Nos. 19-1614 & 20-1215

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

MAYOR AND CITY COUNCIL OF BALTIMORE,
Plaintiff-Appellee,

v.

ALEX M. AZAR II, in his official capacity as the Secretary of Health and Human Services, et al.,
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

APPELLANTS' SUPPLEMENTAL OPENING BRIEF

JOSEPH H. HUNT
Assistant Attorney General

HASHIM M. MOOPPAN
Deputy Assistant Attorney General

MICHAEL S. RAAB
JAYNIE LILLEY
JOSHUA DOS SANTOS
Attorneys, Appellate Staff
Civil Division
U.S. Department of Justice, Room 7321
950 Pennsylvania Ave., NW
Washington, DC 20530
202-514-3542

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INTRODUCTION

This case involves a challenge to a Final Rule issued by the Department of Health and Human Services (HHS) implementing requirements for participation in the Title X family-planning program—requirements that the Supreme Court upheld as lawful and reasonable in *Rust v. Sullivan*, 500 U.S. 173 (1991). The Rule prohibits providers who choose to participate in this federally funded program from referring for abortion as a method of family planning, and it requires that a Title X clinic be physically separate from any clinic providing abortion services. Neither requirement is new to the Title X program. The Rule adopts materially the same requirements, on the basis of materially the same rationales, upheld in *Rust*. Accordingly, the en banc Ninth Circuit recently held that the Rule is neither contrary to law nor arbitrary and capricious, rejecting the same challenges to the Rule that have been pressed here by Baltimore and accepted by the district court. *Becerra ex rel. California v. Azar*, 950 F.3d 1067, 1074 (9th Cir. 2020). In particular, having preliminarily enjoined the Rule on the ground that it violated certain statutory provisions, the district court subsequently issued a permanent injunction on the ground that the Rule is arbitrary and capricious because the court was of the view that HHS insufficiently explained its disagreement with comments regarding medical ethics, reliance interests, and compliance costs.

Neither ruling was correct. As explained in our briefs in the pending preliminary-injunction appeal, hereby incorporated by reference, Baltimore's claims that the Rule violates an appropriations rider and a provision of the Affordable Care Act (ACA) are

meritless. Those claims remain live at least as alternative grounds for affirming the permanent injunction, and this Court should reach and reject those challenges. As for Baltimore's arbitrary-and-capricious claims, they reflect little more than policy disagreement with the agency. HHS reasonably exercised its expert judgment regarding the Rule's potential costs and effects, and explained its disagreement with some commenters. It rationally concluded that the Rule's provisions are warranted to implement the best interpretation of Title X—a conclusion that the Supreme Court has already upheld.

At a minimum, the district court's permanent injunction is overbroad. The decision to extend the injunction beyond Baltimore to all Title X providers in Maryland is impermissible under Article III and basic principles of equity. And the district court erred by enjoining all provisions of the Rule, including those Baltimore did not challenge, despite the Rule's express severability statement.

STATEMENT OF JURISDICTION

1. Baltimore invoked the district court's jurisdiction under 28 U.S.C. § 1331 in its challenge to the Rule under various federal statutes, JA20 (Compl.), and the court entered a preliminary injunction on May 30, 2019, JA275.[1] The government filed a

[1] JA__ refers to the Joint Appendix filed in the preliminary-injunction appeal, No. 19-1614, and SJA__ to the Supplemental Joint Appendix filed with this brief. Op. Br.__ refers to the government's opening brief in the preliminary-injunction appeal.

timely notice of appeal on June 6, 2019. JA276. This Court has jurisdiction over that appeal (No. 19-1614) under 28 U.S.C. § 1292(a).[2]

2. The district court subsequently entered a permanent injunction and final judgment on February 14, 2020, SJA1330. The government filed a timely notice of appeal on February 25. SJA1332. At the time that notice of appeal was filed, this Court had jurisdiction over the appeal (No. 20-1215) under 28 U.S.C. § 1291. On March 13, however, plaintiff filed a timely motion to alter or amend the district court's judgment under Rule 59(e), asking that relief be extended nationwide. That motion remains pending and temporarily renders the government's notice of appeal ineffective. *See* Fed. R. App. P. 4(a)(4)(B)(i). The government has asked the court to rule expeditiously to avoid interfering with this Court's consideration of the issues presented on appeal. Dkt. 114, at 2.

STATEMENT OF THE ISSUES

The Rule implements Title X of the Public Health Service Act by prohibiting referrals for abortion as a method of family planning and requiring physical separation

[2] The question whether the entry of the permanent injunction on different grounds mooted the preliminary-injunction appeal presents serious and novel constitutional questions that this Court has not addressed. *See* Appellants' Reply in Supp. of Mot. to Consolidate 1-3 (Mar. 6, 2020). But this Court need not resolve the mootness question because the statutory claims presented in the preliminary-injunction appeal can be resolved in the permanent-injunction appeal as potential alternative bases for affirmance. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 98 (1998) (court need not resolve question of appellate jurisdiction when it can resolve the merits in a companion appeal that presents no jurisdictional question).

between programs providing Title X services and programs where abortion is a method of family planning. The issues presented are:

1. Whether the Rule's referral restriction and physical-separation requirement are arbitrary and capricious.

2. Whether the district court erred in enjoining on a statewide basis every provision in the Rule.

STATEMENT OF THE CASE

A. Statutory and Regulatory Background

1. In 1970, Congress enacted Title X of the Public Health Service Act to create a limited grant program for certain types of pre-conception family-planning services. *See* Pub. L. No. 91-572, 84 Stat. 1504. The statute authorizes HHS to make grants and enter into contracts with public or private nonprofit entities "to assist in the establishment and operation of voluntary family planning projects which shall offer a broad range of acceptable and effective family planning methods and services (including natural family planning methods, infertility services, and services for adolescents)." 42 U.S.C. § 300(a). It also provides that "[g]rants and contracts made under this subchapter shall be made in accordance with such regulations as the Secretary may promulgate." *Id.* § 300a-4(a).

Section 1008 provides, however, that "[n]one of the funds appropriated under this subchapter shall be used in programs where abortion is a method of family planning." 42 U.S.C. § 300a-6. "That restriction was intended to ensure that Title X

funds would 'be used only to support *preventive* family planning services, population research, infertility services, and other related medical, informational, and educational activities.'" *Rust v. Sullivan*, 500 U.S. 173, 178-79 (1991) (emphasis added) (quoting H.R. Rep. No. 91-1667, at 8 (1970) (Conf. Rep.)). As a sponsor of § 1008 explained, "the committee members clearly intend that abortion is not to be encouraged or promoted in any way through this legislation." 116 Cong. Rec. 37,375 (1970) (statement of Rep. Dingell).

2. The initial Title X regulations did not provide guidance on the scope of § 1008. *See* 36 Fed. Reg. 18,465, 18,466 (Sept. 15, 1971). Starting in 1972, however, HHS construed § 1008 and its regulations "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 previous HHS opinions). The agency nevertheless permitted, and then in 1981 guidelines required, Title X projects to offer "nondirective 'options couns[e]ling' on pregnancy termination (abortion), prenatal care, and adoption and foster care when a woman with an unintended pregnancy requests information on her options, followed by referral for these services if she 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) (discussing prior policy).

3. In 1988, HHS changed course. The Secretary issued a final rule that prohibited Title X projects from promoting, encouraging, advocating, or providing counseling on, or referrals for, abortion as a method of family planning. 53 Fed. Reg. at 2945 (§§ 59.8, 59.10). To prevent programs from evading these restrictions by steering patients toward abortion providers, the 1988 rule placed limitations on the list of providers that a program must offer pregnant patients as part of a required referral for prenatal care. *See id.* (§ 59.8(a)(3)). And to maintain program integrity, it required that grantees keep their Title X-funded projects "physically and financially separate" from all prohibited abortion-related activities. *Id.* (§ 59.9). The Supreme Court upheld this rule in *Rust*, concluding that it was authorized by Title X, was not arbitrary and capricious, and was consistent with the Constitution. 500 U.S. at 183-203.

4. In 1993, President Clinton and HHS suspended the 1988 rule and the 1981 guidance went back into effect. 58 Fed. Reg. 7455 (Jan. 22, 1993); 58 Fed. Reg. 7462 (Feb. 5, 1993) (interim rule). HHS finalized a new rule in 2000, which, like the 1981 guidelines, required Title X projects to offer and provide upon request "information and counseling regarding" (i) "[p]renatal care and delivery"; (ii) "[i]nfant care, foster care, or adoption"; and (iii) "[p]regnancy termination"; followed by "referral upon request." 65 Fed. Reg. 41,270, 41,279 (July 3, 2000). The 2000 rule also eliminated the physical-separation requirement. *See id.* at 41,275-76.

5. In 2018, HHS issued a notice of proposed rulemaking designed to "refocus the Title X program on its statutory mission—the provision of voluntary,

preventive family planning services specifically designed to enable individuals to determine the number and spacing of their children." 83 Fed. Reg. 25,502, 25,505 (June 1, 2018). After receiving comments, the agency issued a final rule. 84 Fed. Reg. 7714 (Mar. 4, 2019).

