No. 21–4235

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

STATE OF OHIO, ET AL., Plaintiffs-Appellants, v. XAVIER BECERRA, ET AL., Defendants-Appellees.	:	On Appeal from the United States District Court for the Southern District of Ohio District Court Case No. 1:21-cv-675-TSB

REPLY BRIEF OF APPELLANTS

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"None of the funds appropriated under" Title X "shall be used in programs where abortion is a method of family planning." 42 U.S.C. §300a-6. So reads Section 1008 of Title X. HHS recently issued a rule—the "Final Rule"—that flouts this prohibition. *See Ensuring Access to Equitable, Affordable, Client-Centered, Quality Family Planning Services*, 86 Fed. Reg. 56144-01 (Oct. 7, 2021) (to be codified at 42 C.F.R. pt. 59). The Final Rule requires Title X grantees to make elective-abortion referrals on request. And its program-integrity requirements allow Title X providers to intermingle Title X and abortion resources; providers can even have an "abortion element in a program of family planning services," as long as that element is not "so large and so intimately related to all aspects of the program as to make it difficult or impossible to separate the eligible and non-eligible items of cost." *Provision of Abortion-Related Services in Family Planning Services Projects*, 65 Fed. Reg. 41281-01, 41282 (July 3, 2000) (incorporated by reference at 86 Fed. Reg. at 56150).

A rule that *requires* Title X providers to promote abortion (by mandating referral), and that allows Title X providers to subsidize the provision and promotion of abortion (by allowing the close intermingling of program assets), impermissibly allows "funds appropriated under" Title X to be "used in programs where abor-

tion is a method of family planning." §300a–6. The Final Rule is therefore illegal, meaning it must be set aside under the Administrative Procedure Act. *See* States' Br.22–32. What is more, because the Final Rule's referral and program-integrity requirements are arbitrary and capricious, the Act would require setting them aside *even if* they complied with Section 1008. *Id.* at 32–49.

HHS's response brief does not refute any of these arguments. The States will thus prevail on the dispositive legal questions in this case. That, combined with the fact that the States can satisfy the remaining preliminary-injunction factors, requires entry of a preliminary injunction. *Id.* at 49–56. And recent developments have solidified the States' ability to satisfy those remaining factors: HHS just announced grants for the 2022–23 grant cycle, cutting Ohio's grant by $1.76 million in the wake of the Final Rule.

But the Court need not even concern itself with the preliminary-injunction factors. It can instead hold that the States prevail as a matter of law and remand with instructions to set aside the Final Rule. *Id.* at 56–58.

I. The Final Rule is not a permissible construction of Section 1008.

Section 1008 does not expressly address program-integrity or referral issues. In that sense, it is ambiguous. *Rust v. Sullivan*, 500 U.S. 173, 184 (1991). This ambiguity leaves HHS with some discretion. *Id.*; *accord* States' Br.21–22. More pre-

cisely, it empowers HHS to adopt any approaches to referrals and program-integrity that rest on a "permissible construction of the statute." *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984).

The Final Rule, however, does not rest on a plausible construction of Section 1008. As to program integrity, the Final Rule reinstates 2000-era guidance that allowed tremendous overlap and resource-sharing between Title X programs and abortion providers. The guidance even allows grantees to have an "abortion element in a program of family planning services." *See* States' Br.23 (quoting 65 Fed. Reg. 41281-01, 41282 (July 3, 2000)). With respect to referral, the Final Rule *requires* Title X providers to make abortion referrals upon request. 86 Fed. Reg. at 56179. No permissible construction of Section 1008 empowers HHS to require that Title X grantees treat abortion as a method of family planning by making referrals for elective abortions. States' Br.27–29.

HHS tries, and fails, to square the Final Rule's referral and program-integrity requirements with Section 1008.

A. The program-integrity rules violate Section 1008.

The Final Rule's program-integrity rules allow a substantial degree of intermingling of Title X and abortion services. It violates Section 1008.

1. HHS never meaningfully grapples with the fact that the Final Rule, by incorporating the 2000-era guidance, allows Title X programs to have an "abortion element in a program of family planning services." States' Br.23 (quoting 65 Fed. Reg. at 41282). HHS insists that this allowance for an "abortion element" is a "cherry-picked quote … read out of context," HHS Br.28, echoing the District Court's insistence that the "full context" yields some better meaning., *id.* (quoting Order Denying PI ("Op."), R.50, PageID#662 n.13). HHS, to its credit, provides a full paragraph of that context. HHS Br.29 (quoting 65 Fed. Reg. at 41282). But no matter how long the reader stares at the context, the guidance can only be read as permitting Title X providers to include an "abortion element" in family-planning programs funded with Title X grants. And that squarely contradicts Section 1008's prohibition on funding any "program where abortion is a method of family planning."

