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

BRIEF FOR APPELLEES

BRIAN M. BOYNTON
Principal Deputy Assistant Attorney General

ABBY C. WRIGHT
KYLE T. EDWARDS
Attorneys, Appellate Staff
Civil Division, Room 7527
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530
(202) 514-4214

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases: **Page(s)**

Statutes:

Regulations:

Other Authorities:

STATEMENT REGARDING ORAL ARGUMENT

The government believes that the outcome of this appeal is controlled by the reasoning of the Court's order denying an injunction pending appeal. The government agrees with appellants, however, that the case presents important questions of federal law and therefore requests oral argument.

STATEMENT OF JURISDICTION

The district court has jurisdiction under 28 U.S.C. § 1331 and entered an order denying plaintiffs' motion for a preliminary injunction on December 29, 2021. Plaintiffs filed a notice of appeal on December 30. This Court has jurisdiction under 28 U.S.C. § 1292(a).

STATEMENT OF THE ISSUE

Title X of the Public Health Service Act authorizes the Department of Health and Human Services (HHS) to make grants to assist in the provision of family planning and sexual health services but prohibits funds from being used in a program where abortion is a method of family planning. For decades, Title X has operated under rules and policies ensuring that Title X projects do not use federal funds to provide or promote abortions and requiring that factual and neutral information be provided to pregnant patients, including referral for abortion if requested.

In 2019, HHS promulgated a rule imposing severe restrictions on Title X projects that had never before been implemented on a nationwide basis. In response to the significant reduction in services precipitated by the rule, HHS revisited the 2019 policy, conducted notice-and-comment rulemaking, and ultimately reinstated its longstanding Title X policies in a 2021 rule.

Plaintiffs are states that seek to enjoin the rule's implementation based on speculation about decreased grant funding and a claim that the rule forces them to endorse abortion as a method of family planning. The question presented is whether

the district court abused its discretion in denying plaintiffs' motion for a preliminary injunction.

STATEMENT OF THE CASE

A. Title X

In 1970, Congress enacted Title X of the Public Health Service Act, Family Planning Services and Population Research Act of 1970, Pub. L. No. 91-572, 84 Stat. 1504, which authorizes HHS to make grants "to assist in the establishment and operation of voluntary family planning projects which shall offer a broad range of acceptable and effective family planning methods and services (including natural family planning methods, infertility services, and services for adolescents)." 42 U.S.C. § 300(a). Such grants "shall be made in accordance with such regulations as the Secretary may promulgate." *Id.* § 300a-4(a). The Act provides that programs receiving Title X funding must agree to give "priority … to persons from low-income families." *Id.* § 300a-4(c)(1). And Section 1008 of the Act provides that "[n]one of the funds appropriated … shall be used in programs where abortion is a method of family planning." *Id.* § 300a-6.

B. Regulatory Background

1. To ensure compliance with Section 1008, the Secretary's initial regulations required assurances that the Title X "project will not provide abortions as a method of family planning." 36 Fed. Reg. 18,465, 18,466 (Sept. 15, 1971). HHS construed Section 1008 "as prohibiting Title X projects from in any way promoting or

encouraging abortion as a method of family planning," and "as requiring that the Title X program be 'separate and distinct' from any abortion activities of a grantee." 53 Fed. Reg. 2922, 2923 (Feb. 2, 1988) (describing prior agency opinions). HHS thus allowed—and then in 1981, required—Title X projects to offer "nondirective 'options couns[e]ling' on pregnancy termination (abortion), prenatal care, and adoption and foster care," "followed by referral for these services if [the patient] so requests." *Id.* HHS also permitted funding recipients to maintain Title X services and abortion-related services at "a single site," 52 Fed. Reg. 33,210, 33,210 (Sept. 1, 1987), though Title X projects were "required to maintain a separation (that is more than a mere exercise in bookkeeping) of their project activities from any activities in which they engage that promote or encourage abortion as a method of family planning," 58 Fed. Reg. 7462, 7462 (Feb. 5, 1993) (describing prior policies).

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

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

In 2000, HHS largely reinstated the pre-1988 compliance standards that had "been used by the program for virtually its entire history." *See* 65 Fed. Reg. 41,270, 41,271 (the 2000 Rule). The 2000 Rule thus removed the complete separation requirements from the 1988 Rule, though grantees would still be required to maintain a separation that was more than "mere … bookkeeping" and "demonstrate," by "financial records, counseling and service protocols, administrative procedures, and other means," that Title X funds are not used to "promot[e] or encourage[] abortion as a method of family planning." *Id.* at 41,270, 41,276. And the 2000 Rule again required grantees to provide non-directive counseling, including referral for abortion, if requested; HHS did not consider that "provision of neutral and factual information about abortion … to promote or encourage abortion as a method of family planning." *Id.* at 41,270-71.

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

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

C. The 2021 Rule

In April 2021, HHS published a notice of proposed rulemaking soliciting comments on a proposal to revoke the 2019 Rule. *See* 86 Fed. Reg. 19,812.

In October 2021, after considering public comments, HHS promulgated the rule challenged in this litigation. 86 Fed. Reg. 56,144 (Oct. 7, 2021). The 2021 Rule reverted to the separation and referral requirements in place under the 2000 Rule and separately adopted multiple changes to modernize and strengthen the Title X program. *See id.* at 56,148-49. Based on "the evidence that has emerged since the adoption of the 2019 rule, as well as a fresh consideration of the evidence that existed at the time [the 2019 Rule was adopted]," *id.* at 56,148, HHS concluded that the 2019 Rule dramatically reduced access to family planning and preventive health services; decreased the number of providers willing to participate in the Title X program; imposed unnecessary compliance and reporting costs with no discernible benefit; and raised the possibility of a "two-tiered healthcare system," where the communities primarily served by the Title X program are "relegated to inferior access" by reduction

in the program's scope. *Id.*; *see also id.* at 56,145-46. HHS concluded that revoking the 2019 Rule, and making certain updates and revisions to the 2000 Rule, would "strengthen the Title X program and ensure access to equitable, affordable, client-centered, quality family planning services for all clients, especially for low-income clients, while retaining the longstanding prohibition on directly promoting or performing abortion that follows from Section 1008's text and subsequent appropriations enactments." *Id.* at 56,148-49.

The rule went into effect on November 8, 2021, for current grantees and will apply to the 2022 grant cycle.

D. This Lawsuit

Ohio and eleven other states filed this suit pursuant to the Administrative Procedure Act (APA) and moved for a preliminary injunction, asserting that the 2021 Rule's separation and referral requirements violate Section 1008 and that the rule is arbitrary and capricious.

The district court denied plaintiffs' motion for a preliminary injunction. *See* Order, RE 50, PageID#646. Relying on the Supreme Court's holding in *Rust* that Section 1008 was "ambiguous" with respect to the issues of program integrity and referrals, the court concluded that the 2021 Rule's separation and referral requirements were "permissible" constructions of Section 1008. *Id.*, PageID#657-68 (quoting *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984)). And emphasizing that HHS had provided ample justification for its change in position

in light of the drastic reduction in Title X services caused by the 2019 Rule, the district court likewise rejected plaintiffs' argument that the rule was arbitrary and capricious. *Id.*, PageID#668-77. The district court further held that plaintiffs had failed to establish that they would be irreparably harmed absent an injunction and that the balance of equities weighed sharply against plaintiffs. *Id.*, PageID#677-80.

Plaintiffs appealed and moved for an injunction pending appeal, arguing that the 2021 Rule would lead to greater competition for grant funds and would require them to put their "imprimatur" on abortion. This Court denied that motion on the ground that plaintiffs had failed to demonstrate any irreparable harm. *See* Order 3.

With respect to increased competition, the Court observed that plaintiffs' primary authority involved Article III injury-in-fact, not irreparable harm, Order 5-6 (citing *Sherley v. Sebelius*, 610 F.3d 69, 74 (D.C. Cir. 2010)), and that, in any event, plaintiffs' "prediction that they will receive smaller grants" is "too speculative to create an irreparable harm," Order 6. Moreover, the Court concluded that plaintiffs "provide[d] no indication that an injunction must be imposed *now*, as opposed to once grant allocations have been determined or announced." Order 7. For similar reasons, the Court rejected plaintiffs' contention that they would suffer irreparable reputational injuries from being unable to provide the same level of Title X services to their constituents, explaining that this argument rests on the same "uncertain prediction that an increase in competition for Title X funds will prompt a corresponding decrease in funds" for plaintiffs. Order 8.