The challenged provisions are materially indistinguishable from those upheld in *Rust*. Like its 1988 predecessor, the Rule prohibits Title X projects from providing referrals for abortion as a method of family planning. 84 Fed. Reg. at 7788-89 (§ 59.14(a)). As the Secretary explained, "[i]f a Title X project refers for … abortion as a method of family planning, it is a program 'where abortion is a method of family planning' and the Title X statute prohibits Title X funding for that project." *Id.* at 7759. In the Secretary's view, this is "the best reading" of § 1008, "which was intended to ensure that Title X funds are also not used to encourage or promote abortion." *Id.* at 7777. To prevent evasion of this prohibition, the Rule, like the 1988 regulations, imposes restrictions on the list of providers that may be given in conjunction with a required referral for prenatal care for pregnant women. *See id.* at 7789 (§§ 59.14(b)(1), (c)(2)). Because § 1008 only addresses abortion "as a method of family planning," the Rule not only permits, but requires, referrals for abortion in cases of an "emergency," such as "an ectopic pregnancy." *Id.* (§ 59.14(b)(2), (e)(2)).

The Rule is *less* restrictive than the 1988 regulations, however, in that it allows, but does not require, "nondirective pregnancy counseling, which may discuss abortion," 84 Fed. Reg. at 7789 (§ 59.14(e)(5)); *see id.* (§ 59.14(b)(1)(i)), provided that such

counseling does "not encourage, promote or advocate abortion as a method of family planning," *id.* (§ 59.16(a)); *see id.* at 7745-46 (preamble). In the preamble, HHS explained that in nondirective counseling, "abortion must not be the only option presented" and providers "should discuss the possible risks and side effects to both mother and unborn child of any pregnancy option presented, consistent with the obligation of health care providers to provide patients with accurate information to inform their health care decisions." *Id.* at 7747. In the agency's view, such limited counseling—"[u]nlike abortion referral"—"would not be considered encouragement, promotion, support, or advocacy of abortion as a method of family planning" in violation of § 1008. *Id.* at 7745.[3]

Like the 1988 regulations, the Rule requires that Title X projects remain physically separate from any abortion-related activities. 84 Fed. Reg. at 7789 (§ 59.15). As HHS explained, "[i]f the collocation of a Title X clinic with an abortion clinic permits the abortion clinic to achieve economies of scale, the Title X project (and, thus, Title X funds) would be supporting abortion as a method of family planning." *Id.* at 7766. And because without physical separation "it is often difficult for patients, or the public, to

[3] Although the Rule permits nondirective counseling about abortion, it does not require it, as the 2000 regulations had. 84 Fed. Reg. at 7716, 7745-46. And because the Title X program focuses on pre-conception services, the Rule, like its 1988 predecessor, requires projects to refer a pregnant patient out of the Title X program for medically necessary prenatal care. *Id.* at 7789 (§ 59.4(b)). Baltimore has not meaningfully argued that these aspects of the Rule are arbitrary and capricious, *see* SJA565-71, and the district court did not address those provisions in issuing a permanent injunction, SJA1308-18.

know when or where Title X services end and non-Title X services involving abortion begin," HHS concluded that reinstating this requirement was necessary to avoid "the appearance and perception that Title X funds being used in a given program may also be supporting that program's abortion activities." *Id.* at 7764. Indeed, the agency's determination that "the 2000 regulations fostered an environment of ambiguity surrounding appropriate Title X activities" was only reinforced by "the many … public comments that argued Title X should support statutorily prohibited activities, such as abortion." *Id.* at 7721-22; *see also id.* at 7728-30.

HHS explained that the benefits, including compliance with the better reading of Title X, outweighed the costs of the Rule, and addressed concerns raised during the notice-and-comment period. Based on its expertise in administering the grant program, the agency predicted that Title X services would expand under the Rule. The Rule would permit new providers, previously deterred from entering the program by the requirement to refer for abortion, to enter the program, and those entrants in particular could fill gaps in services in underserved rural areas. 84 Fed. Reg. at 7744, 7780-83. Furthermore, a withdrawal of some providers in many areas would not be a problem because "there are already competing applicants to serve the same region" who could expand their services with additional funds. *Id.* at 7766. HHS also calculated that expected compliance costs for the physical-separation requirement would be relatively low and apply to only a small percentage of current providers. *Id.* at 7781-82. And in response to concerns by certain commenters that the Rule's restriction on providing

referrals for abortion violated medical ethics, HHS pointed out that this restriction on the scope of the Title X program was just as consistent with medical ethics as the parallel restriction upheld in *Rust* and the state and federal conscience laws permitting providers to decline to refer for abortion. *See id.* at 7724, 7748.

The Rule also contains a number of provisions that have little to do with § 1008, such as a requirement that projects comply with laws that mandate notification or reporting of sexual abuse, 84 Fed. Reg. at 7790 (§ 59.17). Given the Rule's breadth, its preamble contains an express severability statement directing that "[t]o the extent a court may enjoin any part of the rule, the Department intends that other provisions or parts of provisions should remain in effect." *Id.* at 7725.

Most of the Rule was to take effect on May 3, 2019 (and eventually began to be enforced in July 2019 after various preliminary injunctions against the Rule were stayed). But grantees had until March 4, 2020, to comply with the physical-separation requirement, during which time they could consult with HHS about compliance and implement any necessary changes. 84 Fed. Reg. at 7714.

B. Procedural History

1. Baltimore challenged the Rule and sought a preliminary injunction, and the district court granted the motion on the grounds that the Rule violated certain statutory provisions. JA262. The district court accepted that the Rule's "two key provisions"—the prohibition on abortion referrals and the physical-separation requirement—"are essentially a reversion" to the 1988 regulations. JA254-55. It

nevertheless concluded that the Rule's referral bar likely violates two "later-enacted laws"—a requirement in an appropriations rider that "all pregnancy counseling shall be nondirective," and an ancillary ACA provision restricting HHS regulation of medical practice. JA262; *see* JA263-66. The government appealed and a panel of this Court entered a stay. *See Mayor & City Council of Baltimore v. Azar*, 778 F. App'x 212 (4th Cir. 2019). The parties completed briefing, and the same panel held oral argument on September 18, 2019.

2. While the preliminary-injunction appeal was pending, the district court granted summary judgment in part to Baltimore, holding that the Rule's referral restriction and physical-separation requirement are arbitrary and capricious. It did not rule on the statutory claims that were under review in the government's preliminary-injunction appeal, and it granted summary judgment to the government on the other remaining claims. SJA1308. The district court twice denied Baltimore's requests to extend the relief nationwide. SJA1318, SJA1336. It nonetheless granted relief extending throughout the entire State of Maryland, rather than limiting relief to Baltimore. SJA1318.

3. Shortly after the district court issued a permanent injunction, the Ninth Circuit sitting en banc vacated three other preliminary injunctions barring enforcement of the Rule. *Becerra ex rel. California v. Azar*, 950 F.3d 1067, 1074 (9th Cir. 2020). According to the Ninth Circuit, "[i]n light of Supreme Court approval of the 1988 regulations and our broad deference to agencies' interpretations of the statutes they are

charged with implementing," the Rule did not violate either the appropriations rider or § 1554 of the ACA, and withstood arbitrary-and-capricious review as a matter of law. *Id.* at 1074, 1084.

SUMMARY OF ARGUMENT

I. Title X authorizes HHS to provide grants for the operation of family-planning programs, but expressly prohibits the use of funds in programs where abortion is a method of family planning. Based on an interpretation of Title X that the Supreme Court has already upheld in *Rust v. Sullivan*, 500 U.S. 173 (1991), HHS drew two reasonable conclusions: first, that Title X clinics cannot refer patients for abortions as a method of family planning because doing so would treat abortion as a method of family planning; second, that to best avoid confusion and prevent intentional or inadvertent misuse of Title X funds for abortion-related activities, a Title X program should be physically separate from any abortion-related activities.

The district court nonetheless held that HHS acted arbitrarily and capriciously because, in the court's view, the agency failed to persuasively refute commenters' assertions about medical ethics, reliance interests, and compliance costs. That decision was incorrect. HHS adopted the same rationale that the Supreme Court has upheld as lawful and reasonable—specifically, that the better reading of Title X is to require providers to refrain from making referrals for abortions as a method of family planning and to remain physically separate from abortion-related activities. HHS acted rationally in adhering to the better reading of what the statute requires regardless of the costs and

effects. Moreover, as the Ninth Circuit sitting en banc recognized, HHS reasonably assessed the Rule's potential costs and effects and balanced them against various benefits, including avoiding the use of federal funds to facilitate abortions.

