No. 21-4235

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

STATE OF OHIO, ET AL.,

Plaintiffs-Appellants

v.

XAVIER BECERRA, ET AL.,

Defendants-Appellees.

On Appeal from the United States District Court
for the Southern District of Ohio
Case No. 1:21-cv-675-TSB

BRIEF OF AMICI CURIAE THE AMERICAN ASSOCIATION OF PRO-LIFE OBSTETRICIANS & GYNECOLOGISTS, THE CHRISTIAN MEDICAL & DENTAL ASSOCIATIONS, AND THE CATHOLIC MEDICAL ASSOCIATION IN SUPPORT OF APPELLANTS STATE OF OHIO, ET AL.

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CORPORATE DISCLOSURE STATEMENT

Under Fed. R. App. P. 26.1 and 6th Cir. R. 26.1(a), Amici Curiae, the American Association of Pro-Life Obstetricians & Gynecologists (AAPLOG), the Christian Medical & Dental Associations (CMDA), and the Catholic Medical Association (CMA), state that they have no parent corporation and that they do not issue stock.

Dated: January 18, 2022

Respectfully submitted,

/s/ John J. Bursch
John J. Bursch

Attorney for Amici Curiae

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INTEREST OF AMICI CURIAE[1]

The American Association of Pro-Life Obstetricians & Gynecologists (AAPLOG) is a nonprofit professional medical organization with over 6,000 medical professional members and associates who are experts in reproductive health. AAPLOG strives to ensure that pregnant women receive quality care, and that they are informed of abortion's potential long-term consequences on a woman's health. AAPLOG offers health care providers and the public a better understanding of abortion-related health risks, such as depression, substance abuse, suicide, subsequent preterm birth, and placenta previa.

The Christian Medical & Dental Associations (CMDA) educate, encourage, and equip Christian health-care professionals to glorify God by following Christ, serving with excellence and compassion, caring for all people, and advancing biblical principles of health care within the Church and throughout the world. CMDA has more than 16,900 members and 326 chapters at medical, dental, optometry, physician assistant, and undergraduate schools across the country.

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[1] This brief is filed in conjunction with amotion for leave to file this brief consistent under Federal Rule of Appellate Procedure 29(a). No party or party's counsel authored this brief in whole or in part or financially supported this brief, and no one other than amici curiae or their counsel contributed money intended to fund preparing or submitting this brief. Fed. R. App. P. 29(c)(5).

The Catholic Medical Association (CMA) is a nonprofit national organization of Catholic health-care professionals, including physicians, nurses, and physician assistants with over 2,400 members. CMA is opposed to the practice of abortion as contrary to: the teaching and tradition of the Catholic Church, respect for the sanctity of human life, traditional Judeo-Christian medical ethics, and the good of patients. CMA's members are committed to the sanctity of human life, and it would violate their consciences to participate in or refer for abortions. CMA has actively sought conscience protections for its members and other health-care professionals who might otherwise be forced by laws or regulations or by their employers to provide, counsel, or refer for abortions. Numerous CMA members work at health care facilities that receive Title X funds and benefit from, and are affected by, the 2019 Rules.

AAPLOG, CMDA, and CMA have a strong interest in ensuring that Congress's refusal to fund abortion counseling and advocacy through the public fisc is respected, and in preserving efforts of the Department of Health and Human Services ("Department") to implement Congress's conscience protections, which make pro-life health care organizations' and providers' participation in the Title X program possible.

INTRODUCTION

Rights of conscience are at the core of our constitutional freedoms. Indeed, "[n]o provision in our constitution ought to be dearer to man, than that which protects the rights of conscience against the enterprises of the civil authority."[2] These protections are precious for a reason: the conscience not only serves as a moral compass, but as a constant source of inspiration to serve others. So it is no surprise that many health-care professionals put matters of faith and conscience at the heart of their enduring mission to heal and do no harm.

