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

BRIEF OF APPELLANTS

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STATEMENT REGARDING ORAL ARGUMENT

Because this case raises important issues regarding the meaning of federal law, Appellants request oral argument.

JURISDICTIONAL STATEMENT

The District Court had jurisdiction to hear the case under 28 U.S.C. §1331, as it involves the meaning of a federal statute. This Court has appellate jurisdiction under 28 U.S.C. §1292 to review the District Court's denial of a preliminary injunction.

STATEMENT OF THE ISSUES

1. Title X of the Public Health Service Act, Pub. L. No. 91-572, §4, 84 Stat. 1504, 1506–08 (1970), provides funding for family-planning services. The U.S. Department of Health and Human Services ("HHS") implements the program and enforces its requirements. Section 1008 of Title X bars "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 Section 1008, HHS promulgated a rule that requires Title X providers to make abortion referrals and that allows abortion providers to integrate their Title X activities with their abortion services. Did the District Court err by refusing to preliminarily enjoin the rule?

2. Because HHS's rule violates Title X as a matter of law, should the Court exercise its discretion to hold that the States are entitled to final judgment under the Administrative Procedure Act?

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). When it comes 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). One faction consists of the many Americans who believe that abortion takes an innocent life. The other includes those Americans who believe abortion guarantees "a woman's autonomy to determine her life's course, and thus to enjoy equal citizenship stature." *Gonzales v. Carhart*, 550 U.S. 124, 172 (2007) (Ginsburg, J., dissenting).

These views cannot be reconciled. Yet, both factions have reached a "compromise" on one issue—funding. The terms of that compromise "have remained quite consistent and clear." *Baltimore*, 973 F.3d at 297 (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 v. Wade* and its progeny." *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 provides funding for family-planning services. But Congress, in passing the law, included a provision forbidding "funds appropriated under" Title X from being "used in programs where abortion is a method of family planning." 42 U.S.C. §300a-6. The "purpose of singling out this one procedure could only have been Congress's desire not to subsidize the performance of abortion with the federal fisc." *Baltimore*, 973 F.3d at 296 (Wilkinson, J., dissenting).

The Department of Health and Human Services, or "HHS," is not respecting this compromise. In early October, it issued a final administrative rule purporting to implement Title X. *Ensuring Access to Equitable, Affordable, Client-Centered, Quality Family Planning Services*, 86 Fed. Reg. 56144-01 (Oct. 7, 2021). The "Final Rule," among other things: permits abortion providers to indirectly subsidize their abortion practices using Title X dollars; allows Title X grantees to run family-planning programs with an "abortion element," *Provision of Abortion-Related Services in Family Planning Services Projects*, 65 Fed. Reg. 41281-01, 41282 (July 3,

2000) (incorporated into the Final Rule by reference at 86 Fed. Reg. 56150); and *requires* Title X grantees to refer patients for abortions upon request.

The Final Rule, in addition to undermining the "statutory compromise" on which Title X rests, *Baltimore*, 973 F.3d at 297 (Wilkinson, J., dissenting), is illegal. The Administrative Procedure Act requires courts to "hold unlawful and set aside agency action[s]" that are contrary to law or arbitrary and capricious. 5 U.S.C. §706(2)(A). The Final Rule is contrary to law because it permits the use of Title X funds in "programs where abortion is a method of family planning." 42 U.S.C. §300a-6. The rule is arbitrary and capricious because it did not result from "reasoned decisionmaking." *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2569 (2019) (citation omitted).

Twelve States—Ohio, Alabama, Arizona, Arkansas, Florida, Kansas, Kentucky, Missouri, Nebraska, Oklahoma, South Carolina, and West Virginia—challenged the Final Rule in the United States District Court for the Southern District of Ohio, seeking a preliminary injunction. The District Court refused to grant preliminary relief. It erred. This Court should reverse.

The States recognize that the Court may disagree. In particular, it may conclude that, although the States are certain to prevail on the merits, and although they will *eventually* be irreparably harmed by the Final Rule, they are unlikely to

sustain irreparable harm pending the resolution of this appeal. *Cf.* Order Denying Motion for an Injunction Pending Appeal, Doc. 45-2 (Feb. 8, 2022). In that case, the Court should exercise its discretion to reach the merits of this case, at which point it should rule for the States. *See Munaf v. Geren*, 553 U.S. 674, 691–92 (2008); *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 31 (2008). Remanding to a District Court that has already (wrongly) determined the States are unlikely to prevail on the merits would needlessly delay the case's resolution.

STATEMENT

1. In 1968, a best-selling book warned that "hundreds of millions of people" would "starve to death" if population growth were not controlled. Paul R. Ehrlich, *The Population Bomb* xi (1968). This concern about population growth caught the attention of both President Nixon and Congress. So Congress passed, and the President signed, Title X—a law that made funding available to grantees who provide family-planning services at reduced cost.

"During the course of the House hearings," there arose "some confusion regarding the nature of the family planning programs envisioned." 116 Cong. Rec. 37375 (Nov. 16, 1970) (statement of Rep. Dingell). In particular, members of Congress wondered whether the bill would "include abortion as a method of family planning." *Id.* In 1970, funding elective abortions would have been incredibly con-

troversial. At that time, almost all States still forbade elective abortions. Just four States—Alaska, Hawaii, New York, and Washington—had repealed their laws criminalizing abortion. *See Roe v. Wade*, 410 U.S. 113, 140 n.37 (1973).

Title X's supporters in Congress responded by proposing language clarifying that Title X would *not* be used to fund abortion. The as-enacted version of that language appears in Section 1008 of Title X: "None of the funds appropriated under this title shall be used in programs where abortion is a method of family planning." 42 U.S.C. §300a-6. "With the 'prohibition of abortion' amendment—title X, section 1008—the committee members clearly intend[ed] that abortion is not to be encouraged or promoted in any way through this legislation. Programs which include abortion as a method of family planning are not eligible for funds allocated through this act." 116 Cong. Rec. 37375 (Nov. 16, 1970) (statement of Rep. Dingell). Indeed, "properly operated family planning programs should reduce the incidence of abortion." *Id.* And funding abortion would undermine that goal, since "the prevalence of abortion as a substitute or a back-up for contraceptive methods can reduce the effectiveness of family planning programs." *Id.*

President Nixon signed Title X into law on December 24, 1970. Title X empowers the Secretary of Health and Human Services "to make grants to and enter into contracts with public or nonprofit private entities to assist in the establishment

and operation of voluntary family planning projects which shall offer a broad range of acceptable and effective family planning methods and services (including natural family planning methods, infertility services, and services for adolescents)." 42 U.S.C. §300(a). To this day, Section 1008 prohibits Title X funds from being "used in programs where abortion is a method of family planning." 42 U.S.C. §300a-6. Indeed, Congress has bolstered Section 1008: since the 1990s, every bill appropriating Title X funds has banned the funding of elective abortions, and further required that "all pregnancy counseling" conducted under Title X "shall be nondirective." *See, e.g.*, Consolidated Appropriations Act, 2021, Pub. L. No. 116-260, Div. H, Tit. V, §506 (2021); Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. 104-134, tit. II, 110 Stat. 1321, 1321-221 (1996).

2. The initial regulations governing the Title X program essentially reiterated the statutory command: each grantee's application needed to affirm that the "project [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 were confused "about precisely what activities were proscribed" by Section 1008 and that this confusion led to "variations in practice by grantees." *Statutory Prohibition on Use of Appropriated Funds in Programs Where Abortion Is a Method of Family Planning, Standard of Compliance for*

Family Planning Services Projects, 52 Fed. Reg. 33210-01, 33210 (Sept. 1, 1987) (proposed rule). The Inspector General's Office suggested clarifying the scope of Title X. In particular, the Office recommended that the Secretary of HHS provide clear guidance on the "scope of the abortion restriction in section 1008." *Id.* at 33210–11 (quotation omitted).

