

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO

STATE OF OHIO, STATE OF	:	
ALABAMA, STATE OF ARIZONA,	:	
STATE OF ARKANSAS, STATE OF	:	Case No. 1:21-cv-675
FLORIDA, STATE OF KANSAS,	:	Hon. Timothy S. Black
COMMONWEALTH OF	:	
KENTUCKY, STATE OF	:	
MISSOURI, STATE OF	:	
NEBRASKA, STATE OF	:	
OKLAHOMA, STATE OF SOUTH	:	
CAROLINA, STATE OF WEST	:	
VIRGINIA,	:	
<i>Plaintiffs,</i>	:	
v.	:	
XAVIER BECERRA, in his official	:	
capacity as Secretary of Health and	:	
Human Services; U.S.	:	
DEPARTMENT OF HEALTH AND	:	
HUMAN SERVICES; JESSICA S.	:	
MARCELLA, in her official capacity	:	
as Deputy Assistant Secretary for	:	
Population Affairs; and OFFICE OF	:	
POPULATION AFFAIRS,	:	
<i>Defendants.</i>	:	

CONSENT MOTION OF MONTANA, GEORGIA, IDAHO, INDIANA, LOUISIANA,
MISSISSIPPI, SOUTH DAKOTA, AND TEXAS
TO PARTICIPATE AS AMICUS CURIAE IN SUPPORT OF
PLAINTIFFS’ MOTION FOR PRELIMINARY INJUNCTON

The State of Montana, State of Georgia, State of Idaho, State of Indiana, State of Louisiana, State of Mississippi, State of South Dakota, and State of Texas (collectively “the States”) move for leave to file the accompanying proposed Brief of Amicus Curiae. Pursuant to Local Rule 7.3(b), the States certify that they conferred

with counsel for Plaintiffs and Defendants, and that the parties consent to this Motion.

The decision whether to grant leave to participate as amicus curiae is within the broad discretion of the district court. *See BancInsure, Inc. v. U.K. Bancorporation Inc.*, 830 F. Supp. 2d 294, 307 (E.D. Ky. 2011) (“Participation as an amicus is ‘a privilege within the sound discretion of the courts, depending upon a finding that the proffered information of amicus is timely, useful, or otherwise necessary to the administration of justice.’”) (quoting *United States v. Michigan*, 940 F.2d 143, 165 (6th Cir. 1991)). The States seek to enforce the strict statutory requirements of § 1008 and prevent Title X funds from being utilized to subsidize abortion. The States also seek to protect the conscience rights of providers who to decline to provide, perform, participate in, or refer for, abortions. The States are represented by their respective Attorneys General, who bear the duty and authority to represent the States in court. The States have providers within their borders, public and private, who receive Title X funds and will be affected by the Final Rule’s plain violation of Congress’s express wishes.

WHEREFORE, in light of the States’ significant interest in the proper use of Title X funds, the States respectfully request this Court grant leave to file the attached Brief of Amicus Curiae in Support of Plaintiffs’ Motion for Preliminary Injunction.

DATED: November 15, 2021.

/s/ Philip D. Williamson
Philip D. Williamson (0097174)
TAFT STETTINIUS & HOLLISTER LLP
425 Walnut Street, Suite 1800
Cincinnati, OH 45202
Phone: (513) 381-2838
Fax: (513) 381-0205
pwilliamson@taftlaw.com

AUSTIN KNUDSEN
Attorney General of Montana
KRISTIN HANSEN
Lieutenant General
DAVID M.S. DEWHIRST
Solicitor General
CHRISTIAN B. CORRIGAN
Assistant Solicitor General
Office of the Attorney General
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401
David.Dewhirst@mt.gov
Christian.Corrigan@mt.gov

Attorneys for Amicus Curiae

Additional Counsel for Amici Curiae:

Chris Carr
GEORGIA ATTORNEY GENERAL

Lawrence G. Wasden
IDAHO ATTORNEY GENERAL

Jeff Landry
LOUISIANA ATTORNEY GENERAL

Theodore E. Rokita
INDIANA ATTORNEY GENERAL

Jason Ravnsborg
SOUTH DAKOTA ATTORNEY GENERAL

Lynn Fitch
MISSISSIPPI ATTORNEY GENERAL

Ken Paxton
TEXAS ATTORNEY GENERAL

CERTIFICATE OF SERVICE

I hereby certify that on November 15, 2021, a copy of the foregoing was filed electronically. Notice of this filing will be sent to all parties for whom counsel has entered an appearance by operation of the Court's electronic filing system.