Section 1008 of the Public Health Service Act prohibits "funds appropriated under" Title X from being "used in programs where abortion is a method of family planning." 42 U.S.C. §300a-6. Despite this prohibition—and numerous federal and state laws protecting constitutional rights of conscience—the Department of Health and Human Services issued a final rule imposing a universal requirement that each Title X grantee *must* provide information, counseling, and referrals for abortion, despite the fact that referral for abortion represents material cooperation with ending a human life, and thus is antithetical to the healing profession. Ensuring Access to Equitable,

[2] *Thomas Jefferson to Richard Douglas, 4 February 1809*, Founders Online, National Archives, https://founders.archives.gov/documents/Jefferson/99-01-02-9714 (last visited Jan. 18, 2022).

Affordable, Client-Centered, Quality Family Planning Services, 86 Fed. Reg. 56144-01, 56178-79 (Oct. 7, 2021) ("Final Rule").

The Final Rule violates Title X, disregards rights of conscience, and forces many health-care professionals to make an impossible choice between violating their conscience and forgoing generally available governmental benefits. Thus, the Final Rule is not only illegal, it is bad policy, depriving the public of valuable services and contributions from health-care professionals who cannot in good conscience counsel or refer for abortions. For these reasons, Appellants are likely to succeed, and the Court should enjoin the Final Rule pending appeal.

ARGUMENT

I. Appellants are likely to prevail on their APA claim because the Final Rule violates laws protecting conscience rights.

Under the APA, a court "shall hold unlawful and set aside" any agency action that is not in accordance with law or constitutional right. 5 U.S.C. §706(2)(A)–(B). Indeed, the Final Rule recognizes that "a valid statute always prevails over a conflicting regulation." 86 Fed. Reg. at 56153 (quoting *Nat'l Fam. Plan. & Reprod. Health Ass'n, Inc. v. Gonzales*, 468 F.3d 826, 829 (D.C. Cir. 2006)).

Here, the Final Rule requires that Title X grantees "must" provide "information," "counseling," and "referral upon request" for elective abortions. 86 Fed. Reg. at 56178–79. The Final Rule enshrines this obligation as a universal "requirement" that "must be met" by "each"

project supported by Title X funding. *Id.* This referral requirement is contrary to Section 1008, which prohibits Title X funds from being "used in programs where abortion is a method of family planning." 42 U.S.C. § 300a-6; *see* Mot. for Inj. Pending Appeal at 12-21, ECF No. 13.

But Appellants are likely to prevail for an additional reason: the referral requirement violates multiple laws protecting the conscience rights of health-care professionals. The Final Rule concedes that "Congress has passed several laws protecting the conscience rights of providers, particularly in the area of abortion," and that "under these statutes, objecting providers or Title X grantees *are not required to counsel or refer for abortions*." 86 Fed. Reg. at 56153 (emphasis added). While the non-binding preamble suggests that "objecting individuals and grantees will not be required to counsel or refer for abortions," *id.*, the legally controlling text of the Final Rule fails to safeguard or even mention these conscience rights, and instead imposes a universal referral requirement for "each" Title X grantee. 86 Fed. Reg. at 56178–79; *see Cty. of Los Angeles v. Sec'y of Health & Hum. Servs.*, 113 F.3d 1240 (9th Cir. 1997) (unpublished) (holding that promises made in a regulatory preamble but not memorialized in the final rule only amount to a "non-binding statement of intent").

The Final Rule forgets that when a medical professional "refers" for a procedure, that medical professional endorses that procedure and takes professional responsibility for the outcome of that procedure, even

though the referring professional is not the aborting professional. For example, in a different context, if a patient came to a physician seeking opioids without a medical indication, and the physician declined to prescribe opioids but referred to another doctor who would, then the referring physician may still bear professional responsibility for enabling the patient's drug-seeking behavior.

