Case No. 19-1614

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

MAYOR AND CITY COUNCIL OF BALTIMORE, Plaintiff-Appellee, v. ALEX M. AZAR II et al., Defendants-Appellants	:	On Appeal from the United States District Court District of Maryland

BRIEF OF *AMICI CURIAE* OHIO, ALABAMA, ARKANSAS, INDIANA, KANSAS, LOUISIANA, NEBRASKA, OKLAHOMA, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, TEXAS, UTAH, AND WEST VIRGINIA IN SUPPORT OF DEFENDANTS-APPELLANTS AND REVERSAL

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INTRODUCTION AND STATEMENT OF AMICI INTEREST

Ohio and other *amici* States participate in Title X programs, partnering with the federal government to provide family-planning services and related healthcare to their residents. These States fully support Title X's mission.

At the same time, the *amici* States share many of their citizens' growing concerns about providing government support to entities with links to abortion. That is why Ohio law, for example, makes entities that provide abortions (or that affiliate with entities that do) ineligible for funding under certain public-health programs—programs that are outside of, but similar to, Medicaid and Title X. *Planned Parenthood of Greater Ohio v. Hodges*, 917 F.3d 908, 910 (6th Cir. 2019) (en banc). Many other States have similar laws designed to ensure that public funds never make their way to abortion providers.

Title X is supposed to work in much the same way as these state laws. It prohibits its funds from being "used in programs where abortion is a method of family planning." 42 U.S.C. §300a-6. In the past, however, Health and Human Services ("HHS") has failed to meaningfully enforce this prohibition. The new rules will change that: they will ensure that Title X funds are not used to fund or promote abortion, even indirectly. That comports with Congress's command in §300a-6. It is also consistent with many citizens' concerns regarding government-

funded abortion. That is why the *amici* States are, as authorized by Rule 29(a)(2), filing this brief in support of the United States.

The District Court erred in preliminarily enjoining the new rules. As the Ninth Circuit recently explained, in granting a stay pending appeal of lower court decisions similar to the one below, the new Title X rules are not likely to be invalidated. *California v. Azar*, Nos. 19-15974, 19-15979, 19-35386, 19-35394, 2019 U.S. App. LEXIS 18452 (9th Cir., June 20, 2019) (per curiam). To the contrary, they are almost certain to be upheld. That is because the new rules are essentially the same ones that the U.S. Supreme Court found to be valid in *Rust v. Sullivan*, 500 U.S. 173 (1991). The district courts in the Ninth Circuit had, like the District Court here, pointed to post-*Rust* congressional enactments as purportedly changing the legal landscape. But as the Ninth Circuit explained, those post-*Rust* enactments have no bearing on the new rules' validity. This Court should reverse the District Court.

This brief will not address every one of the challengers' arguments or the lower court's errors. It will instead address the Secretary's statutory duty to implement Title X so as to keep its funds from being used in connection with abortion, before addressing important-yet-underappreciated considerations that support the new rules.

ARGUMENT

Americans disagree about abortion. Passionately. But they can all agree that abortion has long been among the country's most divisive issues. These opposing views make public expenditure in support of abortion highly controversial. As a result, the federal government and most State governments avoid funding the practice. *See Rust v. Sullivan*, 500 U.S. 173, 201–02 (1991); *Harris v. McRae*, 448 U.S. 297, 315–17 (1980); *Maher v. Roe*, 432 U.S. 464, 474 (1977). To be sure, some States provide such funding. And many advocates would like to see more public funding. But the broader national consensus against funding elective abortion remains. *See* Pub. L. No. 115-31, §§613–14, 131 Stat. 135, 372 (2017) (barring certain federal funds from being used for elective abortion).

Title X reflects this consensus. So do the new rules, and the Secretary lawfully exercised his Title X authority by promulgating them.

I. Title X forbids using its funds to support programs relating to abortion, and charges the Secretary with administering this prohibition.

A. Title X says that its funds may not be used to support abortion, even indirectly: "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.

