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

MOTION FOR INJUNCTION PENDING APPEAL

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INTRODUCTION

Legislative compromises are one "mark of a healthy society." *Preterm-Cleveland v. McCloud*, 994 F.3d 512, 535 (6th Cir. 2021) (*en banc*) (Sutton, J., concurring). As to abortion, "[f]ederal funding has been the quintessential point of compromise between" two "opposing factions." *Mayor of Baltimore v. Azar*, 973 F.3d 258, 297 (4th Cir. 2020) (*en banc*) (Wilkinson, J., dissenting). "Congress, on the one hand, does not seek to bar or directly restrain the right established by the Supreme Court in *Roe*." *Id.* "Congress, on the other hand, seeks to respect those who hold moral or religious objections to the contested practice by withholding federal funds from it." *Id.* "Like all compromises, this one may not be fully acceptable to the heartfelt and passionate views on either side of this debate. But perhaps it is for that very reason that the compromise on federal funding should be respected." *Id.*

Title X of the Public Health Service Act, Pub. L. No. 91-572, §4, 84 Stat. 1504, 1506–08 (1970), reflects this compromise. Title X funds family-planning services. Its "Section 1008" forbids "funds appropriated under" Title X from being "used in programs where abortion is a method of family planning." 42 U.S.C. §300a-6.

"HHS"—the Department of Health and Human Services—is not respecting this compromise. In October, it issued a final rule purporting to implement Title X. 86 Fed. Reg. 56144-01 (Oct. 7, 2021). This "Final Rule" permits abortion providers to subsidize their abortion practices using Title X dollars and *requires* Title X grantees to make abortion referrals upon request. This violates Section 1008. Further, because the Final Rule is arbitrary and capricious, it violates the Administrative Procedure Act. 5 U.S.C. §706(2)(A). Because the Rule is illegal, and because it will cause irreparable harm if not enjoined, the States move for an injunction pending appeal. They respectfully request a ruling by **January 31, 2022**. That date will allow the parties to seek emergency relief from the Supreme Court before March 2021, when HHS will likely award the next round of Title X grants.

STATEMENT

1. Title X provides federal funds, through HHS, to grantees that provide family-planning services at reduced cost. When Congress created Title X in 1970, most States still forbade elective abortions. *See Roe v. Wade*, 410 U.S. 113, 140 & n.37 (1973). To avoid subsidizing this still-largely-illegal practice, Congress passed Section 1008, which says: "None 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. That made clear that "abortion is not to be encouraged or pro-

moted in any way through this legislation." 116 Cong. Rec. 37375 (Nov. 16, 1970) (statement of Rep. Dingell).

HHS initially enforced Section 1008 by requiring grantees to agree that their projects would "not provide abortions as a method of family planning." 36 Fed. Reg. 18465-02, 18466 (Sept. 15, 1971). But in 1982, HHS's Office of Inspector General determined that grantees had insufficient guidance regarding what they could do or not. 52 Fed. Reg. 33210-01, 33210 (Sept. 1, 1987) (proposed rule). HHS responded with the "1988 Rule." 53 Fed. Reg. 2922-01 (Feb. 2, 1988). That rule prohibited Title X projects from promoting, counseling on, or providing referrals for, abortion as a method of family planning. *Id.* at 2945. The 1988 Rule also imposed strict "program integrity" requirements, mandating that grantees keep their Title X programs "physically and financially separate" from all prohibited abortion-related activities. *Id.*

The Supreme Court upheld the 1988 Rule in *Rust v. Sullivan*, 500 U.S. 173 (1991). But President Clinton suspended the 1988 Rule on his third day in office. 58 Fed. Reg. 7455 (Jan. 22, 1993) (memorandum); 58 Fed. Reg. 7462 (Feb. 5, 1993) (interim rule). Eventually, his administration finalized the "2000 Rule." That rule, among other things, required Title X projects to offer and provide pregnant women "information and counseling regarding" their options, including

