of a law containing a severability clause should be left intact, *National Mining Ass'n v. Zinke*, 877 F.3d 845, 862 (9th Cir. 2017), plaintiffs assert that the district court "narrowly tailored the injunction to exclude the provisions it determined were

[4] Private plaintiffs cite HHS guidance to grantees that the agency would not enforce the Rule until the preliminary injunctions are "lifted" (EAH.Br.49, n.17), but this Court's stay order currently permits the agency to enforce the Rule, and HHS is doing so.

unchallenged" and that this Court "should not engage in an analysis of each provision of the Final Rule in the first instance." EAH.Br.71. But that is precisely what the Court is required to do. Accordingly, if plaintiffs wish to enjoin enforcement of the entire Rule, it is incumbent on them to explain how each of the Rule's provisions—which, when combined, span six pages of the Federal Register—is either unlawful or inseverable. *See* 84 Fed. Reg. at 7786-91. They have not done so.

CONCLUSION

The district court's preliminary injunction should be vacated in whole or at least as to its overbroad scope.

Respectfully submitted,

JOSEPH H. HUNT
Assistant Attorney General

HASHIM M. MOOPPAN
Deputy Assistant Attorney General

BRINTON LUCAS
Senior Counsel

MICHAEL S. RAAB
KATHERINE ALLEN
s/Jaynie Lilley
JAYNIE LILLEY
Attorneys, Appellate Staff
Civil Division
U.S. Department of Justice, Room 7321
950 Pennsylvania Ave., NW
Washington, DC 20530
202-514-3542

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STATEMENT OF RELATED CASES

The following related cases are currently pending in this Court: *National Family Planning & Reproductive Health Ass'n v. Azar*, No. 19-35394; *Washington v. Azar*, No. 19-35394; *Oregon v. Azar*, No. 19-35386(L).

CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDURE 32(a)

I hereby certify that this brief complies with the requirements of Federal Rule of Appellate Procedure 32(a)(5) and (6) because it has been prepared in 14-point Garamond, a proportionally spaced font.

I further certify that this brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) and Ninth Circuit Rule 32-1 because it contains of 6,960 words, according to the count of Microsoft Word.

s/ Jaynie Lilley
Jaynie Lilley

CERTIFICATE OF SERVICE

I hereby certify that on July 22, 2019, I filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. All participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

s/ Jaynie Lilley
JAYNIE LILLEY