To understand why this language is there, consider the historical context. Congress passed Title X in 1970, a few years before *Roe v. Wade*. So, while many

States had loosened their abortion restrictions, many others still forbade the practice in at least some circumstances. These States (and their citizens) would not have supported Title X if it funded, or evinced government approval of, what they still considered a crime. So Title X's principal sponsor, Congressman John D. Dingell, introduced what would become §300a-6 to assuage these concerns:

> Mr. Speaker, I support the legislation before this body. I set forth in my extended remarks the reasons why I offered to the amendment which prohibited abortion as a method of family planning . . . . With the "prohibition of abortion" the committee members clearly intended that abortion is not to be encouraged or promoted *in any way* through this legislation. Programs which include abortion as a method of family planning are not eligible for funds allocated through this Act.

116 Cong. Rec. 37375 (1970) (emphasis added); *see also* 53 Fed. Reg. 2922, 2922–23 (Feb. 2, 1988) (noting Congressman Dingell's statement on the house floor).

The text of §300a-6 does what Congressman Dingell intended: it forbids Title X funds from being used by "programs where abortion is a method of family planning." §300a–6.

While §300a-6's meaning is clear enough, the statute says little about the precise means of keeping Title X funds from being used to promote abortion. The responsibility for developing those means falls to the Secretary of Health and Human Services. The Secretary must develop rules governing Title X grants and contracts. In light of §300a-6, those rules must set forth grant and contract terms to

ensure that Title X funds are not used to promote abortion, even indirectly. *Rust*, 500 U.S. at 178–80.

As is true of any statute that tells the Executive to do something without saying how exactly to do it, Title X leaves the Secretary with some discretion. With that discretion comes a degree of deference. The Secretary may implement Title X in any manner consistent with the law. *Id.* at 184. The upshot is this: since Title X requires the strict segregation of Title X funds and abortion, regulations that preserve that strict segregation must be upheld as long as they comport with all statutory commands. *Id.*

B. Congress has never amended §300a-6. Nonetheless, the District Court below identified two provisions that, it said, fundamentally altered the Secretary's power to regulate Title X grants. Memorandum Opinion ("Dist. Op."), R.43, 17-20. Neither does.

The first provision is a budget rider that Congress has included in every Title X appropriations bill since 1996. Dist. Op. at 17-18. The provision appropriates funds "[f]or carrying out the program under title X," and then adds these limits:

> [A]mounts provided to said projects under such title shall not be expended for abortions, that all pregnancy counseling shall be nondirective, and that such amounts shall not be expended for any activity (including the publication or distribution of literature) that in any way tends to promote public support or opposition to any legislative proposal or candidate for public office.

Pub. L. No. 115-245, 132 Stat. 2981 (2018).

This rider does not weaken the Secretary's duties under Title X. To the contrary, its command that funds "shall not be expended for abortions," *id.*, confirms what §300a-6 already says. The rider further promotes the aims of Title X by stating expressly "that all pregnancy counseling shall be nondirective." *Id.* Read in context, this forbids Title X grantees from giving affirmative advice regarding whether to abort a pregnancy. That was already implicit in §300a-6, since all programs in which doctors advise patients to abort are "programs where abortion is a method of family planning." 42 U.S.C. §300a-6. But the budget rider eliminates any debate on this point, telling the Secretary to keep Title X grantees out of directive counseling altogether.

The second post-1970 provision that the District Court cited was a provision of the Affordable Care Act, which limits what HHS can do through Act-related regulations. Dist. Op. at 18–20. It reads in full:

> Notwithstanding any other provision of this Act, the Secretary of Health and Human Services shall not promulgate any regulation that—

> (1) creates any unreasonable barriers to the ability of individuals to obtain appropriate medical care;
>
> (2) impedes timely access to health care services;
>
> (3) interferes with communications regarding a full range of treatment options between the patient and the provider;
>
> (4) restricts the ability of health care providers to provide full disclosure of all relevant information to patients making health care decisions;
>
> (5) violates the principles of informed consent and the ethical standards of health care professionals; or
>
> (6) limits the availability of health care treatment for the full duration of a patient's medical needs.

42 U.S.C. §18114.

None of this bears on Title X. The provision applies only to regulations promulgated under the Affordable Care Act. We know this because of the "notwithstanding" clause. "The ordinary meaning of 'notwithstanding' is 'in spite of,' or 'without prevention or obstruction from or by.'" *NLRB v. SW Gen., Inc.*, 137 S. Ct. 929, 939 (2017) (citations omitted). "In statutes, the word 'shows which provision prevails in the event of a clash.'" *Id.* (quoting Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* 126–27 (2012)). Applying those principles here, this statute announces six principles and declares that they prevail in the event of clash with "any other provision of *this Act*"—that is, any other provision of *the Affordable Care Act*. 42 U.S.C. §18114 (emphasis added).

