No. 21-4235

IN THE 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 District Court Case No. 1:21-cv-675-TSB

REPLY IN SUPPORT OF
MOTION FOR INJUNCTION PENDING APPEAL

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REPLY

Section 1008 says that "[n]one of the funds appropriated under" Title X "shall be used in programs where abortion is a method of family planning." 42 U.S.C. §300a-6. The Final Rule, *see* 86 Fed. Reg. 56144-01 (Oct. 7, 2021), violates this prohibition, both by permitting abortion providers to subsidize their abortion practices using Title X funds, and by requiring Title X grantees to make abortion referrals. Mot.7–13. Moreover, the rule is arbitrary and capricious because HHS failed to engage in "reasoned decisionmaking." *Michigan v. E.P.A.*, 576 U.S. 743, 750 (2015) (quotation omitted). *See* Mot.14–21. As a result, the appellant States will likely prevail on the merits of their APA challenge to the Final Rule. In light of that, and because the remaining injunction-pending-appeal factors support the award of relief, the Court should enjoin the Final Rule's enforcement pending appeal.

I. The Final Rule is not a permissible construction of Section 1008.

This case presents the question whether the Final Rule comports with Section 1008. In *Rust v. Sullivan*, 500 U.S. 173 (1991), the Supreme Court held that Section 1008 was ambiguous with respect to program-integrity and referral issues. *Id.* at 184. Thus, as the States have recognized, HHS has some discretion when it comes to program-integrity and referral issues. *See* Mot.7. But HHS's exercise of

discretion must rest on a "permissible construction of the statute." *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984).

The Final Rule does not rest on a plausible construction of Section 1008. As to program integrity, the Final Rule reinstates 2000-era guidance that allowed tremendous overlap and resource-sharing between Title X programs and abortion providers. The guidance even allows grantees to have an "abortion element in a program of family planning services." *See* Mot.9 (quoting 65 Fed. Reg. 41281-01, 41282 (July 3, 2000)). With respect to referral, the Final Rule *requires* Title X providers to make abortion referrals upon request. 86 Fed. Reg. at 56179. No permissible construction of Section 1008 empowers HHS to require that Title X grantees treat abortion as a method of family planning by making referrals for elective abortions.

HHS's attempts at squaring the program-integrity and referral requirements with Section 1008 are all unavailing.

A. The program-integrity rules violate Section 1008.

Section 1008 forbids the substantial intermingling of Title X and abortion services that the Final Rule allows.

1. HHS never meaningfully grapples with the fact that the Final Rule, by incorporating the 2000-era guidance, allows Title X programs to have an "abortion

element in a program of family planning services." Mot.9 (quoting 65 Fed. Reg. at 41282). HHS insists that this language does not mean what it says; "when read in context," HHS claims, "it is clear that Title X projects are not permitted to have an abortion element." Opp.10 n.1. This echoes the District Court's opinion, which asserted that, while HHS's "choice of the word 'program' is unfortunate," the "full context" of the passage reveals that HHS meant something other than what it said. Order, R.50, PageID#662 n.13. As best the States can tell, the court interpreted this language to mean that Title X *grantees* can provide abortion services, and not to mean that these grantees can offer such services as part of a Title X program.

That re-writing of the guidance makes little sense. The quoted language comes from a paragraph discussing the degree of separation that Title X requires. It says that the "family planning services" supported by Title X funds may contain an "abortion element," as long as it is not "so large and so intimately related to all aspects of the program as to make it difficult to impossible to separate the eligible and non-eligible items of cost." 65 Fed. Reg. at 41282. In other words, grantees can run family-planning programs with completely integrated Title X and abortion elements, as long as the grantee is able to separate "items of cost." Thus, the language means what it says. The "full context" of the 2000-era guidance, Order,

R.50, PageID#662 n.13, reinforces the plain meaning. As the States explained in their motion for an injunction pending appeal, the 2000-era guidance allows Title X grantees to intermingle substantially their Title X and abortion services. 65 Fed. Reg. at 41282; *see* 86 Fed. Reg. at 56150. Rather than suggesting that HHS intended to keep Title X from subsidizing abortion, the 2000-era guidance suggests HHS intended *to permit* supporting abortion with Title X funds.

2. HHS stresses that allowing Title X programs and abortion facilities to pool funds and resources achieves efficiency—it helps Title X grantees save money. Opp.9. But that is *the problem* with the Final Rule, not an argument for preserving it. As the 2019 Rule recognized, the fungibility of money means that allowing Title X programs and abortion services to share resources would enable abortion providers to achieve "achieve economies of scale"—in other words, they could use Title X funds to illegally subsidize abortion. 84 Fed. Reg. 7714-01, 7766 (March 4, 2019).

