Nos. 19-15974 & 19-15979

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

STATE OF CALIFORNIA,

Plaintiff-Appellee,

v.

ALEX M. AZAR II, In His Official Capacity as Secretary of the United States Department of Health and Human Services; UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, et al.,

Defendants-Appellants.

ESSENTIAL ACCESS HEALTH, INC., et al.,

Plaintiffs-Appellees,

v.

ALEX M. AZAR II, In His Official Capacity as Secretary of the United States Department of Health and Human Services; UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, et al.,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

AMICUS CURIAE BRIEF OF THE AMERICAN CENTER FOR LAW AND JUSTICE, SUPPORTING APPELLANTS AND REVERSAL

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INTEREST OF AMICUS[1]

Amicus, the American Center for Law and Justice ("ACLJ"), is an organization dedicated to the defense of constitutional liberties secured by law. ACLJ attorneys regularly appear before the U.S. Supreme Court, federal courts of appeals (including this Court), and other courts as counsel either for a party, *e.g.*, *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009), or for amicus, *Zubik v. Burwell*, 136 S. Ct. 1557 (2016), addressing a variety of constitutional law issues, including the Free Speech Clause of the First Amendment.

The ACLJ and over 280,000 of its members oppose taxpayer subsidization of the abortion industry and file this brief in defense of the Final Rule, Compliance with Statutory Program Integrity Requirements, 84 Fed. Reg. 7714 (Mar. 4, 2019) ("Final Rule") because they believe it is an important step toward ensuring that the abortion industry is not subsidized either directly or indirectly with federal taxpayer funds.

[1]All parties consented to the filing of this amicus brief. No party's counsel in this case authored this brief in whole or in part. No party or party's counsel contributed any money intended to fund preparing or submitting this brief. No person, other than amicus, its members, or its counsel contributed money that was intended to fund preparing or submitting this brief.

ARGUMENT

The Appellees' challenges to the Final Rule and the district court's decision mask nothing more than a simple policy disagreement about the degree to which abortion can be facilitated or promoted in Title X projects. Appellee Essential Access's Planned Parenthood sub-grantees have been able use Title X funds to cross-subsidize their abortion services and funnel Title X patients into their abortion clinics. While it is true that prior HHS regulations permitted this lucrative arrangement for decades, there is no right to federal funds acquired by laches.

California is free to adopt a policy that is neutral between abortion and childbirth and to use state funds to promote abortion as a method of family planning. But just as Appellees cannot prevent Congress from repealing Title X, they cannot coerce perpetual access to federal funds if they are unwilling to cooperate with the federal policy reflected in the Final Rule – favoring childbirth over abortion. If state governments and private parties object to a condition on the receipt of federal funding, their "recourse is to decline the funds." *Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 570 U.S. 205, 214 (2013).

In *Rust v. Sullivan*, 500 U.S. 173 (1991), the Supreme Court upheld HHS's authority to promulgate regulations virtually identical to the Final Rule. The district court was free to disagree, but it was not free to flout binding Supreme Court precedent. *Hutto v. Davis*, 454 U.S. 370, 375 (1982) (stating that "unless we wish

anarchy to prevail within the federal judicial system, a precedent of this Court must be followed by the lower federal courts no matter how misguided the judges of those courts may think it to be").

I. The Lower Court Wrongly Held that *Rust v. Sullivan* Did Not Control.

This should have been an easy case. In *Rust*, the HHS regulations implementing § 1008[2] (1) required physical and financial separation between Title X projects and abortion services or activities and (2) barred Title X projects from providing abortion referrals, or otherwise promoting abortion as a method of family planning. *Rust*, 500 U.S. at 179–81. Rejecting arguments advanced by Appellees in this case, the *Rust* Court concluded:

> A doctor's ability to provide, and a woman's right to receive, information concerning abortion and abortion-related services outside the context of the Title X project remains unfettered. It would undoubtedly be easier for a woman seeking an abortion if she could receive information about abortion from a Title X project, but the Constitution does not require that the Government distort the scope of its mandated program in order to provide that information.

Id. at 203. "Both patients and doctors are in no different position than they would be if Title X not been enacted." *Id*. at 202.

[2] Section 1008 provides that "[n]one 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 (2018).