The District Court interpreted this provision as applying to *all* HHS regulations, including rules promulgated under Title X, relying on the reasoning in *California v. Azar*, No. 19-cv-01184-EMC, 2019 U.S. Dist. LEXIS 71171 at *75 (N.D. Cal. Apr. 26, 2019). *See* Dist. Op. at 18.

There are a variety of problems with that reading. Begin with the interpretive problems. First, if Congress wanted to alter something as critical to Title X as §300a-6, it would have been much clearer. Congress, after all, "does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001). Section 18114 is certainly vague, forbidding regulations that create "any unreasonable barriers to the ability of individuals to obtain appropriate medical care," or that "interfere[] with communications regarding a full range of treatment options between the patient and the provider." And as the discussion above of §300a-6's text and purpose indicates, the Secretary's power to keep Title X funds from promoting abortion indirectly is a critical part of Title X itself. It follows from the elephants-in-mouseholes canon that, if Congress had wanted to limit the Secretary's ability to enforce §300a-6, it would have been a good deal clearer.

The Northern District of California—which, again, the court below relied on—rejected this canon's applicability, reasoning that because §18114 "was entirely consistent with the prevailing Title X regulatory scheme" at the time of its enactment, it did not alter the fundamental details of that scheme. *See California*, 2019 U.S. Dist. LEXIS 71171 at *77. But that is beside the point. Reading §18114 as limiting the range of options available to enforce §300a-6 would fundamentally alter Title X *itself*, even if it had no effect on then-applicable regulations. Moreover, §18114, even if it somehow bore on Title X, would not conflict with Title X's funding restriction. The reason is that §18114 forbids the Secretary only from imposing barriers on patient choice. But the Secretary's decision not to fund abortion-related services is nothing more than a refusal to *facilitate* abortion. And the refusal to facilitate abortion does not constitute a barrier or "government obstacle" on patient choice. *California v. Azar*, Nos. 19-15974, 19-15979, 19-35386, 19-35394, 2019 U.S. App. LEXIS 18452, *20–21 (June 20, 2019).

The second interpretive problem relates to the first: because §18114 does not *expressly* limit the Secretary's discretion regarding the implementation of §300a-6, reading such a limitation into the statute would run afoul of the strong presumption against implied partial repeals. *See id.* at *14-15 (citing *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 663 (2007)). Courts "disfavor im-

plied repeals and amendments of statutes," *Sierra Club v. United States DOI*, 899 F.3d 260, 291 (4th Cir. 2018), and will find "an implied partial repeal ... only in the face of an irreconcilable conflict or clear repugnancy" between two statutes, *Paredes-Urrestarazu v. United States INS*, 36 F.3d 801, 813 (9th Cir. 1994). But the District Court's reading makes §18114 an implied partial repeal of Title X. After all, if §18114's broad proscriptions apply to the Secretary's actions under Title X, then they implicitly strip the Secretary of quite a bit of discretion that he previously possessed. Since §18114 can be read as leaving Title X unaffected, it should be. *See Sierra Club*, 899 F.3d at 291.

Then there is the historical problem that, "for those … inclined to entertain" an argument based on "legislative history," ought to be nearly dispositive. *Murphy v. Smith*, 138 S. Ct. 784, 790 n.2 (2018). If the Affordable Care Act had been understood as limiting the Secretary's discretion to keep Title X funds from abortion providers, it would not have passed. To obtain the necessary support of pro-life representatives and senators, "Congress attached abortion coverage restrictions introduced by Senator Ben Nelson." Magda Shaler-Haynes, et al., *Abortion Coverage and Health Reform: Restrictions and Options for Exchange-Based Insurance Markets*, 15 U. Pa. J.L. & Soc. Change 323, 326 (2012). These restrictions included limits on federal funding for abortion. *See, e.g.*, 42 U.S.C. §18023. It is hard

to take seriously the suggestion that the same Act that had to include such restrictions in order to win passage simultaneously *weakened* the Secretary's ability to enforce Title X's pre-existing restrictions on abortion-related funding.

