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

OPPOSITION TO MOTION FOR INJUNCTION PENDING APPEAL

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INTRODUCTION

Since its inception fifty years ago, Title X of the Public Health Service Act has funded vital sexual health and client-centered quality family planning services for millions of Americans, while prohibiting the use of those funds for abortions. In 2019, the Department of Health and Human Services (HHS) promulgated a rule imposing restrictions never before nationally implemented. This real-world experiment with the health of low-income Americans led to disastrous results: nearly 1000 service sites withdrew from the program, and over 750,000 fewer Title X clients (most with incomes under the federal poverty limit) received Title X services. For example, 188,920 fewer women underwent clinical breast exams, 276,109 fewer confidential HIV tests were performed, and over 300,000 fewer women received contraception.

In response to this dramatic reduction in services, HHS reexamined the premises of the 2019 rule, and, after notice and comment, reinstated its longstanding Title X policies—policies that plaintiffs operated under for decades without objection. As relevant here, the 2021 rule permits reasonable space-sharing for grantees that provide both Title X services and abortion-related services through separate programs, and requires, in the absence of a conscience objection, Title X providers to give pregnant patients non-directive counseling, including referral for abortion if requested. HHS's decisions regarding separation and referrals reflect reasoned decision-making and are wholly consistent with the text of Title X, which the

Supreme Court has recognized is ambiguous on these issues. This Court should deny plaintiffs' request for an injunction pending appeal.

STATEMENT

1. In 1970, Congress enacted Title X of the Public Health Service Act to "promote public health and welfare," Family Planning Services and Population Research Act of 1970, Pub. L. No. 91-572, 84 Stat. 1504, 1504; the Act authorizes HHS to make grants "to assist in the establishment and operation of voluntary family planning projects which shall offer a broad range of acceptable and effective family planning methods and services," 42 U.S.C. § 300(a). But "[n]one of the funds appropriated … shall be used in programs where abortion is a method of family planning." *Id.* § 300a-6 (Section 1008).

2.a. To ensure compliance with Section 1008, the Secretary's initial regulations required assurances that the Title X "project will not provide abortions as a method of family planning." 36 Fed. Reg. 18,465, 18,466 (Sept. 15, 1971). HHS construed Section 1008 "as prohibiting Title X projects from in any way promoting or encouraging abortion as a method of family planning," and "as requiring that the Title X program be 'separate and distinct' from any abortion activities of a grantee." 53 Fed. Reg. 2922, 2923 (Feb. 2, 1988) (describing prior agency opinions). HHS thus allowed—and then in 1981, required—Title X projects to offer "nondirective 'options couns[e]ling' on pregnancy termination (abortion), prenatal care, and adoption and foster care," upon request, "followed by referral for these services if [the patient] so

requests." *Id.* HHS also permitted funding recipients to maintain Title X services and abortion-related services at "a single site," 52 Fed. Reg. 33,210, 33,210 (Sept. 1, 1987), though Title X projects were "required to maintain a separation (that is more than a mere exercise in bookkeeping) of their project activities from any activities in which they engage that promote or encourage abortion as a method of family planning," 58 Fed. Reg. 7462, 7462 (Feb. 5, 1993) (describing prior policies).

b. In 1988, the agency changed course and issued a rule (the 1988 Rule) that "required grantees to maintain strict physical and financial separation between Title X projects and abortion related activities" and "prohibited the discussion of or referral for abortion." 86 Fed. Reg. 19,812, 19,813 (Apr. 15, 2021) (describing 1988 Rule). Although the Supreme Court upheld the 1988 Rule—concluding that Section 1008 was "ambiguous" and that the rule was a "permissible construction" in light of the "broad directives provided by Congress in Title X," *Rust v. Sullivan*, 500 U.S. 173, 184-87, 188-90 (1991)—the rule was "never implemented on a nationwide basis," 65 Fed. Reg. 41,270, 41,271 (July 3, 2000).

