Nos. 20-429 and 20-539

In the Supreme Court of the United States

AMERICAN MEDICAL ASSOCIATION, ET AL., PETITIONERS

v.

ALEX M. AZAR, II, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL.

STATE OF OREGON, ET AL., PETITIONERS

v.

ALEX M. AZAR, II, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS

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QUESTIONS PRESENTED

Title X of the Public Health Service Act, which authorizes federal funding for family planning services, provides that "[n]one of the funds appropriated under this subchapter shall be used in programs where abortion is a method of family planning." 42 U.S.C. 300a-6. In *Rust* v. *Sullivan*, 500 U.S. 173 (1991), this Court upheld a regulation that, among other things, prohibited recipients of Title X funds from making elective-abortion referrals in Title X clinics and also required them to maintain physical separation between those clinics and any abortion-related activities. This Court explained that those referral and separation provisions were authorized by statute, the product of reasoned decisionmaking, and consistent with the Constitution. Relying on that decision, the Department of Health and Human Services issued a final rule in 2019 that reinstated materially indistinguishable referral and separation provisions. The questions presented are as follows:

1. Whether the rule falls within the agency's statutory authority.

2. Whether the rule is the product of reasoned decisionmaking.

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OPINIONS BELOW

The opinion of the en banc court of appeals vacating the preliminary injunctions (Pet. App. 1a-94a[1]) is reported at 950 F.3d 1067. A prior order of the court of appeals staying the preliminary injunctions (Pet. App. 271a-289a) is reported at 927 F.3d 1068. The opinions and orders of the district courts granting preliminary

[1] Citations refer to the appendix to the petition for a writ of certiorari in No. 20-429.

injunctions (Pet. App. 95a-134a, 135a-157a, 159a-269a) are reported at 389 F. Supp. 3d 898, 385 F. Supp. 3d 960, and 376 F. Supp. 3d 1119.

JURISDICTION

The judgment of the en banc court of appeals was entered on February 24, 2020. A petition for rehearing was denied on May 8, 2020 (Pet. App. 291a-293a). The petitions for writs of certiorari were filed on October 1, 2020, and October 5, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

In *Rust* v. *Sullivan*, 500 U.S. 173 (1991), this Court upheld a regulation imposing various restrictions and requirements to enforce a statutory prohibition on using certain federal funds for family planning services "in programs where abortion is a method of family planning," 42 U.S.C. 300a-6. Relying on that precedent, the Department of Health and Human Services (HHS) reinstated a materially indistinguishable version of that regulation in 2019. Three district courts in the Ninth Circuit preliminarily enjoined the rule's enforcement, one within California and two on a nationwide basis. Pet. App. 95a-134a, 135a-157a, 159a-269a. After a panel stayed the injunctions, *id.* at 271a-289a, the en banc court of appeals, on reconsideration of the stay motion, vacated the underlying injunctions, *id.* at 1a-94a. In a different challenge, the en banc Fourth Circuit subsequently affirmed a permanent injunction preventing the rule's enforcement within Maryland. *Mayor & City Council of Baltimore* v. *Azar*, 973 F.3d 258 (2020) (*Baltimore*), petition for cert. pending, No. 20-454 (filed Oct. 7, 2020). The government agrees that the petitions for writs of certiorari in both cases should be granted.

A. Statutory And Regulatory Background

1. In 1970, Congress enacted Title X of the Public Health Service Act, 42 U.S.C. 300 *et seq.*, to create a limited grant program for certain types of family planning services. See Family Planning Services and Population Research Act of 1970, Pub. L. No. 91-572, § 6(c), 84 Stat. 1506-1508. The statute authorizes HHS to make grants to, and enter into contracts with, public or private nonprofit entities "to assist in the establishment and operation of voluntary family planning projects which shall offer a broad range of acceptable and effective family planning methods and services." 42 U.S.C. 300(a). The statute also provides that "[g]rants and contracts made under this subchapter shall be made in accordance with such regulations as the Secretary may promulgate." 42 U.S.C. 300a-4(a). Section 1008 of the statute commands, however, that "[n]one of the funds appropriated under this subchapter shall be used in programs where abortion is a method of family planning." 42 U.S.C. 300a-6.