II. The new rules reflect a proper exercise of the Secretary's discretion regarding the implementation of §300a-6.

Because Title X tasks the Secretary with its implementation, the question in this case boils down to whether he has permissibly carried out that duty in promulgating the new rules. He has, for all the reasons in the federal government's brief. The *amici* States write separately, however, to emphasize some additional considerations supporting the new rules.

A. The new rules largely restore the system of Title X implementation that the Supreme Court upheld in *Rust v. Sullivan*.

In 1988, HHS issued regulations similar to the new rules. The agency took this step because it determined that the pre-1988 regulations had failed to "preserve the distinction between Title X programs and abortion as a method of family planning." 53 Fed. Reg. 2922, 2923–24 (Feb. 2, 1988). To better promote that distinction, the new rules (among other things) barred recipients from making abortion referrals, and required recipients to maintain strict financial and physical segregation between their non-abortion services and their abortion services (if they provided any).

The Supreme Court upheld these regulations as a proper exercise of the Secretary's discretion to implement Title X. *Rust*, 500 U.S. at 191. *Rust* also rejected free-speech and due-process arguments against those rules. *Id.* at 192–200, 201–13.

The regulations did not last. In 1993, just two weeks into a new administration, the agency rescinded the just-upheld regulations after determining that they would "inappropriately restrict grantees." 58 Fed. Reg. 7462, 7462 (Feb. 5, 1993). The agency settled on a new tack, promulgated through interim rules. Once finalized in 2000, those rules required grantees to provide "information and counseling regarding" abortion, and required grantees to provide this information in "nondirective" terms. Grantees even had to provide abortion "referral upon request." 42 C.F.R. §59.5(a)(5) (July 3, 2000). Thus, HHS replaced the ban on abortion referrals with its opposite. HHS claimed that the *Rust*-approved rules had not been shown to work (even though they were in effect for just a short time), and that grantees preferred looser restrictions. Specifically, HHS said the looser rules were "generally acceptable to the grantee community, in contrast to" the rules that *Rust* upheld. 65 Fed. Reg. 41,270, 41,271 (July 3, 2000).

The agency's new rules will displace the rules from 2000 once they are allowed to go into effect. These new rules—which largely mirror the 1988 rules that *Rust* upheld—differ from the previous rules both in the procedure by which they

were adopted and their substance. Consider first the procedural difference. In 1993, just days after the new administration entered office, HHS rescinded the rules that *Rust* had upheld. Here, in contrast, HHS worked on the issue for many months, announcing its proposed rules only on June 1, 2018. 83 Fed. Reg. 25,502 (June 1, 2018). HHS followed notice-and-comment procedures before any immediate action, and has now issued the updated regulations, explaining its reasons for the changes. 84 Fed. Reg. 7714 (Mar. 4, 2019).

The substantive differences between the current rules and the new ones are more relevant to this case. HHS sought to comply with Title X's text, and with the expectations of citizen taxpayers, by clearly segregating abortion services and Title X funds. *Id.* at 7715. In the agency's own words, the new rules "will ensure compliance with, and enhance implementation of, the statutory requirement that none of the funds appropriated for Title X may be used in programs where abortion is a method of family planning and related statutory requirements." *Id.* How? For one thing, by eliminating the requirement that Title X recipients make abortion referrals, and replacing it with a rule that permits (without requiring) non-directive counseling about the availability of abortion. *Id.* at 7716–17. For another, by requiring Title X recipients to maintain stricter physical and financial segregation between abortion services and programs that spend Title X money. *Id.* at 7763–67; 42

C.F.R. §59.15. The new rules say that, "to be physically and financially separate, a Title X project must have an objective integrity and independence from prohibited activities. Mere bookkeeping segregation of Title X funds from other monies is not sufficient." 42 C.F.R. §59.15.

Together, the new rules' requirements "protect against the unintentional co-mingling of Title X resources with non-Title X resources." 84 Fed. Reg. at 7715. Preventing such comingling is necessary to give effect to Congress's prohibition on using Title X funds "in programs where abortion is a method of family planning." 42 U.S.C. §300a-6. And by addressing "the potential for ambiguity between approved Title X activities and non-Title X activities and services," the new rules eliminate what would otherwise be the "significant risk" of "public confusion over the scope of Title X services, including whether Title X funds are allocated for, or spent on, non-Title X services, including abortion-related purposes." 84 Fed. Reg. at 7715.