/s/ Philip D. Williamson

IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF OHIO

STATE OF OHIO, STATE OF	:	
ALABAMA, STATE OF ARIZONA,	:	
STATE OF ARKANSAS, STATE OF	:	Case No. 1:21-cv-675
FLORIDA, STATE OF KANSAS,	:	Hon. Timothy S. Black
COMMONWEALTH OF	:	
KENTUCKY, STATE OF	:	
MISSOURI, STATE OF	:	
NEBRASKA, STATE OF	:	
OKLAHOMA, STATE OF SOUTH	:	
CAROLINA, STATE OF WEST	:	
VIRGINIA,	:	
<i>Plaintiffs,</i>	:	
v.	:	
XAVIER BECERRA, in his official	:	
capacity as Secretary of Health and	:	
Human Services; U.S.	:	
DEPARTMENT OF HEALTH AND	:	
HUMAN SERVICES; JESSICA S.	:	
MARCELLA, in her official capacity	:	
as Deputy Assistant Secretary for	:	
Population Affairs; and OFFICE OF	:	
POPULATION AFFAIRS,	:	
<i>Defendants.</i>	:	

BRIEF OF MONTANA, GEORGIA, IDAHO, INDIANA, LOUISIANA,
MISSISSIPPI, SOUTH DAKOTA, AND TEXAS AS AMICUS CURIAE IN
SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTON

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF AMICI 1

INTRODUCTION 1

I. THE FINAL RULE VIOLATES TITLE X BY FUNDING AND ENCOURAGING ABORTIONS2

II. THE FINAL RULE IS ARBITRARY AND CAPRICIOUS 8

A. FEDERAL STATUTES 9

B. THE FINAL RULE IGNORES IMPORTANT ASPECTS OF THE PROBLEM..... 11

CONCLUSION 18

CERTIFICATE OF SERVICE 20

TABLE OF AUTHORITIES

CASES

Burwell v. Hobby Lobby Stores, Inc.,
573 U. S. 682 (2014).16

Cleveland Cliffs Iron Co. v. ICC,
664 F.2d 568 (6th Cir. 1981).15

Dep't of Homeland Sec. v. Regents of the Univ. of Cal.,
140 S. Ct. 1891 (2020). 9

E. Bay Sanctuary Covenant v. Garland,
994 F.3d 962 (9th Cir. 2021).17

Grove City College v. Bell,
465 U.S. 555 (1984).5

Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania,
140 S. Ct. 2367 (2020).15, 16, 17

Maher v. Roe,
432 U.S. 464 (1977).3, 4

Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co.,
463 U.S. 29, (1983). *passim*

Nat'l Family Planning & Reprod. Health Ass'n v. Gonzales,
468 F.3d 826 (2006).13, 14

Planned Parenthood Fed'n v. Sullivan,
913 F.2d 1492 (10th Cir. 1990).3

Radio Ass'n on Defending Airwave Rights v. United States DOT,
47 F.3d 794 (6th Cir. 1995)..... 2, 12, 15

Rust v. Sullivan,
500 U.S. 173 (1991).2, 3, 4

United States v. Akzo Coatings of Am.,
949 F.2d 1409 (6th Cir. 1991). 8

Vita Nuova, Inc. v. Azar,
458 F. Supp. 3d 546 (N.D. Tex. 2020). 14, 17

Zubik v. Burwell,
136 S. Ct. 1557 (2016).16

STATUTES AND REGULATIONS

42 U.S.C. 238n..... 8, 10

42 U.S.C. § 300..... 2, 3

42 U.S.C. §300a-6..... *passim*

42 U.S.C. 300a-7*passim*

65 Fed. Reg. at 412826

82 Fed. Reg. 4781216

83 Fed. Reg. at 2551817

84 Fed. Reg. 7714*passim*

86 Fed. Reg. 56144-01*passim*

OTHER AUTHORITIES

H.R. Conf. Rep. No. 91-1667 (1970) 3

H.R. Conf. Rep. No. 5727

116 Cong. Rec. 37375 (Nov. 16, 1970) 4, 7

Title X Opinion, 11 Op. OLC 77.5, 7

Interest of Amici

Amici Curiae States of Montana, Georgia, Idaho, Indiana, Louisiana, Mississippi, South Dakota, and Texas (“the States”) seek to enforce the strict statutory requirements of § 1008 and prevent Title X funds from being utilized to subsidize abortion. The States also seek to protect the conscience rights of providers who to decline to provide, perform, participate in, or refer for, abortions. The States are represented by their respective Attorneys General, who bear the duty and authority to represent the States in court. The States have providers within their borders who receive Title X funds and will be affected by the Final Rule’s plain violation of Congress’s express wishes.