In 1993, HHS issued an interim rule suspending the 1988 Rule, and reverted to the pre-1988 compliance standards while it solicited public comment on a proposed rule. *See* 58 Fed. Reg. at 7462; 58 Fed. Reg. 7464 (Feb. 5, 1993).

c. In 2000, HHS largely reinstated the pre-1988 compliance standards that had "been used by the program for virtually its entire history." *See* 65 Fed. Reg. 41,270, 41,271 (the 2000 Rule). The 2000 Rule thus removed the complete financial and

physical separation requirements from the 1988 Rule, though grantees would still be required to maintain a separation that was more than "mere … bookkeeping." *Id.* at 41,270, 41,276. And the 2000 Rule again required grantees to provide non-directive counseling, including referral for abortion, if requested; HHS did not consider "the provision of neutral and factual information about abortions … to promote or encourage abortion as a method of family planning." *Id.* at 41,270-71.

d. The 2000 Rule remained in effect until 2019, when HHS "essentially revive[d]" the 1988 Rule through a new final rule (the 2019 Rule) that required complete physical and financial separation between Title X funds and abortion-related activities and prohibited abortion referrals. *See Mayor of Baltimore v. Azar*, 973 F.3d 258, 271 (4th Cir. 2020); 84 Fed. Reg. 7714 (Mar. 4, 2019).

Affected Title X providers brought suit. The Ninth Circuit upheld the rule, *California ex rel. Becerra v. Azar*, 950 F.3d 1067 (9th Cir. 2020) (en banc), while the Fourth Circuit enjoined its operation in the state of Maryland, *see Mayor of Baltimore*, 973 F.3d 258. The Supreme Court granted certiorari, but dismissed the case in light of HHS's intent to engage in new rulemaking. *See Becerra v. Mayor & City Council of Baltimore*, 141 S. Ct. 2170 (2021).

3. HHS promulgated a final rule in October 2021, which, as relevant here, revokes the 2019 Rule and effectively readopts the 2000 Rule (plaintiffs do not challenge other provisions of the rule strengthening and modernizing the program). 86 Fed. Reg. 56,144, 56,148-49 (Oct. 7, 2021) (Final Rule). HHS explained that its

reconsideration was based on a "fresh review" of the evidence and assumptions upon which the 2019 Rule was based, *id.* at 56,145, as well as the "stark facts" demonstrating that the 2019 Rule had a "devastating" effect on Title X clients and services, the burden of which fell disproportionately on the low-income clients the program was designed to serve, *id.* at 56,146-47. The rule went into effect on November 8, 2021, and will apply to the 2022 grant cycle.

4. Ohio and eleven other states filed suit and moved for a preliminary injunction, arguing the Final Rule reflects an impermissible construction of Section 1008 and is arbitrary and capricious. The district court denied plaintiffs' motion, explaining that the Supreme Court in *Rust* held that Section 1008 was "ambiguous" and that the Final Rule's separation and referral requirements were "permissible" constructions of Section 1008. Order, RE 50, PageID#657-68 (quoting *Chevron U.S.A. v. Natural Res. Def. Council*, 467 U.S. 837, 843 (1984)). Emphasizing that HHS had provided ample justification for its change in position in light of the drastic reduction in Title X services caused by the 2019 Rule, the district court likewise rejected plaintiffs' argument that the Final Rule was arbitrary and capricious. *Id.*, PageID#668-77. The district court further held that the remaining preliminary injunction factors did not favor plaintiffs, recognizing that the public interest strongly weighed in favor of "restoring access to vital family planning services for millions of Americans," *id.*, PageID#680.

ARGUMENT

An injunction is an "extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008). An appellant "must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Id.* at 20. Plaintiffs cannot satisfy these requirements.