The Court also declined to credit plaintiffs' contention that the 2021 Rule requires them to "put their imprimatur on abortion," thereby causing irreparable harm. Order 8 (quoting Pls.' Mot. for Inj. Pending Appeal 22). The Court noted that the 2021 Rule recognizes that providers may decline to provide abortion referrals based on conscience objections, and the Court also reasoned that any harm from the referral requirement is "neither 'certain' nor 'immediate'" because Ohio—the only state that submitted a declaration supporting its alleged harms—"already provided a degree of nondirective counseling about abortion" under the 2019 Rule, and the State may bring litigation at a later date if it ultimately "seek[s] to avoid a particular approach to patients seeking abortion information." Order 9. The Court did not comment on plaintiffs' likelihood of success on the merits of their challenge to the 2021 Rule.

Judge Larsen wrote a separate concurrence, noting that plaintiffs' theories of harm also "depend upon the actions of grant-competitors who are not before this court and whose response to a mere temporary injunction is uncertain." Order 10 (Larsen, J., concurring).

SUMMARY OF ARGUMENT

Since its inception fifty years ago, Title X of the Public Health Service Act has funded vital sexual health and client-centered quality family planning services for millions of Americans. Reflecting the compromise struck by Congress with respect to family planning and abortion, HHS has long had in place rules and policies ensuring

that Title X projects do not use federal funds to provide or promote abortions and requiring non-directive counseling for pregnant patients, including referral for abortion if requested. In 2019, HHS promulgated a rule imposing new restrictions on Title X projects never before nationally implemented, upending decades of practice. This real-world experiment with the health of low-income Americans led to disastrous results: nearly 1000 service sites withdrew from the program, and over 750,000 fewer Title X clients (most with incomes under the federal poverty limit) received Title X services. For example, 188,920 fewer women underwent clinical breast exams, 276,109 fewer confidential HIV tests were performed, and over 300,000 fewer women received contraception.

In response to this dramatic reduction in services, HHS reexamined the premises of the 2019 Rule and in 2021, after notice and comment, reinstated its longstanding Title X policies. Plaintiffs are several states that seek to enjoin the 2021 Rule—despite operating without objection under identical policies for decades—and appeal from the district court's denial of that request. Because plaintiffs have failed to demonstrate irreparable harm, failed to show how any harms could possibly outweigh the strong public interest in robust Title X services, and failed to demonstrate a likelihood that the 2021 Rule is unlawful, this Court should affirm the district court's order denying plaintiffs' motion for a preliminary injunction.

I. Plaintiffs' claim of irreparable harm is foreclosed by this Court's order denying an injunction pending appeal. This appeal is limited to the record before the

district court, and plaintiffs' lack of irreparable harm remains unchanged. Contrary to plaintiffs' suggestion, the mere fact that there may be greater competition for Title X grants under the 2021 Rule is insufficient to establish irreparable harm, as applicants for discretionary federal grants always face the possibility of increased competition from year to year. No more successful is plaintiffs' contention that if they receive less Title X funding, they may have to reduce family planning services and could potentially suffer reputational harm as a result. As this Court recognized, such purported reputational injuries are too speculative to constitute irreparable harm.

Nor can plaintiffs establish that they are irreparably harmed by the requirement that they provide neutral, factual information to pregnant patients regarding where to obtain an abortion, if requested. The rule explains that providers with conscience objections will not be required to provide referrals for abortion, and plaintiff-states cannot establish harm based on state laws that they erroneously claim prohibit abortion referrals.

Even if plaintiffs could demonstrate some degree of irreparable harm, the balance of harms tilts heavily against enjoining the 2021 Rule. Millions of Americans depend on Title X family planning services, and it is undisputed that the 2019 Rule sharply curtailed access to those services. Restoring that access by maximizing the family planning services provided with the federal funds Congress appropriated for that purpose plainly advances the public interest.

II. Because HHS's decision to reinstate its longstanding program-separation and referral requirements reflects reasoned decision-making and is wholly consistent with the text of Title X—which the Supreme Court has recognized is ambiguous on these issues, *see Rust v. Sullivan*, 500 U.S. 173 (1991)—plaintiffs cannot succeed on the merits of their challenge.

Section 1008 provides that no Title X funds "shall be used in programs where abortion is a method of family planning." 42 U.S.C. § 300a-6. As the Supreme Court recognized in *Rust*, the statute does not speak to the issue of how to implement this provision, and the 2021 Rule does so by requiring grantees to demonstrate via financial records, counseling and service protocols, and other administrative procedures that Title X funds are not used to provide, promote, or encourage abortion. Section 1008 does not compel the physical separation required by the 2019 Rule.

Plaintiffs' argument that the 2021 Rule in fact permits abortion services in Title X programs is based on a blatant misreading of a 20-year-old notice and is divorced from the actual text of the 2021 Rule. Plaintiffs fare no better in urging that Title X funds might be used to provide abortions because money is fungible; the 2019 Rule did not prohibit abortion providers from participating in the Title X program and the "freeing up" theory is inconsistent with the Supreme Court's decisions in *Rust* and its later unconstitutional-conditions cases.

The 2021 Rule's referral requirement is also permissible under the statute. Title X does not speak directly to the question of whether abortion referrals may be provided to pregnant patients, and plaintiffs do not dispute that HHS may permit Title X projects to make such referrals. If the provision of abortion referrals standing alone does not violate Section 1008's prohibition, requiring those referrals is equally permissible under the statute.

HHS's decision to reinstate its longstanding program-separation and referral requirements also reflects reasoned decision-making. HHS carefully considered the impacts of the 2019 Rule and addressed the comments it received during the rulemaking. HHS fully explained its policy decisions, and plaintiffs' arguments to the contrary reflect nothing more than a disagreement with those decisions. HHS did not fail to consider any significant and viable alternatives to the separation requirement, nor did the agency fail to consider any cognizable reliance interests. Moreover, the 2021 Rule fully explains HHS's view that the referral requirement is a critical component of client-centered care and a logical outcome of the non-directive counseling process, a view that is based on the agency's decades of experience with the program and that is consistent with medical ethics.

In no event should this Court grant plaintiffs' extraordinary request to direct entry of judgment in their favor. This Court's ordinary practice is to pass only on the relief sought before the district court. The exceptions to that rule have no bearing here: this is not a case where a defendant demonstrates that a suit should be dismissed

in its entirety or a case where a preliminary injunction should be treated as a permanent injunction lest it become moot.

III. As a final matter, were the Court to determine that plaintiffs are entitled to some measure of preliminary injunctive relief—which, as discussed, they are not—the Court should remand to the district court for consideration of the proper scope of that relief. Any relief awarded must be tailored to those provisions of the 2021 Rule that the Court determines are likely invalid and limited to the parties before the Court that are able to demonstrate the irreparable harm necessary to award injunctive relief.

STANDARD OF REVIEW

This Court "review[s] a district court's denial of a request for a preliminary injunction for abuse of discretion." *Certified Restoration Dry Cleaning Network, L.L.C. v. Tenke Corp.*, 511 F.3d 535, 540 (6th Cir. 2007).

ARGUMENT

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

I. Plaintiffs Fail To Establish Irreparable Harm, and the Public Interest Strongly Weighs Against Enjoining the Rule

A. As This Court Recognized, Plaintiffs Suffer No Irreparable Harm from the Rule

Plaintiffs' opening brief raises the same three theories of harm that this Court rejected in denying plaintiffs' motion for an injunction pending appeal. The Court properly rejected those arguments and the record before the Court is the same; this Court should therefore affirm the district court's denial of injunctive relief.

1. Plaintiffs Fail To Establish Irreparable Harm Based on Increased Competition for Title X Funding

Urging anew a contention rejected by this Court, plaintiffs claim (Br.50) that they will suffer irreparable harm from "increased competition" for Title X grants resulting from the return of grantees that left the program under the 2019 Rule. Plaintiffs appear to assert that such increased competition would constitute a per se irreparable harm, separate from any effects that the increased competition might have on the amount of funds plaintiffs receive or the level of services they are able to provide. This argument is meritless.