In particular, HHS rationally explained its view that, just as the Supreme Court recognized in *Rust* and various federal and state conscience laws show, a physician participating in a limited, federally funded program does not act unethically by merely *refraining from referring* a patient for an abortion as a method of family planning at taxpayer expense. Contrary to the district court's suggestion, HHS did not need to identify a professional medical organization that espoused the same view, especially given that no state regulator has taken that position, even after the Rule has been in effect for almost a year and the majority of providers (including 28 state health departments) have continued to participate in the program.

HHS also rationally exercised its expert judgment in determining that assertions about the Rule's impact on the availability of Title X services and about compliance costs did not undermine its conclusion about the Rule's effect on services. The agency explained that those commenters had ignored the likelihood that the Rule would allow greater participation by providers with conscience objections to abortion referrals, which was likely to fill gaps in services for underserved populations—particularly in rural areas. And at a minimum, HHS could redistribute its funds to other providers. The agency was similarly reasonable in concluding that the vast majority of Title X grantees were already in compliance with the physical-separation requirement, and that

many of those who were not could comply through low-cost options such as re-allocation of services within and among existing facilities. Those expert determinations are entitled to substantial deference, and the district court erred in second-guessing them based on some commenters' predictions.

II. At a minimum, the injunction should be narrowed to redress only the injuries actually established by Baltimore and to cover only the provisions of the Rule held to be unlawful. The district court's contrary decision to enjoin enforcement of every aspect of the Rule as applied to every Title X participant in Maryland cannot be squared with Article III, fundamental equitable principles, or the severability statement in the preamble.

STANDARD OF REVIEW

This Court reviews a decision to grant a permanent injunction for an abuse of discretion, legal conclusions de novo, and any factual findings for clear error. *See Legend Night Club v. Miller*, 637 F.3d 291, 297 (4th Cir. 2011).

ARGUMENT

In the course of its decisions, the district court failed to offer any tenable basis for enjoining the Rule. Consistent with this Court's order consolidating the preliminary- and permanent-injunction appeals, granting initial hearing en banc, and directing the printing of additional briefs in the preliminary-injunction appeal, the government focuses this supplemental brief on the arbitrary-and-capricious ruling supporting the permanent injunction and on the overbreadth of that injunction. As

explained in our preliminary-injunction briefs, however, the Court should also reject the district court's prior statutory rulings. The statutory claims, which were fully briefed, present potential alternative grounds to affirm the permanent injunction, and it would make little sense to remand after reversing only the arbitrary-and-capricious ruling, as the district court would undoubtedly re-enter the permanent injunction based on the statutory claims. Because the Court consolidated these appeals, the government incorporates by reference its arguments on those claims (Op. Br. 15-39). The government likewise incorporates by reference its argument for why the equities independently preclude injunctive relief (Op. Br. 39-43), which applies equally to the preliminary and permanent injunctions. *See Winter v. NRDC*, 555 U.S. 7, 32 (2008).

I. The Secretary Provided A Reasoned Explanation For The Rule.

The standard of review for arbitrary-and-capricious claims is "deferential" and "'narrow'"; courts are to "determine only whether the Secretary examined 'the relevant data' and articulated 'a satisfactory explanation' for his decision, 'including a rational connection between the facts found and the choice made.'" *Department of Commerce v. New York*, 139 S. Ct. 2551, 2569 (2019) (quoting *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)). A reviewing court must "uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned," *State Farm*, 463 U.S. at 43 (citation omitted), and the court may not itself weigh the evidence or "substitute [its] judgment for that of the Secretary," as "the choice between reasonable policy alternatives in the face of uncertainty" is the Secretary's "to make,"

Department of Commerce, 139 S. Ct. at 2569-70. The court may not "ask whether his decision was 'the best one possible' or even whether it was 'better than the alternatives'"; "second-guess[] the Secretary's weighing of risks and benefit"; or subordinate his "policymaking discretion to … technocratic expertise." *Id.* at 2571. And an "agency's predictive judgment … merits deference"—"[e]ven in the absence of evidence." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 521 (2009). In short, final agency action satisfies the arbitrary-and-capricious standard so long as it is "within the bounds of reasoned decisionmaking." *Baltimore Gas & Elec. Co. v. NRDC*, 462 U.S. 87, 105 (1983).

Here, the Rule easily satisfies this deferential standard, as the en banc Ninth Circuit recently held. *Becerra ex rel. California v. Azar*, 950 F.3d 1067, 1095-1104 (9th Cir. 2020). Based on an interpretation of Title X that the Supreme Court has held is lawful and reasonable, HHS reasonably concluded that the best reading of that statute (1) prohibits Title X programs from referring patients for abortions as a method of family planning, and (2) requires Title X programs to be physically separate from any abortion-related activities. HHS could reasonably adopt the Rule based on that conclusion alone, but it also thoroughly addressed the Rule's potential costs and effects. In holding that HHS nonetheless acted arbitrarily and capriciously, the district court misapprehended the agency's explanations, misapplied the deferential standard of review, and inappropriately rejected the agency's expert conclusions in favor of those of various commenters.

A. The Secretary Engaged In Reasoned Decisionmaking.

1. The Rule's referral restrictions and physical-separation requirement are materially the same as the restrictions upheld in *Rust v. Sullivan*, 500 U.S. 173 (1991), and were adopted for materially the same reasons. The Supreme Court has already determined that those requirements are not arbitrary and capricious. There is no basis to depart now from that conclusion.

In *Rust*, the Supreme Court upheld regulations that implemented § 1008's prohibition on the use of Title X funds "in programs where abortion is a method of family planning," 42 U.S.C. § 300a-6, by "limit[ing] the ability of Title X fund recipients to engage in abortion-related activities" in multiple respects. 500 U.S. at 177-78. These regulations "broadly prohibit[ed]" Title X projects from "engaging in activities that 'encourage, promote or advocate abortion as a method of family planning,'" and specifically proscribed them from providing either a "referral for," or "counseling concerning," abortion as a method of family planning, "even upon specific request." *Id.* at 179-80. To justify these restrictions, HHS had concluded that if a program promotes, encourages, advocates, provides counseling concerning, or refers for abortion as a method of family planning, then the program is one "where abortion is a method of family planning." *See, e.g.*, 53 Fed. Reg. 2922, 2933 (Feb. 2, 1988). And the Supreme Court agreed that this is, at least, a "permissible construction" of § 1008, and rejected the argument that the regulations were "arbitrary and capricious." *See Rust*, 500 U.S. at 184, 187-88 (quotation marks omitted).

The Court found that the Secretary provided a "reasoned analysis" for the restrictions. *Rust*, 500 U.S. at 186-87. In particular, the Court concluded that two rationales advanced by the Secretary supported the regulations. First, the Court credited the Secretary's explanation that the interpretation prohibiting the use of Title X funds for abortion referrals is "more in keeping with the original intent of the statute," even if it constituted a "sharp break from the Secretary's prior construction." *Id.* at 186-87; *see also id.* at 195 n.4 (recognizing "Congress' intent in Title X that federal funds not be used to 'promote or advocate' abortion as a 'method of family planning'"). Second, the Court credited the Secretary's determination that "prior policy failed to implement properly the statute and that it was necessary to provide clear and operational guidance to grantees about how to preserve the distinction between Title X programs and abortion as a method of family planning." *Id.* at 187 (quotation marks omitted). The Court determined that these rationales are "sufficient to support the Secretary's revised approach." *Id.*

The Court likewise held that "the Secretary's interpretation of the statute that separate facilities are necessary, especially in light of the express prohibition of § 1008, cannot be judged unreasonable." *Rust*, 500 U.S. at 190. The Secretary had explained that the physical-separation requirement was based "squarely on the congressional intent that abortion not be a part of a Title X funded program." *Id.* (quoting 52 Fed. Reg. 33,212 (Sept. 1, 1987)). The Court affirmed that "if one thing is clear from the

legislative history, it is that Congress intended that Title X funds be kept separate and distinct from abortion-related activities." *Id.*

As the Secretary had explained, the collocation of Title X clinics and abortion clinics would result in the economic reality—or at least the public perception—of taxpayer dollars being used to subsidize abortion as a method of family planning. *See* 53 Fed. Reg. at 2940-41. In accepting this explanation, the Court rejected the argument that the physical-separation requirement imposed burdens on the "efficient use of non-Title X funds by Title X grantees"—in other words, the economies of scale from collocating abortion services and Title X services. *Rust*, 500 U.S. at 188. The Court concluded that the physical-separation requirement rested on a "permissible construction of the statute," and it deferred to the Secretary's judgment that the requirement was needed to "assure that Title X grantees apply federal funds only to federally authorized purposes and that grantees avoid creating the appearance that the Government is supporting abortion-related activities." *Id.*

2. The Secretary relied on the same rationales upheld in *Rust* to adopt materially the same restrictions. As part of its efforts to "consider the effectiveness of its policies enforcing statutory mandates on a continuing basis," 83 Fed. Reg. 25,502, 25,505 (June 1, 2018), HHS reexamined the effectiveness of the 2000 rule in implementing the requirements of Title X generally and § 1008 specifically. Upon re-examination, HHS determined that the best interpretation of the statutory regime it administered required it to re-implement the 1988 regulations that the Supreme Court

upheld as reasonable and lawful in *Rust*. *See* 84 Fed. Reg. 7714, 7723 (Mar. 4, 2019). That decision was eminently reasonable.