Following this report, HHS proposed "revis[ing] the regulations governing Title X so as to conform the obligations of grantees to the statutory prohibition in section 1008, and to establish standards for compliance with section 1008 that will permit adequate monitoring of such compliance." *Id.* at 33211. These efforts culminated in the "1988 Rule." *Statutory Prohibition on Use of Appropriated Funds in Programs Where Abortion is a Method of Family Planning; Standard of Compliance for Family Planning Services Projects*, 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 program-integrity rules, which required grantees to keep their Title X programs "physically and financially separate" from all abortion-related activities. *Id.*

The Supreme Court upheld these regulations in *Rust v. Sullivan*, 500 U.S. 173 (1991). But President Clinton suspended the 1988 Rule on his third day in office. *The Title X "Gag Rule,"* 58 Fed. Reg. 7455 (Jan. 22, 1993); *Standards of Com-*

pliance for Abortion-Related Services in Family Planning Service Projects, 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." *Standards of Compliance for Abortion-Related Services in Family Planning Services Projects,* 65 Fed. Reg. 41270, 41279 (July 3, 2000). And it required Title X grantees to provide a "referral" for abortion "upon request." *Id.* The 2000 Rule also eliminated the 1988 Rule's strict program-integrity requirements. *See* 65 Fed. Reg. at 41275–76. Indeed, guidance published alongside the 2000 Rule confirmed that HHS would permit grantees to integrate their Title X and abortion services to a significant degree. In particular, the program-integrity guidance permitted grantees to integrate Title X activities and abortion practices within the same overall program, 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." *Provision of Abortion-Related Services in Family Planning Services Projects*, 65 Fed. Reg. 41281-01, 41292 (July 3, 2000). The guidance then listed permissible *intermingling* of abortion and Title X services, confirm-

ing that grantees may operate Title X activities and provide abortions using the same staff and same facilities:

> Certain kinds of shared facilities are permissible, so long as it is possible to distinguish between the Title X supported activities and non-Title X abortion-related activities: (a) A common waiting room is permissible, as long as the costs [are] properly pro-rated; (b) common staff is permissible, so long as salaries are properly allocated and all abortion related activities of the staff members are performed in a program which is entirely separate from the Title X project; (c) a hospital offering abortions for family planning purposes and also housing a Title X project is permissible, as long as the abortion activities are sufficiently separate from the Title X project; and (d) maintenance of a single file system for abortion and family planning patients is permissible, so long as costs are properly allocated.

Id.

3. That is where things stood until, in 2019, HHS reinstituted certain provisions of the 1988 Rule to better enforce Section 1008's prohibition on using Title X funds in programs where abortion is a method of family planning. The 2019 Rule required that Title X projects remain physically and financially separate from any abortion-related activities conducted outside the grant program. *Compliance with Statutory Program Integrity Requirements*, 84 Fed. Reg. 7714-01, 7789 (Mar. 4, 2019). The 2019 Rule also forbade Title X grantees from making abortion referrals. The 2019 Rule, unlike the 1988 Rule, *allowed* nondirective pregnancy counseling by a physician or advanced-practice provider—counseling that might include discussion

of abortion. *Id.* at 7788–89. But the rule *prohibited* Title X grantees from making referrals for elective abortions. *Id.*

The 2019 Rule required grantees to comply with most requirements, such as the financial-separation requirement, by July 2019. *Id.* at 7791. But HHS gave grantees more time to comply with the 2019 Rule's *physical-separation* requirement: that requirement would not become effective until March 4, 2020. 84 Fed. Reg. at 7791. Some grantees, including Planned Parenthood, decided to leave the Title X program rather than comply with the new requirements. Sarah McCammon, *Planned Parenthood withdraws from Title X program over Trump abortion rule*, NPR (Aug. 19, 2019), https://perma.cc/L254-VAY8; *see also* 86 Fed. Reg. 19812-01, 19815 (April 15, 2021) (proposed rule). This exodus freed up money that HHS could give to new grantees and to existing grantees willing to expand their services. HHS did just that. Ohio's experience is illustrative. Ohio 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 the 2019 Rule, Planned Parenthood was the only other grantee in Ohio. Once Planned Parenthood left the program, Ohio applied for and received more than $4 million annually in additional Title X funds. It has used that funding to increase or add to the provi-

sion of services in seventeen counties. Decl. of Michelle Clark, attached as Ex. 1, ¶12.

Various parties challenged the 2019 Rule. The Ninth Circuit upheld the rule. *See California ex rel. Becerra v. Azar*, 950 F.3d 1067, 1074 (9th Cir. 2020) (*en banc*). So did the United States District Court for the District of Maine. *See Fam. Plan. Ass'n of Maine v. United States Dep't of Health & Human Servs.*, 466 F. Supp. 3d 259, 273 (D. Me. 2020). 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 HHS's request, agreed to hear the cases from the Fourth and Ninth Circuits. *See Oregon v. Cochran*, 141 S. Ct. 1369 (2021). It never got the chance. HHS, apparently to avoid an adverse ruling that might affect future rulemaking options, agreed with parties opposed to the 2019 Rule to jointly dismiss the cases—cases that both groups had just recently succeeded in convincing the Supreme Court to hear. *See Oregon v. Becerra*, 141 S. Ct. 2621 (2021). The Court granted that dismissal request over the dissents of Justices Thomas, Alito, and Gorsuch. *Id.*

4. HHS issued a new proposed rule in April. 86 Fed. Reg. 19812-01. In essence, the new rule would replace the 2019 Rule with requirements much like those in place under the 2000 Rule. Ohio and twenty other States submitted comments

opposing the proposed rule. *See* Letter to HHS Secretary from Ohio and 20 other States, Ex. 2.

On October 7, HHS published its "Final Rule." 86 Fed. Reg. 56144-01. The Final Rule is, in all relevant respects, identical to the proposed rule. And it does two things of particular relevance here.

First, it eliminates the 2019 Rule's program-integrity requirements. In place of these requirements, HHS is "reinstating interpretations and policies under section 1008" that were "published" at 65 Fed. Reg. 41281 (July 3, 2000). 86 Fed. Reg. at 56150. Those "interpretations and policies" are the 2000-era guidance discussed above, which break sharply from the 2019 Rule. Remember, the 2019 Rule ensured that Title X funds would not be used "in programs where abortion is a method of family planning" by requiring a strict financial and physical separation of Title X programs and the provision of abortion services. The reinstated guidance, in contrast, allows financial and physical integration as long as "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. The guidance go on to address permissible *intermingling* of abortion and Title X services, suggesting the just-discussed standard allows Title X grantees to use their money to fund

all but the most explicit subsidizations of abortion procedures. In particular, the reinstated guidance allow Title X grantees and abortion providers to share "facilities" and use "common staff." *Id.*

Second, the Final Rule requires that Title X grantees make abortion referrals "upon request." 86 Fed. Reg. at 56179 (to be codified at 42 C.F.R. §59.5). This restoration of the referral requirement in the 2000 Rule eliminates the 2019 Rule's *prohibition* on abortion referrals. *See* 84 Fed. Reg. at 7789.

5. On October 25, 2021, 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.

SUMMARY OF ARGUMENT

Four factors govern the question whether a movant is entitled to a preliminary injunction: "(1) whether the movant has a strong likelihood of success on the merits; (2) whether the movant would suffer irreparable injury without the injunction; (3) whether issuance of the injunction would cause substantial harm to others; and (4) whether the public interest would be served by issuance of the injunction." *City of Pontiac Retired Emps. Ass'n v. Schimmel,* 751 F.3d 427, 430 (6th Cir.2014) (*en*

banc) (*per curiam*) (quotation omitted). Here, the States satisfied every element. The District Court therefore erred in denying their motion for a preliminary injunction. This Court should reverse.