The Secretary additionally supported the financial-and-physical-segregation rule by citing numerous sources illustrating the failure of the pre-existing rules to support Congress's mandate. Those sources showed that, "under the current arrangement, it is often difficult for patients, or the public, to know when or where Title X services end and non-Title X services involving abortion begin." 84 Fed.

Reg. at 7764. "Even with the strictest accounting ... , a shared facility greatly increases the risk of confusion." *Id.* The agency noted that this concern sharpened over the years because abortion was increasingly being performed in "nonspecialized clinics"—in other words, clinics that do more than provide abortions. *Id.* at 7765. HHS noted that "[a]ccording to the Guttmacher Institute, nonspecialized clinics accounted for 24% of all abortions in 2008, 31% in 2011, and 36% in 2014." *Id.* (citations omitted). That increased the likelihood of confusion about whether Title X supported abortion services.

B. Strictly segregating Title X funds and abortion is critical for preserving public support for the otherwise-popular program, and for reflecting the values and policy preferences of millions of Americans coast to coast.

1. Because many citizens oppose abortion, federal and state laws have long banned the public funding of abortion facilities and services. *See Harris*, 448 U.S. at 315–17; *Maher*, 432 U.S. at 474. For millions of Americans, these laws do not go far enough. After all, money is fungible. Thus, giving money to abortion providers for purposes unrelated to abortion is often no different from funding abortion itself; if the government doles out $100 to spend on STD tests, an abortion provider can accept the money, buy the tests, and use $100 that it would have spent on the same tests to support its abortion services. *See Holder v. Humanitarian Law Project*, 561 U.S. 1, 31 (2010).

In addition to their concern with fungibility, many Americans believe that prohibitions on direct funding do too little to express a legitimate policy preference against government-endorsed elective abortion. These citizens believe that permitting abortion providers or advocates to participate in providing a government-funded service implies a public imprimatur on abortion—an imprimatur that citizens legitimately seek to withhold. *See Planned Parenthood of Greater Ohio v. Hodges,* 917 F.3d 908, 910 (6th Cir. 2019) (en banc).

The fungibility and public-imprimatur concerns led many citizens to call for laws putting a greater distance between public funding and abortion-performing entities. Their representatives listened, and passed laws doing just that. Ohio, for example, enacted a law barring public funds under several non-Title X programs from going to entities affiliated with abortion providers. This law is designed to "promote childbirth over abortion, to avoid 'muddl[ing]' that message by using abortion providers as the face of state healthcare programs, and to avoid entangling program funding and abortion funding." *Id.* (citing Ohio's brief at 39–41). In upholding the law, the *en banc* Sixth Circuit, in an opinion by Judge Sutton, recognized the validity of Ohio's interest: "Governments generally may do what they wish with public funds," so they may "subsidize some organizations but not others." *Id.* at 911 (citing *Rust*, 500 U.S. at 192–94). Thus, when a State's citizens do not wish to

promote abortion, that State may choose not to spend its citizens' money doing so. *See id.*

Ohio is not alone. In 2011, Indiana enacted a law providing that state agencies "may not[] enter into a contract with, or make a grant to, any entity that performs abortions or maintains or operates a facility where abortions are performed," other than hospitals and ambulatory surgical centers. *Planned Parenthood of Ind., Inc. v. Comm'r of the Ind. State Dep't of Health*, 699 F.3d 962, 969–70 (7th Cir. 2012) (internal citations and quotation marks omitted). The same law cancelled existing contracts with covered abortion providers. *Id.* Arizona passed a similar law in 2012, barring state agencies and subdivisions from entering family-planning services contracts with, or awarding family-planning services grants to, any person performing "nonfederally qualified abortions" or maintaining or operating a facility in which those abortions were performed. *Planned Parenthood Ariz., Inc. v. Betlach*, 727 F.3d 960, 964 (9th Cir. 2013) (citations omitted). The pace of enacting such laws is increasing: while States have sought for decades to bar family-planning funds from going to those who perform abortions, or who provide abortion referrals and counseling, at least eighteen States adopted new fungibility-based restrictions between 2011 and 2016. *See "Fungibility": The Argument at the Center of a 40-Year*

Campaign to Undermine Reproductive Health and Rights, available at https://tinyurl.com/y6n2co24 (last visited July 3, 2019).