The Final Rule denied the fungibility of money. *See* 86 Fed. Reg. at 56150. HHS now apparently concedes that money is fungible. But it suggests fungibility is irrelevant. The agency stresses that arguments resting on the fungibility of money, if taken to their extreme, would forbid HHS from providing *any* Title X funds to abortion-providing grant applicants, no matter how physically and financially sepa-

rate they keep their Title X and abortion services. *See* Opp.8–9. The problem with this argument is that there is no need to take the argument to this extreme. The fungibility of money means only that, to comply with Section 1008, HHS must introduce meaningful safeguards that keep Title X from subsidizing abortion. There is likely a way to do that without requiring the strict financial and physical separation required by the 2019 Rule. But the Final Rule does not do so.

HHS cites cases showing that the government may run into unconstitutional-conditions problems if, as a condition on the receipt of federal money, it requires grantees not to exercise their constitutional rights even when acting outside of the federally funded program. *Id.* (citing *e.g.*, *Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l, Inc.*, 570 U.S. 205, 220 (2013)). Those cases are doubly irrelevant. First, because no one has a right to perform abortions, meaningful program-integrity rules could not possibly impose an unconstitutional condition. *Planned Parenthood of Greater Ohio v. Hodges*, 917 F.3d 908, 910, 912 (6th Cir. 2019) (*en banc*). Second, and more fundamentally, *Rust* held that program-integrity requirements, provided they impose no limits on what grantees do *outside* the Title X program, create no unconstitutional-conditions problem. *Rust*, 500 U.S. at 196–200. So precedent forecloses any argument that the unconstitutional-conditions doctrine would stop HHS from adopting program-integrity requirements with bite.

B. The referral requirement violates Section 1008.

The Final Rule violates Section 1008 by requiring grantees to provide elective-abortion referrals "upon request." 86 Fed. Reg. at 56179. *See* Mot.12–13.

HHS insists that making abortion referrals within a Title X program does not constitute treating abortion as a method of family planning. It said precisely the opposite in 2019: "in most instances when a referral is provided for abortion, that referral necessarily treats abortion as a method of family planning." 84 Fed. Reg. at 7717. HHS had it right in 2019. A government program that requires participants to make referrals for elective abortions necessarily requires those participants to treat "abortion" as "a method of family planning." 42 U.S.C. §300a-6. HHS's own analogy proves the point. *See* Opp.12. If the government funds a teeth-cleaning program, and if it requires participating dentists to make referrals for root canals upon the request of a patient, the dentists would be enlisted in a program that treats root canals as a method of dental care. Here, by requiring grantees to make elective-abortion referrals, HHS requires grantees to run programs where abortion is a method of family planning. That violates Section 1008.

The Final Rule's lax program-integrity requirements make the illegality of the referral requirements especially stark. If Title X grantees can provide Title X services and abortions in the same facility with the same staff in the same room, and

if the Title X grantee can refer Title X patients *to itself* for an abortion, then the Title X program is a program "where abortion is a method of family planning." 42 U.S.C. §300a-6. Building on the dental analogy, if the hypothetical program sketched out above required dentists to make root-canal referrals, and if the dentists could perform the root canals during the same appointment in which they provide the government-sponsored teeth cleaning, then surely the program would be one where root canals are a method of dental treatment. HHS objects that this argument "merely restates" the States' objection to the Final Rule's program-integrity requirements. Opp.12. That is not true. The Final Rule's program-integrity requirements, even assuming they are valid standing alone, make the referral requirements even more blatantly illegal than they would otherwise be.

II. The Final Rule is arbitrary and capricious in several ways.

The Final Rule's program-integrity and referral requirements are arbitrary and capricious, and thus invalid, even if they are not flatly illegal.

A. The program-integrity rules are arbitrary and capricious.

1. HHS abandoned the 2019 Rule's program-integrity requirements without adopting any alternative capable of keeping Title X funds from being used to illegally subsidize abortion. That was arbitrary and capricious. Mot.14–17.

In arguing otherwise, HHS stresses the many objections it had to the 2019 Rule. Opp.13–14. Those objections are irrelevant. HHS acted arbitrarily and capriciously not by departing from the 2019 Rule, but by doing so without adopting program-integrity requirements capable of preventing Title X funds from being used to subsidize abortion. Mot.14–16.

HHS responds that the Final Rule simply "return[s] to the 2000 Rule," and notes that the 2000 Rule "included measures for monitoring compliance." Opp.14. But as detailed above and in the States' motion, the 2000 Rule (and its associated guidance) permitted so much intermingling that it would have been hard to detect any violations. Mot.16–17. In any event, HHS had to at least consider and reject "obviously germane alternatives proposed by commenters during the notice-and-comment period." *Am. Ass'n of Cosmetology Sch. v. DeVos*, 258 F. Supp. 3d 50, 75 (D.D.C. 2017). HHS says it considered alternatives, Opp.14–15, but the Federal Register shows otherwise. The first passage cited mentions that HHS considered "impos[ing] additional restrictions on grantees." 86 Fed. Reg. at 56176. But that is not an alternative to the problem HHS is trying to solve, which is *reducing* compliance costs on grantees. The other citations address provisions the States do not challenge (like grantee reporting on subrecipient activity) and state impacts (which have nothing to do with alternatives). *See* 86 Fed. Reg. at 56161–62; 56168.