I. Under the Administrative Procedure Act, courts "shall … hold unlawful and set aside agency action[s]" that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. §706 & §706(2)–(2)(A). The Final Rule is contrary to law, not in accordance with it. And the Rule is arbitrary and capricious. The States will therefore prevail on the merits of their Administrative Procedure Act challenge.

A. The Final Rule is "not in accordance with law." §706(2)(A). Section 1008 bars Title X funds from being "used in programs where abortion is a method of family planning." 42 U.S.C. §300a-6. This language does not "speak directly to the issues of counseling, referral, advocacy, or program integrity." *Rust*, 500 U.S. at 184. As a result, the statute is somewhat "ambiguous," *id.*, leaving HHS with discretion to carry out the program 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 does not rest on a permissible construction of Section 1008. As to program integrity, the Final Rule reinstates 2000-era guidance that allowed

high degrees of 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. for Inj. Pending Appeal 9 (quoting 65 Fed. Reg. 41281-01 at 41282). No permissible construction of Section 1008 empowers HHS to fund Title X programs that have an "abortion element" in their "program of family planning services." Nor does any permissible reading of Section 1008 allow HHS to indirectly subsidize abortion by allowing Title X providers to use Title X resources to effectively promote abortion by creating economies of scale with abortion providers. That is what the Final Rule does.

As to referral, the Final Rule requires Title X providers to make abortion referrals upon request. 86 Fed. Reg. at 56179. When the government funds a program in which participants must make elective-abortion referrals upon request, that program is, by definition, a program "where abortion is a method of family planning." §300a-6.

B. The Final Rule is arbitrary and capricious, 5 U.S.C. §706(2)(A), for at least five reasons.

First, the Final Rule reinstituted 2000-era program-integrity requirements without considering whether obvious, alternative approaches to program integrity would better ensure that Title X funds are not used to subsidize abortion. The fail-

ure to consider obviously germane alternatives is arbitrary and capricious. *Dep't of Homeland Sec. v. Regents of Univ. of Cal.*, 140 S. Ct. 1891, 1912–13 (2020).

Second, the agency failed to even consider the reliance interests that the 2019 Rule's program-integrity rules engendered. States expanded their Title X services because, under the 2019 Rule, more funding was available for them after abortion providers left the program. When an agency abandons a policy without considering the reliance interests the policy engendered, its acts arbitrarily and capriciously. *Id.* at 1913.

Third, HHS acted arbitrarily and capriciously by failing to consider whether its program-integrity rules or its referral requirement would, by causing Title X to support the provision of abortion, erode public support for Title X. A decrease in public support could threaten Title X's existence, cause Congress to decrease the dollars appropriated to the program, or discourage participation by patients who might otherwise use the program. By failing to consider this important issue, HHS acted arbitrarily and capriciously.

Fourth, the agency "change[d] its existing position" on referrals without showing that there were "good reasons for the new policy." *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125–26 (2016) (quotation omitted). While agencies are free to change position, they must "explicitly and rationally" justify the

decision to do so. *Michigan v. Thomas*, 805 F.2d 176, 184 (6th Cir. 1986); *Rust,* 500 U.S. at 187 (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983)). But the Final Rule does not explain its rejection of the agency's previous finding 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.

Finally, HHS failed to consider the fact that its referral requirement conflicts with multiple States' ethical standards governing the practice of medicine. The failure to consider such standards when promulgating a Title X rule is arbitrary and capricious. *Baltimore*, 973 F.3d at 276 (majority op.).

II. The remaining preliminary-injunction factors also favor the States. The States will be irreparably harmed without an injunction, because they will be forced to compete for limited Title X funding with applicants who, but for the illegal rule, would not participate at all. The States will also be forced to have state-supported clinics make abortion referrals, undermining state polies designed to keep the States from placing their imprimatur on abortion. All of these injuries are irreparable, as there is no way to later obtain damages from the federal government. *See Kentucky v. U.S. ex rel. Hagel*, 759 F.3d 588, 599–600 (6th Cir. 2014).

The final two factors merge "when the government is the defendant." *Daunt v. Benson*, 956 F.3d 396, 422 (6th Cir. 2020). And they favor the States: even if the Final Rule had some positive effects, "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) (*per curiam*).

III. If the Court concludes that the States prevail as a matter of law, but also concludes that they do not satisfy one or more of the remaining preliminary-injunction factors, the Court should exercise its discretion to reach the merits and rule for the States. *Munaf*, 553 U.S. at 691. Because the merits issues are purely legal, failure to resolve the merits at this stage "would require wasted litigation without any offsetting advantage in economy of appellate effort or uninterrupted trial court proceedings." Wright & Miller, 16 Federal Practice and Procedure §3921.1 (3d ed. 2021, Westlaw).

STANDARD OF REVIEW

In deciding whether a preliminary injunction is appropriate, courts balance four factors: "(1) whether the movant has a strong likelihood of success on the merits; (2) whether the movant would suffer irreparable injury without the injunction; (3) whether issuance of the injunction would cause substantial harm to others; and (4) whether the public interest would be served by issuance of the injunction."

City of Pontiac, 751 F.3d at 430 (quotation omitted). On appeal, this Court reviews *de novo* the question whether the movant is likely to succeed on the merits. *Id.* It reviews "for abuse of discretion, however, the district court's ultimate determination as to whether the four preliminary injunction factors weigh in favor of granting or denying preliminary injunctive relief." *Id.* (quotation omitted).

ARGUMENT

The District Court erred when it denied the States' motion for a preliminary injunction. *First*, the States will likely prevail on the merits of their Administrative Procedure Act claim, both because the Final Rule is contrary to law and because it is arbitrary and capricious. *Second*, because grant applications are due and because grants will be distributed before this case is finally resolved, the States will be irreparably harmed absent an injunction. *Third*, enjoining the rule will not substantially harm others—it will simply maintain the *status quo* pending a final resolution. *Finally*, an injunction is in the public interest, since "the public interest lies in a correct application" of the law and in 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).

I. The States are likely to prevail on the merits of this challenge under the Administrative Procedure Act.

The Final Rule is contrary to Title X. It is also arbitrary and capricious. Thus, the States are likely to prevail on the merits.

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

Title X says that its funds may not be used to support abortion, even indirectly. In particular, Section 1008 states: "None 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. This case asks whether the Final Rule, by eliminating meaningful program-integrity requirements and by requiring Title X grantees to provide abortion referrals, violates Section 1008. The answer is "yes." The rule is therefore "not in accordance with law," and must be held "unlawful and set aside" under the Administrative Procedure Act. 5 U.S.C. §706(2)(A).

1. The Final Rule violates Section 1008 by eliminating all meaningful program-integrity requirements and by mandating referrals for abortion.

Section 1008, as even HHS recognizes, "prohibit[s]" the agency from "subsidiz[ing] abortion." 86 Fed. Reg. at 56150. But the statute does not expressly detail what that prohibition entails. It "does not," for example, "speak directly to the issues of counseling, referral, advocacy, or program integrity." *Rust*, 500 U.S. at 184. Section 1008 is "ambiguous" in that sense. *Id.* But ambiguous statutes do

not empower executive 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*, 467 U.S. at 843.

This case thus presents the question whether the Final Rule rests on a permissible construction of Section 1008. The question is one of first impression in this circuit. Further, neither the Supreme Court nor this Court has ever addressed whether Section 1008 permits the degree of financial and physical integration of Title X programs and abortion services that the Final Rule allows. Nor has either court has ever considered whether Section 1008 can be interpreted to permit mandatory abortion referrals within the Title X program. Instead, the only binding case on the matter says that the statute *can be* permissibly construed to require strict financial and physical separation and to forbid Title X grantees from making referrals. *Rust*, 500 U.S. at 178–80, 184; *accord California*, 950 F.3d at 1084.

Here, the Court need not define precisely the outer bounds of Section 1008. It need only hold that the Final Rule exceeds those bounds, thereby violating the statute, because it requires *no* meaningful program-integrity requirements and because it *mandates* abortion referrals.