"[p]regnancy termination." 65 Fed. Reg. 41270, 41279 (July 3, 2000). It required Title X grantees to provide a "referral" for abortion "upon request." *Id.* Further, the 2000 Rule eliminated the 1988 Rule's program-integrity requirements. *See id.* at 41275–76. Guidelines published alongside the 2000 Rule stated that Title X grantees could integrate Title X programs with abortion practices, as long as "the abortion element in a program of family planning services" was not "so large and so intimately related to all aspects of the program as to make it difficult or impossible to separate the eligible and non-eligible items of cost." 65 Fed. Reg. 41281-01, 41282 (July 3, 2000). The guidance also clarified that grantees could operate Title X programs that share staff and facilities with abortion providers. *Id.* These 2000-era guidelines remain relevant to today's questions, as the Final Rule revives them.

2. That is where things stood until, in 2019, HHS reinstituted certain provisions of the 1988 Rule. The 2019 Rule imposed new program-integrity rules, requiring that Title X projects remain physically and financially separate from any abortion-related activities conducted outside the grant program. 84 Fed. Reg. 7714-01, 7789 (Mar. 4, 2019). The 2019 Rule, along with imposing new program-integrity rules, prohibited Title X grantees from making referrals for elective abortions. *Id.* at 7788–89. But, unlike the 1988 Rule, it allowed Title X grantees to en-

gage in nondirective pregnancy counseling—counseling that might include discussion of abortion. *Id.* at 7789.

Some grantees, including Planned Parenthood, decided to leave the Title X program rather than comply with the new requirements. HHS took money that would otherwise have gone to these departed grantees and gave it to existing grantees, allowing them to expand their services. Ohio, for example has long been a Title X grantee; its Department of Health receives Title X grants and then subgrants the money to subgrantees, including county boards of health. Before 2019, Planned Parenthood was the only other grantee in Ohio. Once Planned Parenthood left the program, Ohio received more than $4 million annually in additional Title X funds. It used that funding to increase services in seventeen counties. Clark Decl., R.2-1, ¶¶7–8, 12–14.

Various States and other entities challenged the 2019 Rule in courts around the country. The Ninth Circuit upheld the rule. *See California ex rel. Becerra v. Azar*, 950 F.3d 1067, 1074 (9th Cir. 2020) (*en banc*). The Fourth Circuit vacated the rule, though only in its application to Maryland. *See Baltimore*, 973 F.3d at 266, 294–95 (majority op.). The Supreme Court, partly at the request of the federal government, agreed to hear the cases out of the Fourth and Ninth Circuits. *See Oregon v. Cochran*, 141 S. Ct. 1369 (2021). It never got the chance. Apparently to

avoid an adverse ruling that might affect HHS's ability to adopt a new rule, the federal government agreed with its nominal adversaries to dismiss the cases. *See Oregon v. Becerra*, 141 S. Ct. 2621 (2021).

3. HHS issued a new proposed rule in April. 86 Fed. Reg. 19812-01 (Apr. 15, 2021). It finalized that rule on October 7. *See* 86 Fed. Reg. 56144-01. This "Final Rule" does two things relevant here. *First*, it eliminates the 2019 Rule's program-integrity requirements and "reinstat[es] interpretations and policies" previously in place "under section 1008." *Id.* at 56150. Those "interpretations and policies" are the 2000-era guidelines discussed above. *See above* 3–4. *Second*, the Final Rule replaced the 2019 Rule's prohibition on abortion referrals with a rule requiring that Title X grantees make abortion referrals "upon request." 86 Fed. Reg. at 56179.

4. On October 25, the plaintiff States sued the HHS and various agency officials in the Southern District of Ohio, moving that day for a preliminary injunction. The District Court denied their request. Order Denying PI ("Op."), R.50 (Dec. 29, 2021). It held that the Final Rule comports with Title X, and that the rule is not arbitrary and capricious. *Id.* PageID#656–80.

The States appealed. The District Court denied a requested injunction pending appeal, Notation Order, Jan. 3, 2022, and the States now seek one here.

ARGUMENT

Courts "ask four questions in evaluating whether to grant a stay pending appeal: Is the applicant likely to succeed on the merits? Will the applicant be irreparably injured absent a stay? Will a stay injure the other parties? Does the public interest favor a stay?" *Roberts v. Neace*, 958 F.3d 409, 413 (6th Cir. 2020) (*per curiam*) (granting injunction pending appeal); *Vitolo v. Guzman*, 999 F.3d 353, 360 (6th Cir. 2021) (same). Here, the answer to each question favors the States.