The District Court conceded HHS's phrasing was "unfortunate." Op., R.50, PageID#662 n.13. So it interpreted HHS to have meant only that Title X grantees can offer abortions in family-planning programs distinct from their Title X programs. *Id.* That makes little sense: the guidance addresses programs funded by Title X, and it allows Title X grantees to have abortion elements "within" those "program[s]." 65 Fed. Reg. at 41282.

HHS elaborates on the District Court's attempted saving construction. It argues that the fuller passage "makes clear that any abortion activities must be separate and distinguishable from the Title X project." HHS Br.29. As best the States can tell, HHS interprets the guidance to mean that Title X grantees can have a family-planning program funded *in part* by Title X, as long as any abortion element is kept "separate and distinguishable." That interpretation might have helped square the guidance with Section 1008 had the guidance required the abortion and non-abortion elements of family-planning programs to be kept so separate and distinct that they amount to two different programs. But it did no such thing. Instead, it permits the program to operate in the same places with the same staffs, requiring only *pro forma* bookkeeping. 65 Fed. Reg. at 41282.

The fair reading of the guidance is also consistent with the real motive behind HHS's adopting it: allowing Title X grantees to intermingle substantially their Title X and abortion services. States' Br.23–25; 65 Fed. Reg. at 41282; *see* 86 Fed. Reg. at 56150. The newest HHS announcement of Title X grants confirms HHS's *goal* is funding abortion clinics. The announcement includes the following statement from Secretary Becerra: "As communities face unyielding assaults on reproductive health care, I am proud that our nation can help bolster access to essential health and family planning services." *See HHS Awards $256.6 Million to*

Expand and Restore Access to Equitable and Affordable Title X Family Planning Services Nationwide ("HHS Grant Announcement"), available at https://www.hhs.gov/about/news/2022/03/30/hhs-awards-256-million-to-expand-restore-access-to-equitable-affordable-title-x-family-planning-services-nationwide.html. Secretary Becerra's characterization of "assaults on reproductive health care" refers to States' and citizens' opposition to *abortion*, not contraception—there is no broad or successful movement against non-abortion family planning. His quote thus confirms what would be obvious in any event. HHS incorporated the 2000-era guidance because that guidance will help the agency fund abortion clinics—places running "programs where abortion is a method of family planning."

2. HHS stresses that allowing Title X programs and abortion facilities to pool resources promotes efficiency—it helps Title X grantees save money. HHS Br.32. Indeed it does, and that is *the problem* with the Final Rule, not an argument for preserving it. As the 2019 Rule recognized, the fungibility of money means that allowing Title X programs and abortion services to share resources would enable abortion providers to achieve "achieve economies of scale"—in other words, they could use Title X funds to illegally subsidize abortion. 84 Fed. Reg. 7714-01, 7766 (March 4, 2019).

The Final Rule denied the fungibility of money. *See* 86 Fed. Reg. at 56150. HHS now apparently concedes that money is fungible. HHS Br.30. But it suggests fungibility is irrelevant. The agency stresses that arguments resting on the fungibility of money, if taken to their extreme, would forbid HHS from providing *any* Title X funds to abortion-providing grant applicants, no matter how physically and financially separate they keep their Title X and abortion services. *See id.* But the States' argument does not present a slippery slope that the Court must ski to the bottom. Instead, the States have argued that, because money is fungible, Section 1008 requires *some* meaningful safeguards that keep Title X from subsidizing abortion. There is likely a way to do that without requiring the strict financial and physical separation required by the 2019 Rule. But the Final Rule does not even try.

HHS cites cases showing that the government may run into unconstitutional-conditions problems if, as a condition on the receipt of federal money, it requires grantees not to exercise their constitutional rights even when acting outside of the federally funded program. *Id.* at 31–32 (citing, *e.g.*, *Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l, Inc.*, 570 U.S. 205, 220 (2013)). Those cases are doubly irrelevant. First, because no one has a right to perform abortions, meaningful program-integrity rules could not possibly impose an unconstitutional condition. *Planned Parenthood of Greater Ohio v. Hodges*, 917 F.3d 908, 910, 912 (6th Cir. 2019) (*en*

banc). Second, and more fundamentally, *Rust* held that program-integrity requirements, provided they impose no limits on what grantees do *outside* the Title X program, create no unconstitutional-conditions problem. *Rust*, 500 U.S. at 196–200. So precedent forecloses any argument that the unconstitutional-conditions doctrine would stop HHS from adopting program-integrity requirements with bite.