Program integrity. Consider first the question whether Section 1008 forbids the Final Rule's lax program-integrity requirements. It does.

The Final Rule eliminates the 2019 Rule's strict program-integrity requirements. In place of those requirements, the Final Rule "reinstat[es] interpretations and policies under Section 1008 that were in place for much of the program's history." 86 Fed. Reg. at 56150. Those interpretations and policies permit an enormous amount of financial and physical integration. They even allow Title X grantees to have an "abortion element in a program of family planning services," as long as it 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). Further, the "interpretations and policies" allow grantees to offer their Title X activities in the same locations where they offer abortions, using "common waiting room[s]" and "common staff." *Id.* Thus, the Final Rule permits a significant degree of integration between Title X activities and abortion services.

No "permissible construction" of Section 1008 allows for the reinstatement of the 2000-era guidance. 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 Final Rule, however, says that Title X grantees *can* have an "abor-

tion element in a program of family planning services," as long as it is not too "large" or "intimately related" with the non-abortion parts of the family-planning 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* the Title X funds to flow to programs where abortion is a method of family planning.

The list of "permissible" shared facilities, *id.*, makes the violation even more obvious. Even if Section 1008 can be read to allow *some* sharing of physical locations, the 2000-era guidance permits integration to a degree that plainly violates Section 1008. Even HHS admits that Section 1008 bars 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, *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). Money's fungibility means that every dollar an abortion provider receives through Title X frees up another dollar that the grantee can use to subsi-

dize abortion. The money saved on items that Title X pays for, for example, might be used to pay the clinic's rent, to hire additional staff, to advertise abortion services, and so on.

HHS, in adopting the 2019 Rule's program-integrity requirements, acknowledged the importance of money's fungibility. For example, the agency concluded that many opponents of the 2019 Rule's program-integrity requirements "confirm[ed]" their importance 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"—they can improve the efficiency of their entire operation by supporting any part of it with Title X funds. *Id.* Thus, the integration permitted by the 2000 Rule allowed "Title X funds" to be used in support of "abortion as a method of family planning." *Id.*

Assuming for argument's sake that HHS could protect against impermissible abortion subsidies without adopting the strict separation requirements set out in the 2019 Rule, 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. This contradicts Section 1008's prohibition on subsidizing abortion. Indeed, it contradicts Title X's entire purpose. As *Rust* recognized, "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." 500 U.S. at 191. The Final Rule contravenes that intent, along with the text Congress enacted to effectuate its purpose.

Mandatory referrals. The Final Rule also violates Section 1008 by requiring grantees to provide elective-abortion referrals "upon request." 86 Fed. Reg. at 56179 (to be codified at 42 C.F.R. §59.5).

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." After all, if providers are *obligated* to give an abortion referral to any Title X patient who seeks an abortion in hopes of controlling her family's size, then the program is one where "abortion" is a "method of family planning."

An example unrelated to abortion illustrates the point. Imagine a state law that subsidizes psychiatrists who agree to provide free-of-charge "psychiatric care" for teenagers. Suppose the law contains the following qualifier: "No money shall be used in a psychiatry program where electroshock therapy is a method of psychiatric care." Now ask the following question: if a psychiatry practice *required* its

psychiatrists to make referrals for electroshock therapy upon request, would it be eligible for the funds? Plainly not. A program that requires psychiatrists to make such referrals would be a "program where electroshock therapy is a method of psychiatric care." That logic means that Title X programs in which doctors are required to make elective-abortion referrals upon request are programs where abortion is a method of family planning.

The Final Rule's deficiencies do not stop there. Remember, the Final Rule allows entities to provide abortions and Title X services out of the same facility with shared staff, shared waiting rooms, and so on. *See above* 10; 65 Fed. Reg. at 41282 (incorporated by reference at 86 Fed. Reg. at 56150). In other words, the Final Rule allows abortion providers to offer Title X services. 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 with their own doctors. 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. And again, no one would think twice about that conclusion outside the abortion context. Is a dental practice that refers patients to its own doctors for root canals a practice where root canals are a method of dental care? Is an oncology program that refers cancer patients to its own doctors

for chemotherapy a program where chemotherapy is a method of cancer treatment? The answer to both these questions is "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 for present purposes is not whether Title X grantees may be permitted to make abortion referrals in some specific contexts. Instead, the question is whether the Final Rule contradicts Section 1008 by *requiring* that grantees make elective-abortion referrals upon request. The answer to that narrower question is "yes." Therefore, the mandatory referral policy in the Final Rule is not in accordance with law.

2. HHS and the District Court were mistaken as to the Final Rule's legality.

The Final Rule's attempts to square its approach with Section 1008 are all unavailing, and the District Court erred in adopting HHS's view.

HHS's reasoning. Consider first the defenses that HHS raised in its Final Rule. There, HHS stressed that the Final Rule simply reinstates rules that were in place for many years before the 2019 Rule. 86 Fed. Reg. at 56149–50. But that is irrelevant; the "magnitude of a legal wrong is no reason to perpetuate it." *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2480 (2020). The question for this Court is whether

the Final Rule rests on a permissible construction of Section 1008. As shown above, it does not.

HHS also placed heavy, yet misplaced, reliance on *Rust v. Sullivan*. 500 U.S. 173. *Rust* said that Section 1008 does not speak directly to issues like referrals and physical-and-financial separation. *Id.* at 184. On that ground, *Rust* deemed the statute "ambiguous" with respect to these issues. *Id.* It then determined that the 1988 Rule, in mandating strict financial and physical separation and prohibiting abortion referrals, rested on a permissible interpretation of Section 1008. *Id.* at 184–90. As this description shows, *Rust* does not support the Final Rule's legality. While it acknowledges some ambiguity in Section 1008, it *did not* hold that the statute can be read to permit *mandatory* abortion referrals or to permit the Final Rule's incredibly relaxed approach to financial and physical separation.

In one curious portion of the Final Rule, HHS defended its program-integrity rules by claiming to "disagree[] that Title X grant funds … are 'fungible.'" 86 Fed. Reg. at 56150. That is rather like disagreeing that the sun rises in the east. Money is fungible, whether HHS likes it or not. Thus, there must be adequate safeguards to ensure that Title X grants are not used to subsidize abortion. The Final Rule does not include any.

District Court. The District Court, for its part, rejected the States' view of the merits based primarily on *Chevron*, which it interpreted as requiring deference to HHS's interpretation. But again, *Chevron* requires deference only to agency interpretations that rest on permissible interpretations of ambiguous statutes. And the District Court made no serious effort to show that the Final Rule rests on a permissible interpretation of Section 1008. Nor could it have. Section 1008 bars Title X funds from being "used in programs where abortion is a method of family planning," while the Final Rule empowers Title X grantees to include an "abortion element in a program of family planning." *See above* 24–25. 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.

The District Court's reasoning regarding the referral requirement's legality is even weaker. The court 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. In other words, because abortion *must* stay outside the program, it always *is* outside. That is absurd: if Title X grantees cease participating in Title X programs every time they do something that Section 1008 prohibits, then nothing will ever violate Section 1008.

*

Because the Final Rule is not in accordance with law, the States will likely prevail in showing that the Final Rule must be held "unlawful and set aside." 5 U.S.C. §706(2).

B. The Final Rule is arbitrary and capricious.

The Administrative Procedure Act requires courts to vacate agency actions that are arbitrary and capricious. 5 U.S.C. §706(2)(A). To avoid having their rules vacated for arbitrariness and capriciousness, "administrative agencies" must "engage in 'reasoned decisionmaking.'" *Michigan v. E.P.A.*, 576 U.S. 743, 750 (2015) (quotation 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.* (quotation omitted). Thus, the agency must give "a satisfactory explanation for its action." *State Farm*, 463 U.S. at 43; *accord Montgomery Cnty. v. Fed. Commc'ns Comm'n*, 863 F.3d 485, 491 (6th Cir. 2017).