A. Plaintiffs Fail To Demonstrate a Likelihood of Success

Plaintiffs can demonstrate no likelihood of success on the merits. Responding to the "significant negative public health consequences of the [2019 Rule]," 86 Fed. Reg. at 56,145, HHS promulgated a rule that reflects the reasoned decision-making required by the Administrative Procedure Act and comports fully with the governing statute.

1. The Rule Reflects a Permissible Interpretation of the Statute.

Section 1008 of the Public Health Service Act provides that "[n]one of the funds appropriated under this subchapter shall be used in programs where abortion is a method of family planning." 42 U.S.C. § 300a-6. As plaintiffs recognize (Mot.7), the Supreme Court has held that "[t]he language of § 1008 … does not speak directly to the issues of … referral … or program integrity" and is "ambiguous." *Rust v. Sullivan*, 500 U.S. 173, 184 (1991). The rule challenged here establishes appropriate

separation requirements to ensure that Title X funds are not used for abortions and requires that pregnant clients be provided with non-directive counseling, including referrals for abortion-related services upon request. *See* 86 Fed. Reg. at 56,148-49. Because "the statute is silent or ambiguous with respect to the specific issue," the agency's separation and referral requirements must be upheld so long as they reflect a "permissible" interpretation of the statute. *Metropolitan Hosp. v. U.S. Dep't of Health & Human Servs.*, 712 F.3d 248, 254-55 (6th Cir. 2013) (quoting *Chevron*, 467 U.S. at 843).

a. Separation Requirements. "Title X expressly distinguishes between a Title X *grantee* and a Title X *project*" or program. *Rust*, 500 U.S. at 196; *see* 42 U.S.C. § 300a-4 (using "program" and "project" interchangeably). A Title X *grantee* may operate a variety of programs in addition to their Title X program, including programs that involve abortion-related services. *See Rust*, 500 U.S. at 198. Under the Final Rule, a grantee's Title X program must be "separate and distinguishable" from any abortion-related activities that the grantee conducts, as demonstrated by more than mere "separate bookkeeping entries alone" or "[m]ere technical allocation of funds." 65 Fed. Reg. 41,281, 41,282 (July 3, 2000); *see also* 86 Fed. Reg. at 56,150. But recognizing the realities of healthcare facilities, HHS permits a grantee to have "[c]ertain kinds of shared facilities" among programs—including a common waiting room, staff, and filing system—so long as the two programs remain distinguishable and costs are properly allocated. 65 Fed. Reg. at 41,282; *see* 86 Fed. Reg. at 56,150. HHS utilizes "robust monitoring processes to ensure grantee compliance … including

through regular grant reports, compliance monitoring visits, and legally required audits." 86 Fed. Reg. at 56,152.

These policies reflect a permissible construction of Section 1008. So long as the grantee ensures that any programs that include abortion-related activities are kept "entirely separate from the Title X project," and salaries and costs are properly allocated if common staff or facilities are used, 65 Fed. Reg. at 41,282, then Title X funds are not being "used in [a] *program*[] where abortion is a method of family planning," 42 U.S.C. § 300a-6 (emphasis added).

In response, plaintiffs primarily insist that "[a]llowing facilities to share" staff and waiting rooms is impermissible because "[m]oney is fungible" and "every Title X dollar" received by an abortion provider would "free[] up another dollar that … can [be] use[d] to subsidize abortion." Mot.9-10 (second alteration in original) (quoting *Holder v. Humanitarian Law Project*, 561 U.S. 1, 31 (2010)). But even the 2019 Rule did not prevent HHS from awarding funds to grantees that provided abortion-related services so long as they had a completely separate facility providing those services. Under plaintiffs' theory, even that would be impermissible, lest Title X funds "free[] up" the grantee's private funds for abortion services.