B. The referral requirement violates Section 1008.

The Final Rule violates Section 1008 by requiring grantees to provide elective-abortion referrals "upon request." 86 Fed. Reg. at 56179. *See* States' Br.26–28.

HHS insists that making abortion referrals within a Title X program does not constitute treating abortion as a method of family planning. HHS Br.33–34. It said precisely the opposite in 2019: "in most instances when a referral is provided for abortion, that referral necessarily treats abortion as a method of family planning." 84 Fed. Reg. at 7717. HHS was right in 2019. A government program that requires participants to make referrals for elective abortions necessarily requires those participants to treat "abortion" as "a method of family planning." 42 U.S.C. §300a-6. HHS's own analogy proves the point. *See* HHS Br.35. If the government funds a teeth-cleaning program, and if it requires participating dentists to make referrals for root canals upon the request of a patient, the dentists would be enlisted in a

program that treats root canals as a method of dental care. (In contrast, a program that is silent on root-canal referrals—and that therefore *allows* doctors to provide referrals—could plausibly be describes as something other than "a program where root canals are a method of dental care.") Here, by requiring grantees to make elective-abortion referrals, HHS requires grantees to run programs where abortion is a method of family planning. That violates Section 1008.

The Final Rule's lax program-integrity requirements make the illegality of the referral requirements especially stark. If Title X grantees can provide Title X services and abortions in the same facility with the same staff in the same room, and if the Title X grantee can refer Title X patients *to itself* for an abortion, then the Title X program is a program "where abortion is a method of family planning." 42 U.S.C. §300a-6. The program-integrity requirement thus makes the referral requirements even more blatantly illegal than they would otherwise be.

II. The Final Rule is arbitrary and capricious in several ways.

The Final Rule's program-integrity and referral requirements are arbitrary and capricious, and thus invalid, even if they are not flatly illegal.

A. The program-integrity rules are arbitrary and capricious.

1. HHS abandoned the 2019 Rule's program-integrity requirements without adopting any alternative capable of keeping Title X funds from being used to illegally subsidize abortion. That was arbitrary and capricious. States Br.34–38.

HHS's responses all fall short. It first stresses that the Final Rule simply reinstated safeguards against improper expenditure "that had been in place for much of the program's history." HHS Br.37 (citing 86 Fed. Reg. at 56150). On that basis it insists there is "no merit to" the States' "contention that HHS abandoned the 2019 Rule's program-integrity requirements" without adopting a suitable alternative. *Id.* (quotation omitted). HHS's argument is circular: it proves the adequacy of the pre-2019 approach by assuming its adequacy. There is nothing in the Final Rule, and there is nothing in HHS's appellate brief, showing that the reinstated approach actually worked. HHS failed to consider that issue—it simply *assumed* the previous approach worked. Failing to consider so obvious an issue is arbitrary and capricious. *Michigan v. EPA*, 576 U.S. 743, 752 (2015).

In any event, HHS's reinstatement of the pre-2019 approach to program-integrity rests on the rejection of the objectively true statement that "Title X grant funds … are 'fungible.'" 86 Fed. Reg. at 56150; *accord* States' Br.35. HHS responds by denying that it made any such rejection. "[R]ead in context," HHS

says, the agency "meant only that 'grant funds are spent for grant purposes.'" HHS Br.41 (quoting Op., R.50, PageID#668). Here is the full context:

> The Department disagrees that Title X grant funds allow for the "creation of slush funds" or that those funds are "fungible." As stated above, the Department has multiple methods by which it confirms that grant funds are spent for grant purposes, and it has concluded that grantees comply, not just with section 1008, but with Congressional directives and other requirements of the program. Again, the 2019 rule could point to no significant compliance issues related to the diversion of Title X grant funds, and a fresh review of decades of evidence has uncovered no such issues.

86 Fed. Reg. at 56150. This context does not alter the plain meaning of HHS's statement. No doubt, HHS made its statement in the course of explaining *its conclusion* that grant funds would be spent only for grant purposes. But that conclusion rests on the false premise that Title X grant funds are not fungible.