In a similar way, forcing a doctor to participate by referral in the ending of a human life forces that doctor to violate the Hippocratic Oath which explicitly states that the doctor will not deliberately end the life of a human being either by abortion or by euthanasia and will never counsel such a course. By requiring abortion referrals, the Final Rule forces health-care professionals to "counsel" for ending the life of their preborn patient and thus violates the very essence of the medical profession. Forcing performance of or referral for procedures which end a human life constitute the most egregious violation of the conscience of a medical professional bound by the Hippocratic Oath.

Thus, the Court should grant the Appellants' motion and enjoin application of the Final Rule pending appeal.

A. The referral requirement violates the Coats–Snowe Amendment.

In 1996, Congress adopted the Coats–Snowe Amendment to the Public Health Service Act to provide broad protections for the conscience rights of "health care entities," including individual

physicians, postgraduate physician training programs, and participants in health-training programs. 42 U.S.C. § 238n(c)(2). The Coats–Snowe Amendment prohibits federal, state, and local governments from discriminating against any health care entity because it "refuses to undergo training in the performance of induced abortions, to require or provide such training, to perform such abortions, or *to provide referrals for* such training or *such abortions*." *Id.* at § 238n(a)(1) (emphasis added).

But the statute's protections go even further, prohibiting the government from discriminating against an entity for refusing even to "make arrangements" for any of the aforementioned activities. *Id.* at § 238n(a)(2). Thus, federal statute prohibits the government from discriminating against a health care entity not only because it refuses to provide referrals for abortions, but also because it refuses to make arrangements for the provision of such referrals, let alone make arrangements for the performance of abortion procedures. *Id.*

The Final Rule's referral requirement squarely violates the Coats–Snowe Amendment. Under the Final Rule, the government requires that health care providers "must" provide information, counseling, and "referral upon request" for abortions, or else be excluded from support under Title X. 86 Fed. Reg. at 56178–79. Simply put, the Final Rule categorically excludes from Title X funding any health care entity that refuses to provide—or make arrangement for the provision of—abortion

counseling and referrals. That is precisely the type of discrimination that the Coats–Snowe Amendment prohibits.

Because the Final Rule violates the Coats–Snowe Amendment, Appellants are likely to succeed on their APA claim, and the Court should enjoin application of the Final Rule pending appeal.

B. The referral requirement violates the Weldon Amendment.

As attacks on conscience continued, a bipartisan Congress passed the 2004 Weldon Amendment, an appropriations rider prohibiting funds from the Departments of Health, Labor, or Education from flowing to any federal, state, or local government or program that discriminates against individual or institutional health care providers for their refusal to "provide, pay for, provide coverage for, or refer for abortions." Pub. L. No. 108–447. at Tit. V, § 508(d)(1). Congress has included the Weldon Amendment in every appropriations act since 2004 to protect health-care professionals' rights of conscience. *See* Consolidated Appropriations Act of 2021, Pub. L. No. 116–260, Div. B, § 507(d)(1), 134 Stat. 1182, 1622 (2020).

The Department violates the Weldon Act by issuing and enforcing the referral requirement. Because the Final Rule makes "referral upon request" for abortions a universal "requirement" that must be met by "each" Title X grantee, 86 Fed. Reg. at 56178–79, the referral requirement categorically excludes and discriminates against health

care entities that refuse to refer for abortions. Since the Final Rule also violates the Weldon Amendment, Appellants are likely to succeed on their APA claim, and the Court should enjoin application of the Final Rule pending appeal.

C. The referral requirement violates the Church Amendments.

Years before the Coats–Snowe and Weldon Amendments, the threat to conscience rights triggered by *Roe v. Wade* in 1973 immediately warranted federal laws enacted to protect individuals and institutions that objected to participating in abortion. Congress enacted several provisions (collectively referred to as the Church Amendments) during the 1970s to protect the conscience rights of individual health-care professionals, and those protections remain federal law today.