2. HHS's initial Title X regulations did not provide guidance on the scope of Section 1008. See 36 Fed. Reg. 18,465 (Sept. 15, 1971). Since 1972, however, the agency has construed the provision "as prohibiting Title X projects from in any way promoting or encouraging abortion as a method of family planning," and "as requiring that the Title X program be 'separate and distinct' from any abortion activities of a grantee." 53 Fed. Reg. 2922, 2923 (Feb. 2, 1988) (describing prior agency opinions).

Starting in the 1970s, the agency nevertheless permitted—and then, in guidelines issued in 1981, required—Title X recipients to offer "nondirective 'options couns[e]ling' on pregnancy termination (abortion), prenatal care, and adoption and foster care when a

woman with an unintended pregnancy requests information on her options, followed by referral for these services if she so requests." 53 Fed. Reg. at 2923. HHS also allowed funding recipients to provide "Title X family planning services and separately funded, abortion-related activities" at "a single site." *Id.* at 2924.

3. In 1988, HHS changed course. The agency issued a final rule prohibiting Title X providers from providing referrals for, or counseling about, abortion as a method of family planning, even upon a patient's specific request. 53 Fed. Reg. at 2945. Instead, providers were required to refer every pregnant client "for appropriate prenatal and/or social services by furnishing a list of available providers that promote the welfare of mother and unborn child." *Ibid.* And to prevent evasion of the abortion-referral prohibition, the 1988 rule barred providers from using this list (or any other referrals) "as an indirect means of encouraging or promoting abortion," such as by "'steering' clients to providers who offer abortion as a method of family planning." *Ibid.* The 1988 rule also required that grantees keep their Title X projects "physically and financially separate" from all prohibited abortion-related activities. *Ibid.*

In *Rust*, this Court upheld the 1988 rule's prohibition on abortion referrals and counseling as well as its requirement of physical separation. 500 U.S. at 183-203. As this Court explained, HHS's primary conclusion—that a Title X program which provides referrals for, or counseling about, abortion as a method of family planning is in fact one "'where abortion is a method of family planning'"—was at least a "permissible construction" of Section 1008. *Id.* at 184, 187 (citation omitted); see 53 Fed. Reg. at 2923, 2933. And even if the 1988 rule "represent[ed] a sharp break from the Secretary's prior

construction" of Section 1008, the Court observed, he had "amply justified his change of interpretation with a 'reasoned analysis,'" by, among other things, concluding "that the new regulations are more in keeping with the original intent of the statute." *Rust*, 500 U.S. at 186-187 (citation omitted). This Court likewise held that the physical-separation requirement was "based on a permissible construction of the statute," and that HHS had made a "reasoned determination" that this requirement was "necessary to implement" Section 1008. *Id.* at 188, 190. It also rejected arguments that the 1988 rule contravened the First and Fifth Amendments, drawing a clear distinction between impeding abortion and declining to subsidize it. See *id.* at 192-203.

4. In 1993, President Clinton and HHS suspended the 1988 rule and the 1981 guidelines went back into effect. 58 Fed. Reg. 7455 (Feb. 5, 1993); 58 Fed. Reg. 7462 (Feb. 5, 1993) (interim rule). HHS then finalized a new rule in 2000, which, like the 1981 guidelines, required Title X clinics to offer and provide upon request "information and counseling regarding" (i) "[p]renatal care and delivery," (ii) "[i]nfant care, foster care, or adoption," and (iii) "[p]regnancy termination," followed by "referral upon request." 65 Fed. Reg. 41,270, 41,279 (July 3, 2000). The 2000 rule also eliminated the physical-separation requirement. See *id.* at 41,275-41,276.

5. In 2019, HHS reversed course again. Following notice and comment, the agency issued a final rule with referral and physical-separation provisions materially indistinguishable from those upheld in *Rust*. 84 Fed. Reg. 7714 (Mar. 4, 2019); 42 C.F.R. 59.1-59.19. Like its 1988 predecessor, the rule prohibits Title X projects from providing referrals for abortion as a method of family planning. 84 Fed. Reg. at 7788-7789 (42 C.F.R.