a. HHS reasonably determined that its existing approach to abortion referrals was inconsistent with the best reading of § 1008 of the Title X statute, which provides that "[n]one of the funds appropriated under this subchapter shall be used in programs where abortion is a method of family planning." 42 U.S.C. § 300a-6. The agency explained the reasons for its interpretation of § 1008 in detail. Since 1972, HHS had interpreted § 1008 to prohibit more than just "the provision of abortion," but also the promotion or encouragement of abortion. 84 Fed. Reg. at 7723 n.32. HHS acknowledged, however, that its application of that principle to abortion counseling and referrals had varied over the years. *Id.* at 7745, 7759. In 1988, the agency had generally banned counseling and referrals for abortions as a method of family planning, and the Supreme Court had upheld that interpretation. *Id.* But at other times, HHS had allowed, or even required, such activities. *Id.* at 7746. Having "reconsidered this issue," HHS concluded that § 1008 prohibits promoting or encouraging abortion through referrals or by providing lists identifying abortion providers. *Id.* at 7764. The "better interpretation" of § 1008 is that it "prohibits spending Title X funds on programs where abortion is treated as a method of family planning." *Id.* at 7746, 7759. And a program that refers patients for abortions generally would be treating abortion "as a method of family planning," *id.* at 7759, as such referrals are inextricably tied with the ultimate provision of such an abortion, *see id.* at 7717, 7729, 7746.

HHS therefore decided to prohibit referrals for abortions as a method of family planning, much like it had done in the 1988 regulations. But unlike its approach in 1988, the agency determined that § 1008 did not completely prohibit the discussion of abortion. Rather, Title X providers could discuss the risks and side effects of each option, including abortion, "so long as this counsel in no way promotes or refers for abortion as a method of family planning." 84 Fed. Reg. at 7724. In addition, HHS required providers to refer patients for abortions in emergency cases because such referrals are not for services as a method of family planning. *Id.*; *see id.* at 7762. That careful analysis is far from arbitrary and capricious.

b. HHS also reasonably determined that its existing regulations were too lax about the degree of separation between a Title X program and activities in which abortion is a method of family planning. Since 1972, HHS had interpreted § 1008 as requiring that the Title X program be "separate and distinct from any abortion activities of a grantee." 84 Fed. Reg. at 7745 (quotation marks omitted). The 2000 regulations acknowledged that requirement, but merely required financial separation. *Id.* at 7764. After "carefully consider[ing] the issue" again, HHS "no longer believe[d] financial separation is sufficient without physical separation." *Id.* at 7764.

In particular, HHS explained that the best reading of § 1008 "require[s] clear physical separation between Title X projects and places '*where*' abortion is a method of family planning." 84 Fed. Reg. at 7765 (emphasis added). HHS found that "shared facilities create the risk" that programs will violate "the text and purpose of section

1008"—not only through "the intentional or unintentional use of Title X funds for impermissible purposes, the commingling of Title X funds," and "the use of Title X funds to develop infrastructure that is used for the abortion activities of Title X clinics," but also through "the appearance and perception that Title X funds … [are] supporting [a] program's abortion activities." *Id.* at 7764, 7765.

HHS further provided good reasons why those risks were material. It noted "recent evidence that abortions are increasingly performed at sites that … could be recipients of Title X funds" because they "focus primarily on contraceptive and family planning services." 84 Fed. Reg. at 7765, 7777. Similarly, a study showed that, because of restrictions on the use of funds coming from Medicaid and private insurance, Title X grantees often used Title X grants to cover the costs of infrastructure at facilities that could also engage in abortion-related activities. *Id.* at 7773-74; SJA475-78. HHS also made the commonsense observation that, when Title X services are provided in the same space as abortion-related activities, "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 7764-65. And as a matter of economic reality, "[i]f the collocation of a Title X clinic with an abortion clinic permits the abortion clinic to achieve economies of scale, the Title X project (and, thus, Title X funds) would be supporting abortion as a method of family planning." *Id.* at 7766.

Since HHS was "legally obliged to ensure funds are not misused," it decided to minimize those risks and increase transparency and accountability. 84 Fed. Reg. at 7773,

7766. Although the agency would "continue[] to allow organizations to receive Title X funds even if they also provide abortion as a method of family planning," it would require grantees to show adequate physical separation between abortion-related activities and Title X activities on a case-by-case basis. *Id.* at 7766. To gauge whether a provider met the required degree of separation, HHS explained that it would consider factors such as the separation of clinical space, personnel, electronic or paper-based health records, and work stations, as well as the degree of separation between signage promoting Title X services and signage promoting abortion services. *See id.*

c. The Secretary's legal conclusions alone justify its adoption of the Rule, regardless of what the Rule's effects and costs might be. Even assuming that § 1008 does not *compel* a prohibition on referrals for abortions as a method of family planning within the Title X program, HHS was entitled to conclude that such a prohibition was the *best* reading of § 1008 and adopt that interpretation for that reason alone. *See Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2127 (2016) (noting that "an agency may justify its policy choice by explaining why that policy 'is more consistent with statutory language' than alternative policies") (quoting *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 175 (2007)). It cannot be arbitrary and capricious for an agency to decline to adopt a *worse* reading of an ambiguous statute merely because the better reading of the text comes with practical costs. If the agency reasonably concludes that Congress already made that judgment by using the words that it did, it is entitled to follow Congress's lead, even if its interpretation is not the only permissible reading of the

statute. And at the very least, the choice between fidelity to the best interpretation of statutory text and practical consequences involves the sort of "value-laden decisionmaking and the weighing of incommensurables" entrusted to federal agencies. *Department of Commerce*, 139 S. Ct. at 2571.

Rust itself proves the point. Then, as now, the challengers argued (1) that the referral restriction was inconsistent with medical ethics set forth in "[t]he professional standards of the American Medical Association ('AMA') and the American College of Obstetricians & Gynecologists ('ACOG')," 89-1391 Pet. Br. at 21 n.33, *Rust* (Nos. 89-1391, -1392), 1990 WL 505724 (internal citations omitted); (2) the agency's rule would "compel clinics that Congress sought to create to close their doors," *id.* at 50 n.90; and (3) the Secretary "offered no rebuttal to the comments suggesting that costs" associated with physical separation "would be significant and even prohibitive," 89-1392 Pet. Br. at 31, *Rust* (Nos. 89-1391, -1392), 1990 WL 505760. Yet in holding that the 1988 regulations were not arbitrary and capricious, the Supreme Court felt no need to expressly engage with these claims. *See Rust*, 500 U.S. at 186-87, 188-90. Instead, the Court concluded that the Secretary, among other things, had "determined that the new regulations are more in keeping with the original intent of the statute," and that such "justifications are sufficient to support the Secretary's revised approach." *Id.* at 187. At a minimum, this analysis strongly suggests that the various considerations the district court invoked should be immaterial to an arbitrary-and-capricious inquiry.

d. In all events, as the Ninth Circuit sitting en banc held, HHS also thoroughly considered the Rule's effects, costs, and benefits. *See California*, 950 F.3d at 1095-1104. The agency spent scores of pages considering significant comments, *see* 84 Fed. Reg. at 7722-85, including many about the potential that some providers would withdraw from the program as a result of the Rule. Although HHS noted "substantial uncertainty" as to some of those questions, it provided its "best estimates" pursuant to its expertise. *See id.* at 7781-82.

HHS also enumerated the significant benefits of the Rule. "Even if" the Rule was not compelled by the best reading of the statutory scheme, HHS explained that a change from the 2000 regulations—which *required* abortion referrals and counseling—was necessary to avoid "deter[ring] qualified providers" from participation and "introduc[ing] ambiguity about the use of Title X funds to support abortion as a method of family planning." 84 Fed. Reg. at 7717; *see also id.* at 7722 (mentioning the support "for the government to favor childbirth over abortion"). HHS also predicted that the Rule could fill gaps in services in rural areas, as well as increase the cultural competency of some providers. *Id.* at 7744, 7781, 7783. The Rule would also increase transparency, accountability, and clarity with respect to the proper use of Title X funds. *See id.* at 7782. And perhaps most significantly, the Rule would better ensure compliance with § 1008 and avoid the use of federal funds to facilitate abortions. *See id.* As HHS concluded, "[w]hile cost is an important consideration in any rulemaking, compliance with statutory program integrity provisions is of greater importance." *Id.* at 7783.

HHS's analysis and balancing of costs was entirely reasonable. As the Supreme Court has explained, an agency is especially entitled to deference when its decision "call[s] for value-laden decisionmaking and the weighing of incommensurables under conditions of uncertainty." *Department of Commerce*, 139 S. Ct. at 2571. That describes the Secretary's judgment here.