The district court accepted with minimal analysis Appellees' claim that *Rust* was superseded by an appropriations act rider and an obscure provision of the Patient Protection and Affordable Care Act ("ACA"). *California v. Azar*, Nos. 19-cv-01184, 19-cv-01195, 2019 U.S. Dist. LEXIS 71171, at *52 (N.D. Cal. Apr. 26, 2019) ("Plaintiffs, however, rely on HHS Appropriations Acts and the ACA, which were enacted after *Rust* was decided, *so their claim is not automatically foreclosed by Rust*. The Court therefore must determine whether the Final Rule is inconsistent with the Appropriations Acts [riders] and [§ 1554 of] the ACA.") (emphasis added)); *see also id*. at *54–55 ("The question is whether the Final Rule, as one interpretation of Section 1008, is inconsistent with the Appropriations Acts' mandate that 'pregnancy counseling' be 'nondirective.'").

The district court omitted the essential preliminary analysis of whether the text of either provision clearly manifested Congress's intent to abrogate *Rust's* central holdings or otherwise constrain HHS's authority to reinstate the regulations upheld in *Rust*. *Id*. at *58, *75. The district court's ruling that the Final Rule conflicts with both provisions violates at least three canons of statutory interpretation: the "omitted-case" canon, the "supremacy of text" canon, and the presumption against implied amendment. *See* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 56, 93, 327 (2012).

The "omitted case canon" provides that "a matter not covered is to be treated as not covered." *Id*. at 93; *see, e.g.*, *Alabama v. North Carolina*, 560 U.S. 330, 352 (2010) ("We do not--we cannot--add provisions to a federal statute."). The "supremacy of text" principle holds that "[t]he words of a governing text are of paramount concern, and what they convey, in their context, is what the text means." Scalia & Garner, *supra*, at 56; *see, e.g.*, *United States v. Mo. Pac. R.R.*, 278 U.S. 269, 278 (1929) (stating that "where the language of an enactment is clear and construction according to its terms does not lead to absurd or impracticable consequences, the words employed are to be taken as the final expression of the meaning intended"); *Helvering v. City Bank Farmers Trust Co*., 296 U.S. 85, 89 (1935) (noting "[w]e are not at liberty to construe language so plain as to need no construction, or to refer to Committee reports where there can be no doubt of the meaning of the words used").

The presumption against implied amendments and repeals holds that implied amendments of earlier statutes must not be presumed unless the "intention of the legislature … [is] clear and manifest." *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 663 (2007) (quoting *Watt v. Alaska*, 451 U.S. 254, 267 (1981)).

The district court's nondirective counseling provision analysis violated the omitted-case and supremacy-of-text canons. Its ACA provision analysis violated the

omitted-case canon and the presumption against implied amendments and repeals. The district court accordingly erred in holding that HHS's authority to enact the Final Rule, upheld as a permissible interpretation of § 1008 in *Rust*, was mysteriously circumscribed by post-*Rust* statutes did not so much as mention either *Rust* or § 1008.

II. The District Court Dismissed *Rust* on the Flawed Basis that the Nondirective Counseling Provision Negated HHS's Authority, Upheld in *Rust*, to Ban Abortion Referrals.

The district court's ruling that the Final Rule's ban on abortion referrals violates the nondirective counseling provision[3] goes astray in multiple ways. The nondirective counseling requirement does not mention either § 1008 or referral. It simply imposes a condition on a wholly optional function under Title X – pregnancy counseling. Title X grantees need not provide any pregnancy

[3] The 2018 Consolidated Appropriations Act rider provides:

> For carrying out the program under title X of the PHS Act to provide for voluntary family planning projects, $286,479,000: Provided, That amounts 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.

Consolidated Appropriations Act, 2018, Pub. L. No. 115-141, 132 Stat. 348 (2018).

counseling, 42 C.F.R. § 59.5(a)(5) (2019), because the program's scope is limited to preconception family planning services only, H.R. Rep. No. 91-1667, at 8 (1970) (Conf. Rep.); *Rust*, 500 U.S. at 179.

The absence of abortion referral language makes sense because if Congress intended to make abortion referrals a part of Title X services, adding the requirement to a service that Title X grantees have no obligation to provide would be an ineffective means of doing so. *See* Scalia & Garner, *supra*, at 63 (describing "presumption against ineffectiveness"); *see also United States v. Castleman*, 572 U.S. 157, 178 (2014) (Scalia, J., concurring) (describing the "presumption against ineffectiveness" as "the idea that Congress presumably does not enact useless laws").