I. The States are likely to prevail on the merits.

The Final Rule is contrary to Title X and also arbitrary and capricious.

A. The Final Rule is not in accordance with law.

Section 1008, as even HHS recognizes, "prohibit[s]" the agency from "subsidiz[ing] abortion." 86 Fed. Reg. at 56150. But Section 1008 does not "speak directly to the issues of counseling, referral, advocacy, or program integrity." *Rust*, 500 U.S. at 184. In that respect, the law is "ambiguous." *Id.* Ambiguous statutes, however, do not empower agencies to do whatever they want. Instead, ambiguous statutes (generally) leave the agency with discretion to enforce the statute in any manner consistent with 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's approach to referral and program-integrity rules does not rest on a permissible construction of Section 1008. The States are therefore likely

to prevail under the APA, which prohibits agency actions "not in accordance with law." 5 U.S.C. §706(2)(A).

1. The Final Rule's program-integrity rules are unlawful.

Section 1008 forbids the Final Rule's lax program-integrity requirements.

a. The Final Rule eliminates the 2019 Rule's program-integrity rules—its strict financial- and physical-separation requirements. In their place, the Final Rule "reinstat[es] interpretations and policies under section 1008 of the statute that were in place for much of the program's history." 86 Fed. Reg. at 56150. Those interpretations and policies permit considerable financial and physical integration. They allow Title X grantees who provide abortion services to combine operations whenever "the abortion element in a program of family planning services" is not "so large and so intimately related to all aspects of the program as to make it difficult or impossible to separate the eligible and non-eligible items of cost." 65 Fed. Reg. at 41282 (incorporated by reference at 86 Fed. Reg. at 56150). And these policies confirm their weakness by listing the "kinds of shared facilities" deemed "permissible." *Id.* For example, the reinstituted guidelines expressly permit Title X grantees to share waiting rooms, staff members, and file systems with abortion providers. *Id.*

No "permissible construction" of Section 1008 allows the 2000-era guidelines to be reinstated. First, Section 1008 flatly prohibits Title X funds from being "used in programs where abortion is a method of family planning." 42 U.S.C. §300a-6. The reinstated guidelines, however, says that Title X grantees *can* 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. 65 Fed. Reg. at 41282. So the statute *prohibits* Title X grants from being used in a program where abortion is a method of family planning, but the Final Rule *permits* Title X programs to have an "abortion element." That expressly violates Section 1008.

The list of "permissible" shared facilities, *id.*, underscores the violation. First, when Title X services and abortion services are available in the same physical location, then Title X funds are necessarily used in a "program[] *where* abortion is a method of family planning." §300a-6 (emphasis added). Second, even assuming Section 1008 allows *some* sharing of physical locations, the 2000-era guidelines permit integration to a degree that plainly violates Section 1008. Even HHS admits that Section 1008 forbids subsidizing abortion with Title X funds. 86 Fed. Reg. at 56150. Rightly so: a program that directly or indirectly subsidizes abortion as a method of family planning is a "program[] where abortion is a method of family planning." §300a-6. That dooms the Final Rule. Allowing facilities to share

"staff," "waiting room[s]," and treatment rooms, as the Final Rule does, 65 Fed. Reg. at 41282*; see* 86 Fed. Reg. at 56150 (incorporating 2000 Rule and associated guidance), means Title X funds will be used to subsidize abortions. This follows from the fact that "[m]oney is fungible," *Holder v. Humanitarian Law Project*, 561 U.S. 1, 31 (2010), so every Title X dollar an abortion provider receives frees up another dollar that it can use to subsidize abortion. The money saved on items that Title X pays for, for example, might be used to pay the clinic's rent, to advertise abortion services, and more.