Introduction

The Final Rule, *Ensuring Access to Equitable, Affordable, Client-Centered, Quality Family Planning Services*, 86 Fed. Reg. 56144-01 (Oct. 7, 2021) (to be codified at 42 C.F.R. pt. 59) (“Final Rule”), promulgated by the Department of Health and Human Service (“HHS” or “Agency”) illegally allows funds appropriated under Title X of the Public Health Service Act (PHSA) to be used in programs where abortion is a method of family planning. That squarely violates 42 U.S.C. §300a-6.

Section 1008 of Title X of the PHSA, codified at 42 U.S.C. § 300a-6, expressly prohibits Title X funds from being “used in programs where abortion is a method of family planning.” 42 U.S.C. §300a-6. The text, history, and purpose of § 1008 demonstrate that the Agency’s prior policy correctly enforced the statute by (1) requiring Title X projects to “be organized so that [they are] physically and financially

separate” and (2) prohibiting grantees from making referrals for elective abortions. *See Compliance with Statutory Program Integrity Requirements*, 84 Fed. Reg. 7714, 7789 (Mar. 4, 2019) (“2019 Rule”). The Final Rule—which eliminates the 2019 Rule’s mandatory financial-and physical-separation requirements and requires that Title X grantees make abortion referrals upon request—plainly violates § 1008.

The Final Rule is also arbitrary and capricious in violation of the Administrative Procedure Act (APA) because it failed to consider numerous statutory provisions protecting those who have moral and religious objections to abortion. *Radio Ass'n on Defending Airwave Rights v. United States DOT*, 47 F.3d 794, 802 (6th Cir. 1995). The Agency, moreover, failed to consider providing an express exemption process and the consequences of not doing so. This was despite the fact that HHS was aware of the chilling effect that the lack of an express exemption would have on providers and patients.

For these reasons, the Court should grant Plaintiffs’ motion for preliminary injunction.

I. The Final Rule violates Title X by funding and encouraging abortions.

Title X “provides federal funding for family-planning services.” *Rust v. Sullivan*, 500 U.S. 173, 178 (1991). It “authorizes the Secretary [of Health and Human Services] to ‘make grants to and enter into contracts with public or nonprofit private 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.’” *Id.* (quoting 42 U.S.C. § 300(a)). Among the

acceptable methods of family planning listed by § 300(a) are natural family planning methods, infertility services, and services for adolescents. Faith-based providers are more likely to offer natural family planning services.

In § 1008, however, “Congress forbade the use of appropriated funds in programs where abortion is a method of family planning.” *Id.* at 191 (1991). Congress added this language “to make [its] intent clear” that Title X “be used only to support preventive family planning services, population research, infertility services, and other related medical, informational, and educational activities.” H.R. Conf. Rep. No. 91-1667, p. 8 (1970).

As with most statutes, Title X provides HHS with some discretion in administering its family planning programs. But this discretion comes with a red line: Title X may not be used to fund abortions—directly or indirectly. *See Planned Parenthood Fed'n v. Sullivan*, 913 F.2d 1492, 1497 (10th Cir. 1990) (“Title X clearly directs the Secretary to administer a grant program to promote family planning under a statute that delegates to him some discretion with an admonition not to fund abortions.”). Title X notably funds “a broad range of *acceptable* and effective family planning methods and services.” 42 U.S.C. § 300(a) (emphasis added). Despite this broad range, the language of § 1008 makes clear that abortion is not an acceptable method or service.

Section 1008 reflects Congress’s “value judgment favoring childbirth over abortion, and ... implement[s] that judgment by the allocation of public funds.” *Maher v. Roe*, 432 U.S. 464, 474 (1977). As such, Congress made the decision to

“subsidize family planning services which will lead to conception and childbirth, and declining to promote or encourage abortion.” *Rust*, 500 U.S. at 192–93 (quotations omitted). Contemporaneous evidence bolsters the plain text of § 1008 by showing that Congress understood that Title X funds were not to be used—directly or indirectly—to fund, aid, support, or encourage abortion. *See, e.g.*, 116 Cong. Rec. 37375 (Nov. 16, 1970) (statement of Rep. Dingell) (“With the ‘prohibition of abortion’ amendment—title X, section 1008—the committee members clearly intend *that abortion is not to be encouraged or promoted in any way through this legislation.*”) (emphasis added). HHS’s 1988 regulations, as well as its 2019 Rule, were thus “designed to ensure that the limits of the [Title X] program are observed.” *See id.* at 193.