2. The Final Rule is arbitrary and capricious for a second reason: HHS reinstated the pre-2019 approach to program integrity without even considering obvious alternative approaches. In particular, HHS did not consider loosening the 2019 Rule's program-integrity requirements rather than restoring the pre-2019 approach entirely—this despite the fact that the States offered HHS many such alternative options in their letter to the agency. States' Br.36–37.

HHS says it was not obliged to consider those alternatives, because none of them "provide[d] a 'significant and viable' solution to the core problem that HHS identified. The problem it identified was that the 2019 Rule's separation require-

ments 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.'" HHS Br.38–39 (quoting *National Shooting Sports Found., Inc. v. Jones*, 716 F.3d 200, 215 (D.C. Cir. 2013) & 86 Fed. Reg. at 56145). That is simply false. Consider just one of the alternatives that the States proposed: "granting targeted exceptions for the those Title X programs in need of flexibilities." States' Letter, R.2-2 at 9, PageID#194. HHS does not, and could not possibly, deny that this narrower alternative would address the "core problem" it identified. After all, the States' proposed alternative would give the agency discretion to grant exemptions to entities who could comply with the 2019 Rule only by diverting funding better spent elsewhere. HHS therefore needed to consider this alternative. *National Shooting*, 716 F.3d at 215; *DHS v. Regents of Univ. of California*, 140 S. Ct. 1891, 1912–13 (2020). It failed to do so.

3. HHS also impermissibly failed to consider reliance issues that built up around the 2019 Rule. States' Br.38–39. HHS responds that, because the States have no "legally cognizable interest[]" in the continued receipt of Title X grants, they cannot have developed any legitimate reliance interests. HHS Br.39. But the Supreme Court rejected the idea that one must have a legal entitlement to the benefits of a policy in order to rely on the policy's existence. In *Regents*, it held that the

agency responsible for administering the DACA program acted arbitrarily and capriciuosly by canceling the program without considering reliance interests. 140 S. Ct. at 1915. And it did so *notwithstanding* its acknowledgment that DACA recipients had no legal entitlement to the program's benefits. *Id.* at 1914. HHS further insists that agencies must consider reliance interests only when they abandon "longstanding policies." HHS Br.38 (quoting *Encino Motorcars, LLC v. Nvarro*, 579 U.S. 211, 221–22 (2016). No. While longstanding polcies are perhaps more likely to generate serious reliance interests—that is all *Encino* suggests—no case frees agencies from having to consider reliance interests developed in light of newer policies. To the contrary, *Regents* held that agencies must always consider the reliance interests they upset. 140 S. Ct. at 1913–14. And it said so about a policy that was hardly longstanding.

Perhaps sensing this, HHS argues on appeal that the States had no legitimate reliance interests. Even if that argument had merit, it would be legally irrelevant: HHS never considered reliance interests during the rulemaking process, and "courts may not accept appellate counsel's *post hoc* rationalizations for agency action." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50 (1983). While HHS's brief plucks from their context some statements that might appear to address reliance interests, none does. Each comes from a sin-

gle page of the Final Rule in which the agency concludes that States had not sufficiently filled the gaps in coverage that the 2019 Rule caused. HHS Br.40–41 (86 Fed. Reg. at 56151).

4. Finally, HHS failed to consider the effect that abandoning the program-integrity requirements would have on public support for the Title X program. States' Br.39–40. HHS does not seriously argue otherwise—it does not point to *anything* in the Final Rule addressing public support. Instead, it argues that, because the reinstated program-integrity requirements existed for years before the 2019 Rule, their reinstatement will not harm public support. HHS Br.44–45. That hardly follows. As just about every American can attest, the issue of abortion is more contentious now than ever before. In any event, this explanation appears nowhere in the Final Rule, and HHS cannot cure that problem with *post hoc* rationalization. *State Farm*, 463 U.S. at 50.

B. The referral requirement is arbitrary and capricious.

1. HHS failed to adequately justify its departure from the 2019 Rule. Again, it concluded in 2019 that, "in most instances when a referral is provided for abortion, that referral necessarily treats abortion as a method of family planning." 84 Fed. Reg. at 7717. The Final Rule abandons that conclusion, but without address-

ing it or "rationally justif[ying]" the agency's change in position. *Michigan v. Thomas*, 805 F.2d 176, 184 (6th Cir. 1986).