Plaintiffs' "free[ing] up" theory is, moreover, flatly inconsistent with *Rust* and the Court's other unconstitutional conditions cases, as the Supreme Court has explained. *See Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l, Inc.*, 570 U.S. 205, 220 (2013) (rejecting as inconsistent with *Rust* the argument that "the grant of federal

funds could free a recipient's private funds" to be used to pursue activities barred within the federally funded program); *see also, e.g.*, *Planned Parenthood of Minn. v. Minnesota*, 612 F.2d 359, 362 (8th Cir. 1980) (rejecting "[t]he argument that the money given to Planned Parenthood by the state might free-up other money which would be used for abortions"). And *Holder* is not to the contrary. It involved "the quite different context" "where the record indicated that support for [terrorist] organizations' nonviolent operations was *funneled* to support their violent activities." *Alliance*, 570 U.S. at 220 (emphasis added). The Final Rule prohibits such funneling of Title X funds, which must be used for permissible family planning services, and not abortion. *See* 86 Fed. Reg. at 56,150.

Plaintiffs' argument (Mot.10) that the Final Rule is invalid merely because grantees may "achieve economies of scale" by operating a Title X project and an abortion practice in the same physical location is equally unavailing. The fact that a grantee might be able to more efficiently operate both projects does not mean Title X funds are being impermissibly "used" in the non-Title X program, 42 U.S.C § 300a-6. A grantee that experiences such cost savings can use surplus Title X funds to "expand" its Title X program, *Alliance*, 570 U.S. at 220; it may not divert those funds to any other project. And realizing economies of scale does not depend on space-sharing: a grantee that satisfies the 2019 Rule's separation requirements might still experience economies of scale by, for example, purchasing bulk supplies at a lower cost.

Plaintiffs briefly suggest (Mot.9) that the Final Rule is invalid because Section 1008's prohibition on funds being "used in programs *where* abortion is a method of family planning," 42 U.S.C. § 300a-6 (emphasis added), refers to programs existing in the same "physical location," Mot.9. The district court correctly rejected this insubstantial argument: "'[w]here' need not refer to a physical location," and nothing in the text of Title X or its legislative history suggests otherwise. Order, RE 50, PageID#662-63.[1]

b. Referral Requirement. Under the Final Rule, Title X programs must provide, upon a pregnant patient's request, "neutral, factual information and nondirective counseling" on the patient's various options of "[p]renatal care and delivery," "[i]nfant care, foster care, or adoption," and "[p]regnancy termination," and must also provide a referral for any of those options if the patient so requests. 86 Fed. Reg. at 56,179. That referral may consist of "relevant factual information," like "the name, address, [and] telephone number" of an abortion provider, but the Title X program may not take "further affirmative action (such as negotiating a fee reduction, making an appointment, providing transportation) to secure abortion services for the

[1] Plaintiffs insist that the Final Rule permits "Title X programs to have an 'abortion element,'" relying on a sentence in a 2000 Federal Register notice, Mot.9 (quoting 65 Fed. Reg. at 41,282), but as the district court explained, when read in context, it is clear that Title X projects are not permitted to have an abortion element, Order, RE 50, PageID#662 n.13, as HHS has repeatedly affirmed, *see, e.g.*, 86 Fed. Reg. at 56,150; 65 Fed. Reg. at 41,282.

patient." *Id.* at 56,150 (quoting 65 Fed. Reg. at 41,281). Plaintiffs appear to challenge only the referral requirement and not the counseling requirement.

The referral requirement is based on a permissible construction of Section 1008, and dates back approximately forty years. Section 1008 prohibits funds from being "used in programs where abortion is a method of family planning," 42 U.S.C. § 300a-6, but does not directly address whether a provider can supply neutral, factual information about where an abortion can be obtained. HHS has reasonably interpreted the statutory language as prohibiting the use of Title X funds to "promote or encourage" abortions as a method of family planning, 65 Fed. Reg. at 41,272, but, consistent with medical ethics, not as prohibiting "neutral, factual information." *See* 86 Fed. Reg. 56,154; *Mayor of Baltimore*, 973 F.3d at 277, 278 (discussing ethical concerns with prohibiting abortion referrals). Just as a Title X provider may answer a patient's question regarding where to obtain a cardiology consultation without converting cardiology services into Title X family planning services, so too a provider can supply non-directive factual information about where to seek an abortion without running afoul of Section 1008.