The strict financial and physical separation requirements of the 2019 Rule¹ were not just permissible for the Agency to enact, they are required by the statute.² Those requirements are necessary because, as the HHS recognizes, Section 1008 “prohibit[s]” the agency from “subsidiz[ing] abortion.” 86 Fed. Reg. at 56150. Without them, the prohibitory language in § 1008 would be borderline meaningless. Any comingling of funds, staff, or other resources, of any degree, or achievement of economies of scale, violates § 1008. *See, e.g.*, 84 Fed. Reg. at 7766 (commenters opposing strict separation requirements because they preclude abortion providers from achieving economies of scale).

But the Final Rule does not just remove the strict separation requirements required by the 2019 Rule and § 1008. It actually *permits* the use of Title X funds to

¹ The 2019 Rule provided a list of criteria for the Secretary to determine if a Title X project was physically and financially separate from abortion: “Factors relevant to this determination shall include: (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.” 84 Fed. Reg. at 7789.

² In the wake of the Supreme Court’s decision in *Grove City College v. Bell*, 465 U.S. 555 (1984), a 1987 OLC opinion was ambivalent regarding the exact degrees of separation required by § 1008. It did, however note: “[A] reasonable amount of functional separation may not only be possible, but required. For instance, it may be reasonable in some cases to require that the abortion counseling be provided in a different office than the family planning counseling. This separation would become increasingly important if it was the only reasonable means to segregate abortion-related materials or personnel from the family planning context.” Title X Opinion, 11 Op. OLC at 87.

subsidize abortion by allowing Title X grantees to have an “abortion element in a program of family planning services,” as long as it is not too “large” or “intimately related” with the Title X program. *See* 86 Fed. Reg. at 56150; 65 Fed. Reg. at 41282 . This plainly defiles the moral clarity Congress provided when it enacted Title X.

It would be one thing if the Agency did not adopt the strict separation requirements 2019 Rule and simply told grantees that funds could not be used in violation of Title X. Although Amici believe HHS is required to adopt strict regulations to properly administer and enforce § 1008, the Agency’s silence could at least arguably be seen as not inconsistent with § 1008. *See Rust*, 500 U.S. at 184. But that’s not the case.

Here, the Agency has gone in the opposite direction in open violation of Congress’s wishes and express commands. The Final Rule, on its own terms, plainly allows Title X recipients to share “staff,” “waiting room[s],” and treatment rooms with abortion facilities. 86 Fed. Reg. at 56150. The 2019 Rule correctly recognized that integrating services in this manner lowers the cost of business for abortion providers. 84 Fed. Reg. at 7766 (“If 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. Put differently, the abortion clinic would be benefiting from the presence of the Title X project in the same location.”).

The Final Rule also illegally requires that that Title X grantees make abortion referrals “upon request.” 86 Fed. Reg. at 56179. As a 1987 OLC opinion concluded,

“§ 1008 compels the Secretary of [HHS] to prohibit in Title X programs all counseling and referrals related to abortion as a method of family planning, although abortion counseling and referrals should not be prohibited where they are medically indicated.” Title X Opinion, 11 Op. OLC at 78. The 2019 Rule correctly prohibited Title X grantees from making referrals for elective abortions to avoid promoting or encouraging abortion and to comply with section 1008’s prohibition on funding programs where abortion is a method of family planning. 84 Fed. Reg. at 7788–89. It specified that Title X projects could not provide pregnant patients certain information through nondirective counseling. It protected § 1008’s threshold requirements by mandating that this nondirective counseling could only provide neutral information. *See also* Title X Opinion, 11 Op. OLC at 79 (“The view that the plain meaning of § 1008 prohibits abortion counseling and referral is supported by its legislative history.”) (citing 116 Cong. Rec. 37375 (1970) (floor statement of Rep. Dingell); H.R. Conf. Rep. No. 572, 91st Cong., 1st Sess. 2 (1970) (Conference Report)). Without these requirements, providers would be allowed to encourage or promote abortion upon request even under the guise of nondirective counseling on abortion—putting them out of compliance with the statute. 84 Fed. Reg. at 7716; *id.* at 7788–89. Federal conscience laws and § 1008 can tolerate no less.