HHS responds by obfuscating. Instead of pointing to anything in the rule refuting its prior position, it simply insists that it had good policy reasons for restoring the pre-2019 approach to referrals. HHS Br.42–43. That hardly constitutes a reasoned rejection of the conclusion regarding the impact of referrals. HHS notes it determined Section 1008 permits a referral mandate, HHS Br.42, apparently suggesting that this determination refuted the 2019 Rule's conclusion. That suggestion is wrong. *Even if* Section 1008 permits requiring abortion referrals in the abstract, the question remains whether "in most instances" such referrals cause the referrer to treat abortion as a method of family planning. In 2019, HHS answered that question in the affirmative. The Final Rule changes the agency's position without explaining why.

What HHS did say hardly counts as "a 'reasoned analysis'" of the question whether referrals lead to treating abortion as a method of family planning. *Rust*, 500 U.S. at 187 (quoting *State Farm*, 463 U.S. at 42). HHS claims otherwise, citing a portion of the Final Rule. HHS Br.42 (citing 86 Fed. Reg. at 56149–50). But the cited portion does not address the issue at all; it just says that *Rust* called Section 1008 ambiguous. That establishes, at most, that HHS can *restrict* referrals, not that

it ought to permit them and not that it can require them. That passage does not examine and reject the 2019 Rule's analysis. HHS's inability to uncover any explanation for its departure from the 2019 Rule's determination regarding referrals proves that the administrative record contains none

2. Second, HHS failed to consider serious medical-ethics concerns with the Final Rule. More precisely, it failed to consider state laws showing that medical ethics arguably forbid, and definitely do not require, policies mandating abortion referrals. States' Br.48–49.

HHS has no good response. It says the Final Rule "endorsed the position put forth by major medical organizations that prohibiting abortion referrals conflicted with medical ethics." HHS Br.43. So it did. But there are two problems with that. First, the States, not medical organizations, regulate medical ethics. The regulators' views on medical ethics are entitled to at least as much weight as the views of organizations comprising the regulated. If nothing else, the regulators' views are owed *some* consideration, yet the Final Rule never addresses them. Second, as the States explained in their comment letter to HHS, it is doubtful that these organizations reflect the ethical views of the medical profession as a whole. States' Letter, R.2-2 at 12, PageID#197. One of the organizations in question, the American College of Obstetricians and Gynecologists, has even filed briefs defend-

ing the practice of eugenic abortion, in which doctors kill unborn children based on their perceived genetic inferiority. *See* Brief for Am. Coll. of OBGYNS, *et al.*, as *Amici Curiae* in Support of Appellees, *Preterm-Cleveland*, 994 F.3d 512 (No. 18-3329). An organization "willing to stand up for eugenics ought not be taken seriously in any discussion of ethics." States' Letter, R.2-2 at 13, PageID#198.

Perhaps sensing these issues, HHS says that the referral requirement is actually consistent with the laws to which the States pointed. These laws, it notes, do not *forbid* abortion referrals. Instead, they provide "conscience protections for physicians who object to" making referrals or counseling on abortion. HHS Br.44. HHS notes that the Final Rule incorporates federal laws requiring providing similar protections. *Id.* This misses the point. The fact that the States and the federal government allow doctors with conscientious objections not to make abortion referrals shows that one can ethically practice medicine without making these referrals. That possibility—of acting ethically without referrals—confirms that medical ethics do not require a mandatory-referral policy. HHS altogether failed to consider this issue, and it cannot fix the problem at this point with *post hoc* rationalization.

Finally, HHS notes that the Fourth Circuit previously deemed referral requirements consistent with medical ethics. HHS Br.43 (citing *Mayor of Baltimore v. Azar*, 973 F.3d 258, 276–77 (4th Cir. 2020) (*en banc*)). And it cites a passage in the

Final Rule noting that "major medical organizations" had ethical concerns *about the 2019 Rule*. *Id.* (citing 86 Fed. Reg. at 19817). But HHS does not cite *any* consideration of the serious ethical concerns with the Final Rule, which the States raised in a comment letter. States' Letter, R.2-2 at 12–13, PageID#197–98. It was arbitrary and capricious not to consider this important issue. *Baltimore*, 973 F.3d at 276–78. And while HHS now objects to the States' ethical concerns, its *post hoc* explanation for rejecting those concerns is legally irrelevant. *State Farm*, 463 U.S. at 50.

3. Finally, HHS failed to consider what mandating referrals would mean for public support for the Title X program. States' Br.39–41. HHS insists that is wrong, just as it did with respect to the Final Rule's program-integrity requirements. HHS Br.44–45. But once again, its arguments amount to *post hoc* rationalizations that cannot be considered during arbitrary-and-capricious review. *State Farm*, 463 U.S. at 50.