B. The District Court's Analysis Does Not Withstand Scrutiny.

The district court nevertheless held that the Rule's referral restriction and physical-separation requirement are arbitrary and capricious because (in its view) HHS failed to adequately explain its disagreement with comments about medical ethics, reliance interests, and compliance costs. As a threshold matter, none of those factors could possibly render it arbitrary and capricious for HHS to adhere to what *Rust* itself recognized is the best interpretation of § 1008. *See supra* pt. I.A.2.c. And regardless, HHS reasonably addressed those factors even taken on their own terms.

1. Medical Ethics

a. The district court primarily faulted HHS for allegedly failing to explain how the Rule is consistent with medical ethics. SJA1309-1314. But HHS expressly considered and responded to comments arguing that the Rule would force providers to violate medical ethics. *See* 84 Fed. Reg. at 7748. It acknowledged that "[m]any commenters" had asserted that "prohibitions on abortion counseling and referral would directly conflict with the requirements or codes of ethics of medical professional associations," in light of the general principle, reflected in "the American Medical

Association Code of Medical Ethics," that "withholding information without patient's knowledge or consent is ethically unacceptable." *Id.* at 7745. And HHS agreed that as a general matter, "medical ethics obligations require the medical professional to share full and accurate information with the patient, in response to her specific medical condition and circumstance." *Id.* at 7724.

HHS concluded, however, that the Rule permitted providers to fulfill these ethical duties "while maintaining the integrity of the Title X program." 84 Fed. Reg. at 7724. Under the Rule, medical professionals could "provide nondirective pregnancy counseling to pregnant Title X clients on the patient's pregnancy options, including abortion." *Id.* They could "discuss the risks and side effects of each option." *Id.* And they could—indeed, had to—"refer for medical emergencies." *Id.*

The only thing they could not do was use taxpayer money to "refer[] for abortion as a method of family planning." 84 Fed. Reg. at 7724. But that modest restriction was "not inconsistent" with "medical ethics" because it was merely "a matter of Congress's choice of what activities it will fund, not about what all clinics or medical professionals may or must do outside the context of the federally funded project." *Id.* at 7748. And Title X providers were always free to inform their patients "that the project does not consider abortion a method of family planning and, therefore, does not refer for abortion." *Id.* at 7789 (§ 59.14(e)(5)). Given the provider's ability to advise a patient on the limits on the Title X program, it is difficult to see how a provider could violate the AMA's *Code of Ethics*, which prohibits only "withholding information *without*

[a] patient's knowledge or consent." *Id.* at 7745 (emphasis added); *see also Rust*, 500 U.S. at 200 (A doctor "is always free to make clear that advice regarding abortion is simply beyond the scope of the program.").

By way of analogy, if HHS had decided to prohibit providers from furnishing information about non-FDA-approved family-planning methods within the confines of the Title X program, no one would think that this would put their medical licenses in jeopardy, notwithstanding any general ethical duty to provide patients with the information they desire. Indeed, the 2000 regulations that Baltimore prefers required Title X projects to provide only those family-planning methods that were "medically approved," and the City has never suggested that this restriction somehow violated medical ethics. *See* 84 Fed. Reg. at 7740-41 (discussing removal of the "medically approved" requirement).

In addition, HHS explained that Congress and state legislatures presume that not referring for or promoting abortion is consistent with medical ethics, as evidenced by the many federal and state conscience statutes giving that option to medical providers, who likewise must believe they are not violating medical ethics. *See* 84 Fed. Reg. at 7748; *see also id.* at 7716, 7746-47 (discussing statutes); *id.* at 7780-81 (discussing medical providers with conscience objections to referring for abortion); *id.* at 7744-45 (same); SJA21 (comment that some providers were "prevented by ethical commitments" from participating under the 2000 rule because of the requirement to refer for abortions). As HHS observed, a provider's failure to refer for abortion as a method of family planning

cannot possibly be a violation of medical ethics given the number of "[f]ederal and State conscience laws, in place since the early 1970s, [that] have protected the ability of health care personnel to not assist or refer for abortions in the context of HHS funded or administered programs (or, under State law, more generally)." 84 Fed. Reg. at 7748; *see also* SJA41 (comment agreeing with Rule's application of numerous conscience laws). Moreover, those protections were consistent with the fact that *Roe v. Wade*, 410 U.S. 113 (1973), itself "favorably quoted the proceedings of the American Medical Association House of Delegates 220 (June 1970), which declared 'Neither physician, hospital, nor hospital personnel shall be required to perform any act violative of personally-held moral principles.'" 84 Fed. Reg. at 7748 (citing *Roe*, 410 U.S. at 144 n.38).

HHS also observed that the Supreme Court in *Rust* upheld a nearly identical, but stricter, version of the referral and counseling restrictions, which it would not have done had the 1988 rule "required the violation of medical ethics." 84 Fed. Reg. at 7748. Indeed, in the face of a dissent arguing that the restrictions were inconsistent with "the ethical responsibilities of the medical profession," *Rust*, 500 U.S. at 214 (Blackmun, J., dissenting), the Court held that even these more restrictive regulations did not "significantly impinge upon the doctor-patient relationship," *id.* at 200 (majority opinion).

As the Ninth Circuit observed, these discussions reveal that "HHS examined the relevant considerations arising from commenters citing medical ethics and rationally

articulated an explanation for its conclusion." *California*, 950 F.3d at 1103. In fact, HHS's analysis of medical ethics here significantly overlaps with the agency's discussion of the issue in promulgating the 1988 rule. Then, as now, "[n]umerous providers, provider organizations, and health professionals argued that the proposed restriction" was "co[n]trary to sound medical practice and the canons of medical ethics." 53 Fed. Reg. at 2928. Then, as now, HHS responded by stressing the limited nature of the Title X program—namely, that there is evidently "no ethical imperative for a health professional at a Title X clinic … to counsel a woman who displays a medical condition unrelated to family planning as to the medical management of that condition," much less to refer her for an abortion specifically. *Id.* at 2932; *see also id.* ("[S]ince Title X resources are clearly limited, the patient has no claim to the services relating to the provisions of abortion."). And then, as now, HHS observed that the various "conscience" statutes reveal "there is no absolute ethical imperative upon physicians to counsel or refer for abortion." *Id.* Neither Baltimore nor the district court has explained why that analysis no longer applies. If anything, HHS provided an *additional* reason in connection with the current Rule for rejecting the argument that the referral and counseling limitations violate medical ethics—namely, that the Supreme Court had done so in *Rust* with respect to even more restrictive regulations. 84 Fed. Reg. at 7748.

Finally, HHS's reasonable analysis has been starkly confirmed by the operation of the Rule since it went into effect nearly a year ago. The majority of incumbent providers have remained in the program without any apparent ethical sanction,

demonstrating that neither those providers nor their state regulators believe that compliance with the Rule violates medical ethics. *See* Press Release, HHS, *HHS Issues Supplemental Grant Awards to Title X Recipients* (Sept. 30, 2019) (*Supplemental Grant Awards*).[4] In fact, the remaining providers include 28 state health departments, making it rather implausible that they and other providers in those jurisdictions are in violation of those States' rules governing medical ethics. *See* HHS Office of Population Affairs, *Title X Family Planning Directory* (Mar. 2020).[5]

b. In the face of this analysis, the district court gave three reasons for its remarkable conclusion that HHS had failed to explain how the Rule is consistent with medical ethics. None withstands scrutiny.

First, the district court summarily dismissed the Secretary's reliance on the various conscience laws on the ground that "[i]n HHS's explanation for its disagreement with the comments on medical ethics, it does not mention the conscience statutes." SJA1312 (citing 84 Fed. Reg. at 7724, 7748). That is contrary to the preamble's plain text, as confirmed by one of the pages the court itself cited. *See* 84 Fed. Reg. at 7748; *supra* pp. 28-29.

Second, the district court wrote off HHS's conclusion "that *Rust* would not have upheld similar regulations if they were inconsistent with medical ethics"—which the court incorrectly viewed as the agency's "entire justification" for rejecting commenters'

[4] https://go.usa.gov/xvDEU
[5] https://go.usa.gov/xvWQW

objections in this area—on the ground that *Rust* "never addressed the implications of the 1988 regulations on medical ethics." SJA1312. That is contrary to *Rust*'s plain text. Like Baltimore, the principal dissent in *Rust* insisted that "the legitimate expectations of the patient and the ethical responsibilities of the medical profession demand" that Title X providers furnish their patients "with the full range of information and options regarding their health and reproductive freedom[,] … includ[ing] the abortion option," 500 U.S. at 213-14 (Blackmun, J., dissenting). But the majority took a different view.