An agency will be held not to have engaged in reasoned decisionmaking if it "relied on factors which Congress had not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 658 (2007) (quoting *State Farm*, 463 U.S. at 43); *accord Louisville Gas & Elec. Co. v. Fed. Energy Regul. Comm'n*, 988 F.3d 841, 846 (6th Cir. 2021). "When an agency changes its existing position," it must "show that there are good reasons for the new policy." *Encino*, 136 S. Ct. at 2125–26 (quotation omitted). And it must consider any "reliance interests" that its previous position "engendered." *Regents*, 140 S. Ct. at 1913 (quoting *Encino*, 136 S. Ct. at 2126). Relatedly, when an agency entirely abandons one position in favor of another, it must show that it considered and rationally rejected alternative possibilities. *Id.* at 1912; *State Farm*, 463 U.S. at 47–48.

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

The Final Rule's approach to program integrity is arbitrary and capricious. So is the Final Rule's requirement that abortion providers make abortion referrals.

a. Failure to consider alternatives to the program-integrity rules

HHS abandoned the 2019 Rule's program-integrity requirements. But it did so without adopting any alternative to keep Title X funds from being used to subsidize abortion. It thereby failed to consider an "important aspect of the problem" before it. *Michigan*, 576 U.S. at 752 (quoting *State Farm*, 463 U.S. at 43). To the extent it considered the problem, it failed to "show that there are good reasons for the new policy," *Encino*, 136 S. Ct. at 2126 (quotation omitted), and failed to consider alternative policies, *Regents*, 140 S. Ct. at 1912.

Again, Title X funds cannot be used to subsidize or promote abortion. *See* 42 U.S.C. §300a-6; Consolidated Appropriations Act, 2021, Div. H, Tit. V, §506. The Final Rule acknowledges this. 86 Fed. Reg. at 56150. Yet it abolishes the 2019 Rule's requirement that Title X grantees remain financially and physically separate from abortion providers. In place of the 2019 Rule's separation requirements, the Final Rule "reinstat[es] interpretations and policies under Section 1008 … that were … published in the Federal Register in 2000." 86 Fed. Reg. at 56150 (citing 65 Fed. Reg. 541281). As detailed above, those interpretations and policies permit

significant intermingling of Title X resources and abortion resources; Title X grantees cross the line from "permissible" intermingling to impermissible intermingling *only* when "the abortion element in a program of family planning services is 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.

Assuming for argument's sake that this alternative approach is consistent with Section 1008, *but see above* 22–27, HHS still had to justify its choice of this alternative over other, more-demanding separation requirements. *Regents*, 140 S. Ct. at 1912–13. In other words, HHS had to justify not only the decision to abandon the 2019 Rule's strict program-integrity requirements, but also its decision to adopt the Final Rule's incredibly relaxed program-integrity requirements as a means for enforcing Section 1008. It did not do so.

HHS's primary rationale is incoherent. It claimed to "disagree[]" with those who noted that "Title X grant funds … are 'fungible.'" 86 Fed. Reg. at 56150. Based on its non-fungibility finding, apparently, the agency saw no need for any requirements beyond the exceptionally lenient qualitative guidance adopted in 2000. The trouble is, HHS's position is objectively wrong—"[m]oney is fungible," and there can be no disagreement on that point. *Holder*, 561 U.S. at 31.

Perhaps sensing this, the Final Rule contains a backup argument. It explains that HHS reviewed reports involving the Title X program from 1975 to 2021, and found "no evidence of compliance issues regarding [Section 1008] by Title X grantees." 86 Fed. Reg. at 56145. It therefore concluded that the 2019 Rule's strict program-integrity requirements were unjustified. *Id.*

That reasoning is doubly flawed. *First*, to the extent it proves anything, it proves only that the 2019 Rule imposed more safeguards than necessary—it does not show that the "interpretations and policies" the Final Rule adopts in place of the 2019 Rule, *id.* at 56150, imposed enough safeguards. Yet HHS failed to consider alternative approaches less strict than the 2019 Rule but stricter than the Final Rule's approach. It stated that the 2019 Rule's program-integrity requirements imposed "greatly increased compliance costs for grantees and oversight costs for the federal government." 86 Fed. Reg. at 56145. And it concluded that, without proven violations, those increased costs were unjustified. But instead of even *considering* ways to alleviate the compliance burden—"dedicating funds to assist grantees with those costs, providing additional runway for grantees to comply, giving additional guidance to clarify restrictions," "granting targeted exceptions for those Title X programs in need of flexibilities," or even just relaxing the 2019 Rule's separation requirements, States' Letter, Ex. 2 at 9–10—HHS abandoned

meaningful separation requirements entirely. HHS thus failed to consider alternatives. "That omission alone renders [the agency's] decision arbitrary and capricious." *Regents*, 140 S. Ct. at 1913.

Second, the absence of "*evidence* of compliance issues" does not imply the absence of compliance issues. 86 Fed. Reg. at 56145 (emphasis added). Remember, only the short-lived 1988 Rule and the 2019 Rule strictly prohibited financial and physical integration. Between the repeal of the 1988 Rule and 2019, HHS permitted a tremendous degree of financial and physical integration between Title X providers and abortion clinics. *See above* 10–11; *see also* 86 Fed. Reg. at 56150 (incorporating guidance from 65 Fed. Reg. 41281). Given the degree of *permitted* integration, it is hard to see how HHS would have detected *impermissible* integration. 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 there were no such issues. The Final Rule does not meaningfully address this. True, it vaguely alludes to "a variety of mechanisms" used to enforce Section 1008, "such as grant reports, compliance monitoring visits, third-party audits, compliance guidance, and grantee education." 86 Fed. Reg. at 56150. But the fact that these "mechanisms" exist does not mean

they work. How does HHS know that they do or will? It never says, and apparently never considered the matter.

The problem is compounded by the fact that, in promulgating the 2019 Rule, HHS cited evidence of compliance issues that the Final Rule never accounts for. The 2019 Rule made the following observation: "Commenters' insistence that requiring physical and financial separation would increase the cost for doing business only confirm[ed] the need for such separation," since it showed that Title X grants were used to create efficiencies that subsidized abortion. 84 Fed. Reg. at 7766. The Final Rule altogether ignores this issue, further demonstrating its failure to grapple with the fact that, between the 1988 and 2019 Rules, it had few means to uncover improper subsidization of abortion.

In sum, when HHS replaced the 2019 Rule's program-integrity requirements with "interpretations and policies" from 2000, it ignored key aspects of the problem before it and failed to justify the new policy it adopted. It thus acted arbitrarily and capriciously. *Michigan*, 576 U.S. at 752; *Encino*, 136 S. Ct. at 2126; *Regents*, 140 S. Ct. at 1913; *see also Ohio v. U.S. EPA*, 798 F.2d 880, 882 (6th Cir. 1986).

b. Failure to consider reliance interests relevant to program-integrity requirements

The Final Rule completely neglects to consider reliance issues. The 2019 Rule, thanks in part to the program-integrity recruitments, 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 these grantees left, others began expanding their offerings to fill any gaps left by prior grantees. In Ohio, the State's Department of Health met this need, establishing a new or increased presence in seventeen counties. Clark Decl., Ex. 1, ¶12. Filling those gaps required investments. Yet the Final Rule never mentions this. Thus, HHS failed to consider whether its Final Rule upsets reliance interests that grantees formed in light of the 2019 Rule. By failing to "consider" the "reliance interests" that its previous position "engendered," HHS acted arbitrarily and capriciously. *Regents*, 140 S. Ct. at 1913 (quoting *Encino*, 136 S. Ct. at 2126).

c. Failure to consider the effect that the program-integrity and referral requirements would have on public support for Title X

HHS never considered whether eliminating the requirements and replacing them with the 2000-era guidance would erode public support for the Title X program. It similarly failed to consider how public support for the program would be affected by requiring Title X grantees to provide abortion referrals—a requirement that ensures *all* Title X programs will indirectly support abortion. Because public support is a critically important issue bearing on the program-integrity and referral requirements, HHS erred.