III. The District Court erred in failing to award a preliminary injunction.

Because the States are likely to prevail on the merits (certain, in fact), the question becomes whether they can satisfy the remaining preliminary-injunction factors. They can.

Irreparable injury: The States will suffer at least three irreparable injuries. States' Br.49–56. This reply focuses on two.

First, the States are harmed by increased competition for funding and the resulting lost funds. The just-announced grant awards for the 2022-23 cycle prove the point. States' Br.50–51; *see* HHS Grant Announcement. This Court, at the injunction-pending-appeal stage, said the States' expectation of impending cuts was too speculative *at the time.* Order at 6–7. The Court explained that the States' theory was "premised on the prediction that they will receive smaller grants (or a smaller share of Title X funds) in the upcoming funding round," but said "[t]hat prospect [was] too speculative to create an irreparable harm." *Id.* at 6. Elsewhere in its order, it stated that "the nature of the alleged competition is too uncertain *at this stage* to warrant an injunction," and noted that "the States provide[d] no indication that an injunction must be imposed now, as opposed to once grant allocations have been determined or announced." *Id.*

Now, the facts are in, and the expected cuts materialized. Ohio, for example, had previously received $8.8 million in 2021–22, as the sole Ohio grantee. *See* Clark Decl. ¶13, R.1-1, PageID#31. Now that HHS has awarded $2 million to Planned Parenthood of Greater Ohio for the coming grant year, Ohio will receive

$1.76 million less. The overall increase in grants for Ohio providers did not overcome the State of Ohio's loss to competitor Planned Parenthood.

HHS had, pre-announcement, suggested that if the States receive less funding, it *might* be for reasons unrelated to increased competition. HHS Br.16. That argument asks this Court "to exhibit a naiveté from which ordinary citizens are free." *Dep't of Com. v. New York*, 139 S. Ct. 2551, 2575 (2019) (citation omitted). *The express purpose* of the Final Rule is to bring abortion providers back into the program. Indeed, the President's Memorandum to HHS in January 2021 objected that the 2019 Rule "impose[d] … onerous requirements on abortion providers" and "caused the termination of Federal family planning funding for many women's healthcare providers." Memorandum on Protecting Women's Health at Home and Abroad, January 28, 2021; *see* 86 Fed. Reg. at 56171 (identifying goal as having departed grantees re-enter program). When Planned Parenthood dropped out of Title X, Ohio's funding went up. When Planned Parenthood reentered, Ohio's funding went down. Denying a causal link denies reality.

HHS also insisted the funds lost might not have "substantial attendant harms." HHS Br.15. Ohio lost *twenty percent* of its funding—over $1.5 million—which is substantial by any measure. HHS complains that Ohio did not detail which programs or sub-grants Ohio would cut in turn, or whether Ohio would use

its own revenue to maintain service levels instead. *Id.* Such detail is unnecessary: a 20 percent cut has to mean program cuts or extra expenditures or both—something has to give—and Ohio feels the pain regardless.

Perhaps expecting that the States' predictions would come true, HHS preemptively argued that the Court ought to blind itself to today's facts. HHS Br.19. It notes, accurately enough, that appeals (including preliminary-injunction appeals) are generally limited to the record before the District Court. HHS Br.19 (citing *Wilson v. Williams*, 961 F.3d 829, 833 (6th Cir. 2020)). Nevertheless, this Court retains the power to "take judicial notice of changed circumstances." *Namo v. Gonzales*, 401 F.3d 453, 458 (6th Cir. 2005); *Broom v. Shoop*, 963 F.3d 500, 509 (6th Cir. 2020); *Mallory v. Eyrich*, 922 F.2d 1273, 1281 (6th Cir. 1991). HHS also repeats its puzzling insistence that cases addressing injuries in the standing context have no relevance to the irreparable-harm context. HHS Br.15. If something is in fact an injury when assessing standing, it remains an injury when assessing irreparable harm. And since there is no way to sue the federal government for money damages, any injury it inflicts is irreparable.

Second, aside from the lost funds, the referral requirement will force the States to put their imprimatur on abortion. *See* States' Br.53. In denying the States' request for an injunction pending appeal, this Court noted that States might

avoid this harm by invoking "federal statutes protecting conscience and/or civil rights." Order at 9 (quotation omitted). It further suggested that the referral requirement had not yet gone into effect.