59.14(a)). As HHS explained, "[i]f a Title X project refers for * * * abortion as a method of family planning, it is a program 'where abortion is a method of family planning' and the Title X statute prohibits Title X funding for that project." *Id.* at 7759. To prevent evasion of this prohibition, the rule, like its 1988 predecessor, prohibits implicit abortion referrals by imposing restrictions on the list of providers that may be given in conjunction with a required referral for prenatal care for pregnant women. See *id.* at 7789 (42 C.F.R. 59.14(b)(1) and (c)(2)). For example, Title X clinics may not "identify which providers on the list perform abortion." *Ibid.* (42 C.F.R. 59.14(c)(2)). If a pregnant client "requests information on abortion and asks the Title X project to refer her for an abortion," the rule, like its 1988 predecessor, explains that a provider may "tell[] her that the project does not consider abortion a method of family planning and, therefore, does not refer for abortion." *Ibid.* (42 C.F.R. 59.14(e)(5)). And because Section 1008 addresses abortion only "as a method of family planning," the rule, like its 1988 predecessor, not only permits, but requires, referrals for abortion in cases of an "emergency," such as "an ectopic pregnancy." *Ibid.* (42 C.F.R. 59.14(c)(1) and (e)(2)).

The rule is more permissive, in fact, than its 1988 predecessor, as it allows, but does not require, "nondirective pregnancy counseling, which may discuss abortion," 84 Fed. Reg. at 7789 (42 C.F.R. 59.14(e)(5)); see *ibid.* (42 C.F.R. 59.14(b)(1)(i)), so long as such counseling does not "promote" abortion as a method of family planning, *id.* at 7788 (42 C.F.R. 59.14(a)); see *id.* at 7745-7746. In the agency's view, such limited counseling—"[u]nlike abortion referral"—"would not be considered encouragement, promotion, support, or

advocacy of abortion as a method of family planning" in violation of Section 1008. *Id.* at 7745.

Also like its 1988 predecessor, the rule requires that Title X clinics remain physically separate from any abortion-related activities. 84 Fed. Reg. at 7789 (42 C.F.R. 59.15). As HHS explained, "[i]f the collocation of a Title X clinic with an abortion clinic permits the abortion clinic to achieve economies of scale, the Title X project (and, thus, Title X funds) would be supporting abortion as a method of family planning." *Id.* at 7766. To give Title X recipients "time to make arrangements," however, HHS gave them a "transition period"—a year from the rule's publication date—to comply with the physical-separation requirement, during which they could consult with the agency about compliance and implement any necessary changes. *Id.* at 7766-7767.

In HHS's view, the referral and physical-separation provisions represent "the best reading" of Section 1008, "which was intended to ensure that Title X funds are also not used to encourage or promote abortion." 84 Fed. Reg. at 7777; see, *e.g.*, *id.* at 7765 (explaining that the physical-separation requirement will "help assure fidelity to the text and purpose of section 1008"). Accordingly, after considering and addressing significant comments about the rule's alleged effects, see *id.* at 7722-7783, HHS ultimately concluded that "compliance with statutory program integrity provisions is of greater importance" than "cost," *id.* at 7783.

B. Procedural History

1. Petitioners—various private organizations, individual providers, States, and the District of Columbia—brought challenges against the rule under the Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.*, 701

et seq., in district courts in California, Oregon, and Washington. Pet. App. 22a. At petitioners' request, each of the district courts issued a preliminary injunction preventing enforcement of the rule. *Id.* at 133a, 156a, 269a. Two of the courts did so on a nationwide basis, *id.* at 133a, 156a, while one enjoined the rule's enforcement within California, *id.* at 269a.[2]

Collectively, the district courts concluded that the rule's referral and counseling provisions and its physical-separation requirement likely contravened two pieces of legislation enacted after *Rust*: (1) an annual appropriations rider providing that, within the Title X program, "all pregnancy counseling shall be nondirective," *e.g.*, Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, Tit. II, 110 Stat. 1321-221; see Pet. App. 112a-119a, 152a, 195a-208a; and (2) Section 1554 of the Patient Protection and Affordable Care Act (ACA), which prohibits HHS from adopting a regulation that, among other things, "interferes with communications regarding a full range of treatment options between the patient and the provider," restricts "full disclosure of all relevant information to patients making health care decisions," "creates any unreasonable barriers" to obtaining "appropriate medical care," or "impedes timely access to health care services." Pub. L. No. 111-148, Tit. I, Subtit. G, § 1554(1)-(4), 124 Stat. 259 (42 U.S.C. 18114(1)-(4)); see Pet. App. 119a-123a, 152a, 208a-222a.