As explained at the outset, Title X reflects a compromise: those opposed to abortion agreed to fund family-planning services as long as they could be assured that their money would not support abortion. That decades-old compromise retains its worth today. Many Americans do not want their tax dollars used to fund abortion. That is why the federal government has long avoided funding abortion. *See Rust*, 500 U.S. at 201–02; *Harris v. McRae*, 448 U.S. 297, 315–17 (1980); *Maher v. Roe*, 432 U.S. 464, 474 (1977); Consolidated Appropriations Act, 2017, Pub. L. No. 115-31, §§613–14, 131 Stat. 135, 372 (2017). And that is why States across the country have enacted laws to keep tax dollars from supporting the practice. *See Planned Parenthood of Greater Ohio v. Hodges*, 917 F.3d 908, 910 (6th Cir. 2019) (*en banc*); *Planned Parenthood of Ind., Inc. v. Comm'r of the Ind. State Dep't of Health*, 699 F.3d 962, 969–70 (7th Cir. 2012); *Planned Parenthood Ariz. Inc. v. Betlach*, 727 F.3d 960, 964 (9th Cir. 2013); *Planned Parenthood of Kan. & Mid-Mo. v. Anderson*, 882 F.3d 1205, 1212–14 (10th Cir. 2018); *Planned Parenthood Ass'n of Utah v. Herbert*, 828 F.3d 1245, 1250 (10th Cir. 2016); *Planned Parenthood of Gulf Coast, Inc. v. Gee*, 862 F.3d 445, 450–52 (5th Cir. 2017).

As these laws show, programs that fund or support abortion, even indirectly, jeopardize the "compromise" that the "political process" has yielded—a compromise that protects the interests of the many people of good faith who hold dia-

metrically opposed positions regarding abortion. *Baltimore*, 973 F.3d at 297 (Wilkinson, J., dissenting). Failing to respect that compromise means jeopardizing public support for the program. And public support matters. When a program loses that support, it is likely to become less effective, either because fewer grantees will be willing to participate or because Congress will be less eager to provide the necessary funding. The agency failed to address the concern. It thus failed to consider yet another important aspect of the question before it.

d. Failure to justify change in position regarding referrals

The Final Rule requires Title X grantees to provide abortion referrals upon request. But HHS failed to "show that there are good reasons for the new policy." *Encino*, 136 S. Ct. at 2126 (quotation omitted). This requirement is thus arbitrary and capricious.

As HHS recognized 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 does not explain how its own conclusion from 2019 has been disproven. At most, HHS notes that grantees have experience making referrals under past rules. 86 Fed. Reg. at 56149–50. But as explained above regarding the program-integrity requirements, HHS has not shown that it had the tools in place to detect whether abortion-referring grantees were in fact engaging in

taxpayer-funded promotion of abortion. *See above* 37–38. By failing to justify its sudden departure from its determination that Title X providers generally treat abortion as a method of family planning when they make abortion referrals, the agency acted arbitrarily and capriciously. *See Encino*, 136 S. Ct. at 2126.

e. Failure to consider state laws regulating medical ethics

Finally, HHS failed to consider whether mandating referrals was consistent with medical ethics—another critically "important aspect of the problem" before it. *Nat'l Ass'n of Home Builders*, 551 U.S. at 658 (quoting *State Farm*, 463 U.S. at 43).

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. The States submitted a comment explaining that it would be irrational to rely on ethical analyses from those organizations, as it is "doubtful," States' Letter, Ex. 2 at 12, that those "major medical organizations" reflect the ethical views of the medical profession as a whole. One of the organizations in question, the American College of Obstetricians and Gynecologists, has even filed briefs defending the practice of eugenic abortion, in which doctors end the lives of unborn children based on their perceived genetic inferiority. *See* Brief for Am. Coll. of OBGYNS, *et al.*, as *Amici Curiae* in Support of Appellees, *Preterm-*

Cleveland, 994 F.3d 512 (No. 18-3329). As the States explained, an organization "willing to stand up for eugenics ought not be taken seriously in any discussion of ethics." States' Letter, Ex. 2 at 13. These organizations should not be presumed, without evidence, to reflect the ethical views of medical providers generally.

More important, "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—standards that confirm that sound medical practice does not require complicity in abortion. *See* La. Rev. Stat. §40:1061; Ky. Rev. Stat. §311.800(4); Mont. Code Ann. §50-20-111(2); Or. Rev. Stat. §435.485.

HHS was aware of this problem—the States' comment letter informed HHS that mandating referrals would *contravene* medical ethics, citing these provisions. *See* States' Letter, Ex. 2 at 12–13. Yet, HHS entirely failed to address the problem. 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). Especially relevant here, 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 (majority op.). (While the Fourth Circuit wrongly held that HHS gave insufficient consideration to medical ethics in promulgating the 2019 Rule, it correctly recognized that HHS must consider medical ethics. *Id.*) Consequently, the Final Rule is arbitrary and capricious.

2. The District Court erred in rejecting the States' showing that HHS was arbitrary and capricious in adopting the Final Rule.

The District Court erred in rejecting the States' arguments regarding the Final Rule's arbitrariness and capriciousness.

a. Failure to consider alternatives to the program-integrity rules

The District Court found that HHS "properly address[ed] fears that Title X funds would be used to subsidize abortion." Op., R.50, PageID#668. But aside from its own *ipse dixit*, it offered little to support that conclusion. The court first rejected any argument that HHS irrationally "disagree[d] that Title X grant[s] … are fungible." *Id.*, PageID#668 (quoting 86 Fed. Reg. at 56150). HHS, the court insisted, "clearly meant only that 'grant funds are spent for grant purposes.'" *Id.* (quoting 86 Fed. Reg. at 56150). This response betrays the District Court's failure to understand the problem of money's fungibility. Precisely *because* money is fungible, HHS must ensure that grant funds really are spent on permissible uses. By

denying that "Title X grant funds … are fungible," 86 Fed. Reg. 56150, HHS all but ensured it would not address that issue.

In any event, the incoherent fungibility discussion is the least of the Final Rule's problems regarding the program-integrity rules. Two others stand out. *First*, *even if* the Final Rule's program-integrity requirements comport with Section 1008, the agency still had to consider whether other obvious alternative approaches would perform even better. It failed to do so. *See above* 34–37. The District Court apparently concluded that the agency had no duty to consider such alternative approaches. Op., R.50, PageID#669–70. The Supreme Court has said otherwise. *Regents*, 140 S. Ct. at 1912–13.

Second, the agency concluded that, because it was effectively reinstituting the 2000 Rule, and because it found relatively few Section 1008 violations when that Rule was in place, the Final Rule would perform equally well. *See above* 36–38. But as the States explained above, the 2000 Rule's approach to program integrity was so permissive that it is unclear how the agency would have learned of any improper uses of Title X funds. *See* 37. The District Court refused to address these concerns; it said it did not want to "wade into the reliability of reports." Op., R.50, PageID#670. But courts cannot refuse to consider parties' arguments on the ground that they will require too much work to resolve. *See Alabama Dep't of Reve-*

nue v. CSX Transp., Inc., 575 U.S. 21, 31 (2015). More fundamentally, the States did not ask the court to consider the reliability of individual reports. Instead, they said *the agency* needed to justify inferring the absence of compliance issues from the lack *of evidence on* compliance issues. HHS failed to do so, and the District Court's opinion does not say otherwise.

b. Failure to consider reliance interests relevant to program-integrity requirements

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 policies need not be in place for any minimum time before they engender reliance interests. No doubt, "longstanding policies" are especially likely to engender such interests. *Regents*, 140 S. Ct. at 1913. But if reliance interests are relevant to the decision whether to abandon a pre-existing policy—and the Supreme Court has said they are, *see id.*; *accord Wages & White Lion Invs., L.L.C. v. FDA*, 16 F.4th 1130, 1139 (5th Cir. 2021); *MediNatura, Inc. v. FDA*, 998 F.3d 931, 940 (D.C. Cir. 2021)—then they constitute an important aspect of the problem before the agency whenever they arise. The vintage of the abandoned policy makes no difference. Consistent with this, in recent years, the Fifth and Ninth Circuits have both faulted agencies for failing to consider reliance interests before abandoning recently adopted policies.