HHS concedes that the Court erred: States cannot make use of the conscience-protection statutes, and the referral requirement *has been* in effect. HHS Br.20–21. The agency nonetheless denies that the referral requirement causes any irreparable harm. It first says any harm is self-inflicted because the States can just turn down the funds. *Id.* at 21. By that logic, federal grantees and contractors are *never* harmed by the tying of illegal terms to federal funds. That is not the law. *See, e.g.*, *Kentucky v. Biden*, 23 F.4th 585, 611–12 (6th Cir. 2022); *Mayor of Baltimore v. Azar*, 973 F.3d 258, 274 n.6 (4th Cir. 2020) (*en banc*). HHS knows that, so it raises a backup argument. It insists that, because many of the States took Title X grants under the 2000 Rule requiring referrals, they must not be harmed by doing so. HHS Br.21–22. That argument is fallacious. For one thing, the fact that the States took the funds does not mean they sustained no harm—it just means the program's benefits outweighed the harms. And regardless, times change. Perhaps the previous referral requirement went unnoticed. Or perhaps the States did too little to beat it back. But the States will not be "consciously wrong today" simply because they were "unconsciously wrong yesterday." *Massachusetts v. United States*, 333 U.S.

611, 640 (1948) (Jackson, J., dissenting). As a fallback, HHS insists that not *all* of the state laws the States cited expressly bar state entities from making abortion referrals. HHS Br.22. Of course, some do. In any event, whether the laws specifically address referral is irrelevant: the laws indisputably show that the States do not want to encourage or promote abortion. The referral requirement makes them do so.

Remaining factors. With respect to the final two factors, HHS stresses that the Final Rule will have positive effects. That is irrelevant. As the Supreme Court has twice had to remind the federal government recently, "our system does not permit agencies to act unlawfully even in pursuit of desirable ends." *Alabama Ass'n of Realtors v. HHS*, 141 S. Ct. 2485, 2490 (2021) (*per curiam*); *accord NFIB v. OSHA*, 142 S. Ct. 661, 666 (2022) (*per curiam*). The remaining factors are therefore satisfied. *Realtors*, 141 S. Ct. at 2490; *NFIB*, 142 S. Ct. at 666.

IV. HHS wrongly insists that preliminary relief must be limited to Ohio.

HHS argues that, if this Court grants preliminary relief, it should enjoin the enforcement of only the two provisions the States have challenged: the referral requirement and the program-integrity rules. HHS Br.48–49. On that score, the States agree. They disagree, however, regarding the geographic scope of any injunction. HHS errs in arguing that any injunction should be limited to Ohio's bor-

ders. HHS notes that only Ohio submitted evidence of irreparable harm. HHS Br.50. But that was all the States needed. The Court can grant relief whenever one party has standing to seek it, *Trump v. Hawaii*, 138 S. Ct. 2392, 2416 (2018), and Ohio unambiguously does. Further, while some jurists have expressed skepticism about the permissibility of nationwide injunctions, *see DHS v. New York*, 140 S. Ct. 599, 600 (Gorsuch, J., concurring in the grant of a stay), this Court's precedents permit their issuance when needed to address the plaintiffs' proven harms, *see, e.g.*, *Washington v. Reno*, 35 F.3d 1093, 1103 (6th Cir. 1994). It is undisputed that nine of the plaintiff States participate in Title X. Compl., ¶24, PageID#5. HHS now says that Title X funds are not allocated on a state-by-state basis. This presumably means that HHS could, if it wanted to, allocate no Title X funds to States where the program-integrity or referral requirements are enjoined. The only way to stop that—the only way to ensure that adversely affected States suffer no adverse consequences—is to enjoin the referral and program-integrity requirements nationwide.

V. Alternatively, the Court should hold that the States prevail as a matter of law and remand for entry of a final judgment in their favor.

If the Court concludes that the States prevail as a matter of law on the merits, it need not even reach the preliminary-injunction issue: it can simply remand to

the District Court with instructions to set aside the Final Rule under the Administrative Procedure Act. *See* States' Br.56–58.