The district courts also ruled that HHS's adoption of the rule was likely arbitrary and capricious. See Pet. App. 129a-133a, 152a-153a, 224a-263a. Collectively, the

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[2] Although the State of Washington also brought a challenge to the rule, it has not sought further review in this Court.

courts concluded that HHS had failed to adequately address comments alleging that: (1) the referral and counseling provisions contravened medical ethics, *id.* at 124a-128a; (2) the likely costs of complying with the physical-separation requirement during the transition period were higher than the agency's estimate, *id.* at 239a-242a; and (3) the rule would disrupt the Title X program to the detriment of patients, *id.* at 128a-130a.

2. The government appealed and sought a stay of the preliminary injunctions. After a unanimous panel of the court of appeals granted the government's stay motion, the court ordered en banc reconsideration of the motion, Pet. App. 23a n.10, 273a-289a, and then vacated the underlying injunctions by a 7-4 vote, *id.* at 1a-94a.

a. The en banc majority first determined that the rule was consistent with both the appropriations rider and Section 1554 of the ACA. Pet. App. 27a-49a. In approaching this question, the majority explained that because "*Rust*'s conclusion that § 1008 could be interpreted to bar abortion counseling, referral, and advocacy within a Title X project" had become "part of Title X's scheme," it could "not lightly infer that Congress intended to overrule that holding in enacting the appropriations rider or § 1554 of the ACA." *Id.* at 27a-28a. The majority then explained that the appropriations rider's directive that "'all pregnancy counseling shall be nondirective'" did not abrogate this Court's decision in *Rust* for two reasons: (1) "the term 'pregnancy counseling'" does not clearly encompass "referrals"; and (2) "the term 'nondirective'" does not clearly require "the presentation of all options on an equal basis." *Id.* at 28a (citation omitted); see *id.* at 28a-40a. Turning to Section 1554 of the ACA, the majority observed that this Court, including in *Rust* itself, "has long made a

distinction between regulations that impose burdens on health care providers and their clients and those that merely reflect Congress's choice not to subsidize certain activities." *Id.* at 43a. And that "logic," the majority explained, "applies equally to statutory and constitutional claims," for if "a rule implementing the government's policy decision to encourage childbirth rather than abortion does not burden or interfere with a client's health care at all, then it does not matter whether the client's health care rights were created by the Constitution or a statute." *Id.* at 45a-46a (citation omitted).

The en banc majority then rejected the argument that the rule was arbitrary and capricious and held that "HHS properly examined the relevant considerations and gave reasonable explanations." Pet. App. 68a; see *id.* at 49a-68a. In response to the assertion that HHS had "failed to consider claims by some commenters" that the referral and counseling "restrictions would require 'providers to violate their ethical obligations,'" the majority explained how the agency had "specifically addressed those concerns" and added that this Court in "*Rust* rejected ethical arguments similar to those raised here." *Id.* at 62a, 64a n.36; see *id.* at 63a-65a. The majority also explained that "HHS's cost estimates" regarding "'compliance with the physical separation requirement'" were reasonable, and that petitioners' challenge to that analysis would impermissibly require the court to favor their "pessimistic cost estimates over those provided by HHS." *Id.* at 60a n.32 (citation omitted). And the majority dismissed the contention that HHS had failed to adequately address comments that "predicted the Final Rule would cause an exodus of Title X providers and have a deleterious effect on client care." *Id.* at 59a. As the majority explained, "HHS was

not required to accept the commenters' 'pessimistic' cost predictions, and the agency adequately explained why it did not expect grantees to participate in a mass rejection of Title X funds." *Id.* at 60a-61a (quoting *Department of Commerce* v. *New York*, 139 S. Ct. 2551, 2571 (2019)).