Texas v. Biden, 20 F.4th 928, 989 (5th Cir. 2021); *Nat'l Urb. League v. Ross*, 977 F.3d 770, 778 (9th Cir. 2020).

Perhaps sensing these issues, the District Court offered a backup argument. HHS, it said, concluded that "any reliance interests" were "minimal" when it observed that "'no particular private organizations have a right to Title X funding.'" Op., R.50, PageID#673–74 (quoting 86 Fed. Reg. at 56150). But the District Court plucked that line out of context; it has nothing to do with reliance interests. And in any event, because parties can form reliance interests on programs that afford them benefits to which they are not legally entitled, *see, e.g.*, *Regents*, 140 S. Ct. at 1913, the assertion does not address the problem.

c. Failure to consider the effect that the program-integrity and referral requirements would have on public support for Title X

The District Court said HHS adequately considered public support when it noted that the reinstated compliance standards "had been in effect for nearly the entirety of the Title X program, had been widely accepted by grantees, had enabled the Title X program to operate successfully, and had not resulted in any litigation." Op., R.50, PageID#674 (quoting 86 Fed. Reg. at 56145). But that passage addresses the program's workability *from the perspective of grantees*—it has nothing to do with public perception, and the Final Rule does not say otherwise. The District Court further suggested that, because President Biden won the popular vote, and

because HHS adopted the Final Rule in response to one of his executive orders, the Final Rule will be sufficiently popular. This is a *non sequitur*. And in any event, this reasoning appears nowhere in the Final Rule, making it irrelevant: agency actions can "be upheld" only "on the same basis articulated … by the agency itself," not based on "counsel's" or a court's "*post hoc* rationalization[]." *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168–69 (1962).

d. Failure to justify change in position regarding referrals

The District Court made no serious effort to deny the fact that the Final Rule ignored the agency's prior determination 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. Instead, it simply quotes the Final Rule and declares the agency's decision reasonable. Op., R.50, PageID#675–76. This non-argument proves nothing.

e. Failure to consider state laws regulating medical ethics

The District Court was similarly weak in analyzing whether HHS failed to adequately consider medical ethics. It concluded that HHS adequately considered ethics when, in a section discussing the 2019 Rule, it observed that "[o]ne organization" deemed the 2019 Rule's referral ban inconsistent "with medical ethics and evidence-based standards of care." 86 Fed. Reg. at 56144. It also pointed to the

proposed rule, which observed that Title X should "not prohibit willing providers and grantees from providing information in accordance with the ethical codes of major medical organizations." 86 Fed. Reg. at 19817. But the District Court did not, and could not, refute the States' primary criticism: HHS never considered *state laws* showing that mandatory referral policies are inconsistent with, or at least not required by, any sound view of medical ethics. While HHS did not have to agree with the States' complaint, it did need to address it.

*

In sum, the Final Rule is arbitrary and capricious *even if* it is not contrary to law. The States, therefore, will likely prevail on the merits.

II. The plaintiff States satisfy the remaining preliminary-injunction factors.

The States also satisfy the remaining three preliminary-injunction factors, so they are entitled to a preliminary injunction.

A. The States will be irreparably injured without an injunction.

Without a preliminary injunction, the States will sustain three, separate irreparable injuries. This Court previously concluded that the States failed to prove they would be irreparably harmed without an injunction pending appeal. Order, Doc. 45-2, at 5. But even if the States failed to show they needed an injunction "during the few months it will take to resolve the appeal," Order at 11 (Larsen, J.,

concurring in the judgment), they have shown that they will sustain irreparable harm without an injunction during the many months or years it will take to resolve this case. This Court expressly left open the question whether the States would be able to "successfully obtain an injunction at some later point." Order at 9. And at this point, or at some point soon, they can. In any event, the States disagree with, and ask this Court to reconsider, aspects of its earlier analysis.

1. The States are being made to compete with abortion providers for grants. 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*, 139 S. Ct. at 2565; *Planned Parenthood of Greater Washington & N. Idaho v. U.S. Dep't of Health & Hum. Servs.*, 946 F.3d 1100, 1108 (9th Cir. 2020). The States, after all, will never be able to recover grant money awarded to and expended by the other grantees with whom they are made to compete by the Final Rule. The non-recoverable nature of the injury makes it irreparable. *See, e.g.*, *Tex. Children's Hosp. v. Burwell*, 76 F. Supp. 3d 224, 242–44 & n.7 (D.D.C. 2014); *Performance Unlimited, Inc. v. Questar Pub., Inc.*, 52 F.3d 1373, 1382–83 (6th Cir. 1995).

In rejecting this argument, the Court acknowledged caselaw holding that plaintiffs have "Article III standing to protest a rule change that would have had

the practical effect of increasing the pool of federal grant applicants." Order at 5 (citing *Sherley*, 610 F.3d at 74). But it distinguished that case on the ground that it addressed whether "increased competition can suffice as an injury-in-fact for standing purposes," not whether any such injury "might be irreparable." Order at 6. That distinction fails. *Sherley* establishes that increased competition is an injury, and the fact that the States will have no redress for that injury (given the federal government's sovereign immunity) shows the injury is irreparable, *Kentucky*, 759 F.3d at 599–600. This "increased competition" is hardly "speculative," *contra* Order at 6: the primary goal of the Final Rule is to encourage more providers—in particular, those who left because of the 2019 Rule—to reenter the program. *See* 86 Fed. Reg. at 56171. HHS has not, and could not, deny that the rule will have this effect.

Moreover, the States will "incur costs associated with applying in the face of greater competition." Order at 6; *accord Sherley*, 610 F.3d at 74. The Court noted that the State made no such argument at the injunction-pending-appeal stage, and that the argument would have been weak since "the applications for the 2022-2023 funding year"—the only funding year likely to matter during the months required to resolve this appeal—had all been filed. *Id.* But the preliminary-injunction analysis is different: because the entire case (as opposed to this discrete) appeal will not

be resolved in the same short timeframe, the States are likely to sustain these costs absent a preliminary injunction.

If nothing else, the Court should defer issuing any opinion until HHS awards grants for the 2022–23 year. The grant awards may show that the injuries this Court deemed too speculative have come to pass. Grant awards will be public records, so the Court will be able to take judicial notice of them (or the parties could supplement the record with such information). And, if the States' predictions bear out, irreparable harm will have been proven.

2. Second, at least one of the plaintiff States—Ohio—was able to expand its services *because* abortion providers dropped out of the Title X program. *See* Clark Decl., Ex. 1, ¶12. Because those providers will now reenter the program, the money will be divided among more grantees. This means that Ohio will receive less money. The loss of money to which a State would otherwise be entitled is an injury. *Dep't of Commerce*, 139 S. Ct. at 2565. And the injury is irreparable here, since the federal government's sovereign immunity will keep the States from suing later to obtain the money lost. *See Kentucky*, 759 F.3d at 599–600. In any event, the decrease in funds will cause other irreparable injuries, too. The States that expanded services will, if they receive fewer federal funds, have to either to make up for the lost funding themselves (spending money they cannot later recover) or risk sustain-

ing reputational injuries from reducing services on which people have come to rely. *See, e.g.*, *Tex. Children's Hosp.*, 76 F. Supp. 3d at 242–44.