As it explained, the doctor-patient relationship in a Title X project is not "sufficiently all encompassing so as to justify an expectation on the part of the patient of comprehensive medical advice," and hence "a doctor's silence with regard to abortion cannot reasonably be thought to mislead a client into thinking that the doctor does not consider abortion an appropriate option for her." 500 U.S. at 200 (majority opinion). Nor did the regulations "require[] a doctor to represent as his own any opinion that he does not in fact hold," as the doctor "is always free to make clear that advice regarding abortion is simply beyond the scope of the program," *id.*—the same option expressly provided under the current Rule, 84 Fed. Reg. at 7789 (§ 59.14(e)(5)). "In th[ose] circumstances," the Court held, "the general rule that the Government may choose not to subsidize speech applies with full force." *Rust*, 500 U.S. at 200. Whether

one couches the principal dissent's theory in terms of medical ethics, the doctor-patient relationship, or the First Amendment, *Rust* rejected it.[6]

In any event, even if one disagrees with conclusion of HHS and the en banc Ninth Circuit that *"Rust* rejected ethical arguments similar to those raised here," *California*, 950 F.3d at 1103 n.36, the district court provided no basis for its remarkable conclusion that this understanding of *Rust* is so implausible as to be arbitrary and capricious. And regardless of what arguments *Rust* did or did not reject, it was hardly irrational for HHS to have reached the conclusion that the *Rust* majority would not have upheld the 1988 rule if it thought, like the principal dissent, that the rule required providers to violate medical ethics. 84 Fed. Reg. at 7748.

Third, the district court claimed that several "medical organizations have grave medical ethics concerns" with the Rule, whereas HHS's view of medical ethics had no record "support from any significant leading medical association." SJA1309, 1311. But even the court eventually acknowledged that "HHS was not required to demonstrate that any professional organization supported the Rule" (SJA1313), making these objections beside the point. Indeed, given that the Secretary's "policymaking

[6] Contrary to the district court's suggestion (SJA1312-13), ethical standards have not changed in any relevant sense since the Supreme Court decided *Rust*. *See* 89-1391 Pet. Br., *Rust* (Nos. 89-1391, -1392), 1990 WL 505724 at *21 n.33 (contending that the 1988 rule's prohibition on abortion referrals was inconsistent with medical ethics because "[t]he professional standards" of the AMA and ACOG "require doctors to provide full, unbiased information about and referral for all medical alternatives, even for those treatment options they are unwilling or unable to provide").

discretion" under the APA permits him to disagree with "technocratic expertise" within his own agency, *Department of Commerce*, 139 S. Ct. at 2571, he certainly may reject the views of outside professional organizations as well. *See California*, 950 F.3d at 1100 n.31 ("HHS may reasonably decide not to rely on the opinions of outside commenters, even where they claim expertise.").

That is particularly true here. Unlike state authorities, these professional organizations have no regulatory power over medical ethics. And neither the district court nor Baltimore has pointed to any evidence that any provider (much less a provider participating in federally funded family-planning program) has been disciplined by a medical-ethics body for failing to provide an abortion referral upon demand—not in the time since the Rule has been in effect, *see supra* pp. 30-31, or in any other context.

Indeed, such discipline would be quite surprising given that the majority of States (and the federal government) prohibit abortion referrals (or even abortion counseling) in various publicly funded programs,[7] while still others—Maryland included—at least permit medical providers to refuse to do so under their conscience laws. Notably,

[7] *See, e.g.*, 42 U.S.C. § 300z-10(a); *id.* § 12584a(a)(9); Ark. Code § 20-16-1602; Ariz. Rev. Stat. § 36-2989.A.9; Cal. Health & Safety Code § 124180(b); Ga. Code Ann. § 31-2A-36(a)(9); Fla. Stat. § 320.08058(29)(b); Ill. Admin. Code tit. 77, § 655.10(d); Ind. Code § 16-19-13-3; Kan. Stat. § 65-1,159a(c); Ky. Rev. Stat. § 216B.400(5); La. Stat. § 40:31.3(c)(1); 2018 Mich. Pub. Acts 207 § 1303; Minn. Stat. § 145.925 subd. 1a; Miss. Code. Ann. § 41-79-5(3); Mo. Ann. Stat. § 170.015.7-8; Miss. Code. § 93-21-309(3); N.C. Gen. Stat. § 20-81.12(b84) N.D. Cent. Code § 12.1-41-20; Neb. Rev. Stat. § 68-1722; Ohio Rev. Code § 3701.046; Okla. Stat. tit. 63, § 1-740.12; 72 Pa. Stat. §§ 1702-D, 1703-D; 42 R.I. Gen. Laws § 42-12.3-3(b); S.C. Code § 44-44-30(B)(2); Tenn. Code § 68-1-1205; Tex. Gov't Code § 402.036(g); Va. Code § 32.1-325.A.7; Wis. Stat. § 253.07(b).

Maryland's conscience law expressly provides that "[t]he refusal of a person to … refer" for "any medical procedure that results in … termination of pregnancy" cannot serve as "a basis for … [d]isciplinary or other recriminatory action," thereby guaranteeing that any Title X provider in Baltimore can comply with the Rule without forfeiting the provider's medical license. Md. Code Ann. Health-Gen. § 20–214(a). Accordingly, while the State of Maryland may have withdrawn from the Title X program, another Maryland Title X recipient, Community Clinic Inc., has chosen to remain. *See Supplemental Grant Awards*.

Indeed, the view of the medical organizations the district court invoked is little more than *ipse dixit*. Neither the court nor Baltimore even identified "an opinion from the AMA's *Code of Medical Ethics* directly addressing abortion," *California*, 950 F.3d at 1102 n.34, much less any medical code stating that compliance with abortion-referral restrictions in the context of a federally funded pre-conception family-planning program is unethical. And even if they had, that hardly would be conclusive. For example, even though "the [AMA], like many other medical and physicians' groups, has concluded that '[p]hysician-assisted suicide is fundamentally incompatible with the physician's role as healer,'" *Washington v. Glucksberg*, 521 U.S. 702, 731 (1997) (citing AMA, *Code of Ethics* § 2.211), the Supreme Court has treated that judgment as merely "one reasonable understanding of medical practice," *Gonzales v. Oregon*, 546 U.S. 243, 273 (2006); *see also id.* at 273 (acknowledging the "the teachings of Hippocrates, the positions of prominent medical organizations, the Federal Government, and the

judgment of the 49 States that have not legalized physician-assisted suicide"). Here, there is not even a comparable consensus over the alleged ethical imperative to refer for abortion as method of family planning within the context of a federally funded family-planning program, much less one that could override the agency's reasonable judgment. In short, while Baltimore and its preferred organizations are entitled to their own view of what medical ethics demand, courts cannot "strike down legitimate abortion regulations" simply because "some part of the medical community [is] disinclined to follow" them. *Cf. Gonzales v. Carhart*, 550 U.S. 124, 166 (2007).[8]

2. Reliance Interests

The district court also erroneously concluded that HHS had insufficiently considered the Rule's impact on the availability of Title X services solely because the agency's analysis differed from that of certain commenters. As the Ninth Circuit recognized, HHS was entitled to rely on its own expertise, rather than on the commenters' "gloomy assumptions" and "'pessimistic' predictions." *California*, 950 F.3d at 1100.

a. HHS expressly and extensively considered the reliance interests at stake, including the Rule's likely effect on incumbent providers and patients. *See* 84 Fed. Reg. at 7766, 7780-82. As the Ninth Circuit explained, HHS specifically and thoroughly

[8] As noted above, *supra* n.3, Baltimore has not alleged that the Rule violates medical ethics by requiring a referral for prenatal care or by allowing providers not to provide nondirective counseling regarding abortion. And even if it had, those aspects of the Rule are also consistent with medical ethics for the reasons explained.

addressed comments asserting that some providers might choose to leave the Title X program. *See California*, 950 F.3d at 1098-1100 (describing HHS's analysis). Indeed, the Secretary's discussion of the Rule's impact on the Title X program was substantially more detailed than the sole paragraph devoted to the issue in the 1988 regulations. *See* 53 Fed. Reg. at 2933.

Specifically, HHS reasonably concluded that the comments about the Rule's potential effects on *a subset of* the existing provider network did not establish that the Rule would reduce Title X services *as a whole*. HHS predicted that the Rule would likely encourage new providers to enter the program—in particular, those who had previously been deterred from participating because the 2000 regulations required providers to refer for abortion as a method of family planning. *See* 84 Fed. Reg. at 7780. Notably, commenters had informed the agency "that the 2000 regulations stand in the way of some organizations applying for Title X funds, or participating in Title X projects, due to the requirement for abortion referrals," and that consequently, those "regulations limit choice for patients, especially those who live in rural or remote areas, where faith-based and local community organizations would be more likely to apply if the abortion counseling and referral requirement were lifted." *Id.* at 7744. Those concerns were understandable: Although the 2000 regulations provided that "grantees may not require individual employees" with conscience objections from providing abortion counseling or referrals, it also instructed that "in such cases the grantees must make other arrangements to ensure that the service is available," thereby precluding grantees with

such objections from participating in the program. 65 Fed. Reg. 41,270, 41,274 (July 3, 2000); *see id.* at 41,275; 84 Fed. Reg. at 7716 n.10. And more generally, HHS observed that it had uncovered evidence during another recent rulemaking suggesting that "neither grantees nor their employees may know of" available statutory conscience protections. 84 Fed. Reg. at 7716 n.10. Accordingly, the agency reasonably "expect[ed] that honoring statutory protections of conscience in Title X may increase the number of providers in the program." *Id.* at 7780.