HHS, in 2019, acknowledged these fungibility concerns. It noted that many opponents of its program-integrity rules "confirm[ed]" the need for such separation by insisting "that requiring physical and financial separation would increase the cost for doing business." 84 Fed. Reg. at 7766. As HHS recognized, because money is fungible, integrating Title X programs and abortion services enables abortion providers to "achieve economies of scale"—to improve the entire operation's efficiency by supporting parts of it with Title X funds. *Id.* Thus, the integration permitted by the 2000 Rule, and now the Final Rule, allowed "Title X funds" to be used in support of "abortion as a method of family planning." *Id.*

None of this means that HHS lacked discretion to replace the 2019 Rule's program-integrity requirements. Those requirements are surely not the *only* means

of preventing Title X funds from being used to subsidize abortion. But the Final Rule does not adopt any relaxed-yet-still-sufficient safeguards. Instead, it enables abortion providers to achieve economies of scale using Title X funds, contradicting Section 1008. Indeed, it contradicts all of Title X. For "if one thing is clear from the legislative history" of Title X, "it is that Congress intended that Title X funds be kept separate and distinct from abortion-related activities." *Rust*, 500 U.S. at 191.

b. In rejecting these arguments, the District Court relied primarily on *Chevron*, claiming that case required deference to HHS's reading. But the Court failed to show that the Final Rule rests on a permissible reading of Section 1008, as it must before *Chevron* deference can apply.

Again, Section 1008 bars Title X funds from being "used in programs where abortion is a method of family planning," while the Final Rule authorizes an "abortion element in a program of family planning." *See above* 8–9. That is a stark conflict. In concluding otherwise, the District Court stressed that there is a difference been a "program" and a "grantee," Op., R.50, PageID#661–62. But that distinction hardly squares the Final Rule (which allows grantees to use Title X funds in a "program" containing an "abortion element") with the statute (which does not). The District Court further stressed that, because money is fungible, requiring a

complete separation between Title X funds and abortion would push abortion providers out of Title X. *See* Op., R.50, PageID#663–66. This argument ignores the heart of the States' argument: *even if* Section 1008 does not require complete separation, it requires *some*. And the Final Rule, by allowing an immense degree of overlap between abortion services and Title X programs, violates Section 1008.

2. The referral requirement is illegal.

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

a. Again, Title X funds may not be "used in programs where abortion is a method of family planning." 42 U.S.C. §300a-6. When a "program[]" is run so as to *require* that grantees make abortion referrals upon request, it qualifies as a program "where abortion is a method of family planning."

The Final Rule's deficiencies do not stop there. The Final Rule allows entities to provide abortions and Title X services at the same facility with shared staff, shared waiting rooms, etc. *See* 65 Fed. Reg. at 41282 (incorporated by reference at 86 Fed. Reg. at 56150). That is, the Final Rule allows abortion providers to administer Title X in abortion facilities. And, because the Final Rule requires Title X grantees to make abortion referrals upon request, it empowers abortion providers to operate Title X programs in which they refer patients for abortions *at their own*

facilities. An abortion clinic that refers a patient to itself for an elective abortion runs a "program[] where abortion is a method of family planning." §300a-6. No one would think twice about that conclusion outside the abortion context. Is a dental practice that refers patients to its own dentists for root canals a practice where root canals are a method of dental care? Yes. Therefore, a Title X grantee that provides abortion referrals to doctors within the same office is a program where abortion is a method of family planning.

Notably, the question here is not whether Title X grantees may make some abortion referrals. The question is whether the Final Rule contradicts Section 1008 by *requiring* referrals upon request. It does.

b. The District Court dismissed the States' referral argument by again distinguishing a "program" from a "grantee." It reasoned that, precisely because a Title X program cannot offer abortion, a referral must be to some parallel abortion "program" outside the Title X program—even if down the hall, provided by the same staff. Op., R.50, PageID#665–66. That reasoning is tautologous and would make Section 1008 impossible to violate: it would mean that, because abortion *must* stay outside the program, it always *is* outside. That is absurd.