The Court deemed this injury to be overly speculative. Order at 8. While the States disagree, and ask the Court to reconsider, they offer no new arguments or distinctions on this front.

3. Finally, the Final Rule will force the States to support abortion by making referrals upon request. Many States, including plaintiff States, have laws designed to withhold the State's imprimatur from the practice of abortion. *See, e.g.*, Ala. Const. §36.06; Ariz. Rev. Stat. Ann. §35-196.02; Colo. Rev. Stat. Ann. §25.5-3-106; Fla. Stat. Ann. §627.66996(1); La. Rev. Stat. §40:1061.6; Iowa Code Ann. §217.41B; Miss. Code. Ann. §41-41-91; Mich. Comp. Laws Ann. §400.109a; Mo. Ann. Stat. §188.205; Neb. Rev. Stat. Ann. §71-7606(3); N.C. Gen. Stat. Ann. §143C-6-5.5; Ohio Rev. Code §5101.56; Tex. Health & Safety Code Ann. §32.005; Wis. Stat. Ann. §20.927. By forcing state-supported clinics to make abortion referrals, the Final Rule will undermine that policy. And the damage done cannot be repaired—the States cannot sue HHS for monetary damages or otherwise undo the fact that their clinics will have made abortion referrals.

The Court doubted this constituted an irreparable injury, noting that "federal statutes protecting conscience and/or civil rights" may exempt some

"[p]roviders" from complying with the referral requirement. Order at 8–9 (quoting 86 Fed. Reg. at 56178 n.2). But *the States* are not protected under any of those statutes—while individual doctors working for the States might be, no statute would free a government grantee from complying with the referral requirement. And if the States are obligated to comply, they will be made to contravene state policy forbidding the promotion of abortion.

The Court also concluded that the asserted injury is not sufficiently certain or immediate. Again, the States respectfully disagree: the referral rules are *already* in effect, and so already inflicting the injuries associated with forcing the States to support or promote abortion.

The Court also mistakenly reasoned that, because States (like Ohio) that participated in the Title X program under 2019 Rule "provided a degree of nondirective counseling about abortion," they will not be harmed by having to make referrals. Order at 9. That is incorrect. The "nondirective counseling" permitted by the 2019 Rule included the neutral discussion of options, and expressly *forbade* doctors from referring for, or even encouraging, abortion. *California*, 950 F.3d at 1074, 1081 (citing 42 C.F.R. §59.14(e)(5)). The States' willingness to engage in nondirective counseling hardly suggests they are unharmed by a rule requiring them to encourage or promote abortion.

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

The final two factors both support awarding injunctive relief.

First, "issuance of the injunction" will not "cause substantial harm to others." *City of Pontiac*, 751 F.3d at 430. To the contrary, if there are serious doubts about the legality of the Final Rule, it is better to maintain the *status quo*: neither patients nor anyone else will benefit from the confusion that would result if abortion clinics were to enter the Title X program briefly only to leave again once the Final Rule is permanently set aside. That is especially so because there is no indication that anyone is being *substantially* harmed by the current state of affairs. Planned Parenthood, the largest grantee to exit the program, served more patients and provided more services after exiting the program than it did while a part of the program. 86 Fed. Reg. at 56174. So there is simply no evidence that the American public or abortion providers will be substantially harmed by a preservation of the *status quo*. True, HHS insists that the Final Rule will have beneficial effects. But that is irrelevant, as "our system does not permit agencies to act unlawfully even in pursuit of desirable ends." *Alabama Ass'n of Realtors*, 141 S. Ct. at 2490.

Second, the public interest favors issuing an injunction. This follows from the fact that "the public interest lies in a correct application" of the law and the will of the people being effected "in accordance with … law." *Coal. to Def. Affirm-*

ative Action, 473 F.3d at 252 (quotation omitted). The Final Rule violates the Administrative Procedure Act. So the public interest favors an injunction.

III. Alternatively, the Court should remand to the District Court with instructions to enter judgment for the States on the merits.

If the Court concludes that the States prevail as a matter of law on the merits, but also concludes that they failed to prove one of the remaining preliminary-injunction factors, it should exercise its discretion to reach the merits and remand with instructions to enter judgment in the States' favor.

"Review of a preliminary injunction 'is not confined to the act of granting the injunction." *Munaf*, 553 U.S. at 691 (quoting *City & Cnty. of Denver v. New York Trust Co.*, 229 U.S. 123, 136 (1913)) (alterations accepted). Instead, courts may proceed to the merits of the underlying claim. *Id.*; *Winter*, 555 U.S. at 31. And that relief is especially appropriate when one party is "entitled to judgment as a matter of law." *Munaf*, 553 U.S. at 691. "Any other rule frequently would require wasted litigation without any offsetting advantage in economy of appellate effort or uninterrupted trial court proceedings." Wright & Miller, 16 Federal Practice and Procedure §3921.1.

Courts most often reach the merits when a district court's award of injunctive relief fails on the ground that a defendant is sure to prevail as a matter of law. *See Munaf*, 553 U.S. at 691. But courts may also proceed to the merits when a low-

er court denies or stays a preliminary injunction. *See, e.g.*, *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 584–85 (1952); *Graham v. Teledyne-Cont'l Motors, Inc.*, 805 F.2d 1386, 1388 (9th Cir. 1986); *Kansas ex rel. Stephan v. Adams*, 608 F.2d 861, 867 & n.5 (10th Cir. 1979); *Jackson Cnty., Mo. v. Jones*, 571 F.2d 1004, 1007 (8th Cir. 1978). And, where appropriate, they may finally resolve a claim or the case in the plaintiff's favor. *See, e.g.*, *Youngstown*, 343 U.S. at 585; *Miller v. Rich*, 845 F.2d 190, 191 (9th Cir. 1988).

The Court should do so here. The States' merits argument are purely legal issues—no factfinding is needed. And, as shown above, the States prevail "as a matter of law." *Munaf*, 553 U.S. at 691. If the Court agrees, there is no point in remanding to the District Court so that it can again reject the States' claims on the merits, at which point the States will again appeal to this Court. Under the Administrative Procedure Act, courts "shall … hold unlawful and set aside agency action … found to be … arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. §706 & §706(2)–(2)(A). In using the word "shall," the Administrative Procedure Act speaks in terms of "obligation rather than discretion." *Bennett v. Spear*, 520 U.S. 154, 172 (1997). Thus, if the States prevail as a matter of law, the District Court has no choice but to award relief: it *must* set aside the Final Rule.

Even if the Court wishes to leave the matter of relief to the District Court, it could still hold that the States prevail on the merits and remand for proceedings consistent with that ruling. *See Miller*, 845 F.2d at 191. Because the States prevail as a matter of law, there is no reason to leave the question of their entitlement to relief (as opposed to the question of what relief to issue) for the District Court to resolve in the first instance.

CONCLUSION

The Court should preliminarily enjoin the Final Rule.

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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 brief complies with the type-volume requirements and contains 12,929 words. *See* Fed. R. App. P. 32(a)(7).

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 February 22, 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.

/s/ Benjamin M. Flowers
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DESIGNATION OF DISTRICT COURT RECORD

Defendants-Appellees, pursuant to Sixth Circuit Rule 30(g), designate the following filings from the District Court's electronic records:

***State of Ohio, et al. v. Becerra, et al.*, 1:21-cv-675-TSB**

Date Filed	R. No.; PageID#	Document Description
10/25/2021	R.1; 1–26	Complaint
10/25/2021	R.2; 120–78	Motion for a Preliminary Injunction
11/22/2021	R.27; 308–63	Memorandum in Opposition to Motion for a Preliminary Injunction
12/03/2021	R.46; 609–40	Reply in Support of Motion for a Preliminary Injunction
12/29/2021	R.50; 656–80	Order Denying Plaintiffs' Motion for a Preliminary Injunction
12/30/2021	R.51; 682–86	Notice of Appeal