Second, the district court ignored the ordinary meaning of "nondirective" and "counseling," reasoning that "ample statutory, regulatory, and industry guidance" made such an inquiry unnecessary. 2019 U.S. Dist. LEXIS 71171, at *61. The "guidance" upon which the court relied, however, cannot withstand closer scrutiny. For one thing, there is no statutory guidance in the appropriations riders themselves. Congress did not define "nondirective counseling." Given the existing law in 1996, it is all the more telling that Congress chose not to define nondirective counseling to include abortion referrals. *See Miss. ex rel. Hood v.*

AU Optronics Corp., 571 U.S. 161, 170 (2014) (Congress is presumed to be aware of existing law when it legislates.).

Congress knew in 1996 that 1) *Rust* upheld HHS's authority to interpret § 1008 to proscribe abortion counseling and referrals and 2) the 1988 regulations, though suspended in 1993, could be reinstated by future administrations. *See Nat'l Ass'n of Home Builders*, 551 U.S. at 659 (noting that administrative agencies are "fully entitled" to change their minds); *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 863 (1984) (holding that a revised interpretation deserves deference because agency interpretations are not "instantly carved in stone"); *Am. Trucking Ass'ns v. Atchison, Topeka & Santa Fe Ry.*, 387 U.S. 397, 416 (1967) (stating that an agency interpretations need not "last forever"). Notwithstanding this knowledge, Congress remained silent on the definition of nondirective counseling.

The district court's conversion of Congress's silence into an affirmative mandate turns the omitted-case canon on its head. *See Cmty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 749 (1989) (stating "[o]rdinarily, 'Congress' silence is just that – silence.'" (quoting *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 686 (1987))).

A. The "Statutory Guidance" Upon Which the District Court Relied Undercuts the Conclusion that the Nondirective Counseling Provision Encompasses Abortion Referrals.

An extra-textual source of "statutory guidance" upon which the district court relied was the referral language in the Infant Adoption Awareness Act ("IAAA"). *See* 2019 U.S. Dist. LEXIS 71171, at *56–57 ("Congress expressed its understanding in [42 U.S.C. § 254c-6(a)(1)] that 'nondirective counseling' includes referral."). The IAAA, H.R. 2511, 106th Cong. (1999), was incorporated into the Children's Health Act of 2000. 42 U.S.C. § 254c-6(a)(1) (2006); 146 Cong. Rec. S9094-116 (2000) (Adding Title XII, "Adoption Awareness" to Children's Health Act); 146 Cong. Rec. H8209 (2000) (House concurred in Senate Amendment).

What the district court overlooked, however, is that the express purpose of the IAAA is to promote adoption. 42 U.S.C. §254c-6(a)(1) (providing that "[t]he Secretary shall make grants to national, regional, or local adoption organizations for the purpose of developing and implementing programs to train the designated staff of eligible health centers in providing adoption information and referrals to pregnant women on an equal basis with all other courses of action included in nondirective counseling to pregnant women."); s*ee also* 146 Cong. Rec. H2711 (statement of Rep. Bilirakis) (stating that § 254c-6(a)(1) was enacted to "promote adoption"); *id*. at H2719 (statement of Rep. Bliley, Sponsor) (stating that program

grantees should "be those which promote adoption in a realistic, positive manner as beneficial to the birth parents, child, and adoptive parents").

If anything, the IAAA contradicts the district court's conclusion that Congress intended nondirective counseling to encompass abortion referrals. First, Congress manifested its intent that referrals for adoption be included by actually inserting the word "referrals" into the text. 42 U.S.C. § 254c-6(a)(1). Second, the primary IAAA sponsor expressed the hope that the Act would reduce the incidence of abortion. *See* 146 Cong. Rec. H8257 (statement of Rep. DeMint, Sponsor) ("[M]ore women will hear about the [adoption] resources available to help them through [their] difficult time and to encourage them to *bring [their] newly-formed life into the world*." (emphasis added)).

Section 1008 forbids Title X funds from being used in programs where abortion is a method of family planning. Congress's use of the word "referral" in the IAAA, which explicitly encourages adoption, cannot be construed to mean that Congress intended to mandate referrals for abortion as well. The district court's reasoning is akin to saying that a program funding hospice services which includes referrals for palliative care must also include referrals for assisted suicide, even if Congress stated in another section of the statute that program grantees cannot promote assisted suicide.