In any event, the Final Rule is arbitrary and capricious because the agency did not consider *any* of the alternatives the States suggested for loosening the 2019 Rule's program-integrity requirements without returning to the relaxed approach of the 2000-era. Mot.15–16. HHS contends that there is "no support in the record" for the proposition that HHS failed to consider these alternatives. Opp.14. But the Final Rule nowhere discusses these alternatives, and HHS points to nothing suggesting otherwise. Insofar as HHS now argues that one or more of those alternatives would not have been viable, its arguments are legally irrelevant; "courts may not accept appellate counsel's *post hoc* rationalizations for agency action." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50 (1983).

2. HHS also impermissibly failed to consider reliance issues that built up around the 2019 Rule. Mot.17–18. It claims that agencies must consider reliance issues only when they depart from *longstanding* policies. Opp.15–16. The Supreme Court disagrees. *Dep't of Homeland Sec. v. Regents of Univ. of Cal.*, 140 S. Ct. 1891, 1913–14 (2020). HHS also plucks a few out-of-context statements from the Final Rule, none of which were made in response to reliance issues. Opp.16. In fact, the agency never discussed reliance issues. And HHS's attorneys cannot cure that problem with *post hoc* rationalizations. *State Farm*, 463 U.S. at 50.

B. The referral requirement is arbitrary and capricious.

1. HHS failed to adequately justify its departure from the 2019 Rule, which states: "in most instances when a referral is provided for abortion, that referral necessarily treats abortion as a method of family planning." 84 Fed. Reg. at 7717. HHS in 2019 thus determined that allowing referrals would, in practice, lead to violations of Section 1008.

The Final Rule did not "rationally justif[y]" abandoning the 2019 Rule's analysis, *Michigan v. Thomas*, 805 F.2d 176, 184 (6th Cir. 1986), nor does it reflect "a 'reasoned analysis'" of the question whether referrals lead to treating abortion as a method of family planning. *Rust*, 500 U.S. at 187 (quoting *State Farm*, 463 U.S. at 42). HHS claims otherwise, citing a portion of the Final Rule. Opp.18 (citing 86 Fed. Reg. at 56149–50). But the cited portion does not address the issue at all; it just says that *Rust* called Section 1008 ambiguous. That establishes, at most, that HHS can *restrict* referrals, not that it ought to permit them and not that it can require them. That passage does not examine and reject the 2019 Rule's analysis. HHS's inability to uncover any explanation for its departure from the 2019 Rule's determination regarding referrals proves that the administrative record contains none.

2. Finally, HHS failed to consider serious medical-ethics concerns with the Final Rule. Mot.19–21. HHS notes that the Fourth Circuit previously deemed referral requirements consistent with medical ethics. Opp.18 (citing *Mayor of Baltimore v. Azar*, 973 F.3d 258, 276–77 (4th Cir. 2020) (*en banc*)). And it cites a passage in the Final Rule noting that "major medical organizations" had ethical concerns *about the 2019 Rule*. *Id.* (citing 86 Fed. Reg. at 19817). But HHS does not cite *any* consideration of the serious ethical concerns with the Final Rule, which the States raised in a comment letter. States' Letter, R.2-2 at 12–13, PageID#197–98. It was arbitrary and capricious not to consider this important issue. *Baltimore*, 973 F.3d at 276–78. And while HHS now objects to the States' ethical concerns, its *post hoc* explanation for rejecting those concerns is legally irrelevant. *State Farm*, 463 U.S. at 50.

III. The equities favor the States.

The remaining injunction-pending-appeal factors favor the States. Mot.21–23. With respect to irreparable injury, HHS insists that the States have no right to "Title X funds at the amount they prefer." Opp.20. True, but the States will be harmed if they are made to compete for funds with entities who are able to win Title X grants *only* because of the illegal Final Rule. Mot.21–22. And since one stated purpose of the Final Rule is to increase the number of grantees willing to partici-

pate in the program, *see* 86 Fed. Reg. at 56147, the expected competitive, financial, and reputational harms facing the States are concrete, not speculative.

With respect to the final two factors, HHS stresses that the Final Rule will have positive effects. Even if so, "our system does not permit agencies to act unlawfully even in pursuit of desirable ends." *Alabama Ass'n of Realtors v. Dep't of Health & Hum. Servs.*, 141 S. Ct. 2485, 2490 (2021).

CONCLUSION

The Court should enjoin the Final Rule's enforcement pending appeal.

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CERTIFICATE OF COMPLIANCE

I hereby certify, in accordance with Rule 32(g) of the Federal Rules of Appellate Procedure, that this motion complies with the type-volume requirements and contains 2,583 words. *See* Fed. R. App. P. 27(d)(2)(C).

I further certify that this motion complies with the typeface requirements of Federal Rule 32(a)(5) and the type-style requirements of Federal Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Equity font.

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CERTIFICATE OF SERVICE

I hereby certify that on January 20, 2022, 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. Parties may access this filing through the Court's system.

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