HHS says that the States' "boldness in making this request is matched only by the extent of the error." HHS Br.45. But fortune favors the bold, especially when the bold have a point. The States do. The ultimate merits question in this case is whether the referral and program-integrity requirements are either contrary to law or arbitrary and capricious. That question is purely legal, meaning there is no factfinding left to do in the District Court. Nor is there any uncertainty regarding the States' entitlement to relief: the District Court "*shall* hold unlawful and *set aside*" any challenged requirement that is either contrary to law or arbitrary and capricious. 5 U.S.C. §706(2) (emphasis added). In other words, the States will win relief *even if* they cannot show irreparable harm. *Contra* HHS Br.47. Remanding for months of summary-judgment briefing—which HHS will be able to drag out, keeping its illegal rule in place a bit longer while the parties litigate before a district court that has already made clear its intent to uphold the rule—"would require wasted litigation without any offsetting advantage in economy of appellate effort or uninterrupted trial court proceedings." Wright & Miller, 16 Federal Practice and Procedure §3921.1. The Court can avoid this wasted time and wasted effort by resolving the issue now. It has ample authority to do so. *Munaf v. Geren*, 553 U.S.

674, 691 (2008); *Miller v. Rich*, 845 F.2d 190, 191 (9th Cir. 1988); *Graham v. Teledyne-Cont'l Motors, Inc.*, 805 F.2d 1386, 1388 (9th Cir. 1986); *Kansas ex rel. Stephan v. Adams*, 608 F.2d 861, 867 & n.5 (10th Cir. 1979); *Jackson Cnty., Mo. v. Jones*, 571 F.2d 1004, 1007 (8th Cir. 1978).

HHS says that, while courts may award final relief to the *defendant* in a preliminary-injunction appeal, they can rarely do the same for a plaintiff. HHS Br.46. But in law as in life, "what is sauce for the goose is normally sauce for the gander." *Heffernan v. City of Paterson*, 578 U.S. 266, 272 (2016). As the D.C. Circuit recently confirmed, courts may "resolve the merits" on an appeal of a preliminary-injunction ruling, and they may do so in favor of the plaintiff, when "the facts are established or of no controlling relevance" and the issue turns on a purely legal question. *United States Ass'n of Reptile Keepers, Inc. v. Zinke*, 852 F.3d 1131, 1135 (D.C. Cir. 2017). In that case, the D.C. Circuit awarded final relief "in order to 'save the parties the expense of future litigation.'" *Id.* (quoting *Thornburgh v. ACOG*, 476 U.S. 747, 756–57 (1986)). Following *Reptile Keepers*, another recent D.C. Circuit case summarily resolved a dispute about the legality of an agency action instead of staying that action pending further judicial review. *Clean Air Council v. Pruitt*, 862 F.3d 1, 8 (D.C. Cir. 2017); *see also, e.g.*, *Wisconsin Legislature v. Wisconsin Elections Commission*, No. 21A471, 2022 WL 851720 (U.S., Mar. 23,

2022) (*per curiam*). This Court too should follow *Reptile Keepers*. It should "hold as a matter of law that the government lacks authority" to enforce the referral and program-integrity requirements. 852 F.3d at 1142.

HHS admits that, under the "'death knell' doctrine," courts may "treat the denial of preliminary relief as 'a de facto denial of a permanent injunction'" and reach the merits "if, absent preliminary relief, the plaintiff's claims will be rendered moot." HHS Br.47. But it implies that is the *only* circumstance in which a court may resolve the merits in favor of a plaintiff. That is wrong. *Reptile Keepers*, for example, was not a death-knell case: Judge Srinivasan's opinion for the court resolved the purely legal question presented not because there was any risk of mootness, but rather because it could save the parties' a great deal of expense. 852 F.3d at 1335. And because the *Reptile Keepers* court concluded that the plaintiffs in that case prevailed on their Administrative Procedure Act challenge as a matter of law, it ruled in their favor without even addressing the remaining injunctive-relief factors, including irreparable harm. *See id.*; *accord Clean Air Council*, 862 F.3d at 8; *contra* HHS Br.47. This Court can do the same thing here.

CONCLUSION

The Court should permanently or preliminarily enjoin the Final Rule.

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CERTIFICATE OF COMPLIANCE

I hereby certify, in accordance with Rule 32(g) of the Federal Rules of Appellate Procedure, that this brief complies with the type-volume requirements and contains 6,183 words. *See* Fed. R. App. P. 32(a)(7).

I further certify that this brief complies with the typeface requirements of Federal Rule 32(a)(5) and the type-style requirements of Federal Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Equity font.

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CERTIFICATE OF SERVICE

I hereby certify that on April 11, 2022, the foregoing was filed electronically. Notice of this filing will be sent to all parties for whom counsel has entered an appearance by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

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