B. The "Regulatory Guidance" Upon Which the District Court Relied Provides No Support for the Assertion that the Nondirective Counseling Provision Encompasses Abortion Referrals.

The "regulatory guidance" that the district court relied upon is similarly unavailing. The court reasoned that Congress saw no need to define nondirective counseling to include abortion referrals because HHS regulations then in effect permitted abortion referrals. 2019 U.S. Dist. LEXIS 71171, at *62. By that logic, the nondirective counseling rider was utterly pointless. The same HHS regulations also required nondirective pregnancy counseling. *See* Standards of Compliance for Abortion-Related Services in Family Planning Service Projects, 58 Fed. Reg. 7462 (Feb. 5, 1993) (to be codified at 42 C.F.R. pt. 59) (Title X projects "required in the event of an unplanned pregnancy and where the patient requests such action, to provide nondirective counseling to the patient on options relating to her pregnancy, including abortion, and to refer her for abortion, if that is the option she selects."). The district court did not and could not explain why Congress thought it necessary to require nondirective counseling but did not think it necessary to require abortion referrals, even though HHS regulations required both at the time.

In similar vein, the district court held that Congress intended the nondirective counseling provision to encompass referrals because "Congress repeatedly enacted the Nondirective Counseling Provision in substantially the

same form every year since 1996." 2019 U.S. Dist. LEXIS 71171, at *60. Because HHS regulations in effect during that time period required abortion referrals, the court reasoned that Congress must have intended the nondirective counseling provision to encompass abortion referrals. *Id*. at *62 (noting that "Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change" (quoting *Lorillard v. Pons*, 434 U.S. 575, 580 (1978))).

The false premises underlying that reasoning are (1) HHS had statutory authority to interpret the nondirective counseling provision, and (2) the HHS regulations in effect between 1996 and 2019 interpreted both § 1008 and the nondirective counseling requirement. The district court cited no such authority because there is none. HHS had authority under 42 U.S.C. § 300a-4(a) to promulgate regulations interpreting § 1008, but that authority cannot be twisted into authority to interpret the nondirective counseling provision. Prior HHS regulations are irrelevant to a textually grounded interpretation of the nondirective counseling requirement.

The matter of abortion referral is simply not covered in the nondirective pregnancy counseling requirement. The supremacy-of-text and omitted-case canons preclude this Court from discovering an abortion referral mandate in the text of the nondirective counseling riders. Because the riders do not mention

referral, *Rust*, or § 1008, they cannot be read to rescind HHS's authority to bar Title X grantees from counseling and referring for abortion.

III. Section 1554 of the Patient Protection and Affordable Care Act Does Not Limit HHS's Authority to Promulgate the Final Rule.

The district court also erred in holding that § 1554 of the ACA[4] limits HHS's authority under Title X. The court's interpretation of § 1554 violates not only the omitted-case canon but also the presumption against implied amendment. *See Nat'l Ass'n of Home Builders*, 551 U.S. at 663 ("While a later enacted statute . . . can sometimes operate to amend or even repeal an earlier statutory provision, . . . repeals and amendments by 'implication are not favored' and will not be presumed unless the 'intention of the legislature to repeal [is] clear and

[4] Section 1554 provides:

> 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 (2010).

manifest.'") (citation omitted). The ACA, which expanded health insurance coverage and revamped the health care delivery system, said nothing about Title X, which deals with a narrow, specific government funding program. "[A] statute dealing with a narrow, precise, and specific subject is not submerged by a later enacted statute covering a more generalized spectrum." *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153 (1976).

A. The District Court's Reading of § 1554 Flies In the Face of the Presumption Against Implied Amendments.

The district court's reading of § 1554 is irreconcilable with the Supreme Court's decision in *National Association of Home Builders*. There, the Court held that the presumption against implied amendment applies with equal force when a later enacted statute might be read to constrain an administrative agency's authority to implement an earlier enacted law. *Nat'l Ass'n of Home Builders*, 551 U.S. at 663. The Court rejected an argument remarkably similar to the district court's ruling. In *National Association of Home Builders*, there was a conflict between a provision of the Endangered Species Act ("ESA") and a provision of Clean Water Act ("CWA"). *Id.* at 661. The ESA had been passed after the CWA, and the lower court had held that the ESA provision effectively altered the EPA's authority under the CWA to grant National Pollution Discharge Elimination

System permits to Plaintiffs. *Defs. of Wildlife v. EPA*, 420 F.3d 946, 961–62 (9th Cir. 2005).