In addition, HHS noted that in many areas a withdrawal of some providers would not be a problem because "there are already competing applicants to serve the same region" who could expand their services with additional grant money. 84 Fed. Reg. at 7764. HHS also explained that it would administer the physical-separation requirement on a case-by-case basis and work with providers to help them comply, and that the agency routinely monitors the availability of its services and would be able to quickly adjust to a decrease in services in an area. *Id.* at 7781.

Accordingly, HHS did not "anticipate that there will be a decrease in the overall number of facilities offering services," 84 Fed. Reg. at 7782, and concluded that "overall, the final rule will contribute to more clients being served, gaps in services being closed, and improved client care," *id.* at 7766; *see* SJA531 (study suggesting that accommodating religious beliefs could reduce barriers to healthcare for ethnic minorities). Those predictive judgments, concerning matters "squarely within HHS's field of discretion and expertise," are entitled to "particularly deferential review."

California, 950 F.3d at 1096, 1100 (citation omitted). And although the APA does not require an agency's predictions to come true, here, the vast majority of Title X grantees have remained in the program since the Rule's referral restriction took effect and HHS has used the funds relinquished from the departing ones to issue supplemental awards that it "expects … will enable grantees to come close to—if not exceed—prior Title X patient coverage." *Supplemental Grant Awards*; *see California*, 950 F.3d at 1099 n.30.

b. The district court rejected HHS's analysis entirely, relying instead on comments from a minority of incumbent providers who objected to the Rule's referral restrictions and physical-separation requirements. *See* SJA1314-16. Specifically, the district court concluded that the Rule is arbitrary and capricious merely because certain providers said that they would withdraw from the program rather than comply with the Rule. *See* SJA1315. But, as explained, those withdrawals (if the threats to withdraw were ultimately realized) are only one part of the equation; the other is how many *new* providers would join the program, and whether *remaining* incumbent providers would expand their services to fill the gaps. The district court incorrectly ignored the agency's expertise in predicting that the overwhelming majority of Title X providers would remain in the program, that those providers would expand their services, and that the Rule would encourage new providers to join.

The district court's decision in effect would require HHS to take commenters' predictions over its own, or else specify with impossible precision which new providers would join the program. But the district court cited no authority for the extraordinary

proposition that an agency administering a competitive grant program must either accede to the wishes of a subset of current grantees or identify in advance the entities that will take their place. And the court misconstrued the ordinary requirement that an agency must consider reliance interests to mean that grantees can veto an agency's decision by threatening to withdraw from a program. *See* SJA1315-16. The APA simply requires an agency to consider significant comments and provide a reasoned response. *See Perez v. Mortgage Bankers Ass'n*, 575 U.S. 92, 96 (2015). It does not displace the fundamental principle that the terms and conditions of a federal grant program are determined by Congress and the administering agency, not by would-be grant recipients who threaten to boycott if their demands are not met.

In all events, HHS could reasonably conclude that the Rule was necessary to comply with the best reading of Title X and other policy objectives regardless of the costs. *See, e.g.*, 84 Fed. Reg. at 7783; *supra* pp. 24-25. The APA allows the Secretary to engage in "value-laden decisionmaking and the weighing of incommensurables under conditions of uncertainty," *Department of Commerce*, 139 S. Ct. at 2571, and that is what he did here.

3. Compliance Costs

The district court further erred in rejecting HHS's considered prediction about the compliance costs associated with the physical-separation requirement. In so doing, the court replaced the agency's expert judgment with its own and inappropriately credited the higher cost estimates of certain commenters. SJA1316-17.

HHS thoroughly explained its calculation of the costs to separate Title X programs from those where abortion is a method of family planning. Based on a Congressional Research Service report, HHS explained that only about 10% of clinics offer abortion as a method of family planning, and estimated that only around 20% of providers participating in the Title X program had "their Title X services and abortion services … currently collocated." 84 Fed. Reg. at 7781; *see* SJA507 (explaining survey result showing that 10% of clinics receiving Title X funds also performed abortions). Accordingly, the vast majority of providers would not need to incur *any* costs to comply with the physical-separation requirement.

Of the remaining providers, HHS predicted that most could comply without incurring large costs. It acknowledged that some commentators estimated much higher compliance costs and adjusted its own estimate in response to those concerns. 84 Fed. Reg. at 7782. But the agency also noted that those commenters did not "provide sufficient data to estimate these effects across the Title X program." *Id.* Moreover, although commenters "provided extremely high cost estimates based on assumptions that they would have to build new facilities" to comply with the physical-separation requirement, HHS reasonably predicted that costs would be lower. *Id.* It explained that it did not "anticipate that entities will necessarily engage in construction of new facilities to comply with the new requirements." *Id.* at 7781. Instead, HHS expected that providers "will make the decision which best suits their circumstances in light of the new requirements" and "will usually choose the lowest cost method to come into

compliance." *Id.* In many cases, "Title X providers which operate multiple physically separated facilities and perform abortions may shift their abortion services, and potentially other services not financed by Title X, to distinct facilities, a change which likely entails only minor costs." *Id.*

HHS thus estimated an average compliance cost of $20,000-$40,000 per site. 84 Fed. Reg. at 7782. But it noted uncertainty in its estimate of costs and acknowledged that individual providers may have different circumstances that may affect their options and the resulting costs of compliance. *Id.* For example, a Title X clinic located in a different part of "a hospital that also performs some abortions" would be less likely to violate the physical-separation requirement than "a free-standing clinic." *Id.* at 7767. Accordingly, HHS explained that compliance would be assessed on a case-by-case basis, and it would help providers come to solutions to comply with the physical-separation requirement. *See id.* at 7766-67, 7781.

After analyzing the costs, HHS determined that "compliance with statutory program integrity provisions is of greater importance." 84 Fed. Reg. at 7783. The agency also noted that, even if commenters were correct that the physical-separation requirement would "increase the cost [of] doing business," such an increase would only confirm the risk that Title X funds were being used to subsidize programs where abortion was a method of family planning. *Id.* at 7766, 7773-76; *see also, e.g.*, *Family Planning Ass'n of Maine v. HHS*, No. 19-100, 2019 WL 3774619, at *1 (D. Me. Aug. 9, 2019) (noting grantee's assertion that it must depart the program and "close 11 to 15,

or all 17, satellite clinics because there is no feasible means of developing an abortion network untethered from Title X").

As the Ninth Circuit explained, HHS adequately explained and supported its estimate. *California*, 950 F.3d at 1098-1101; *id.* at 1101 n.32 (breaking down calculation). In fact, the agency's analysis of compliance costs here was, once again, more extensive than the one given in connection with the 1988 rule. *See* 53 Fed. Reg. at 2940-41. As with its analysis of reliance interests, HHS was not required to accept any commenter's predictions about compliance costs; nor should the district court "weigh evidence or pick the more persuasive opinions and predictions." *California*, 950 F.3d at 1096 n.28. Rather, those estimates, even quantitative ones, are "simply evidence for the [agency] to consider," *id.* at 1100 (citation omitted), and not entitled to control the agency's decision. HHS did consider each of the commenters' predictions cited by the district court (SJA1316-17), but simply reached a different conclusion. The district court erred in substituting its own policy judgment regarding compliance costs—a matter well within the agency's expertise.

II. The Permanent Injunction Is Overbroad In Multiple Respects.

Like the preliminary injunction, the permanent injunction is, at a minimum, overbroad due to its statewide scope and coverage of severable provisions of the Rule.

A. The Statewide Scope Of The Injunction Is Improper.

Article III and equitable principles require that the injunction at least be narrowed to apply only to Baltimore. Absent a certified class action, a court generally

lacks the power to grant relief that goes beyond what is necessary to provide complete redress to the plaintiffs before it. Yet that is precisely what the district court did here: it enjoined enforcement of the Rule against *any* Title X participant "in the State of Maryland." SJA1329. Neither Baltimore nor the district court articulated a tenable justification for that sweeping relief.

1. To establish Article III standing, a plaintiff "must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 342 (2006) (quotation marks omitted). This principle applies with equal force when considering the remedy to which a prevailing plaintiff is entitled. *Town of Chester v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1650 (2017) (a plaintiff must establish standing "separately for each form of relief sought") (quotation marks omitted)). Thus, where plaintiffs are not themselves injured by the application of the challenged policy to third parties, "[they] lack standing to seek—and the district court therefore lacks authority to grant—relief that benefits third parties." *McKenzie v. City of Chicago*, 118 F.3d 552, 555 (7th Cir. 1997).