B. The Final Rule is arbitrary and capricious.

The APA requires courts to set aside agency actions that are "arbitrary" or "capricious." 5 U.S.C. §706(2). That means that "administrative agencies" must "engage in 'reasoned decisionmaking.'" *Michigan v. E.P.A.*, 576 U.S. 743, 750 (2015) (citation omitted). "Not only must an agency's decreed result be within the scope of its lawful authority, but the process by which it reaches that result must be logical and rational." *Id.* (citation omitted). The agency must give "a satisfactory explanation for its action." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

The Final Rule's program-integrity and referral requirements are, for many reasons, both the products of arbitrary and capricious decisionmaking. Here, the States focus on the most egregious and easy-to-explain problems.

1. The Final Rule's abandonment of the 2019 Rule's program-integrity requirements is arbitrary and capricious.

HHS decision to jettison the 2019 Rule's program-integrity requirements is arbitrary and capricious in many respects.

a. First, HHS abandoned the 2019 Rule's separation requirements without adopting any alternative to keep Title X funds from being used to subsidize abortion. Recall that the Final Rule replaces the 2019 Rule's strict program-integrity requirements with guidelines in place under the 2000 Rule. And recall that those

guidelines permit substantial intermingling of Title X resources and abortion services. Assuming for argument's sake that this alternative approach satisfies Section 1008, HHS still had to justify its choice of this alternative over other, more-demanding separation requirements. *Dep't of Homeland Sec. v. Regents of Univ. of Cal.*, 140 S. Ct. 1891, 1912–13 (2020). That is, HHS had to justify not only its choice to abandon the 2019 Rule's strict requirements, but also its decision to adopt the Final Rule's lenient approach to program integrity. It did not do so—the Final Rule mentions *no* alternatives.

True enough, HHS was not required to "consider all policy alternatives in reaching its decision." *Am. Ass'n of Cosmetology Sch. v. DeVos*, 258 F. Supp. 3d 50, 75 (D.D.C. 2017). But it was required to "address," at least, "obviously germane alternatives proposed by commenters during the notice-and-comment period." *Id.*; *see Int'l Ladies' Garment Workers' Union v. Donovan*, 722 F.2d 795, 817 (D.C. Cir. 1983). It did not. The States presented viable alternatives. Recognizing HHS's desire to alleviate "undue and improper" restrictions on grantees, 86 Fed. Reg. at 56145, the States' comment letter proposed several options for easing the compliance costs associated with the 2019 Rule's program-integrity requirements. In particular, the States suggested "dedicating funds to assist grantees with those costs, providing additional runway for grantees to comply, giving additional guidance to

clarify restrictions, or granting targeted exceptions for those Title X programs in need of flexibilities." States' Comment Letter, R.2-2, PageID#194–95. The Final Rule never addressed these possibilities. The agency's failure to consider matters "within the ambit of the existing policy" was, necessarily, arbitrary and capricious. *See Regents*, 140 S. Ct. at 1913.

HHS's decision was arbitrary and capricious in other respects. For example, in response to concerns about money's fungibility, HHS "disagree[d] that Title X grant funds … are 'fungible.'" 86 Fed. Reg. at 56150. That is objectively wrong: "[m]oney is fungible." *Holder*, 561 U.S. at 31. Baldly asserting otherwise ignores an important part of the problem, which is arbitrary and capricious. *See Regents*, 140 S. Ct. at 1912–13. The Final Rule also defends reinstating the 2000-era guidelines by emphasizing the scant evidence of "non-compliance" during the time in which those policies governed. 86 Fed. Reg. at 56148. That justification does not reflect reasoned decisionmaking. First, even if the now-reinstituted guidelines led to few violations of Section 1008 before, that would not excuse the agency from considering alternative options. *See Regents*, 140 S. Ct. at 1913. Second, the failure to uncover violations does not mean that no violations occurred—it could mean that the guidelines were ineffective at exposing violations. Nothing in the Final Rule explains whether or how HHS determined that the guidelines enabled it to

uncover illegal subsidization of abortion. Just as a city that eliminates its police force cannot infer a decrease in crime based on a decrease in arrests, an agency cannot cite the absence of compliance issues that it had no ability to detect as evidence that no such issues arose.