To start, plaintiffs fail to demonstrate how a mere increase in competition for federal grant funds—without more—can constitute irreparable harm. Plaintiffs have no entitlement to Title X funds at the amount they prefer, and all applicants for federal funds run the risk of increased competition from year to year based on a variety of intervening factors. Although plaintiffs primarily rely on *Sherley v. Sebelius*,

610 F.3d 69 (D.C. Cir. 2010), this Court explained that the D.C. Circuit in "*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." Order 5-6. The other cases on which plaintiffs rely likewise concern Article III injury, not irreparable harm. *See Department of Commerce v. New York*, 139 S. Ct. 2551, 2565-66 (2019); *Planned Parenthood of Greater Wash. & N. Idaho v. U.S. Dep't of Health & Human Servs.*, 946 F.3d 1100, 1109 (9th Cir. 2020).[1]

Nor do plaintiffs fare any better by asserting that they will receive less in grant funds under the 2021 Rule. As this Court explained, plaintiffs' asserted harm "is premised on the prediction that they will receive smaller grants (or a smaller share of Title X funds) in the upcoming funding round," and that "prospect is too speculative to create an irreparable harm." Order 6. "[E]ven assuming that more service providers have applied for Title X grants because of the 2021 Rule," that does not necessarily mean that "HHS will provide the States with less money than they received following the 2019 Rule." *Id.* That is because "HHS need not make a zero-sum choice between" grantees like "Planned Parenthood and Ohio," because Title X grants "are discretionary grants NOT formula or block grants" and are "not allocated

[1] Plaintiffs no longer rely on *Basicomputer Corp. v. Scott*, 973 F.2d 507 (6th Cir. 1992). *Cf.* Order 5-6. For good reason: *Scott* involved "the loss of *fair competition* that results from the breach of a non-competition covenant." 973 F.2d at 512 (emphasis added).

on a state-by-state basis." *Id.* at 7 (quoting Office of the Assistant Sec'y for Health, Office of Population Affairs, PA-FPH-22-001, *Notice of Funding Opportunity: Title X Family Planning Services Grants* 21 (closed Jan. 11, 2022) (Notice of Funding Opportunity[2])). Plaintiffs' response (Br.51) that "the primary goal of the Final Rule is to encourage more providers … to reenter the program" is no answer to the Court's conclusion that more competitors does not necessarily mean plaintiffs will receive less money.

Moreover, there are numerous reasons why a grantee might receive lower funding in a given year compared to a prior year. As the Notice of Funding Opportunity explains (at 36-39), Title X grant applications are evaluated based on a broad range of criteria, including, for example, evidence of the applicant's ability to "increase[] access to quality family planning services" and the applicant's "[h]istory of performance." Plaintiffs do not attempt to explain how any decrease in funds would be traceable to increased competition rather than to the agency's independent judgments about a grantee's performance on these factors.

Even assuming the alleged harm here were not speculative, plaintiffs would still fail to meet their burden to demonstrate irreparable harm sufficient to sustain the extraordinary remedy of a preliminary injunction. Plaintiffs reason that because any financial losses from the increased competition are "non-recoverable" due to the

[2] Available at https://go.usa.gov/xzvj9.

government's sovereign immunity (Br.50), any decreased funding level must result in a "harm" that is "irreparable." But the inadequacy of money damages is not sufficient to prove that a harm warrants preliminary injunctive relief. Such a harm must also be both "certain and *great*, rather than speculative or theoretical." *State of Ohio ex rel. Celebrezze v. Nuclear Regulatory Comm'n*, 812 F.2d 288, 290 (6th Cir. 1987) (emphasis added). Otherwise, preliminary injunctive relief would not be an "extraordinary" remedy in cases involving government defendants generally shielded by sovereign immunity. *Winter*, 555 U.S. at 22. Indeed, the cases on which plaintiffs rely (Br.50) for the proposition that "[t]he non-recoverable nature" of their injury "makes it irreparable" highlight that an economic loss must not only be irrecoverable but also have substantial attendant harms. *See Performance Unlimited, Inc. v. Questar Publishers, Inc.*, 52 F.3d 1373, 1382 (6th Cir. 1995) ("The impending loss or financial ruin of [a plaintiff's] business constitutes irreparable injury."); *Texas Children's Hosp. v. Burwell*, 76 F. Supp. 3d 224, 242-44. 244 n.7 (D.D.C. 2014) (explaining that the movant must demonstrate that "losses are certain, great and actual" and noting that the movant's imminent economic loss would greatly reduce certain hospital services for children).

Here, plaintiffs do not even attempt to explain how potential economic losses attributable to increased competition will significantly harm them. The record

contains a single declaration from a single state—Ohio[3]—documenting its status as a Title X grantee and speculating that there will be increased competition for Title X grants in Ohio due to the challenged provisions of the 2021 Rule. *See* Clark Decl., RE 2-1, PageID#183-84. But Ohio's declaration does not even hypothesize about the extent to which its Title X grants might be reduced or the impact that will have on its programs' continued functioning. And Ohio's reliance on alleged financial harm is especially unpersuasive given that Ohio has not alleged that it will make up "lost" funds with its general revenues. Moreover, Ohio does not speculate that its residents will experience reduced access to Title X services if Ohio receives less money, an argument that would, in any case, be pure conjecture, given that other entities in Ohio may receive Title X funds.

Plaintiffs also cannot establish irreparable harm based on "incur[ring] costs associated with applying in the face of greater competition." Br.51 (quoting Order 6). As this Court recognized, "[a]ll the applications for the 2022-2023 funding year have already been filed." Order 6. Plaintiffs seem to suggest (Br.51-52) that they might incur such costs in future funding cycles on the theory that this case might not be expeditiously resolved. Both assertions are speculative and, in any event, plaintiffs

[3] No other plaintiff has even attempted to demonstrate harm from increased competition, and three of the states—Arizona, Missouri, and Nebraska—are not current Title X grantees, Compl., RE 1, PageID#5.

cannot establish that the possibility of distant costs of unknown magnitude warrants preliminary injunctive relief.

As this Court recognized, plaintiffs have also failed to establish "that an injunction must be imposed *now*, as opposed to once grant allocations have been determined or announced." Order 7. At that point, plaintiffs could seek relief anew from the district court, developing a factual record for decision. Plaintiffs briefly suggest (Br.52) that this Court could take judicial notice of grant awards once they are announced or that the parties could supplement the record with that information. To the extent plaintiffs suggest that they could succeed on this appeal based on such information, they are plainly mistaken. On a preliminary-injunction appeal, this Court "review[s] the record that was before the district court at the time the preliminary injunction" was granted or denied. *Wilson v. Williams*, 961 F.3d 829, 833 (6th Cir. 2020). Plaintiffs cannot establish that the district court abused its discretion in denying a motion based on evidence that was not before that court.

2. Plaintiffs' Asserted Reputational Injuries Do Not Establish Irreparable Harm

This Court recognized that plaintiffs likewise cannot demonstrate irreparable harm by claiming (Br.52-53) that a reduction in funding will lead them to "sustain[] reputational injuries from reducing services on which people have come to rely." As the Court explained, this "reputational-injury argument is speculative and cannot demonstrate irreparable harm at this time." Order 8. Like plaintiffs' increased-

competition theory, this theory "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." *Id.* And it "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." *Id.* Moreover, plaintiffs' argument overlooks the possibility that "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 which case "the reputational harm might not occur." *Id.* Plaintiffs candidly "offer no new arguments or distinctions on this front," Br.53, and the Court should again reject this theory.

3. Plaintiffs Are Not Irreparably Harmed by the Referral Requirement

Plaintiffs further renew their contention that they will be irreparably harmed by the 2021 Rule because it "will force the States to support abortion by making referrals upon request." Br.53.

Although this Court correctly rejected this argument, the government wishes to clarify two issues that the Court addressed. First, plaintiffs are correct (Br.54) that states do not fall within the terms of existing federal conscience statutes, which are limited to medical providers and medical facilities. A state would therefore not be able to invoke those statutes to avoid complying with the referral requirement. *See*

Order 9 (quoting 86 Fed. Reg. at 56,153: "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 in Order)). Second, the 2021 Rule went into effect in November 2021, and so plaintiffs are correct (Br.54) that any plaintiffs that are current Title X grantees are already subject to the referral requirement. *See* Order 9. Neither of these clarifications undermines this Court's rejection of plaintiffs' alleged irreparable harm.

As an initial matter, plaintiffs' argument ignores the fact that plaintiffs have a choice whether to comply with the 2021 Rule or to withdraw from the Title X program. "As a general matter, if a party objects to a condition on the receipt of federal funding, its recourse is to decline the funds." *Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l, Inc.*, 570 U.S. 205, 214 (2013). Any alleged harm that plaintiffs suffer from instead applying for and abiding by the lawful terms of a federal grant is a "self-inflicted" injury that cannot constitute irreparable harm. 11A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 2948.1, Westlaw (database updated Apr. 2021); *cf. Salt Lake Tribune Publ'g Co., v. AT & T Corp.*, 320 F.3d 1081, 1106 (10th Cir. 2003) (alleged harms from the terms of a contract that the plaintiff entered into were self-inflicted and could not establish irreparable harm).

In any event, it is unclear what harm plaintiffs experience from the referral requirement. Many plaintiffs, including Ohio, complied with the 2000 Rule's referral requirement for decades without objection and, indeed, have presumably been

complying with the 2021 Rule's requirement since it went into effect in November 2021. And as this Court recognized, Ohio's declaration establishes that, even under the 2019 Rule, Ohio provided "information on pregnancy termination" through "a physician or advanced practice provider," when requested. Order 9 (quoting Clark Decl., RE 2-1, PageID#182). Thus although states do not fall within the terms of existing federal conscience statutes, *see supra* p. 20, plaintiffs do not explain how they are harmed by a non-objecting medical provider offering a patient neutral, factual information about where to obtain an abortion.