The Supreme Court reaffirmed this principle in *Gill v. Whitford*, 138 S. Ct. 1916 (2018), concluding that a set of voters had not demonstrated standing to challenge alleged statewide partisan gerrymandering of legislative districts. The plaintiffs alleged that voters with similar political views were disadvantaged by the way district lines were drawn statewide, and that they were entitled to challenge the entire state map. *Id.* at 1924-25. But the Court concluded that a "plaintiff's remedy must be 'limited to the

inadequacy that produced [his] injury in fact,'" and that a voter's "harm [from] the dilution of [his] vote[] … is district specific" because it "results from the boundaries of the particular district in which he resides." *Id.* at 1930 (citation omitted). Accordingly, the Court held that "the remedy that is proper and sufficient lies in the revision of the boundaries of the individual's own district," not the broader remedy of "restructuring all of the State's legislative districts." *Id.* at 1930-31. And the Court "caution[ed]" that "'standing is not dispensed in gross': A plaintiff's remedy must be tailored to redress the plaintiff's particular injury." *Id.* at 1934 (citation omitted).

Gill reaffirmed established law. *Summers v. Earth Island Institute*, 555 U.S. 488 (2009), for example, held that the plaintiffs lacked standing to challenge regulations after the parties had resolved the controversy regarding the application of the regulations to the project that had caused the plaintiffs' alleged injury. Noting that the plaintiffs' "injury in fact with regard to that project ha[d] been remedied," *id.* at 494, the Court held that to allow the plaintiffs to challenge the regulations "apart from any concrete application that threatens imminent harm to [their] interests" would "fly in the face of Article III's injury-in-fact requirement." *Id.*; *see also Alvarez v. Smith*, 558 U.S. 87, 93 (2009) (once class certification had been denied, named plaintiffs whose own injuries were no longer live lacked standing to seek injunctive relief against challenged state practice).

2. Even apart from Article III's constraints, equity demands that injunctions should "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) (citation omitted). This Court and others have routinely enforced this basic premise. In *Virginia Society for Human Life, Inc. v. FEC*, 263 F.3d 379 (4th Cir. 2001), this Court vacated a permanent injunction that precluded a federal agency from enforcing, against any entity, a regulation held to have violated the First Amendment. The Court explained that an injunction covering the plaintiff "alone adequately protects it from the feared prosecution," and that "[p]reventing the [agency] from enforcing [the regulation] against other parties in other circuits does not provide any additional relief to [the plaintiff]." *Id.* at 393; *see also Los Angeles Haven Hospice, Inc. v. Sebelius*, 638 F.3d 644, 664-65 (9th Cir. 2011).

Related equitable principles reinforce this rule. The availability of non-party injunctions without class certification creates an inequitable "asymmetr[y]," whereby non-parties can claim the benefit of a favorable ruling, but are not bound by a loss. *DHS v. New York*, 140 S. Ct. 599, 600 (2020) (Gorsuch, J., concurring). In other words, if Baltimore prevails, the court issues the relief appropriate only if it had certified a class of all Title X participants in Maryland; but if the government prevails, it gains none of the benefits of prevailing in a class action. Relatedly, such injunctions undermine the rule that non-parties cannot assert collateral estoppel as plaintiffs "against the government." *United States v. Mendoza*, 464 U.S. 154, 162 (1984); *see Virginia Soc'y for Human Life*, 263 F.3d at 393. *Mendoza*'s bar is meaningless if the first party granted a

favorable ruling against the government can obtain an injunction that extends to non-parties who would otherwise be forced to relitigate the issue.

Finally, historical practice confirms that non-party injunctions exceed the district court's equitable powers. A court's statutory authority to enter injunctive relief is circumscribed by the type of relief that was "traditionally accorded by courts of equity." *Grupo Mexicano de Desarrollo S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 318-19 (1999). But the tradition of equity was premised on "providing equitable relief only to parties" because the fundamental role of a court was to "adjudicate the rights of 'individual[s].'" *Trump v. Hawaii*, 138 S. Ct. 2392, 2427-28 (2018) (Thomas, J., concurring) (citation omitted). As a result, "a plaintiff could not sue to vindicate the private rights of someone else." *Id.* at 2428; *see also New York*, 140 S. Ct. at 600 (Gorsuch, J., concurring).

3. Although the district court agreed with these principles in the abstract (*see* SJA1318 n.8), it failed to justify the broad scope of its relief. Whether considered as a Title X participant or a municipality, Baltimore's alleged injuries would be remedied by an injunction limited to that City. Indeed, Baltimore's complaint requested "permanent injunctive relief" preventing the government from enforcing the Rule *only* "against Plaintiff and its subgrantees." JA78. The City likewise has not availed itself of any mechanism to represent the interests of non-parties: it has not sought class certification or asserted third-party standing to represent others in this suit. Baltimore therefore is not entitled to "relief" on behalf of other Title X recipients and potential applicants in Maryland—some of whom, such as Community Clinic Inc., evidently have no objection

to the Rule and may actually prefer it to the 2000 regulations, which required abortion counseling and referrals.

The district court insisted that a statewide injunction was necessary because Baltimore is "close in proximity to multiple other States and municipalities" and a "[l]oss of funding in neighboring states will put pressure on Baltimore's health system, as mobile patients come from neighboring communities to make use of Baltimore's resources." SJA1318. But an injunction tracking Maryland's boundaries cannot be tailored to redress that (speculative) injury, as it *includes* providers on the other side of the State but *excludes* nearby providers located across state lines. An injunction limited to Baltimore, by contrast, would be sufficient to redress any injury the City actually established.

Finally, the district court's overbroad injunction was particularly inappropriate given that Maryland itself chose to challenge the Rule within—and lost before—the Ninth Circuit. *See California*, 950 F.3d at 1067. Accordingly, the district court effectively nullified the decision in that forum, granting relief that Maryland failed to obtain and would be precluded from seeking in this forum. Meanwhile, if the government ultimately prevails in this suit, that will not preclude others from bringing the same claim in a different forum in the future. Equity does not permit litigation on these terms.

B. The Injunction Of Severable Provisions Is Inappropriate

This Court should also vacate the permanent injunction to the extent it prohibits the enforcement of provisions of the Rule that the district court did not address and deem unlawful, because all such provisions are severable. The district court held only that the Rule's referral restrictions and physical-separation requirement were arbitrary and capricious. Yet that court nevertheless enjoined every provision of the entire Rule, including provisions unrelated to abortion.

The Court's order inverts the presumption of severability. The Rule's preamble expressly clarifies that "[t]o the extent a court may enjoin any part of the rule, the Department intends that other provisions or parts of provisions should remain in effect." 84 Fed. Reg. at 7725. And only "strong evidence" can overcome the "presumption" created by a severability clause that "the objectionable provision[s] can be excised." *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 686 (1987). The district court provided no such evidence. Its main rationale was that HHS had called the challenged provisions "major" ones, and that other provisions referenced them. SJA1328. But neither fact is inconsistent with the express severability statement, as HHS could reasonably desire to promulgate the other provisions in the Rule even if the "major" ones were enjoined. Indeed, several portions of the Rule have nothing to do with abortion referrals or physical separation and can easily function if those restrictions never took effect, such as the requirement that providers comply with laws that mandate notification or reporting of sexual abuse, 84 Fed. Reg. at 7790 (§ 59.17).

The district court also suggested that the government has "not explained how the provisions should be severed." SJA1328. But it is the *plaintiff's* burden to justify why an injunction is necessary with respect to each provision of the Rule, and Baltimore has failed to do so. *Cf. Printz v. United States*, 521 U.S. 898, 935 (1997) (courts "have no business answering" questions about the validity of provisions that concern only "the rights and obligations of parties not before [them]"). If Baltimore wishes to obtain an injunction of the entire Rule, it must explain how each provision—which, when combined, span six pages of the Federal Register—is unlawful or inseverable. *See* 84 Fed. Reg. at 7786-91. Instead, the proper remedy is straightforward: the court could have enjoined the referral restriction and physical-separation requirement, but should have left provisions like the sexual-abuse-reporting requirement untouched.

CONCLUSION

The district court's permanent injunction should be vacated in whole, or at least insofar as it is broader than necessary to redress Baltimore's injuries and insofar as it applies to provisions never held to be unlawful or inseverable.

Respectfully submitted,

JOSEPH H. HUNT
Assistant Attorney General
HASHIM M. MOOPPAN
Deputy Assistant Attorney General
MICHAEL S. RAAB

s/*Jaynie Lilley*
JAYNIE LILLEY
JOSHUA DOS SANTOS
Attorneys, Appellate Staff
Civil Division
U.S. Department of Justice, Room 7321
950 Pennsylvania Ave., NW
Washington, DC 20530
202-514-3542

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CERTIFICATE OF COMPLIANCE WITH
FEDERAL RULE OF APPELLATE PROCEDURE 32(a)

I hereby certify that this brief complies with the requirements of Federal Rule of Appellate Procedure 32(a)(5) and (6) because it has been prepared in 14-point Garamond, a proportionally spaced font.

I further certify that this brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 12,998 words, according to the count of Microsoft Word.

s/ Jaynie Lilley
Jaynie Lilley