One provision in the Church Amendments prohibits the government from conditioning grant funds on whether an individual will "perform or assist in the performance of" abortion-related activities. 42 U.S.C. § 300a–7(b). Another provides that "[n]o individual shall be 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 of Health and Human Services if his performance or assistance in the performance of such part of such program or activity would be contrary to his religious beliefs or moral convictions." 42 U.S.C. § 300a–7(d).

Here again, the Final Rule runs afoul of statutory conscience protections. The Final Rule requires that abortion counseling and referral "must" be part of "each" program supported by Title X, 86 Fed. Reg. at 56178–79. But the Church Amendments guarantee that that no individual can be required to perform "*any* part" of a program that is contrary to their moral convictions. 42 U.S.C. § 300a–7(d). Thus, the Final Rule violates the Church Amendments as well.

D. The referral requirement violates RFRA.

The Religious Freedom Restoration Act (RFRA) provides that "[g]overnment shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability" unless "it demonstrates that application of the burden to the person (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb–1(a)–(b).

The Supreme Court has held that funding conditions constitute cognizable burdens of religious exercise when they put individuals or entities to the choice of violating their religious convictions of forgoing funding. *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021); *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017). By requiring "each" grantee to provide abortion counseling and referrals or fail to meet a "requirement" for Title X funding, 86 Fed. Reg. at 56178–79, the Final Rule puts current or potential grantees to the choice of

violating their religious convictions or forgoing Title X funds. Thus, the Final Rule imposes a substantial burden on the religious exercise of current and potential grantees who oppose abortion counseling and referral for religious reasons. *Fulton*, 141 S. Ct. at 1876.

Further, there is no government interest—much less a compelling interest—to require abortion referrals in the Title X program. Because "the Government has no affirmative duty to commit any resources to facilitating abortions," the Supreme Court upheld prior Title X regulations *prohibiting* abortion counseling or referral. *Rust v. Sullivan*, 500 U.S. 173, 184–87, 201 (1991) (citing *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 511 (1989)). Nor is the abortion-referral requirement the least restrictive means of advancing any conceivable government interest. There are many other ways the government could provide information regarding abortion services and providers without universally forcing all Title X grantees to provide abortion counseling and referrals. *Nat'l Inst. of Family & Life Advoc. v. Becerra*, 138 S. Ct. 2361, 2376 (2018) (agreeing with the National Institute of Family & Life Advocates that the government could, for example, "inform the women itself with a public-information campaign" as a more narrowly tailored means than forcing private speakers to promote or refer for abortion). Therefore, the referral requirement also violates RFRA.

E. The referral requirement displaces state conscience laws in violation of the clear statement rule.

When a federal law or regulation purports to displace a state law, the clear statement rule provides that the States' obligations to defer or comply exist only to the extent that those requirements are "unambiguously" set forth on the face of the federal provision. *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981); *see also Haight v. Thompson*, 763 F.3d 554, 568–70 (6th Cir. 2014); *Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., Occupational Safety & Health Admin.*, Nos. 21A244 & 21A247, 2022 WL 120952, at *7 (U.S. Jan. 13, 2022) (Gorsuch, J., concurring) (explaining that legal doctrines prevent agencies from exploiting a "gap, ambiguity, or doubtful expression in Congress's statutes to assume responsibilities far beyond its initial assignment").

Within just a few years after the decision legalizing abortion in *Roe v. Wade*, most states enacted conscience protections, modeled primarily after the Church Amendments.[3] But no act of Congress clearly and unambiguously disqualifies states from the Title X program if they prohibit grantees from counseling or referring for abortions. Indeed, the Supreme Court has recognized that Section 1008 "does not speak directly to the issues of counseling, referral, advocacy, or program

[3] Rachel Benson Gold, *Conscience Makes a Comeback in the Age of Managed Care*, Guttmacher Institute (Feb. 26, 1998), http://www.guttmacher.org/pubs/tgr/01/1/gr010101.html.

integrity." *Rust*, 500 U.S. at 184. Accordingly, Section 1008 is "silent or ambiguous" on the issue of abortion counseling and referral, *id.*, and therefore does not constitute the type of unambiguous federal law that could displace state conscience laws guaranteeing health-care professionals' conscientious refusal to provide abortion-related counseling and referrals.