Plaintiffs do not appear to dispute that HHS could, consistent with Section 1008, *permit* grantees to make abortion referrals. Mot.13. Rather, plaintiffs object to the Final Rule's "*require[ment]*" that grantees make referrals upon request. *See* Mot.12-13. But because the statute "does not speak directly to the issue[] of … referral," *Rust*, 500 U.S. at 184, the decision whether to permit or require referrals for abortion when

requested was a policy decision entrusted to HHS, *see id.* And HHS fully justified its policy choice to reinstate the referral requirement that had been in place for nearly the entire history of the program. *See* 65 Fed. Reg. at 41,274 ("[T]he provision of a referral is the logical and appropriate outcome of the counseling process."); 86 Fed. Reg. 56,144; *see also infra* p. 17.

Plaintiffs' argument that the Final Rule is unlawful because it "allows entities to provide abortions and Title X services at the same facility," Mot.12, merely restates their argument that Section 1008 requires physical separation of office facilities. That a Title X program could inform a patient of the option to obtain an abortion at the same facility (Mot.12-13) does not add to that argument. Under those circumstances, any abortion would not be performed using Title X funds, and the Title X *program* would not have adopted abortion as a method of family planning merely by providing a pregnant patient with neutral, factual information about their options.

Plaintiffs' "dental practice" analogy (Mot.13) only underscores their misunderstanding. The better analogy is a dental practice that offers free teeth cleaning during a weekend clinic. *See* Order, RE 50, PageID#665. If a patient at the weekend clinic requests a root canal, and the dental practice informs the patient that root canals are not part of the free weekend clinic and refers the patient to its commercial practice for a root canal during the week, "no one could argue that root canals were a part of the weekend clinic program." *Id.*

2. The Rule Reflects Reasoned Decision-Making and Sound Policy.

As demonstrated, the Final Rule fully accords with the relevant statutory text; it was also a reasonable, procedurally proper response to the dramatic reduction in Title X services occasioned by the 2019 rule.

a. Separation Requirements. HHS explained in the Final Rule that it had "conducted a fresh review" of the evidence underlying the 2019 Rule's complete separation requirements and had found a lack of "any specific evidence" justifying the need for those requirements. 86 Fed. Reg. at 56,145 (discussing "two GAO reports" the 2019 Rule had relied upon, which found only "minor compliance issues with grantees" and "no evidence that Title X funds had been used for abortions or to advise clients to have abortions"). In contrast to the lack of evidence demonstrating any "discernible compliance benefits" from the 2019 Rule's separation requirements, HHS found significant evidence that those requirements "greatly increased compliance costs for grantees," *id.*, and contributed to a "dramatic[]" reduction in Title X services, *id.* at 56,148. Indeed, under the 2019 Rule, 19 grantees (representing 945 service sites) "withdrew from the program," and the Title X program served "789,960 fewer clients"—with low-income clients bearing the brunt of the impact. *Id.* at 56,146. HHS therefore reasonably decided to return to the 2000 Rule's policies for ensuring separation of Title X funds and abortion-related activities, which had been in

place for "decades" and had "uncovered no misallocation of Title X funds by grantees," *id.* at 56,145; *see id.* at 56,152-53.

Plaintiffs' argument that HHS failed to "justify" its decision (Mot.15) to return to the 2000 Rule is therefore difficult to fathom. There is likewise no merit to plaintiffs' contention that HHS "abandoned the 2019 Rule's separation requirements without adopting any alternative to keep Title X funds from being used to subsidize abortion." Mot.14. The Final Rule reinstates the policies for ensuring grantees' separation of Title X funds and abortion-related activities that were "in place for much of the program's history," 86 Fed. Reg. at 56,150; those policies have always included measures for monitoring compliance, *id.* at 56,145; *see also, e.g.*, 45 C.F.R. §§ 75.302, 75.303. To the extent plaintiffs suggest that only strict physical and financial separation would "keep Title X funds from being used to subsidize abortion," Mot 14, that merely restates plaintiffs' incorrect statutory argument, *see supra* pp. 8-10.