Requiring Title X grantees to make abortion referrals upon request is tantamount to funding a program where abortion is the method of family planning. *See* 84 Fed. Reg. at 7717 (“[HHS] believes both the referral for abortion as a method of family planning, and such abortion procedure itself, are so linked that such a

referral makes the Title X project or clinic a program one where abortion is a method of family planning, contrary to the prohibition against the use of Title X funds in such programs.”); *see also* 11 Op. OLC at 79 (“[A] program that includes abortion among the family planning options about which it counsels women is one in which abortion is a method of family planning.”). Practically, this allows Title X recipients to refer patients for elective abortions at their own abortion facilities. As aptly demonstrated by Plaintiffs, the logic supporting that conclusion is critically flawed. *See, e.g.*, ECF 2 at 18 (“Is a dental practice that refers patients to its own doctors for root canals a practice where root canals are a method of dental care?”).

II. The Final Rule is arbitrary and capricious.

The Court should also set aside the Final Rule because it is arbitrary and capricious in violation of the APA. *See* 5 U.S.C. § 706(2)(A). The Final Rule is arbitrary and capricious because HHS failed to consider an important aspect of the problem and failed to consider reasonable alternatives. *Motor Vehicle Mfrs. Ass’n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42, 51 (1983); *United States v. Akzo Coatings of Am.*, 949 F.2d 1409, 1428 (6th Cir. 1991) (agency must “examine[] all relevant factors [and] adequately explain[] its decision”).

The Final Rule fails to adequately consider and protect the conscience rights of individuals and entities who decline to provide, perform, participate in, or refer for, abortions. Specifically, the Final Rule’s requirement to counsel on abortion, if requested, conflicts with HHS-enforced statutes protecting conscience in health care, including the Church Amendments, 42 U.S.C. 300a-7, the Coats-Snowe Amendment, section 245 of the Public Health Service Act, 42 U.S.C. 238n, and the Weldon

Amendment, *see, e.g.*, Consolidated Appropriations Act, 2021, Public Law 116-260, Div. H, § 507(d), 134 Stat.1182, 1622 (Dec. 29, 2020); Extending Government Funding and Delivering Emergency Assistance Act, Public Law 117-43, Div. A, § 101, 135 Stat. 344, 344-45 (Sept. 30, 2021) (appropriating funds through Dec. 3, 2021, and other PHA provisions. The lack of an express exemption for conscience objectors will deter some providers from applying for Title X funds or from seeking to participate in a Title X project as a subrecipient, and, thus, threatens to limit patient options in some locales. Considering such policy implications “was the agency’s job, but the agency failed to do it.” *Dep’t of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1914 (2020).

A. Federal Conscience Statutes

The Final Rule fails to adequately account for the protections provided by a plethora of federal conscience statutes. The Church Amendments, which apply to grants funded under the PHSA (such as Title X), prohibit grantees from discriminating against any physician or other health care personnel because he or she “performed or assisted in the performances of a lawful sterilization procedure or abortion....” or refused to perform or assist in the performance of such procedures, on the basis of religious belief or moral conviction. 42 U.S.C. 300a–7(c). The Church Amendments also prohibit individuals from being required to perform or assist in the performance of any part of a health service program or research activity funded in whole or in part under a program administered by the Secretary contrary to their religious beliefs or moral convictions. *See* 42 U.S.C. 300a–7(d).

The Coats-Snowe Amendment prohibits the Federal government and any State or local government that receives Federal financial assistance from discriminating against any health care entity (including individual providers) on the basis that the entity refuses to, among other things, (1) receive training in induced abortion; (2) require or provide abortion training; (3) perform abortions; (4) provide referral for such abortions or abortion training; or (5) make arrangements for any such activities. *See* 42 U.S.C. 238n(a).

The Weldon Amendment³ bars the use of appropriated funds on a federal agency or programs, or to a State or local government, if such agency, program, or government subjects any institutional or individual health care entity to discrimination on the basis that the health care entity does not, among other things, refer for abortions.

