UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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Filed: February 08, 2022

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Re: Case No. 21-4235*, OH, et al v. Xavier Becerra, et al*
Originating Case No. 1:21-cv-00675

Dear Counsel,

The Court issued the enclosed Order today in this case.

Sincerely yours,

s/Robin L Baker
Case Manager
Direct Dial No. 513-564-7014

cc: Ms. Olivia Flora Amlung
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Mr. William Tong
Mr. Vincent M. Wagner
Mr. Lawrence G. Wasden
Mr. Phil Weiser
Mr. Zachary Paul West

Mr. Kurtis Kenneth Wiard
Mr. Thomas Alexander Wilson
Ms. Abby Christine Wright

Enclosure

No. 21-4235

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

STATE OF OHIO, et al.,	)	
	)	
Plaintiffs-Appellants,	)	
	)	
v.	)	O R D E R
	)	
XAVIER BECERRA, Secretary, Department of Health and Human Services, et al.,	)	
	)	
	)	
Defendants-Appellees.	)	

Before: BOGGS, BUSH, and LARSEN, Circuit Judges.

This case involves a new rule the Department of Health and Human Services ("HHS") adopted to govern its grants of money under Title X of the Public Health Service Act, 42 U.S.C. §§ 300 et seq., a family planning initiative in place under a variety of rules since 1970. A group of states challenged that rule and moved for a preliminary injunction preventing HHS from implementing it. The district court denied that motion, and the states now ask this court to enjoin the rule's implementation pending an appeal from the district court's denial.

The rules for grants under this program, and the relation of grantees to information and services relating to abortion, have changed a number of times over the last fifty years. *See Ohio v. Becerra*, No. 1:21-cv-675, 2021 WL 6134149, at *1–4 (S.D. Ohio Dec. 29, 2021). Directly at issue here is a 2021 rule that eases some restrictions on Title X grantees; restrictions that in the past apparently caused some potential grant applicants to opt not to participate. The new rule

interprets Section 1008 of the statute, which prohibits Title X funds from being "used in programs where abortion is a method of family planning." 42 U.S.C. § 300a-6. In 2019, HHS issued a final rule revoking regulations issued in 2000 and readopting regulations issued in 1988, with modifications (the "2019 Rule"). *See* Compliance with Statutory Program Integrity Requirements, 84 Fed. Reg. 7,714 (Mar. 4, 2019). In 2021, HHS issued a final rule revoking the 2019 Rule and readopting the 2000 regulations, again with modifications (the "2021 Rule"). *See* Ensuring Access to Equitable, Affordable, Client-Centered, Quality Family Planning Services, 86 Fed. Reg. 56,144 (Oct. 7, 2021). In summary, the 2019 Rule replaced the 2000 regulations, while the 2021 Rule primarily reinstated the 2000 regulations.

Two features of the 2021 Rule are at issue here. First, the 2021 Rule eliminates the 2019 Rule's requirement that grantees create strict physical and financial separation between their Title X programs and any abortion services they may provide. *See id.* at 56,144; *Ohio v. Becerra*, 2021 WL 6134149, at *4. Second, the 2021 Rule now requires that grantees provide referrals to abortion services when requested by the patient. *See* 86 Fed. Reg. at 56,144; *Ohio v. Becerra*, 2021 WL 6134149, at *4.

The 2021 Rule applies to a funding cycle that is now underway. The parties have provided limited information in their briefing, while additional information is publicly available from government sources. HHS announced the availability of $256 million in new grants for Title X programs on October 27, 2021. *See HHS Announces $256 Million to Expand Access to Equitable and Affordable Title X Family Planning Services*, U.S. Dep't of Health & Hum. Servs. (Oct. 27, 2021), https://www.hhs.gov/about/news/2021/10/27/hhs-announces-256-million-expand-access-equitable-affordable-title-x-family-planning-services.html. The deadline for that application appears to have been January 11, 2022. *See Grant Opportunity Synopsis, Funding Opportunity*

No. PA-FPH-22-001: Title X Family Planning Services Grants, https://www.grants.gov/view-opportunity.html?oppId=334698 (last visited Feb. 2, 2022).