Plaintiffs rely on a series of state laws that they say (Br.53) are "designed to withhold the State's imprimatur from the practice of abortion," urging that the referral requirement "undermine[s]" those laws. But those state laws do not go as far as plaintiffs urge. The majority of those laws merely put limits on the use of public funds to pay for abortion services, without mention of referrals. *See, e.g.*, Ohio Rev. Code § 5101.56(B) ("Unless required by the United States Constitution or by federal statute, regulation, or decisions of federal courts, state or local funds may not be used for payment or reimbursement for abortion services" except in certain circumstances.). Indeed, the only state law that mentions "referral for abortion" is the Nebraska law, *see* Neb. Rev. Stat. Ann. § 71-7606(3), and Nebraska has not even claimed to have applied for funding nor did it submit any declaration in support of its standing for this suit, *see infra* pp. 50-51. And while the Missouri law makes it unlawful to use public funds "for the purpose of encouraging or counseling a woman to have

an abortion not necessary to save her life," Mo. Ann. Stat. § 188.205, the 2021 Rule does not permit—let alone, require—Title X grantees to encourage or counsel a woman to have an abortion, and, like Nebraska, Missouri has not submitted any declaration in support of its alleged harm. *See infra* pp. 50-51. Plaintiffs are accordingly unable to demonstrate that the referral requirement conflicts with state law.

Plaintiffs' imprimatur argument also ignores the reality that a state has many means at its disposal to make clear its views on abortion. A state could, for example, place a statement on its family planning services website explaining that the state does not condone abortion and that it is the terms of federal funding—not state policy—that require Title X projects to offer non-directive counseling and abortion referrals upon request.

B. The Public Interest Lies in Maintaining the 2021 Rule

In all events, the balance of harms and public interest weigh decisively against any potential harm plaintiffs have asserted. *See Nken v. Holder*, 556 U.S. 418, 435 (2009) (explaining that, in a suit involving the government, harm to the government and the public interest merge).

Plaintiffs' bald assertion that an injunction requiring the 2019 Rule to remain in place "will not cause substantial harm to others" (Br.55) cannot be squared with the extensive factual record demonstrating that the 2019 Rule "dramatically reduced access to essential family planning and related preventive health services for hundreds

of thousands of clients, especially for the low-income clients Title X was specifically created to serve." 86 Fed. Reg. at 56,151-52. As the district court explained, the 2019 Rule "harm[ed] our most vulnerable members of society daily": after implementation of the 2019 Rule, "573,650 fewer clients under 100 percent of the federal poverty level (FPL); 139,801 fewer clients between 101 percent FPL to 150 percent FPL; 65,735 fewer clients between 151 percent FPL and 200 percent FPL; and 30,194 fewer clients between 201 percent FPL to 250 percent FPL received Title X services." Order, RE 50, PageID#680 (quoting 86 Fed. Reg. at 56,146). This impact is especially troubling because "[t]he Title X program is the only federal grant program dedicated to providing comprehensive family planning and related preventative health services," and in many cases, Title X clinics are "the only ongoing source of healthcare and health education" for clients. 86 Fed. Reg. at 56,147.

Plaintiffs' other invocations of the public interest are equally unpersuasive. Plaintiffs' suggestion (Br.55) that the public interest requires an injunction to "maintain the status quo," due to "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" must be rejected. As this Court observed, "[a]ll the applications for the 2022-2023 funding year have already been filed," Order 6, and the 2021 Rule has been in effect since November 2021.

Similarly misplaced is plaintiffs' reliance on the fact that Planned Parenthood "served more patients and provided more services after exiting the program than it

did while a part of the program," Br.55 (citing 86 Fed. Reg. at 56,174). As explained in the 2021 Rule, "Planned Parenthood affiliates … indicated that without Title X funding, they have had to adjust their sliding fee scales, pushing more costs onto the clients," which has "resulted in clients forgoing recommended tests, lab work, [sexually transmitted infection] testing, clinical breast exams, and Pap tests in large numbers," and, in some cases, has led clients to "seek[] care elsewhere, interrupting their continuity of care." 86 Fed. Reg. at 56,151. That evidence underscores HHS's concern that the 2019 Rule "raise[d] the possibility of a two-tiered healthcare system in which those with insurance and full access to healthcare receive full medical information and referrals, while low-income populations with fewer opportunities for care are relegated to inferior access," *id.* at 56,155; it does not remotely support plaintiffs' suggestion that no one would be "*substantially* harmed" if the Court enjoined operation of the 2021 Rule, Br.55 (emphasis in original).

More fundamentally, it is plainly in the public interest for Title X to serve its statutory purpose of providing family planning services to as many low-income Americans as possible, regardless of whether and to what extent other entities provide those services. The Court cannot simply ignore, as plaintiffs urge, the fact that the 2019 Rule led to a reduction in the amount of family planning services provided by the federal funds appropriated by Congress for that purpose. That a private entity temporarily filled some gaps cannot alleviate the harm to the public's interest in the efficient and proper use of taxpayer funds for the purpose they were appropriated.

Equally unpersuasive is plaintiffs' contention that the balance of harms favors an injunction because "the public interest lies in a correct application" of the law. Br.55 (quoting *Coalition to Defend Affirmative Action v. Granholm*, 473 F.3d 237, 252 (6th Cir. 2006)). In *Coalition to Defend Affirmative Action*, the Court invoked the interest in correct application of the law only after noting that, in that case, "irreparable harm w[ould] befall one side or the other of the dispute no matter what" and the "irreparable-harm inquiry in the end d[id] not strongly favor one party or another." 473 F.3d at 252. Even assuming, therefore, that plaintiffs were right on the merits, *but see infra* pp. 26-45, that case would not assist them.

II. Plaintiffs Fail To Demonstrate a Likelihood of Success on the Merits

Plaintiffs have failed to demonstrate irreparable harm, which defeats their claim for a preliminary injunction. *D.T. v. Sumner Cty. Sch.*, 942 F.3d 324, 327 (6th Cir. 2019). This Court may also affirm on the ground that plaintiffs have failed to demonstrate a likelihood of success on the merits. In no event, however, should this Court entertain plaintiffs' request that it adjudicate the merits of this case and direct entry of judgment in plaintiffs' favor.

A. The Rule Reflects a Permissible Interpretation of the Statute

Section 1008 provides that no Title X funds "shall be used in programs where abortion is a method of family planning." 42 U.S.C. § 300a-6. As plaintiffs recognize (Br.22), the Supreme Court has held that "[t]he language of § 1008 … does not speak

directly to the issues of … referral … or program integrity" and is "ambiguous." *Rust*, 500 U.S. at 184. For that reason, as plaintiffs acknowledge (Br.23), the agency's referral and separation requirements must be upheld so long as they reflect a "permissible" interpretation of the statute. *Metropolitan Hosp. v. U.S. HHS*, 712 F.3d 248, 254-55 (6th Cir. 2013) (quoting *Chevron*, 467 U.S. at 843)). They do.

1. The Rule's Separation Requirements Are Consistent with Section 1008

a. The 2021 Rule provides that a grantee's Title X program must be "separate and distinguishable" from any abortion-related activities that the grantee conducts, as demonstrated by more than mere "separate bookkeeping entries alone" or "[m]ere technical allocation of funds." 65 Fed. Reg. 41,281, 41,282 (July 3, 2000); *see also* 86 Fed. Reg. at 56,150. But recognizing the realities of healthcare facilities, HHS permits a grantee to have "[c]ertain kinds of shared facilities" among programs—including a common waiting room, staff, and filing system—so long as the Title X program and the non-Title X program remain distinguishable and costs are properly allocated. 65 Fed. Reg. at 41,282; *see* 86 Fed. Reg. at 56,150. A Title X grantee can "demonstrate" that its Title X program and non-Title X program are distinct through "financial records, counseling and service protocols, administrative procedures, and other means." 65 Fed. Reg. at 41,276. And HHS utilizes "robust monitoring processes to ensure grantee compliance … including through regular grant reports, compliance monitoring visits, and legally required audits." 86 Fed. Reg. at 56,152.

These policies reflect a permissible construction of Section 1008. In *Rust*, in the course of rejecting the argument that the 1988 Rule impermissibly conditioned the receipt of Title X funding on the relinquishment of the plaintiffs' constitutional right to engage in abortion advocacy and counseling, the Court explained that "'Title X expressly distinguishes between a Title X *grantee* and a Title X *project*'" or program. 500 U.S. at 196; *see* 42 U.S.C. § 300a-4 (using "program" and "project" interchangeably). A Title X *grantee* may operate a variety of programs in addition to their Title X program, including programs that involve abortion-related services, *see Rust*, 500 U.S. at 198, so long as "'Title X funds [are] kept separate and distinct from abortion-related activities,'" *id.* at 190.