Relying on its authority to "'address the underlying merits of plaintiffs' legal claims,'" the en banc majority concluded that petitioners "will not prevail on the merits of their legal claims," vacated the preliminary injunctions, and remanded the cases. Pet. App. 24a, 68a (quoting *Winter* v. *Natural Res. Def. Council, Inc.*, 555 U.S. 7, 31 (2008)) (brackets omitted).

b. Judge Paez, joined by Chief Judge Thomas and Judges Wardlaw and Fletcher, dissented. Pet. App. 69a-94a. In the dissenters' view, *Rust* and other decisions of this Court emphasizing the lack of an "affirmative entitlement to state subsidization of abortion" had "little bearing on the matter." *Id.* at 70a-72a. According to them, Congress, by enacting the appropriations rider and Section 1554 of the ACA, had established "statutory protections that exceed the constitutional floor set decades ago." *Id.* at 71a. And the fact that "a congressional decision not to subsidize abortion does not burden the abortion right in the *constitutional* sense," they concluded, "has no bearing whatsoever" on whether HHS had contravened "statutory requirements." *Id.* at 81a-82a; see *id.* at 76a-77a (concluding that by enacting the appropriations rider, "Congress has prohibited" HHS from "delaying some women's access to time-sensitive care and preventing others from accessing abortion altogether").

The dissenters also faulted the majority for holding that the rule represented an exercise in reasoned decisionmaking. Pet. App. 82a-94a. They contended that petitioners were likely to prevail on their arbitrary-and-capricious claim on the theory that HHS failed "'to respond meaningfully to the evidence' that" the rule "contradicts medical ethics"; that HHS calculated "costs of compliance with the physical separation requirement in a 'mystifying' way"; and that HHS failed to sufficiently address comments that the rule "will cause providers to leave the Title X program, leading to decreased access to Title X-funded care." *Id.* at 85a, 87a n.13, 88a, 89a n.16 (citations omitted).

c. Petitioners sought rehearing of the en banc panel's decision by the full court of appeals. Pet. App. 293a. The court denied their petitions, with no judge requesting a vote on whether to rehear the case as a full court. *Ibid.*

3. In addition to this case, another suit challenging the rule is before this Court. In *Baltimore*, *supra*, the City of Baltimore brought a challenge to the rule under the APA in a district court in Maryland, raising the same arguments as the ones advanced by petitioners here. See Pet. App. at 147a-163a, *Baltimore, supra* (No. 20-454). The district court preliminarily and then permanently enjoined the rule's enforcement within Maryland, *id.* at 133a-134a, 135a-177a, 178a-179a, 180a-211a, and then the Fourth Circuit granted initial en banc review and affirmed, after a panel had stayed the preliminary injunction pending appeal, *id.* at 1a-132a. The government has filed a petition for a writ of certiorari in that case. See *Baltimore*, *supra* (No. 20-454).

DISCUSSION

For the reasons set forth in its petition in *Azar* v. *Mayor & City Council of Baltimore* (*Baltimore*), petition for cert. pending, No. 20-454 (filed Oct. 7, 2020), the government agrees with petitioners that the question whether the rule falls within HHS's statutory authority and the question whether the rule is the product of reasoned decisionmaking both warrant this Court's review. See Pet. at 31-33, *Baltimore*, *supra* (No. 20-454); AMA Pet. 20-23, 34-35; Oregon Pet. 16-20. Although the government disagrees with petitioners on the merits, see Pet. at 11-31, *Baltimore*, *supra* (No. 20-454), there is a square conflict between two en banc courts of appeals implicating the government's weighty interest in avoiding the use of federal funds to promote or subsidize abortion. Only this Court can definitively resolve the validity of the rule, and it should do so.

The government also agrees with petitioners that this case presents an appropriate vehicle for resolving the conflict. See Oregon Pet. 25-32. Accordingly, this Court should grant the petitions both in this case and in *Baltimore*, consolidate the cases, and realign the parties to minimize duplicative briefing.

CONCLUSION

The petitions for writs of certiorari should be granted both in this case and in *Azar* v. *Mayor & City Council of Baltimore* (*Baltimore*), petition for cert. pending, No. 20-454 (filed Oct. 7, 2020).

Respectfully submitted.

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