The parties have not indicated a specific date for the announcement of grantees and awards, but the anticipated start date of the funding is April 1, 2022. *See* Office of the Assistant Secretary for Health, Office of Population Affairs, Notice of Funding Opportunity: Title X Family Planning Services Grants 12 (closed Jan. 11, 2022) ("Notice of Funding Opportunity").[1] The Notice of Funding Opportunity for the Title X grants states that HHS anticipates that it will make Title X grants to approximately ninety grantees. *Id.* Apart from an award ceiling of $22 million and a floor of $200,000, however, HHS does not set further boundaries on its grants. *Id.* In particular, the agency underscores that "[t]he funding is not allocated on a state-by-state basis" and that historical state-level funding data will not be used to determine grant amounts in the current funding round. *Id.* at 21, 63.

On October 25, 2021, the State of Ohio and eleven other States (the "States") filed this action under the Administrative Procedure Act ("APA"), 5 U.S.C. § 706(2), asserting that the 2021 Rule is arbitrary, capricious, and contrary to law. The district court denied the States' motion for a preliminary injunction preventing implementation of the 2021 Rule. *Ohio v. Becerra*, 2021 WL 6134149, at *1. The States now move for an injunction preventing implementation of the 2021 Rule pending appeal of that denial.[2] Because the States have not demonstrated that they will be irreparably harmed without the injunction, we deny their motion.

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[1] The grant's identification number is PA-FPH-22-001, and the Notice of Funding Opportunity may be accessed at: https://www.grantsolutions.gov/gs/preaward/previewPublicAnnouncement.do?id=95156 (last visited Feb. 2, 2022).

[2] Several other motions are before this court. Nine additional states support the States' motion as amici curiae and move for leave to exceed the word limit in their brief. The American Association of Pro-Life Obstetricians and Gynecologists, the Christian Medical and Dental Associations, and the Catholic Medical Association move for leave to file an amicus brief supporting the States' motion and to exceed the word limit in their brief. Twenty-three other states and the District of Columbia, as well as Planned Parenthood Federation of America, Inc., oppose the States'

In determining whether to grant an injunction pending appeal, this court conducts the same general analysis it would in considering an appeal from a preliminary injunction. *Overstreet v. Lexington-Fayette Urb. Cnty. Gov't*, 305 F.3d 566, 572 (6th Cir. 2002). We balance four factors in determining whether to grant such relief: "(1) whether the movant has shown a strong likelihood of success on the merits; (2) whether the movant will suffer irreparable harm if the injunction is not issued; (3) whether the issuance of the injunction would cause substantial harm to others; and (4) whether the public interest would be served by issuing the injunction." *Id.* at 573. The movant bears the burden of "proving that the circumstances clearly demand" the injunction. *Id.* Because a motion for an injunction pending appeal does not require us to review a district court decision or order, our review is de novo. *A. Philip Randolph Inst. v. Husted*, 907 F.3d 913, 917 (6th Cir. 2018) (per curiam) (order).

Although this inquiry involves balancing multiple factors, "the *existence* of an irreparable injury is mandatory." *D.T. v. Sumner Cnty. Schs.*, 942 F.3d 324, 327 (6th Cir. 2019). In other words, "'even the strongest showing' on the other factors cannot justify a preliminary injunction if there is no 'imminent and irreparable injury.'" *Memphis A. Philip Randolph Inst. v. Hargett*, 978 F.3d 378, 391 (6th Cir. 2020) (quoting *D.T.*, 942 F.3d at 326–27). That injury "'must be both certain and immediate,' not 'speculative or theoretical.'" *D.T.*, 942 F.3d at 927 (quoting *Mich. Coal. of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 154 (6th Cir. 1991)). Additionally, "[t]he possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of

motion as amici curiae. The National Family Planning and Reproductive Health Association moves for leave to file an amicus brief opposing the States' motion and to exceed the word limit in its brief. Those motions are granted.

irreparable harm." *Griepentrog*, 945 F.2d at 154 (quoting *Sampson v. Murray*, 415 U.S. 61, 90 (1974)).