Here, the 2021 Rule's separation requirements ensure that Title X funds are sufficiently separate and distinct from abortion-related activities. Because the rule requires grantees to ensure that any programs that include abortion-related activities are kept "entirely separate from the Title X project," and that salaries and costs are properly allocated if common staff or facilities are used, 65 Fed. Reg. at 41,282, Title X funds are not being "used in [a] *program*[] where abortion is a method of family planning," 42 U.S.C. § 300a-6 (emphasis added).

b. Plaintiffs' arguments to the contrary lack merit. Demonstrating the weakness of their attack on the rule, plaintiffs rely extensively on a cherry-picked quote from a 2000 Federal Register notice that they read out of context. *See* Br.24-25, 31 (citing 65 Fed. Reg. at 41,282). Plaintiffs assert that the 2021 Rule, by readopting

the policies outlined in that 2000 notice, provides "that Title X grantees *can* have an 'abortion element in a program of family planning services,' as long as it is not too 'large' or 'intimately related' with the non-abortion parts of the family-planning program." Br.24-25 (quoting 65 Fed. Reg. at 41,282). This is false.

As the district court recognized, plaintiffs' wordplay based on a decades-old summary falls flat because "reading the passage with full context reassures that the Final Rule does not permit an abortion element in a 'Title X program.'" Order, RE 50, PageID#662 n.13. The relevant passage states:

> Non-Title X abortion activities must be separate and distinct from Title X project activities. Where a grantee conducts abortion activities that are not part of the Title X project and would not be permissible if they were, the grantee must ensure that the Title X-supported project is separate and distinguishable from those other activities. What must be looked at is whether 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 41,282. The passage makes clear that any abortion activities must be separate and distinguishable from the Title X project. Plaintiffs improperly read the reference to an "abortion element in a program of family planning services" to mean that HHS permits abortion in a *Title X* program of family planning services. It does not. The passage concerns a situation where an abortion provider may be ineligible for Title X funds because it is not possible for it to maintain a separate Title X project, which HHS has repeatedly affirmed may not have any abortion element. *See, e.g.*, 86 Fed. Reg. at 56,150; 65 Fed. Reg. at 41,276; 65 Fed. Reg. at 41,282.

Plaintiffs next argue that the 2021 Rule allows Title X funds to be used to "subsidize abortions" because "[m]oney is fungible," and "every dollar an abortion provider receives through Title X frees up another dollar that the grantee can use to subsidize abortion." Br.25-26 (quoting *Holder v. Humanitarian Law Project*, 561 U.S. 1, 31 (2010)); *see also* Br.34. But this argument proves too much. Even the 2019 Rule did not prevent HHS from awarding funds to grantees that provided abortion-related services. Under plaintiffs' theory, the 2019 Rule was also impermissible, lest Title X funds "free[] up" the grantee's private funds for abortion services.

Nor can this argument be squared with *Rust:* in upholding Title X and the 1988 Rule against an unconstitutional-conditions challenge, the Supreme Court recognized that grantees were not prohibited from engaging in abortion-related activities so long as those activities were kept separate from Title X funds. That holding rests on the premise that "public funds" can, in fact, "be spent for the purposes for which they were authorized," *Rust*, 500 U.S. at 196, a principle that is inconsistent with plaintiffs' limitless "free[ing] up" theory.

Likewise repudiating plaintiffs "freeing up" theory, other courts of appeals have rejected arguments similar to plaintiffs' argument in the context of limits on state funding. *See Planned Parenthood of Cent. & N. Ariz. v. Arizona*, 718 F.2d 938, 945 (9th Cir. 1983) (holding that "as a matter of law, the freeing-up theory cannot justify withdrawing all state funds from otherwise eligible entities merely because they engage in abortion-related activities disfavored by the state"); *see also Planned Parenthood of*

Minn. v. Minnesota, 612 F.2d 359, 362 (8th Cir. 1980) (rejecting "[t]he argument that the money given to Planned Parenthood by the state might free-up other money which would be used for abortions" and finding "that Planned Parenthood's accounting procedures are more than adequate to insure that state money is not used for abortions nor allowed to free-up other money for abortions"). As in those cases, the 2021 Rule's separation requirements and HHS's compliance measures are more than sufficient to ensure that Title X funds are neither used for abortion-related activities nor to free up a grantee's other funds for such activities.

The error of plaintiffs' "freeing up" argument is further underscored by the Supreme Court's decision in *Alliance*, 570 U.S. 205. There the Court held that a grant funding condition that required grantees to agree that they oppose prostitution and sex trafficking violated the First Amendment. The Court rejected the argument that the funding condition was "necessary because, without it, the grant of federal funds could free a recipient's private funds 'to be used to promote prostitution or sex trafficking,'" explaining that that argument "assumes that federal funding will simply supplant private funding, rather than pay for new programs or expand existing ones." *Id.* at 220. The Court also explained that the "freeing up" theory was inconsistent with the reasoning of *Rust* and other of the Court's unconstitutional-conditions cases. *Id.*

The Supreme Court's holding in *Alliance* also demonstrates why plaintiffs' reliance on *Holder* is misplaced. *Holder* "concerned the quite different context of a ban

on providing material support to terrorist organizations, where the record indicated that support for those organizations' nonviolent operations was *funneled* to support their violent activities." *Alliance*, 570 U.S. at 220 (emphasis added). For example, record evidence in *Holder* supported the conclusion that "[f]unds raised ostensibly for charitable purposes have in the past been redirected by some terrorist groups to fund the purchase of arms and explosives." *Holder*, 561 U.S. at 31. Here, by contrast, the 2021 Rule prohibits such funneling of Title X funds, which must be used for permissible family planning services and not abortion, and plaintiffs point to no evidence of impermissible "funneling" in which Title X funds were not used to provide Title X services. *See* 86 Fed. Reg. at 56,150.

Plaintiffs' next argument (Br.26-27) that the 2021 Rule is invalid merely because grantees may "achieve economies of scale" by operating a Title X project and an abortion practice in the same physical location is unavailing for similar reasons. The fact that a grantee might be able to more efficiently operate both the Title X project and non-Title X activities does not mean Title X funds are being impermissibly "used" in the non-Title X program, 42 U.S.C. § 300a-6. A grantee that experiences such cost savings can use surplus Title X funds to "expand" its Title X program, *Alliance*, 570 U.S. at 220; it may not divert those funds to any other project. And realizing economies of scale does not depend on space-sharing: a grantee that satisfies the 2019 Rule's separation requirements might still experience economies of scale by, for example, purchasing bulk supplies at a lower cost.

2. The Rule's Referral Requirement Is Consistent with Section 1008

a. Under the 2021 Rule, Title X programs must provide, upon a pregnant patient's request, "neutral, factual information and nondirective counseling" on the patient's various options of "[p]renatal care and delivery," "[i]nfant care, foster care, or adoption," and "[p]regnancy termination," and must also provide a referral for any of those options if the patient so requests. 86 Fed. Reg. at 56,179. That referral may consist of "relevant factual information," like "the name, address, [and] telephone number" of an abortion provider, but the Title X program may not take "further affirmative action (such as negotiating a fee reduction, making an appointment, providing transportation) to secure abortion services for the patient." *Id.* at 56,150 (quoting 65 Fed. Reg. at 41,281).

The referral requirement is based on a permissible construction of Section 1008, and has been in place for most of the program's history. Section 1008 prohibits funds from being "used in programs where abortion is a method of family planning," 42 U.S.C. § 300a-6, but does not directly address whether a provider can supply neutral, factual information about where an abortion can be obtained. HHS has reasonably interpreted the statutory language as prohibiting the use of Title X funds to "promote or encourage" abortions as a method of family planning, 65 Fed. Reg. at 41,272, but, consistent with medical ethics, not as prohibiting "neutral, factual information." *See* 86 Fed. Reg. at 56,154; *Mayor of Baltimore*, 973 F.3d at 277, 278

(discussing ethical concerns with prohibiting abortion referrals). Just as a Title X provider may answer a patient's question regarding where to obtain a cardiology consultation without converting cardiology services into Title X family planning services, so too a provider can supply neutral, factual information about where to seek an abortion without running afoul of Section 1008.

b. Plaintiffs' arguments fail to establish that the referral requirement is inconsistent with Section 1008. Plaintiffs do not appear to dispute that HHS could, consistent with Section 1008, *permit* grantees to make abortion referrals. *See* Br.29. For good reason: had Section 1008 *barred* Title X programs from making abortion referrals, the Supreme Court in *Rust* would not have held that the statute's text and legislative history are ambiguous on this point. *See* 500 U.S. 184-85. Rather, plaintiffs object to the 2021 Rule's "require[ment]" that grantees make referrals upon request. *Id.* But because Section 1008 does not bar abortion referrals, the decision whether to permit or require such referrals was a policy decision entrusted to HHS, *see id.* And HHS fully justified its policy choice to reinstate the referral requirement that had been in place for nearly the entire history of the program. *See, e.g.*, 86 Fed. Reg. at 56,154 (explaining that a "referral upon request for option(s) the client wishes to receive" is "critical for the delivery of quality, client-centered care"); *see also infra* pp. 41-45. Congress is plainly aware that HHS policies regarding abortion referrals during the history of the Title X program have not been uniform. *See* 86 Fed. Reg. at 56,150 (explaining that the Title X program has been subject to "decades of close

Congressional oversight, including annual Title X appropriations riders, and a specific annual line item appropriation"). That Congress has acted neither to prohibit such referrals nor to require them underscores that Section 1008 is subject to a range of permissible interpretations, including the one HHS readopted in the 2021 Rule.