The District Court erroneously credited this view of "minor compliance issues," but never addressed the States' point that noncompliance would not have been detected under a lax detection regime. Op., R.50, PageID#668. The Court said it did not want to "wade into the reliability of reports." *Id.* PageID#670. It also paradoxically cited, as a reason for rejecting stricter-separation alternatives, the "burden of maintaining separate physical locations, duplicate staff, and separate patient records," saying those costs could not be justified when no compliance problems existed. *Id.* PageID#668. But that very observation of "burden" *shows* that the overlap of Title X funding and abortion saved abortion providers money—that Title X helped subsidize abortion by achieving those efficiencies. That *is* the compliance problem.

b. The Final Rule completely neglects to consider reliance issues. The 2019 Rule, in part due to the program-integrity requirements, caused some entities to leave the program. In Ohio, for example, the only non-State grantee—Planned Parenthood of Greater Ohio—left the program instead of complying with the 2019

Rule. As those grantees left, others expanded their offerings to fill any gaps. In Ohio, for example, the State's Department of Health met this need, establishing a new or increased presence in seventeen counties. Clark Decl., R.2-1, ¶12. Filling those gaps required investments. Yet the Final Rule never mentions this. In other words, HHS failed to consider whether its Final Rule upsets reliance interests that grantees formed in light of the 2019 Rule. By failing to "address" the "reliance interests" that its previous position "engendered," HHS acted arbitrarily and capriciously. *Regents*, 140 S. Ct. at 1913 (citation omitted).

The District Court dismissed reliance concerns, noting that the 2019 Final Rule was not in effect for long. Op., R.50, PageID#673–74. But Ohio and her subgrantees set up programs and built a client base. They need not meet some longer-period threshold before being entitled to have their interests considered.

2. HHS acted arbitrarily and capriciously by mandating referrals.

The States will likely prevail in showing that the Final Rule's referral requirement was arbitrary and capricious. This motion addresses two bases for that conclusion.

a. HHS acted arbitrarily and capriciously because it failed to adequately justify its sudden departure from the 2019 Rule. The 2019 Rule states that, "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 address this observation or explain why it was wrong. It ignored it. That was arbitrary and capricious. Agencies may change course, but any "departure" from earlier policy must be "explicitly and rationally justified." *Michigan v. Thomas*, 805 F.2d 176, 184 (6th Cir. 1986). The agency must "justif[y]" its change in policy "with a 'reasoned analysis.'" *Rust*, 500 U.S. at 187 (quoting *State Farm*, 463 U.S. at 42). On this issue, the Final Rule contains no analysis whatsoever.

The District Court said that the departure of past grantees (like Planned Parenthood) gave HHS all the reason it needed to jettison the 2019 Rule. But the Court gave no consideration to the question whether such grantees' pre-2019 arrangements were, as HHS previously determined, causing Section 1008 violations. Op., R.50, PageID#676. And it failed to realize that HHS, even if it found changing the rule to be justified, had to explain its change in policy.

Ethical issues. HHS "entirely failed to consider an important aspect of the problem." *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 658 (quoting *State Farm*, 463 U.S. at 43). In particular, it failed to consider whether

mandating referrals comported with medical ethics. In its notice of proposed rulemaking, HHS stated that the 2019 Rule's prohibition on referrals was contrary to the "ethical codes of major medical organizations." 86 Fed. Reg. at 19817. But "major medical organizations" do not dictate the ethical rules that bind medical professionals. States do. And while States are free to accept input from major medical organizations, States have the final say. That matters here because the Final Rule, by mandating that grantees refer patients for abortion, conflicts with multiple States' ethical standards governing the practice of medicine. *See, e.g.*, La. Rev. Stat. §40:1061.2; Ky. Rev. Stat. §311.800(4); Or. Rev. Stat. Ann. §435.485; Mont. Code Ann. §50-20-111(2).

Although the States raised this concern during the rulemaking process, *see* States' Letter, R.2-2 at 12–13, PageID#195–96, HHS entirely failed to address the problem—the Final Rule never mentions their ethical concerns. Where an agency is aware of laws that may conflict with a proposed rule, yet fails to address those laws and articulate a satisfactory solution, it acts in an arbitrary and capricious manner. *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2384 (2020). Thus, as the *en banc* Fourth Circuit has held, a Title X rule that fails to address medical-ethics concerns raised during the rulemaking process is arbitrary and capricious. *See Baltimore*, 973 F.3d at 276.