The States say that they will be irreparably harmed based on the possibility that grants will go to other applicants rather than to them, and because of restrictions that they allege the 2021 Rule places on the operations of their own Title X programs under any grants that they may receive. Specifically, they maintain they will be harmed in three ways if the 2021 Rule goes into effect. First, the States argue that the 2021 Rule will subject them to increased competition for Title X funds from other prospective grantees who were unable or unwilling to comply with the stricter requirements of the 2019 Rule. Second, they suggest they will suffer reputational injuries if, due to receiving fewer Title X funds, they cannot provide the same level of healthcare services that their citizens have come to expect. Third, they contend that they will be forced to place an imprimatur on abortion by making referrals to abortion providers. None of these arguments demonstrates irreparable harm.

I

In support of their increased-competition theory, the States point to an out-of-circuit case holding that entities had Article III standing to protest a rule change that would have had the practical effect of increasing the pool of federal grant applicants. *See Sherley v. Sebelius*, 610 F.3d 69, 74 (D.C. Cir. 2010). From the States' perspective, this means that whenever an allegedly illegal rule change could mean increased competition for limited federal funds, a prospective applicant is irreparably harmed by the rule going into effect. Indeed, the States suggest that even if they receive the same level of funding as before, they would still be irreparably harmed by facing "'unfair' competition." Mot. for Inj. Pending Appeal at 22 (quoting *Basicomputer Corp. v. Scott*, 973 F.2d 507, 511–12 (6th Cir. 1992)). But that principle is too broad: While *Sherley* held that

increased competition can suffice as an injury-in-fact for standing purposes, the court did not comment on when that injury might be irreparable.

However they characterize the harm created by increased competition, the States' theory is premised on the prediction that they will receive smaller grants (or a smaller share of Title X funds) in the upcoming funding round. That prospect is too speculative to create an irreparable harm. The States do not, for example, argue that they will incur costs associated with applying in the face of greater competition: All the applications for the 2022-2023 funding year have already been filed. And even assuming that more service providers have applied for Title X grants because of the 2021 Rule, we cannot determine at this point whether HHS will provide the States with less money than they received following the 2019 Rule. No grant money has been allocated, nor has HHS announced how the money is likely to be allocated in the future. Finally, even if, in the abstract, unfair competition could qualify as an injury outside of the context of *Scott*—the breach of a non-competition covenant—the States have not demonstrated how that injury is certain, immediate, or irreparable in this case. *See Scott*, 973 F.2d at 512.

In support of the States' increased-competition theory, Ohio offers a declaration indicating how it would be affected by increased competition.[3] The declarant, an official at the Ohio Department of Health, writes that she understands HHS to set a state-by-state ceiling for Title X funds. Before the 2019 Rule went into effect, the declarant adds, both the Ohio Department of Health and Planned Parenthood of Greater Ohio received grants. After the 2019 Rule, Planned Parenthood of Greater Ohio stopped participating in Title X, and the Ohio Department of Health received all of the funds that were allocated to grantees in Ohio—amounting to $8.8 million in

[3] No other State provides a declaration with facts showing how they would be harmed. Ohio's arguments, therefore, may not necessarily apply to the other States.

each of 2020-2021 and 2021-2022. The declarant concludes that "should Planned Parenthood of Greater Ohio once again compete for a Title X grant award in the State of Ohio, it is likely that the Ohio Department of Health will receive fewer dollars for the 2022-2023 grant year than it would have as the sole provider of Title X services." *Ohio v. Becerra*, No. 1:21-cv-675, Doc. 2-1, PageID 184.