Contrary to plaintiffs' assertion (Mot.15), HHS did not fail to consider any "significant and viable" or "obvious" "alternatives." *See National Shooting Sports Found., Inc. v. Jones*, 716 F.3d 200, 215 (D.C. Cir. 2015) (quotation marks omitted). Plaintiffs' suggestion that HHS failed to consider whether to maintain the 2019 Rule but take additional measures to assist grantees finds no support in the record. Mot.15-16. HHS fully considered whether to "maintain many elements" of the 2019 Rule, and explained that doing so would have "exacerbate[d]" the 2019 Rule's negative impacts,

including a loss of providers. 86 Fed. Reg. at 56,176; *see also id.* at 56,161-62 (considering retaining the 2019 Rule's subrecipient monitoring); *id.* at 56,168 (addressing comments that some states benefitted under the 2019 Rule). None of plaintiffs' vague alternatives—such as providing additional funds to cover the 2019 Rule's compliance costs (Mot.15-16)[2]—would have been viable solutions to the core problem that HHS identified: the 2019 Rule's separation requirements imposed prohibitive burdens on grantees with no "discernible compliance benefits" and "diver[ted]" funds towards "increased infrastructure costs" rather than "the core purpose of Title X," 86 Fed. Reg. at 56,145. At bottom, plaintiffs' purported "alternatives" simply reflect plaintiffs' disagreement with HHS's weighing of the costs and benefits of the challenged rule. But that policy judgment is entrusted to the agency, not plaintiffs.

Nor did HHS "neglect[] to consider reliance issues." Mot.17. In changing positions, an agency must "be cognizant that longstanding policies may have 'engendered serious reliance interests.'" *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 221-22 (2016). But the 2019 Rule was not "longstanding," *id.*—it was in place for approximately two years—and plaintiffs do not have any legally cognizable reliance interest in the continued receipt of a discretionary funding grant under the

[2] Plaintiffs' proposal to provide funding to help grantees maintain greater physical separation between Title X programs and abortion-related activities is also at odds with plaintiffs' fungibility argument, *see supra* p. 8.

conditions they prefer. Title X grants generally obligate HHS to provide funds for one year, 42 C.F.R. § 59.8(b), and a grant does not commit HHS to renewing the funding the next year, *id.* § 59.8(c).

In any event, whatever minimal reliance interest the States had in the 2019 Rule, HHS reasonably determined it was outweighed by the need to restore the level of Title X services to that provided before the rule. HHS recognized that "a few states were able to increase their service sites following the 2019 rule." 86 Fed. Reg. at 56,151; *see also* Mot.17-18. But these states were the "exception," and a majority of states "saw a decrease in the number of service sites in their network." 86 Fed. Reg. at 56,151-52. HHS explained, moreover, that "even if the same amount of funding is provided to a different set of grantees in a given area, it does not necessarily follow that the same number of clients will be served or same number of services will be provided." *Id.* Indeed, HHS explicitly considered Ohio, and noted that although Ohio had received additional funding, there was not "clear support for [the] claim" that Ohio had increased the number of clients served. *Id.*