Plaintiffs' electroshock-therapy hypothetical (Br.27-28) does not undermine this reasoning. Plaintiffs reason that a psychiatry program that is barred from performing electroshock therapy but is required to refer for such therapy if a patient so requests is a "program where electroshock therapy is a method of psychiatric care." Br.28. Not so. Electroshock therapy may be a method of psychiatric care, but it is not a method of psychiatric care provided as part of the slate of psychiatric services offered by the hypothetical program. For the same reason, the fact that a Title X program provides referrals for abortion does not make that program one where abortion is provided as a method of family planning. Plaintiffs' "dental practice" and "oncology program" analogies (Br.28) similarly underscore their misunderstanding. The better analogy is, for example, a dental practice that offers free teeth cleaning during a weekend clinic. *See* Order, RE 50, PageID#665. If a patient at the weekend clinic requests a root canal, and the dental practice informs the patient that root canals are not part of the free weekend clinic and refers the patient to its commercial practice for a root canal during the week, "no one could argue that root canals were a part of the weekend clinic program." *Id.* This is so, even though the dental office might have "the same facility with shared staff, shared waiting rooms, and so on." Br.28.

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

As demonstrated, the 2021 Rule fully accords with the relevant statutory text. It was also a reasonable, procedurally proper response to the dramatic reduction in Title X services occasioned by the 2019 Rule.

1. HHS Reasonably Revoked and Replaced the 2019 Rule's Complete Separation Requirements

a. HHS explained in the 2021 Rule that it had "conducted a fresh review" of the evidence underlying the 2019 Rule's complete separation requirements and had found a lack of "any specific evidence" justifying the need for those requirements. 86 Fed. Reg. at 56,145. During that review, the agency examined over 30 reports from the Government Accountability Office (GAO), Office of the Inspector General, and Congressional Research Services concerning the Title X program from 1975 to 2021. *Id.* The review revealed "only minor compliance issues with grantees—and those only in two GAO reports from the 1980s," which had "found no evidence that Title X funds had been used for abortions or to advise clients to have abortions." *Id.*

Furthermore, based on its "[e]xperience under the 2019 rule," the agency determined that the 2019 Rule's complete separation requirements had "diver[ted]" funds from Title X's "core purpose" of providing family planning services to "increased infrastructure costs … as well as the micro-level monitoring and reporting," which had not "provide[d] discernible compliance benefits" but had "greatly increased compliance costs for grantees and oversight costs for the federal

government." 86 Fed. Reg. at 56,145. In contrast, HHS found significant evidence that the 2019 Rule's requirements had contributed to a "dramatic[]" reduction in Title X services, *id.* at 56,148. Indeed, under the 2019 Rule, 19 grantees (representing 945 service sites) "withdrew from the program," and the Title X program served "789,960 fewer clients"—with low-income clients bearing the brunt of the impact. *Id.* at 56,146. HHS therefore reasonably decided to return to the 2000 Rule's policies for ensuring separation of Title X funds and abortion-related activities, which had been in place for "decades" and had "uncovered no misallocation of Title X funds by grantees," *id.* at 56,145; *see id.* at 56,152-53.

b. Plaintiffs' argument that HHS failed to "justify" its decision (Br.35) to return to the 2000 Rule is therefore difficult to fathom. There is likewise no merit to plaintiffs' contention that HHS "abandoned the 2019 Rule's program-integrity requirements … without adopting any alternative to keep Title X funds from being used to subsidize abortion." Br.34, 35. As HHS explained, in "readopting the 2000 rule," it also reinstated policies designed to ensure grantees' separation of Title X funds and abortion-related activities that had been in place for much of the program's history. 86 Fed. Reg. at 56,150 (citing 65 Fed. Reg. at 41,281-82). In addition, "[a]ll Title X grantees are subject to 45 CFR part 75," which sets out uniform administrative and audit requirements for HHS grant awards. *Id.* at 56,152; *see* 42 C.F.R. § 59.9. Through these procedures, HHS's Office of Population Affairs "closely monitors Title X grantee compliance through regular grant reports, compliance monitoring

visits, and legally required audits, and it has done so since the beginning of the program." 86 Fed. Reg. at 56,145; *see also, e.g.*, 45 C.F.R. § 75.302 (requiring that grantees establish management systems and records for the source and use of federal funds); 45 C.F.R. § 75.303 (establishing controls to guarantee compliance with federal award statutes and regulations).

In view of these various oversight mechanisms, the Title X program bears no resemblance to "a city that eliminates its police force," Br.37, and plaintiffs' baseless opinion that the mechanisms don't "work," Br.38, is insufficient to set aside the agency's reasoned decision-making based on its expertise and decades of experience. *See National Lime Ass'n v. EPA*, 233 F.3d 625, 635 (D.C. Cir. 2000) (rejecting plaintiff's attempt to cast "doubt[]" on agency's assertion that its monitoring practices were sufficient to "ensure compliance" with standard).

Plaintiffs' next argument (Br.34) that HHS "failed to consider alternative polices" is flawed on multiple levels. Plaintiffs suggest that HHS could have retained the 2019 Rule's separation requirements while "alleviat[ing] the compliance burden"—by, for example, "dedicating funds to assist grantees" with the costs of compliance. Br.36. But none of plaintiffs' vague alternatives provides a "significant and viable" solution, *National Shooting Sports Found., Inc. v. Jones*, 716 F.3d 200, 215 (D.C. Cir. 2013), to the core problem that HHS identified: the 2019 Rule's separation requirements imposed prohibitive burdens on grantees with no "discernible compliance benefits" and "diver[ted]" funds towards "increased infrastructure costs"

rather than "the core purpose of Title X," 86 Fed. Reg. at 56,145.[4] In any event, HHS did consider whether to "maintain many elements" of the 2019 Rule and explained that doing so would have "exacerbate[d]" the 2019 Rule's negative impacts, including a loss of providers. 86 Fed. Reg. at 56,176; *see also id.* at 56,161-62 (considering retaining the 2019 Rule's subrecipient monitoring); *id.* at 56,168 (addressing comments that some states benefitted under the 2019 Rule).

Nor did HHS "neglect[] to consider reliance issues." Br.38. In changing positions, an agency must "be cognizant that longstanding policies may have 'engendered serious reliance interests.'" *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 221-22 (2016). But the 2019 Rule was not "longstanding," *id.*—it was in place for approximately two years. *Cf. Breeze Smoke, LLC v. U. S. Food & Drug Admin.*, 18 F.4th 499, 507 (6th Cir. 2021) (reasoning that Food & Drug Administration's 2019 guidance "does not qualify as 'longstanding'" for purposes of deference).

In any event, plaintiffs have no legally cognizable reliance interest in the continued receipt of a discretionary funding grant under the conditions they prefer. Title X grants generally obligate HHS to provide funds for one year, 42 C.F.R. § 59.8(b), and a grant does not commit HHS to renewing the funding the next year, *id.* § 59.8(c); *see supra* pp. 14-15. And although plaintiffs note (Br.39) that one state,

[4] Plaintiffs' proposal to provide funding to help grantees maintain greater physical separation between Title X programs and abortion-related activities is also at odds with plaintiffs' "freeing up" argument, *see supra* pp. 30-32.

Ohio, increased services to fill gaps left by grantees that exited the program after the 2019 Rule, and that "[f]illing those gaps required investments," plaintiffs point to no evidence that they incurred any costs of their own in reliance on the 2019 Rule. Rather, the evidence they offer states that *Title X funds* were used to fill the gaps. *See* Clark Decl., RE 1-1, PageID#30-31 ("[T]he Ohio Department of Health used the $2 million it received in supplemental Title X funding to expand Title X services in 17 additional counties throughout Ohio."). This case accordingly bears no resemblance to plaintiffs' primary authority, *DHS v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1914 (2020), where an agency reversed a five-year old policy on which recipients relied to "enroll[] in degree programs, embark[] on careers, start[] businesses, purchase[] homes, and even marr[y] and ha[ve] children." Nor is it factually analogous to the other cases on which plaintiffs rely. *See* Br.47; *Texas v. Biden*, 20 F.4th 928, 989 (5th Cir. 2021) (states' reliance interests in federal immigration policies); *National Urban League v. Ross*, 977 F.3d 770, 778 (9th Cir. 2020) (public's reliance interests in advertised census deadline).