However, HHS need not make a zero-sum choice between Planned Parenthood and Ohio. Indeed, in the current round of Title X grant funding, HHS has specified that its grants "are discretionary grants NOT formula or block grants," and that "[t]he funding is not allocated on a state-by-state basis." Notice of Funding Opportunity 21; *see also id.* at 63. It is not certain or immediate that the funds awarded to Title X grantees will be allocated at the same statewide levels as obtained in previous years. Indeed, HHS disclaims that it will use historical funding levels as the basis for determining current funding levels. *Id.* at 21. It is similarly speculative that the Ohio Department of Health will receive less Title X funding than it did in previous years—even if Planned Parenthood of Greater Ohio or other applicants who did not participate under the 2019 Rule also receive money—or that a smaller Title X grant will force Ohio to limit the services it offers to patients. In short, the nature of the alleged competition is too uncertain at this stage to warrant an injunction.

Moreover, the States provide no indication that an injunction must be imposed *now*, as opposed to once grant allocations have been determined or announced. True, economic injuries caused by federal agency action are generally unrecoverable because the APA does not waive sovereign immunity for damages claims. *See District of Columbia v. U.S. Dep't of Agric.*, 444 F. Supp. 3d 1, 34 (D.D.C. 2020); *see also* 5 U.S.C. § 702; *Kentucky v. U.S. ex rel. Hagel*, 759 F.3d 588, 599–600 (6th Cir. 2014) (considering economic loss from lost government contract to be

irreparable). But any economic injury in this case would only occur upon disbursement of funds that Ohio considers inadequate, that is, after HHS determines its Title X funding allocations for the 2022-2023 funding year. Ohio does not suggest that it would be unable to seek relief at that point.

II

The States' second argument is that "States (like Ohio) that expanded their services based on the availability of additional Title X grants will face reputational injuries if they are no longer able to provide the same level of service." Mot. for Inj. Pending Appeal at 22. This theory also rests on the uncertain prediction that an increase in competition for Title X funds will prompt a corresponding decrease in funds for state health agencies that participate in Title X. It also implies—without providing supporting facts—that a decrease in Title X funds will necessarily diminish the quality of a state agency's services, and that patients will observe these changes and form a negative impression of those services. Additionally, as previously mentioned, this theory overlooks the availability of other contingencies that could prevent this harm from occurring after HHS finalizes its funding allocations. For instance, a state-run grantee that receives less funding might face decreased demand for Title X services, if some demand is met by other grantees who receive Title X funds; in this circumstance, the reputational harm might not occur. Therefore, the States' reputational-injury argument is speculative and cannot demonstrate irreparable harm at this time.

III

Finally, the States contend that under the 2021 Rule, they will be "forced to make referrals [for abortion services]" and will therefore be required "to put their imprimatur on abortion." Mot. for Inj. Pending Appeal at 22. However, the 2021 Rule recognizes that "[p]roviders may separately

be covered by federal statutes protecting conscience and/or civil rights" despite the referral requirement. 86 Fed. Reg. at 56,178 n.2 (codified at 42 C.F.R. § 59.5(a)(5) n.2); *see also id.* at 56,153 (stating, in response to comments regarding the 2021 Rule and conscience statutes, that "objecting individuals *and grantees* will not be required to counsel or refer for abortions in the Title X program in accordance with applicable federal law") (emphasis added). The States imply that this exemption is toothless and will not prevent their harm from occurring. We need not reach a firm conclusion about the interaction between federal conscience statutes and the 2021 Rule to observe that, at this point, the alleged injury arising from a state agency's theoretical approach to abortion referrals is neither "certain" nor "immediate." *D.T.*, 942 F.3d at 927 (citation omitted). Still less is it irreparable: As of now, all state programs that apparently desire Title X funds for this year, presumably including the Ohio Department of Health, have already applied. *See* Notice of Funding Opportunity 1 (showing grant application deadline of January 11, 2022). And according to the declaration that Ohio supplied before the district court, under the 2019 Rule the Ohio Department of Health already provided a degree of nondirective counseling about abortion, upon request. *See Ohio v. Becerra*, No. 1:21-cv-675, Doc. 2-1, PageID 182 ("Following the March 2019 rule, the [Ohio Department of Health] Reproductive Health & Wellness Program provides information on pregnancy termination only through a physician or advanced practice provider, when such information is requested."). To the extent that Ohio may seek to avoid a particular approach to patients seeking abortion information, litigation might ensue at that later date. So this argument, too, does not establish irreparable harm.