Plaintiffs' remaining arguments are equally without merit. Contrary to plaintiffs' assertion (Mot.16), the agency properly considered comments that the rule is invalid because money is "fungibl[e]." 86 Fed. Reg. at 19,816-17 (recognizing that courts have rejected the "fungibility" theory); 86 Fed. Reg. at 56,150-51 (explaining HHS has "multiple methods by which it confirms that grant funds are spent for grant purposes"). Likewise, plaintiffs' assertion that HHS did not uncover any compliance

issues only because it "had no ability to detect" them (Mot.17) is unfounded. In the Final Rule, HHS explained the "robust monitoring processes" that have been in place throughout the history of the Title X program and fully examined potential evidence of compliance issues, but found none. 86 Fed. Reg. at 56,152-53; *see id.* at 56,145. Plaintiffs' bare speculation is not sufficient to set aside the agency's reasoned decision-making based on its decades of experience and expertise. *See National Lime Ass'n v. EPA*, 233 F.3d 625, 635 (D.C. Cir. 2000) (rejecting plaintiff's attempt to cast "doubt[]" on agency's assertion that its monitoring practices were sufficient to "ensure compliance" with standard).

b. Referral Requirement. HHS reasonably chose to reinstate the requirement that Title X grantees provide "nondirective counseling on all pregnancy options," and a "referral upon request for option(s) the client wishes to receive," including abortion. 86 Fed. Reg. at 56,154. HHS explained that "the opportunity to receive neutral, factual information and nondirective counseling on all pregnancy options," and a "referral upon request for option(s) the client wishes to receive," is "critical for the delivery of quality, client-centered care." 86 Fed. Reg. at 56,154; *see* 65 Fed. Reg. at 41,275 ("[T]he provision of a referral is the logical and appropriate outcome of the counseling process."). Indeed, grantees that withdrew from the program under the 2019 Rule explained that that rule's prohibitions "interfered with the patient-provider relationship," and made it "impossible … to provide healthcare and information to patients consistent with medical ethics." 86 Fed. Reg. at 56,146.

As HHS explained, restoring the non-directive counseling and referral requirements (which date back approximately forty years) enables "healthcare providers to offer complete and medically accurate information and counseling to their clients." *Id.* at 56,154

Plaintiffs' attack on this reasoned decision fails. Contrary to plaintiffs' contention (Mot.14), HHS fully explained its view that the abortion referral requirement complies with Section 1008, *see* 86 Fed. Reg. at 56,149-50—views HHS previously held and "published in the Federal Register in 2000," *id.* at 56,150.

Plaintiffs are likewise incorrect that HHS failed to consider "whether mandating referrals comported with medical ethics." Mot.19-20. As the Fourth Circuit summarized, several leading medical organizations submitted comments to HHS about the 2019 Rule, and "*all of them*" stated that the rule's prohibition on referrals "would violate the established principles of medical ethics." *Mayor of Baltimore*, 973 F.3d at 276-77. In the 2021 rulemaking, HHS endorsed the position put forth by these major medical organizations, who again provided comment. *See* 86 Fed. Reg. at 19,817 (explaining that the 2019 Rule's ban was not "in accordance with the ethical codes of major medical organizations"); 86 Fed. Reg. at 56,146, 56,154 (summarizing comments from major medical organizations criticizing 2019 Rule).

Similarly failing to advance their case, plaintiffs assert that HHS should have deferred to state laws on medical ethics, which, plaintiffs say, conflict with that of major medical organizations and the Final Rule. Mot.20. But the laws plaintiffs cite

provide generally that a medical provider cannot be forced to perform an abortion or participate in an abortion procedure. *See, e.g.*, Ky. Rev. Stat. § 311.800(4) (providing physicians may not "be required to, or held liable for refusal to, perform, participate in, or cooperate in" an abortion). Those laws do not conflict with the Final Rule's non-directive counseling and referral requirements, which do not promote abortion, let alone require a provider to participate or cooperate in an abortion. Furthermore, HHS explained in the Final Rule that objecting providers will not be required to counsel or refer for abortion, consistent with federal conscience statutes. *See* 86 Fed. Reg. at 56,153.

B. The Remaining Factors Do Not Favor an Injunction

Because plaintiffs have no likelihood of success on the merits, this Court can deny plaintiffs' motion without considering the remaining factors. *See Daunt v. Benson*, 956 F.3d 396, 421 (6th Cir. 2020). But those factors similarly do not favor plaintiffs.