II. The public interest strongly favors an injunction because protecting conscience rights is in the public interest, and an injunction would protect conscientious objectors from being forced out of freely serving in the health care industry.

"Protecting religious liberty and conscience is obviously in the public interest." *California v. Azar*, 911 F.3d 558, 582 (9th Cir. 2018). An injunction here would protect the religious liberty and conscience rights of many. Gallup and Pew polling consistently show that between 37–43% of Americans believe that abortion should be illegal in most or all circumstances,[4] and 45–56% of Americans believe that abortion is morally wrong.[5] And with roughly 20 million people in the U.S. health care workforce,[6] there are millions of health-care professionals who take

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[4] *Public Opinion on Abortion*, Pew Research Center (May 6, 2021), https://www.pewforum.org/fact-sheet/public-opinion-on-abortion/

[5] *Abortion*, Gallup News, https://news.gallup.com/poll/1576/abortion.aspx (last visited Jan. 18, 2022).

[6] *Industries at a Glance—Health Care and Social Assistance*, Bureau of Labor Statistics, https://www.bls.gov/iag/tgs/iag62.htm (last visited Jan. 18, 2022).

seriously their professional medical oath to never intentionally end a human life, and would, under the Final Rule, be forced to decide between violating their professional conscience or being excluded from participation in Title X because of their beliefs.

The Final Rule also harms the public by reducing health resources and decreasing diversity among health-care professionals. Absent an injunction protecting health care conscience rights against the Final Rule, health-care professionals who practice according to the Hippocratic oath which forbids the intentional destruction of human life in medical practice will not only suffer the inherent harm of conscience violation; they also will be forced out of providing Title X services like fertility education and treatment. In some cases, depending on their specialty, experience, and geographic location, these health-care professionals could be driven from the field of medicine entirely. The result would deprive American citizens of vital health care access from professionals of conscience and would deny patients the opportunity to seek services from professionals who are dedicated to doing no harm to them or their children, and who share their moral and religious beliefs.

Congress intended for Title X grants to fund a diverse array of individuals and entities engaged in a wide range of activities, including "preventive family planning services, population research, infertility services, and other related medical, informational, and educational activities." *Rust*, 500 U.S. at 178–79 (quoting H. R. Conf. Rep. No. 91-

1667, p. 8 (1970)). The Department claims to promote diversity among Title X grantees, 86 Fed. Reg. at 56168, but that claim rings hollow. Far from granting religious and conscientious exemptions, the Final Rule categorically excludes many religious health-care professionals from participating in Title X. By eliminating any professional that cannot in good conscience counsel or refer for abortions, the Final Rule reduces the resources available to members of the public who seek fertility services, family-planning information, and other medical services. Diminishing health care services in this way — especially when discriminating against certain viewpoints in violation of state and federal law — cannot advance the public interest. Accordingly, the public interest favors an injunction here.

CONCLUSION

For these reasons, and for those submitted by Appellants, the Court should grant the requested injunction pending appeal.

Dated: January 18, 2022

Respectfully submitted,

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RULE 32(G)(1) CERTIFICATE OF COMPLIANCE

This brief complies with the word limit of Fed. R. App. P. 32(a)(7)(B) and 29(a)(5) because this brief contains 3,231 words, excluding parts of the brief exempted by Fed. R. App. P. 32(f) and 6th Cir. R. 32(b).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in Word 365 using a proportionally spaced typeface, 14-point Century Schoolbook.

Dated: January 18, 2022

/s/ John J. Bursch
John J. Bursch

Attorney for Amici Curiae

CERTIFICATE OF SERVICE

I hereby certify that on January 18, 2022, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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