The Supreme Court reversed, holding that the lower court's ruling was predicated on the erroneous conclusion that the ESA amended the CWA by implication. *Nat'l Ass'n of Home Builders*, 551 U.S. at 662–63. The lower court's reading of the two statutory provisions would "effectively repeal the mandatory and exclusive list of criteria" that the EPA was obligated to consider under the CWA and "replace it with a new, expanded list of criteria [under the ESA]." *Id.* at 662.

National Association of Home Builders requires reversal of the district court's holding. Reading § 1554 to constrain on HHS's authority to promulgate regulations implementing § 1008 requires the predicate assumption that § 1554 amended either § 1008 or the statutory grant of authority to HHS in 42 U.S.C § 300a-4(a). Section 1554 reflects no "clear and manifest" congressional intent to amend either provision. *See* 551 U.S. at 663.

B. When Congress Intended the ACA to Amend Other Federal Laws, It Did So Explicitly.

That Congress did not intend § 1554 to limit HHS's authority to promulgate regulations implementing § 1008 is further demonstrated by ACA provisions that actually do amend other federal health laws. For example, the ACA expanded

services provided under another funding program, the State Children's Health Insurance Program ("SCHIP"). 42 U.S.C. § 1397aa(a) (2002). Section 2302 of the ACA amended SCHIP to include hospice care within the definition of "child health assistance." 42 U.S.C. § 1397jj(a)(23) (2006 & Supp. 2011). The ACA's SCHIP amendment demonstrates that when Congress intends to expand the scope of services provided by federal funding programs, it does so expressly.

The ACA amended other federal laws as well. *See, e.g.*, 29 U.S.C. § 1185d (2010) (adding § 715 to Employee Retirement Income Security Act to incorporate the changes made to the Public Health Service Act); 42 U.S.C. § 1396a(gg) (Supp. 2010) (amending § 1902(a) of the Social Security Act to require states with Medicaid programs in place on March 23, 2010, to maintain the same program eligibility standards until the state's insurance exchange was operable in 2014). The ACA's express amendment of other federal laws discredits the district court's assumption that § 1554 impliedly amended HHS's authority under Title X.

C. The District Court Misread § 1554's "Notwithstanding" Clause.

The district court's unprincipled interpretation of § 1554 is further demonstrated in the court's rewriting of the "notwithstanding" clause. Section 1554 begins, "Notwithstanding any other provision of *this Act*," clearly indicating that it affects only HHS's authority under the ACA. *See Preseault v. ICC*, 494 U.S. 1, 13–14 (1990) (holding that "notwithstanding any other provision of this Act" refers to

the statute in which it appeared and not to the related Tucker Act). But in essence, the district court interpreted the notwithstanding clause to mean "notwithstanding *any other provision of law*." 2019 U.S. Dist. LEXIS 71711, at *75.

For the district court, "this Act" means exactly what the court "chooses it to mean, neither more nor less." Lewis Carroll, *Through the Looking-Glass* 205 (1934). Thus, Congress's use of "this Act" in the notwithstanding clause does not limit the restrictions in § 1554 to HHS's authority under the ACA. 2019 U.S. Dist. LEXIS 71711, at *75. But other ACA provisions which refer to "this Act" do limit the provision to the ACA:

> Section 1553 directs that "[t]he Federal Government, and any State or local government or health care provider that receives Federal financial assistance under this Act . . . may not subject an individual or institutional health care entity to discrimination . . . ." 42 U.S.C. § 18113(a) (emphasis added). Similarly, Section 1555 provides that "[n]o individual, company, business, nonprofit entity, or health insurance issuer offering group or individual health insurance coverage shall be required to participate in any Federal health insurance program created under this Act." 42 U.S.C. § 18115 (emphasis added).

Id. *76.

The district court's holding that Congress intended § 1554 to limit HHS's authority under Title X, without amending or even referring to it is meritless. *Rust* remains binding and requires that the injunction be vacated.

CONCLUSION

For the foregoing reasons, Amicus respectfully asks this Court to vacate the injunction.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE (FORM 8)

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CERTIFICATE OF SERVICE

I hereby certify that on June 10, 2018, I electronically filed a copy of the foregoing *Amicus Curiae* Brief using the ECF System which will send notification of that filing to all counsel of record in this litigation. I also certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: June 10, 2018

/s/ Jay A. Sekulow
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