To be clear, we express no opinion on the States' likelihood of success on the merits for their claims. Nor do we comment on whether the States could successfully obtain an injunction at some later point. Rather, we hold that because the States fail at this time to show irreparable harm

from the 2021 Rule, and "[t]hat factor is indispensable," they fail to carry their burden for an injunction pending appeal. *D.T.*, 942 F.3d at 927. Accordingly, the States' motion is **DENIED**. Upon consideration, the motions for leave to file amicus briefs and to exceed the word limit are **GRANTED**.

LARSEN, Circuit Judge, concurring in the judgment.

The States have sought an injunction pending appeal, meaning that they ask us to upset the status quo pending the resolution of what is already an expedited appeal. *See Nken v. Holder*, 556 U.S. 418, 428–29 (2009). To invoke such a remedy, the States must meet the standards for preliminary injunctive relief. *See Roberts v. Neace*, 958 F.3d 409, 412–13 (6th Cir. 2020) (per curiam). But they must also show that they need this court's intervention *now*, lest they be irreparably harmed before their appeal can be heard.

The States' theory is that, without an immediate injunction, entities who were "unable or unwilling to comply with the 2019 Rule" will take a share of the Title X grant funds that would otherwise go to the States. Any loss of funding would be irreparable because the United States has not waived sovereign immunity. *See Kentucky v. United States ex rel. Hagel*, 759 F.3d 588, 599 (6th Cir. 2014). So the States ask us to enjoin enforcement of the 2021 Rule now, before the grants are made or the funds disbursed. There is a wrinkle, however.

Any real-world relief for the States would depend upon the actions of grant-competitors who are not before this court and whose response to a mere temporary injunction is uncertain. The States assume that, if this court were to enjoin enforcement of the 2021 rule pending appeal, grant-competitors opposed to the 2019 rule would instantly withdraw their grant applications, thus freeing up funds for the States before HHS makes the grants. If that happens, the States' anticipated financial harm would be remedied. But we do not know how the other grant-

competitors would respond to a short-term injunction from this court pending appeal. Would they immediately withdraw their applications, despite knowing that our injunction was only temporary, pending the outcome of the appeal? Or would they remain in the grant competition, perhaps on the theory that, if awarded, they would prefer temporary compliance to losing their chance at funding altogether? We do not know. The other grant competitors are not before the court, and we are mostly in the dark about who they may be or what options they may have. We are told only that one presumed competitor, Planned Parenthood of Greater Ohio, stayed in the program during the 2019-2020 grant year for five months before exiting. *See* Declaration of Michelle Clark, R. 2-1, PageID 181–82. So even if we were to enjoin enforcement of the 2021 Rule during the few months it will take to resolve the appeal, it is not clear that our injunction would cause the decrease in grant competition that the States desire. In other words, the States have not shown that granting them temporary relief will cure their alleged harm.[*]

The States bear the heavy burden of showing that an injunction now is likely to prevent irreparable harm that would befall them before the appeal can be resolved. Having failed to meet that burden, I agree with my colleagues that we must deny the States' motion.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

[*] As to the question of harm from the requirement to refer, I agree with the majority's conclusion that that challenge is premature and does not require this court's intervention pending appeal.