The District Court found adequate discussion of ethics, noting that the Rule at one point referred to private medical groups' opinions. Op., R.50, PageID#676–77. But that is no answer to the flaw the States highlighted, which is that HHS ignored *States'* ethical rules—rules that are law, not just opinions.

II. The plaintiff States will be irreparably injured without an injunction pending appeal.

The States will sustain three forms of irreparable harm if the Final Rule is not enjoined pending appeal.

First, if the Final Rule goes into effect, the States will sustain irreparable harm in the form of greater competition for Title X funds. They will have to compete with entities (like abortion providers) unable or unwilling to comply with the 2019 Rule. HHS cannot deny that these abortion providers will reenter the program; indeed, one of the Final Rule's goals is to enable reentry by abortion providers. *See* 86 Fed. Reg. at 56171–72. That increased competition for a limited pool of funds constitutes an "actual, here-and-now injury." *Sherley v. Sebelius*, 610 F.3d 69, 74 (D.C. Cir. 2010); *see also Dep't of Commerce v. New York,* 139 S. Ct. 2551, 2565 (2019); *Planned Parenthood of Greater Washington & N. Idaho v. U.S. Dep't of Health & Hum. Servs.*, 946 F.3d 1100, 1108 (9th Cir. 2020). That injury is irreparable: because of the federal government's sovereign immunity, grant money that the States lose will be lost forever. *See Kentucky v. U.S. ex rel. Hagel*, 759 F.3d 588,

599–600 (6th Cir. 2014). Even if the States do not actually lose money, being subjected to "unfair" competition causes irreparable injury. *Basicomputer Corp. v. Scott*, 973 F.2d 507, 511–12 (6th Cir. 1992). If the Final Rule is illegal, the State will be unfairly forced to compete for funds with entities that are statutorily ineligible but enabled anyway by the Rule.

Second, States (like Ohio) that expanded their services based on the availability of additional Title X grants will face reputational injuries if they are no longer able to provide the same level of service. Indisputably, Planned Parenthood's exit from the Title X program caused Ohio to receive *$11 million* extra, which the State used to expand services. *See* Clark Decl., R.2-1, ¶¶7–8, 10, 12–14. If Planned Parenthood reenters, Ohio will either have to self-fund those expanded services (spending money it cannot later recover) or sustain reputational injury from reducing services on which citizens have come to rely. Either way, the State will suffer irreparable injury. *See, e.g.*, *Texas Children's Hosp. v. Burwell*, 76 F. Supp. 3d 224, 242–44 (D.D.C. 2014).

Finally, the States will be irreparably injured if they are forced to make referrals. To do so would require the States to put their imprimatur on abortion—an imprimatur that the States, as indicated by their laws withholding support for abor-

tion, legitimately seek to withhold. *See, e.g.*, Ala. Const. art. I, §36.06; Ariz. Rev. Stat. Ann. §35-196.02; Ohio Rev. Code §5101.56.

III. Enjoining the Final Rule will not substantially harm others and will promote the public interest.

The final two injunction-pending-appeal factors support such relief. First, "no substantial harm can be said to inhere" in the enjoining of an illegal policy. *Deja Vu of Nashville, Inc. v. Metro. Gov't of Nashville & Davidson Cty.*, 274 F.3d 377, 400 (6th Cir. 2001). (Regardless, even HHS has not contended that patients sustained "substantial" harm because of the 2019 Rule.) Second, enjoining the illegal Final Rule advances the public interest, which always "lies in a correct application" of the law and the will of the people being effected "in accordance with … law." *Coal. to Def. Affirmative Action v. Granholm*, 473 F.3d 237, 252 (6th Cir. 2006) (quotation omitted).

CONCLUSION

This Court should enjoin the Final Rule pending this 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 5,117 words. *See* Fed. R. App. P. 27(d)(2)(A).

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.

/s/ Benjamin M. Flowers
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CERTIFICATE OF SERVICE

I hereby certify that on January 4, 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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