In any event, even if plaintiffs had a cognizable reliance interest in the 2019 Rule, HHS reasonably determined that interest was outweighed by the need to restore the level of Title X services to that provided before the rule. HHS recognized that "a few states were able to increase their service sites following the 2019 rule." 86 Fed. Reg. at 56,151. But these states were the "exception," and a majority of states "saw a decrease in the number of service sites in their network." *Id.* HHS explained,

moreover, that "even if the same amount of funding is provided to a different set of grantees in a given area, it does not necessarily follow that the same number of clients will be served or same number of services will be provided." *Id.* Indeed, HHS explicitly considered Ohio, and noted that although Ohio had received additional funding, there was not "clear support for th[e] claim" that Ohio had increased the number of clients served. *Id.*

Finally, contrary to plaintiffs' assertion (Br.35-36), the agency properly responded to comments urging that the rule is invalid because money is fungible. Plaintiffs take issue with the agency's statement that it "disagrees that Title X grant funds allow for the 'creation of slush funds' or that those funds are 'fungible,'" because money is "objectively" fungible. Br.35 (quoting 86 Fed. Reg. at 56,150). But as the district court recognized, when read in context, HHS meant only that "'grant funds are spent for grant purposes,'" Order, RE 50, PageID#668 (quoting 86 Fed. Reg. at 56,150), and that funds were not being funneled to abortion-related activities.

2. HHS Reasonably Reinstated the Long-Standing Referral Requirement

a. HHS also reasonably chose to reinstate the requirement that Title X grantees provide "nondirective counseling on all pregnancy options," and a "referral upon request for option(s) the client wishes to receive," including abortion. 86 Fed. Reg. at 56,154. HHS explained that the non-directive counseling and referral requirements are "critical for the delivery of quality, client-centered care," *id.* at

56,154, and that "the provision of a referral is the logical and appropriate outcome of the counseling process," which plaintiffs do not challenge, 65 Fed. Reg. at 41,274. Indeed, grantees that withdrew from the program under the 2019 Rule explained that that rule's prohibitions "interfered with the patient-provider relationship" and made it "impossible … to provide healthcare and information to patients consistent with medical ethics." 86 Fed. Reg. at 56,146. As HHS explained, restoring the non-directive counseling and referral requirements (which date back approximately forty years) enables "healthcare providers to offer complete and medically accurate information and counseling to their clients." *Id.* at 56,154.

b. Plaintiffs are therefore mistaken in arguing that HHS failed to adequately explain its departure from the 2019 Rule's determination that "in most instances when a referral is provided for abortion, that referral necessarily treats abortion as a method of family planning." Br.41 (quoting 84 Fed. Reg. at 7717). As discussed *supra* pp. 33-35, HHS fully explained its view that the abortion referral requirement complies with Section 1008, *see* 86 Fed. Reg. at 56,149-50—a view HHS previously held and "published in the Federal Register in 2000," *id.* at 56,150; *see also* 65 Fed. Reg. at 41,271. Moreover, compelling reasons existed for reconsidering the 2019 Rule's approach and reinstituting the referral requirement. HHS explained that the fact "[t]hat so many providers … withdr[e]w from the program is a change in circumstances that, in the Department's view, demands reconsideration of the 2019 rule." 86 Fed. Reg. at 56,146. HHS's decision to reinstate the referral requirement

was a rational response to concerns that the 2019 Rule's prohibition on non-directive counseling and abortion referral "interfered with the patient-provider relationship and compromised [providers'] ability to provide quality healthcare," *id.*, and to the agency's determination that requiring referrals upon request is critical to the delivery of client-centered care and the appropriate outcome of the counseling process.

Plaintiffs are likewise incorrect that HHS failed to consider "whether mandating referrals was consistent with medical ethics." Br.42. In the 2021 rulemaking, HHS endorsed the position put forth by major medical organizations that prohibiting abortion referrals conflicted with medical ethics. *See* 86 Fed. Reg. at 19,817 (explaining that the 2019 Rule's ban was not "in accordance with the ethical codes of major medical organizations"); 86 Fed. Reg. at 56,146, 56,154 (summarizing comments from major medical organizations criticizing 2019 Rule); *see also Mayor of Baltimore*, 973 F.3d at 276-77. Plaintiffs make no serious attempt to undermine this support for the 2021 Rule, suggesting merely that these organizations, like the American College of Obstetricians and Gynecologists (ACOG), might not adequately "reflect the ethical views of medical providers generally." Br.43. But this assertion is difficult to square with the facts, *see Mayor of Baltimore*, 973 F.3d at 276 (noting that ACOG "comprises 90% of the nation's obstetricians-gynecologists"), and with plaintiffs' contention (Br.43) that HHS should have deferred to state laws on medical ethics, rather than the position of major medical organizations.

Plaintiffs in any event err in asserting (Br.43) that state medical ethics laws conflict with the 2021 Rule's referral requirement. Three of the cited laws set out conscience protections for physicians who object to counseling for, providing, or performing abortions. *See* Or. Rev. Stat. § 435.485(1) (explaining that physicians are "not required to give advice with respect to or participate in any termination of a pregnancy"); Ky. Rev. Stat. Ann. § 311.800(4) (West) (similar); Mont. Code Ann. § 50-20-111(2) (similar). Like these statutes, the 2021 Rule explains that objecting providers will not be required to counsel or refer for abortion in accordance with federal conscience statutes. *See* 86 Fed. Reg. at 56,153. (The fourth law plaintiffs cite is not in effect and its substantive provisions are inconsistent with controlling Supreme Court precedent. *See* La. Stat. Ann. § 40:1061(A) (providing criminal penalties for performing an abortion that "shall become effective" in the event *Roe v. Wade*, 410 U.S. 113 (1973), is overturned).)

Finally, plaintiffs' argument (Br.39) that HHS "[f]ail[ed] to consider the effect that the program-integrity and referral requirements would have on public support for Title X" cannot withstand even cursory scrutiny. As HHS explained, the 2021 Rule readopts the 2000 Rule, which "reflected compliance standards that 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." 86 Fed. Reg. at 56,145. In other words, the "decades-old compromise" to which Plaintiffs refer, Br.40, has largely involved the regulatory standards to which

they now object. Congress at no point altered the language of Title X to prohibit abortion referrals even in the face of those longstanding rules, *see Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 846 (1986), and, moreover, HHS explained that it reconsidered the 2019 Rule in response to a directive from the President that detailed the need of women for "complete medical information, including with respect to their reproductive health." 86 Fed. Reg. 56,148.

C. The Court Should Reject Plaintiffs' Extraordinary Request That It Direct Entry of Judgment in Their Favor

Plaintiffs urge (Br.57-58) that even if this Court affirms the district court's order denying their motion for a preliminary injunction—the only order before this Court on appeal—it should nonetheless direct the district court to enter judgment in plaintiffs' favor on their APA claims. Plaintiffs' boldness in making this request is matched only by the extent of their error.

"Normally," this Court "limit[s] [its] review of a district court's decision to grant or deny a preliminary injunction to a consideration of whether the district court abused its discretion, leave[s] it at that, and remand[s] to the district court for further proceedings." *Doe v. Sundquist*, 106 F.3d 702, 707 (6th Cir. 1997). The Court "generally decline[s] comment on the merits of the case to the extent possible," recognizing that "legal issues are more fully argued once litigation passes the preliminary stage" and respecting "the axiom that [the Court] do[es] not consider issues not passed upon by the district court." *Id.*

Under the usual rule, then, plaintiffs' request is fruitless. Nor can it be redeemed under the exception sometimes made when "an insuperable obstacle to awarding relief is apparent." *Sundquist*, 106 F.3d at 707-08 (quoting 11A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2962 Westlaw (database updated Apr. 2021)). That might happen, for example, if a defendant urges the Court to dismiss a suit where the district court lacks subject-matter jurisdiction. That course is supported "[b]y the ordinary practice in equity as administered in England and this country," under which a reviewing court has the power to "examine the merits of the case … and upon deciding them in favor of the defendant to dismiss the bill." *Munaf v. Geren*, 553 U.S. 674, 691 (2008). This of course has no bearing on a case in which a *plaintiff* seeks relief beyond that addressed by the district court and where the court of appeals agrees that the district court properly rejected the relief the plaintiff did ask for.