These laws do not even count the executive actions terminating funding. Between 2015 and 2016, officials in Arkansas, Kansas, and Utah all sought to terminate funding for non-abortion services to Planned Parenthood affiliates. *See Doe v. Gillespie*, 867 F.3d 1034, 1037–38 (8th Cir. 2017) (Arkansas); *Planned Parenthood of Kan. & Mid-Mo. v. Anderson*, 882 F.3d 1205, 1212–14 (10th Cir. 2018) (Kansas); *Planned Parenthood Ass'n of Utah v. Herbert*, 828 F.3d 1245, 1250 (10th Cir. 2016) (Utah). And in 2015, Louisiana's Department of Health and Hospitals terminated Planned Parenthood of Gulf Coast's Medicaid provider agreements, apparently in response to concerns related to particular aspects of Planned Parenthood's abortion practices. It canceled these agreements even though Planned Parenthood claimed also to be providing various public-health services ranging from pregnancy testing to STD treatment and beyond. *Planned Parenthood of Gulf Coast, Inc. v. Gee*, 862 F.3d 445, 450–52 (5th Cir. 2017).

These laws and executive acts have no direct bearing on Title X. Each involves a change to a program receiving no Title X funds. They are nonetheless significant because they reflect a common, concrete reality: many Americans do not want their tax dollars going to fund public-health initiatives linked to abortion.

Even the *impression* that a law steers money to abortions can stir intense voter passion. In 2010, an advocacy group in Ohio "issued a press release announcing its plan to 'educat[e] voters that their representative voted for a health care bill that includes taxpayer-funded abortion.'" *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 153 (2014) (citations omitted). The same group "sought to display a billboard in [a representative's] district condemning that vote." *Id.* at 154. The public's concerns may arise from money's fungibility. They may rest on a desire to withhold the government's "stamp of approval" for organizations connected to abortion. But whatever motivates these concerns, they are undoubtedly deeply held and here to stay.

2. All of this matters to Title X. Many Americans—perhaps hundreds of millions—do not want their money going to fund abortions, directly or indirectly. If Title X provides such funding, or *appears to* provide such funding, support for the program will erode. HHS properly accounted for that.

The updated rules, once implemented, will assure concerned citizens that their tax dollars are not being "used in programs where abortion is a method of family planning." §300a-6. The enhanced financial-segregation requirement addresses concerns about money's fungibility. Higher figurative walls between any entity's Title X funds and abortion-related funds protects against indirect subsidi-

zation. The physical-separation requirement addresses the "imprimatur" or approval concern, as it assures citizens that their Title X dollars are not indirectly supporting abortions by attracting patients to facilities that perform abortions. These assurances ultimately help to preserve and promote public support for Title X itself. Keeping Title X funds far away from abortion ensures that the consensus support for Title X is not eroded by any connection to the controversial practice of abortion.

The agency recognized all this. In announcing its new rules, it explained how the previous administrative regime did not adequately assure the separation that citizens expect and Congress requires. *See above* 13–15. The new rules do.

In addition to preserving public support for the program, the new rules promote the intrinsic democratic interest in adopting rules that majorities can get behind. Most people, whether they are pro-life or pro-choice or neither, support funding family-planning services *unrelated to* abortion. The new rules assure the public that Title X will continue providing that support, but that it will do so without indirectly supporting abortion. For example, the new rules bar recipients from making abortion referrals, in contrast to the old rules, which *required* referral. The rules will no longer require "nondirective pregnancy counseling" (though they will permit it). The rules will also encourage family participation in family-planning de-

cisionmaking, and will require training regarding compliance with State and local sexual-abuse reporting requirements. 84 Fed. Reg. at 7715–18. These and other changes reflect (in addition to Congress's mandate) the consensus position that public funding for services unrelated to abortion is appropriate, all while keeping the government from funding abortion even indirectly.