Additionally, the Final Rule fails to properly account for several other conscience provisions in the PHSA. For example, § 300a-7(c)(1) provides that “[n]o entity which receives a grant, contract, loan, or loan guarantee under the [Act]” ... may discriminate against any physician or other health care personnel ... because he or she refused to perform or assist in the performance of an abortion on the grounds

³ The Weldon Amendment was added to the annual 2005 health spending bill and has been included in subsequent appropriations bills. *See, e.g.*, Consolidated Appropriations Act, 2021, Public Law 116-260, Div. H, § 507(d), 134 Stat.1182, 1622 (Dec. 29, 2020); Extending Government Funding and Delivering Emergency Assistance Act, Public Law 117-43, Div. A, § 101, 135 Stat. 344, 344-45 (Sept. 30, 2021) (appropriating funds through Dec. 3, 2021; Consolidated Appropriations Act, 2018, Public Law 115–141, Div. H, sec. 507(d), 132 Stat. 348, 764; Consolidated Appropriations Act, 2017, Public Law 115–31, Div. 507(d), 131 Stat. 135, 562.

that doing so “would be contrary to his religious beliefs or moral convictions” 42 U.S.C. 300a-7(c)(1). Section 300a-7(c)(2) provides that no entity may discriminate against any health care professional “because he refused to perform or assist in the performance of” “any lawful health service” based on religious belief or moral conviction. 42 U.S.C. 300a-7(c)(2). Section 300a-7(d) provides that “[n]o individual [may] be required to perform or assist in the performance of any part of a health service program ... funded in whole or in part under a program administered by the Secretary of Health and Human Services” if doing so “would be contrary to his religious beliefs or moral convictions.” 42 U.S.C. 300a-7(d). Finally, §300a-7(b) provides::

[t]he receipt of any grant, contract, loan, or loan guarantee under the [PHSA] ... by any individual or entity does not authorize any court or any public official or other public authority to require (1) the individual to perform or assist in an abortion if it would be contrary to his/her religious beliefs or moral convictions; or (2) the entity to make its facilities available for abortions, if the performance of abortions in the facilities is prohibited by the entity on the basis of religious beliefs or moral convictions, or provide personnel for the performance of abortions if it would be contrary to the religious beliefs or moral convictions of such personnel

42 U.S.C. 300a-7(b).

These conscience statutes are important measures that the Final Rule failed to consider.

B. The Final Rule ignores important aspects of the problem

The Final Rule, at best, pays lip service to the aforementioned conscience rights protected by federal statute. After receiving “thousands of comments on the preamble language concerning the application of the conscience statutes to Title X,”

86 Fed. Reg. at 56152, the text of the Rule incredibly confines conscience rights to a mere footnote. The Final Rule states that “[e]ach project ... must [n]ot provide abortion as a method of family planning.” *Id.* at 56178. In a footnote to that provision, it then makes the Rule’s sole statement regarding conscience rights: “Providers may separately be covered by federal statutes protecting conscience and/or civil rights.” *Id.* at n.2. That doesn’t cut it.

Nor did HHS give “a satisfactory explanation for its action.” *State Farm*, 463 U.S. at 43. The Preamble to the Final Rule acknowledges the *existence* of several conscience statutes and the public’s concerns about the rights of objectors. *See* 86 F.R. at 56153. It even recognizes that “objecting providers or Title X grantees are not required to counsel or refer for abortions.” *Id.* But it ultimately avoided the issue by falling back on existing structures: “Providers may avail themselves of existing conscience protections and file complaints with OCR, which will be evaluated on a case-by-case basis as is done with other complaints.” *Id.* Its lone assurance to objectors was: “As with any issue facing Title X grantees and applicants, the program will work to provide guidance to grantees and coordinate any conflicts with the OCR. A case-by-case approach to investigations will best enable the Department to deal with any perceived conflicts within fact-specific situations.” *Id.* at 56153–56154.

The Final Rule consequently fails to consider its real and foreseeable burdens on religious exercise and provides no express conscience exemption. *See Radio Ass’n*, 47 F.3d at 802 (“court must ensure that the agency took a hard look at all relevant issues and considered reasonable alternatives”). It inhibits some organizations from

applying for Title X funds, or participating in Title X projects, due to the requirement for abortion referrals and information. HHS failed to recognize the 2019 Rule’s rationale that, because positions of conscience are often grounded in religious convictions, “[d]enying the aspect of spirituality and religion for some patients can act as a barrier.” 84 Fed. Reg. at 7783. “These influences can greatly affect the well-being of people.” *Id.* HHS even ignored evidence from the 2019 Rule that “[t]hese influences were reported to be an essential element in the lives of certain migrant women which enabled them to face life with a sense of equality.”⁴

HHS was—and should have been—well aware of the possibility and probability of conscience objections under the Final Rule. *See* 86 F.R. at 56153. The Final Rule claims that “[f]rom 1993 to 2017, Title X received no reports of grantees or individuals objecting to the regulatory requirement to counsel or refer for abortions when requested.” 86 F.R. at 56153 (citing *Nat’l Family Planning & Reprod. Health Ass’n v. Gonzales*, 468 F.3d 826, 830 (2006)).