1. Plaintiffs have not established irreparable harm, an "indispensable" requirement for a preliminary injunction. *D.T. v. Sumner Cty. Schs.*, 942 F.3d 324, 326-27 (6th Cir. 2019). Plaintiffs principally contend they will suffer irreparable harm "in the form of greater competition for Title X funds." Mot.21. Plaintiffs do not assert that their citizens will receive fewer Title X services as a result of the Final Rule, but rather that the States' Title X grants will be reduced because private entities offering Title X services will "reenter the program." *Id.* Only one state (Ohio) even purports

to offer any specific evidence regarding that alleged harm.[3] Clark Decl., RE 2-1, PageID#183-84.

Plaintiffs have no entitlement to Title X funds at the amount they prefer, and indeed "the reality is that all applicants for federal funds run" the risk of increased competition and "decreased funding" from year to year. *Experience Works, Inc. v. Chao*, 267 F. Supp. 2d 93, 96 (D.D.C. 2003). And Ohio's declaration does not establish that a mere increase in competition for Title X funds will cause any irreparable injury to its ability to offer Title X services. *See Ohio ex rel. Celebrezze v. Nuclear Regulatory Comm'n*, 812 F.2d 288, 290 (6th Cir. 1987) (an irreparable injury must be "both certain and great" and not "speculative or theoretical"). Ohio's fear of "reputational injury" (Mot.22) is even more speculative. Moreover, the cases cited by plaintiffs are inapposite: the court in *Sherley v. Sebelius*, 610 F.3d 69 (D.C. Cir. 2010), for example, discussed increased competition in the context of Article III injury, not irreparable harm; and *Basicomputer Corp. v. Scott*, 973 F.2d 507, 511-12 (6th Cir. 1992), involved "the loss of fair competition" as a result of "the breach of a non-competition covenant" between an employer and an employee.

Plaintiffs also cannot establish irreparable injury from the referral requirement. Mot.22. Non-directive counseling and referral upon request does not promote or

[3] Accordingly, any injunctive relief could not extend beyond Ohio. *See Mayor of Baltimore*, 973 F.3d at 293 (injunctive relief in challenge to 2019 Rule limited to Maryland).

encourage abortion, *see supra* p. 11, and in any event, federal conscience laws allow objecting providers to decline "to counsel or refer for abortions in the Title X program." 86 Fed. Reg. at 56,153.

2. In all events, the balance of harms and public interest weigh decisively against plaintiffs. Plaintiffs' assertion that an injunction "will not substantially harm others" (Mot.23) cannot be squared with the extensive factual record demonstrating that the 2019 Rule "dramatically reduced access to essential family planning and related preventative health services for hundreds of thousands of clients, especially for the low-income clients Title X was specifically created to serve." 86 Fed. Reg. at 56,151-52. It is not in the public interest to hamstring the program's efforts to fully deploy funds to provide vital family planning services to patients nationwide.

CONCLUSION

For the foregoing reasons, plaintiffs' motion should be denied.

Respectfully submitted,

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JANUARY 2022

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing motion complies with the word limit of Federal Rule of Appellate Procedure 27(d)(2)(A) because the motion contains 5,194 words. The motion complies with the typeface and type-style requirements of Federal Rules of Appellate Procedure 27(d)(1)(E) and 32(a)(5) and (6) because it has been prepared using Microsoft Word 2016 in proportionally spaced 14-point Garamond typeface.

s/ Kyle T. Edwards
KYLE T. EDWARDS

CERTIFICATE OF SERVICE

I hereby certify that on January 14, 2022, I electronically filed the foregoing with the Clerk's Office for the United States Court of Appeals for the Sixth Circuit using the appellate CM/ECF system. Participants in this case are registered CM/ECF users and service will be accomplished using the appellate CM/ECF system.

s/ Kyle T. Edwards
KYLE T. EDWARDS