The new rules are hardly unique in funding priorities that can achieve greater consensus. Indeed, funding limits of this sort are quite common. Voters may, through their representatives, sometimes fund "all comers" in a certain category. But they may do the opposite too, even in areas that touch on constitutional rights. Thus, for example, the federal government may issue grants to promote art projects that are consistent with the "general standards of decency and respect for the diverse beliefs and values of the American public." 20 U.S.C. §954(d)(1); *see also Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 580 (1998). In a pluralistic society, it is fully appropriate for a government to spend its taxpayers' money on art that many will deem worthy of funding—and not, for example, a photograph of a crucifix submerged in urine. *See Finley*, 524 U.S. at 574. Supreme Court precedent further establishes that when a government chooses to fund education, it may choose not to fund religious studies if many of its citizens object to the public funding of religious training. *Locke v. Davey*, 540 U.S. 712, 720–22 (2004). The fact of

the matter is that funding decisions require policy choices. In a constitutional democracy, one reasonable way to make such choices is to fund the projects that can gain—and retain—broad support.

3. Critically, the new rules will serve the foregoing interests without posing any threat to the vitality of Title X programs. We know this because many States administer their own public-health programs without funding abortion providers. This confirms that there is no necessary connection between the success of Title X's family-planning mission and the comingling of abortion and Title X funds.

States vary in the degree to which they rely on private entities to implement Title X programs. Most Title X funds go to fund services at state agencies and county health departments. *See* Title X Family Planning Directory at https://www.hhs.gov/opa/sites/default/files/Title-X-Family-Planning-Directory-December2018.pdf (last visited July 3, 2019); *see also* Title X Family Planning Service Grants Award by State at https://www.hhs.gov/opa/grants-and-funding/recent-grant-awards/index.html (last visited July 3, 2019). Several States have laws that express a preference that Title X funds be prioritized for public entities, even if it is possible for leftover funds to be subgranted to private organizations. *See, e.g.*, Kan. Stat. Ann. §65-103b; Ky. Rev. Stat. Ann. §311.715; Wis. Stat. §253.075(5)(a). These public programs, of course, provide no abortion services.

They are nonetheless able to serve the public by providing precisely the services that Title X is designed to fund.

Other States do not subgrant federal Title X funds to private parties *at all*. Consider, for example, the State of Alabama. The State Department of Public Health is the sole Title X grantee in Alabama. See Title X Family Planning Directory at https://www.hhs.gov/opa/sites/default/files/Title-X-Family-Planning-Directory-December2018.pdf (last visited July 3, 2019). It uses Title X funds to support more than eighty health centers across the state, all of which are operated by state and local county health departments. *See id*. These local health centers provide contraceptive services, pelvic exams, screening for STDs, infertility services, and health education. The Department's 2019 grant award is over $5,000,000, which it will use to provide services to roughly one-hundred-thousand people. *See* Title X Family Planning Service Grants Award by State at https://www.hhs.gov/opa/grants-and-funding/recent-grant-awards/index.html (last visited July 3, 2019).

Finally, some States that subgrant Title X funding to private organizations already do so subject to state laws that mirror the challenged regulations. At least thirteen States—Arizona, Arkansas, Colorado, Indiana, Iowa, Louisiana, Michigan, Mississippi, Missouri, North Carolina, Ohio, Texas, and Wisconsin—have laws

that prevent federal pass-through family planning funds from being used to pay for abortions. *See* Ariz. Rev. Stat. Ann. §35-196.02; Colo. Rev. Stat. Ann. §25.5-3-106; La. Rev. Stat. §40:1061.6; Iowa Code Ann. §217.41B; Miss. Code. Ann. §41-41-91; Mich. Comp. Laws Ann. §400.109a; Mo. Ann. Stat. §188.205; N.C. Gen. Stat. Ann. §143C-6-5.5; Ohio Rev. Code §5101.56; Tex. Health & Safety Code Ann. §32.005; Wis. Stat. Ann. §20.927. Several of these States have further restricted family-planning funds from any organizations that provide abortions, that contract with abortion providers, or that refer patients to get abortions. *See* Ark. Code Ann. §20-16-1602; La. Rev. Stat. §49:200.51; Ind. Code Ann. §5-22-17-5.5; Wis. Stat. Ann. §253.075(5).

The success of these various approaches confirms that the Secretary's new rules create no barrier to those genuinely interested in promoting Title X's mission, rather than using Title X as an indirect source of abortion funding.

CONCLUSION

This Court should reverse the District Court.

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
Effective 12/01/2016

No. 19-1614 **Caption:** Mayor and City Council of Baltimore v. Alex Azar II et al

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