But as many across America would acknowledge, history did not end (or begin) in 2017. During HHS’s 2019 rulemaking process, a number of organizations and grantees made these concerns known to the Agency. *See* 84 Fed. Reg. at 7744. (“[o]ther supportive commenters note 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.”). And when mulling

⁴ Citing Scheppers, E. et al., Potential Barriers to the Use of Health Services Among Ethnic Minorities: A Review, *Family Practice* (23):325, 343 (June 1, 2006), <https://academic.oup.com/fampra/article/23/3/325/475515>.

regulatory alternatives, HHS considered granting case-by-case exemptions, but rejected the approach noting it would involve a burdensome process and “the mere existence of the requirements—even with a process to apply for exemptions—may serve to discourage organizations with religious or moral objections to counseling on, or referring for, abortion from applying.” 84 Fed. Reg. at 7784. Indeed, one Christian, pro-life organization that wished to participate in the Title X program even filed a lawsuit to ensure that a conscience exemption would be recognized if the 2019 Rule was rescinded by a future Administration. *See Vita Nuova, Inc. v. Azar*, 458 F. Supp. 3d 546, 550–51 (N.D. Tex. 2020). HHS either willfully ignored this history or deliberately chose to ignore it during the rulemaking process.

At no point does the Final Rule consider that it will limit choice for patients, especially those who live in rural or remote areas, where faith-based and local community organizations would be more likely to apply (or seek to participate as a subrecipient) if the abortion counseling and referral requirement were lifted. Indeed, the Agency during the 2019 rulemaking received comments that the 2000 regulations (which, just like the Final Rule, specified that Title X projects must provide information on, counseling regarding, and referral for, a variety of services for pregnant women, including abortion) did exactly that. 84 Fed. Reg. at 7744.

HHS even acknowledges that it declined to create a specific exemption in 2000, because it was “unaware of any current grantees that object to the requirement for nondirective options counseling, so this suggestion appears to be based on more of a hypothetical than an actual concern.” 86 Fed. Reg. at 56153 (quoting *Nat'l Family*

Planning & Reprod. Health Ass'n, 468 F.3d at 830)). This mismatch between the HHS's rationale and the record is itself arbitrary and capacious. *See Radio Ass'n*, 47 F.3d at 802 (rule is "arbitrary and capricious if the agency ... offered an explanation for its decision that runs counter to the evidence before the agency").

Commenters also warned the Agency during the 2021 rulemaking process of "a concern that applications from providers objecting to abortion counseling or referral would not be favorably evaluated." 86 Fed. Reg. at 56153. Yet the Department cast those concerns aside without adequate consideration or explanation.

Rather than giving meaningful consideration to these concerns, HHS pretended that conscience objections were much ado about nothing, in both substance and consequence. It merely iterated that "the conscience provisions and Title X rules have existed side by side for decades with very little conflict, or even interaction." *Id.* That isn't good enough to survive APA review. *See State Farm*, 463 U.S. at 57 (agency "must supply a reasoned analysis"); *Cleveland Cliffs Iron Co. v. ICC*, 664 F.2d 568, 580 (6th Cir. 1981) (agency's reasoning must be "both discernible and defensible"). This is particularly true when the concerns involve fundamental rights that animate religious and moral objections.

The Supreme Court has warned that failure to adequately consider religious exemptions when promulgating contraceptive rules would violate the APA. *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2383–84 (2020). In *Little Sisters*, some states challenged HHS's express religious accommodation rules related to the contraception mandate in the Patient Protection

and Affordable Care Act of 2010 (ACA). HHS promulgated two interim final rules (IFRs) following the Court's decisions in *Burwell v. Hobby Lobby Stores, Inc.*, 573 U. S. 682 (2014) (holding that the ACA's contraceptive mandate violated the Religious Freedom Restoration Act (RFRA)) and *Zubik v. Burwell*, 136 S. Ct. 1557, 1559 (2016) (remanding so that the parties could develop an approach that would accommodate employers' RFRA concerns). One IFR significantly expanded the church exemption to include an employer that "objects ... based on its sincerely held religious beliefs," "to its establishing, maintaining, providing, offering, or arranging [for] coverage or payments for some or all contraceptive services." The other created a similar "moral exemption" for employers with sincerely held moral objections to providing some or all forms of contraceptive coverage. *Id.* at 2371 (quoting 82 Fed. Reg. 47812).