Plaintiffs present several cases in support of their extraordinary request (Br.57), but in none did a court do what plaintiffs seek here. In *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), the Supreme Court affirmed the district court's grant of a preliminary injunction restraining the Secretary of Commerce from seizing the plaintiff-steel mills. Although the Court addressed the merits of the constitutional question at issue over the government's objection, it did not suggest there was any other ground on which to deny preliminary injunctive relief and it did not purport to grant any relief beyond affirmance of the preliminary injunction. *See id.* at 584-85,

589. And in *Kansas ex rel. Stephan v. Adams*, 608 F.2d 861, 867 & n.5 (10th Cir. 1979), the court of appeals affirmed the denial of a preliminary injunction, exercising its discretion to reject the merits of *plaintiffs'* claims.

Plaintiffs' remaining authorities are equally inapposite because they involve application of a version of the "death knell" doctrine, under which some courts treat the denial of preliminary relief as "a de facto denial of a permanent injunction" if, absent preliminary relief, the plaintiff's "claims will be rendered moot." *Graham v. Teledyne-Cont'l Motors, a Div. of Teledyne Indus., Inc.*, 805 F.2d 1386, 1388 (9th Cir. 1986); 15A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 3912 Finality—Death Knell Orders, Westlaw (database updated Apr. 2021) (discussing *Graham*); *see also Miller v. Rich*, 845 F.2d 190, 191 (9th Cir. 1988) (following *Graham* and "treat[ing] this [case] as an appeal from a final judgment denying permanent injunctive relief"); *Jackson County v. Jones*, 571 F.2d 1004, 1007 (8th Cir. 1978) (treating the denial of a preliminary injunction against transfer of employees from an Air Force base as a denial on the merits, where employees were immediately transferred after the denial of preliminary relief). Plaintiffs here do not assert that their claims will be rendered moot absent preliminary relief. And treating plaintiffs' appeal as one from a denial of a permanent injunction would not help plaintiffs: plaintiffs are unable to establish the irreparable harm necessary for such relief. *See Women's Med. Prof'l Corp. v. Baird*, 438 F.3d 595, 602 (6th Cir. 2006); *supra* pp. 14-23.

III. The Scope of Any Preliminary Relief Must Be Appropriately Tailored

If the Court determines that plaintiffs are entitled to some measure of preliminary injunctive relief, the Court should remand to the district court to allow that court to determine in the first instance the proper scope of that relief. Any such relief must be tailored to the particular portions of the 2021 Rule that this Court deems impermissible and must further be limited to the parties before the Court that are able to demonstrate irreparable harm absent such relief. *See, e.g.*, *Gun Owners of Am., Inc. v. Garland*, 992 F.3d 446, 474 (6th Cir.) (reversing the denial of a preliminary injunction but declining to "decide the scope of the injunction" in an APA challenge to a notice-and-comment rule "except to say that the scope may not exceed the bounds of the four states within the Sixth Circuit's jurisdiction and, of course, encompasses the parties themselves"), *vacated on other grounds*, 2 F.4th 576 (6th Cir.), *on reh'g en banc*, 19 F.4th 890 (6th Cir. 2021).

A. An injunction may extend, at most, to the two components of the 2021 Rule that plaintiffs challenge: the separation requirements and the referral requirement. The 2021 Rule includes various changes designed to modernize and strengthen the Title X program. *See supra* p. 5. Those provisions are severable from the challenged provisions and should under no circumstances be disturbed. Unless "it is evident that the [lawmaking body] would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be

dropped if what is left is fully operative as a law." *Mayor of Baltimore*, 973 F.3d at 292 (alteration in original) (quoting *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 191(1999)). That rule applies in the context of a challenge to agency action. *See Carlson v. Postal Regulatory Comm'n*, 938 F.3d 337, 351 (D.C. Cir. 2019) ("[T]he APA permits a court to sever a rule by setting aside only the offending parts of the rule.").

Here, as the 2021 Rule explains, the "new provisions added to the re-adoption of the 2000 rule operate independently of each other—and the 2000 rule—to enhance the program." 86 Fed. Reg. at 56,148. It is clear that the agency would have adopted those changes to the Title X program independently of the separation and referral requirements. *See id.* at 56,148-59. For example, the 2021 Rule explains that revisions designed to "clarify[] required billing practices and income verification for low-income clients" and "strengthen[] client confidentiality" are crucial for the agency's important goals of "improving access to services" and "[a]dvancing equity for all." *Id.* at 56,149.

B. Furthermore, any injunction may be no broader than necessary to provide plaintiffs with relief and should be limited to those states that have shown that they will be irreparably harmed in the absence of such relief. *See, e.g.*, *Mayor of Baltimore*, 973 F.3d at 294 (limiting geographic scope of injunction to Maryland).

Under Article III, "[t]he Court's constitutionally prescribed role is to vindicate the individual rights of the people appearing before it," and a "plaintiff's remedy must be tailored to redress the plaintiff's particular injury." *Gill v. Whitford*, 138 S. Ct. 1916, 1933-34 (2018). Moreover, principles of equity require that injunctions "be no more

burdensome to the defendant than necessary to provide complete relief to the plaintiffs." *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 765 (1994). Courts have routinely applied this rule even in cases under the APA. *See, e.g.*, *Los Angeles Haven Hospice, Inc. v. Sebelius*, 638 F.3d 644, 664 (9th Cir. 2011) (holding regulation facially invalid but limiting district court's injunction to the plaintiff); *Virginia Soc'y for Human Life, Inc. v. Federal Election Comm'n*, 263 F.3d 379, 392-94 (4th Cir. 2001) (narrowing injunction to apply only to plaintiff).

As an initial matter, any relief awarded should be no broader than necessary to remedy the legal error this Court perceives. For example, in the event this Court determines that plaintiffs are likely to succeed on their challenge to the referral requirement, *but see supra* pp. 33-35, an injunction should extend only to HHS's enforcement of that requirement.

Moreover, any injunctive relief should at most apply to Ohio because "[n]o other State provides a declaration with facts showing how they would be harmed." Order 6 n.3. In evaluating a claim of irreparable harm, this Court considers not only "the substantiality of the injury alleged" and "the likelihood of its occurrence," but also "the adequacy of the proof provided" through "facts and affidavits." *Celebrezze*, 812 F.2d at 290; *see also McNeilly v. Land*, 684 F.3d 611, 615 (6th Cir. 2012) (explaining that "[t]he proof required for the plaintiff to obtain a preliminary injunction" is "stringent" because "a preliminary injunction is an extraordinary remedy"). As discussed, *supra* pp. 17-18, 18 n.3, all plaintiffs except Ohio failed to even attempt to

substantiate their claims of irreparable harm, a "mandatory" element of seeking preliminary relief. *D.T.*, 942 F.3d at 327. Accordingly, any preliminary injunction in this case should extend solely to Ohio.[5]

[5] In response to the court order enjoining the 2019 Rule in Maryland, the agency issued two separate funding notices for the 2020 cycle—one for the State of Maryland only and one for the rest of the country—explaining that "all services provided in Maryland" had to comply with the 2000 regulations and that applications under each notice would "be reviewed under the respective review criteria of each notice, and ranked in a single list for funding consideration." Office of the Assistant Sec'y for Health, Office of Population Affairs, *Funding Opportunity: FY2020 Title X Services Grants: Providing Publicly-Funded Family Planning Services in Areas of High Need—Maryland Service Area Only* 3 (closed July 28, 2020), https://go.usa.gov/xzvDV.

CONCLUSION

For the foregoing reasons, the order of the district court should be affirmed.

Respectfully submitted,

BRIAN M. BOYNTON
Principal Deputy Assistant Attorney General

ABBY C. WRIGHT

s/ Kyle T. Edwards
KYLE T. EDWARDS
Attorneys, Appellate Staff
Civil Division, Room 7527
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530
(202) 514-4214
kyle.t.edwards@usdoj.gov

March 2022

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 12,943 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2016 in Garamond 14-point font, a proportionally spaced typeface.

s/ Kyle T. Edwards
Kyle T. Edwards

CERTIFICATE OF SERVICE

I hereby certify that on March 25, 2022, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the appellate CM/ECF system.

s/ Kyle T. Edwards
Kyle T. Edwards

DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

Pursuant to Sixth Circuit Rule 28(b)(1)(A)(i), the government designates the following district court documents as relevant:

Record Entry	**Description**	**PageID# Range**
RE 1	Complaint with Exhibits	1-110
RE 2	Motion for a Preliminary Injunction with Exhibits	120-201
RE 27	Memorandum in Opposition to Motion for a Preliminary Injunction	308-63
RE 46	Reply in Support of Motion for a Preliminary Injunction	609-40
RE 50	Order Denying Plaintiffs' Motion for a Preliminary Injunction	656-80
RE 51	Notice of Appeal	682-86