The Court upheld the rule, finding that the ACA provided a basis for both exemptions and the APA procedural requirements had been satisfied. Although the Court did not need to reach the question, it felt *compelled* to address the plaintiffs' "argument that the [agencies] could not even consider RFRA as they formulated the religious exemption from the contraceptive mandate." *Id.* at 2382–83. The Court noted that "[i]t is hard to see how the [agencies] could promulgate rules consistent with [*Hobby Lobby* and *Zubik*] if they did not overtly consider these entities' rights under RFRA." *Id.* at 2383.

Indeed, "[i]f the [agencies] did not look to RFRA's requirements or discuss RFRA at all when formulating their solution, they would certainly be susceptible to claims that the rules were arbitrary and capricious for failing to consider an

important aspect of the problem.” *Id.* at 2384. Here, HHS paid lip service to the existence of these conscience statutes but failed to include them in the Final Rule. 86 Fed. Reg. at 56153–56154.

Elsewhere in the context of exemptions, the Department of Homeland Security’s (DHS) asylum eligibility rules were struck down as arbitrary and capricious for failing to address exemptions for unaccompanied minors. *See E. Bay Sanctuary Covenant v. Garland*, 994 F.3d 962, 984 (9th Cir. 2021). The DHS asylum rule at issue did not exempt unaccompanied minors. *Id.* Similar to HHS’s Final Rule in this case, “[t]he agencies’ only explanation for the Rule’s failure to do so” was that minors were given special protection by other federal statutes and were still covered by the particular section of the INA. *See id.* But merely referencing other statutory provisions without discussing special vulnerabilities falls below the modest threshold of reasoned decisionmaking there and here. *See id.* (“This explanation in no way addresses the special vulnerability of unaccompanied minors and the failure of the Rule to take that vulnerability into account.”); *see also State Farm*, 463 U.S. at 51 (agency was “too quick” to dismiss reasonable alternative).

The special vulnerabilities of current and potential conscientious Title X recipients and subrecipients, are well documented and obvious. *See* 86 Fed. Reg. at 56153; 84 Fed. Reg. at 7744, 7784; 83 Fed. Reg. at 25518; *Vita Nuova*, 458 F. Supp. 3d at 550–51. HHS failed to consider and failed to adequately address the significant burden the Final Rule would impose on religious and moral objectors. That makes it arbitrary and capricious.

Conclusion

The Final Rule flouts § 1008’s entire purpose by expressly committing the use of Title X funds to subsidize abortion. It allows Title X grantees to have an abortion element in a program of family planning services. This policy option is simply one Congress didn’t extend to HHS. The statutory text and its interpretive case law make that clear. The Final Rule is also arbitrary and capricious because it failed to consider and then—despite express statutory provisions protecting those who object to counseling and referral for abortion—failed to expressly provide protections for the foreseeable objections its compulsions would beget. Abortion is a morally fraught issue. It has always aroused justifiable compunction. HHS should have explicitly made provision for that. It did not.

The Court should grant Plaintiffs’ Motion for Preliminary Injunction.

DATED: November 15, 2021.

/s/ Philip D. Williamson
Philip D. Williamson (0097174)
TAFT STETTINIUS & HOLLISTER LLP
425 Walnut Street, Suite 1800
Cincinnati, OH 45202
Phone: (513) 381-2838
Fax: (513) 381-0205
pwilliamson@taftlaw.com

AUSTIN KNUDSEN
Attorney General of Montana
KRISTIN HANSEN
Lieutenant General
DAVID M.S. DEWHIRST
Solicitor General
CHRISTIAN B. CORRIGAN
Assistant Solicitor General
Office of the Attorney General

215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401
David.Dewhirst@mt.gov
Christian.Corrigan@mt.gov

Attorneys for Amicus Curiae

Additional Counsel for Amici Curiae:

Chris Carr
GEORGIA ATTORNEY GENERAL

Lawrence G. Wasden
IDAHO ATTORNEY GENERAL

Jeff Landry
LOUISIANA ATTORNEY GENERAL

Theodore E. Rokita
INDIANA ATTORNEY GENERAL

Jason Ravnsborg
SOUTH DAKOTA ATTORNEY GENERAL

Lynn Fitch
MISSISSIPPI ATTORNEY GENERAL

Ken Paxton
TEXAS ATTORNEY GENERAL

CERTIFICATE OF SERVICE

I hereby certify that on November 15, 2021, a copy of the foregoing was filed electronically. Notice of this filing will be sent to all parties for whom counsel has entered an appearance by operation of the Court's electronic filing system.

/s/ Philip D. Williamson