No. 19-35386(L)

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STATE OF OREGON, 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.

AMERICAN MEDICAL ASSOCIATION, 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 DISTRICT OF OREGON

APPELLANTS' REPLY BRIEF

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INTRODUCTION AND SUMMARY

Plaintiffs' responses only underscore how extraordinary this injunction is. Like the district court, plaintiffs accept that *Rust v. Sullivan*, 500 U.S. 173 (1991), upheld regulations materially indistinguishable from the ones challenged here based on a statutory provision that has not changed. Plaintiffs nevertheless contend that a single district court can effectively overrule the Supreme Court through a nationwide injunction based on a clause in an appropriations rider and an obscure provision of the Affordable Care Act (ACA).

A unanimous motions panel of this Court correctly rejected that remarkable position, and plaintiffs make little effort to grapple with its decision. Dkt.No.58.[1] As the panel explained, Congress did not amend Title X—much less abrogate a high-profile Supreme Court decision—*sub silentio* through a clause in an appropriations rider or a mousehole in the ACA. Nor did HHS act irrationally in adopting regulations over plaintiffs' objections or in making reasonable predictions using its expertise. And plaintiffs' predicted harms do not outweigh injuries to the government that the Supreme Court has already identified—such as preventing taxpayer dollars from promoting

[1] Although this Court ordered these cases to be reheard en banc and instructed that the motions panel's order not be cited as precedential, Dkt.No.85, the panel's order constitutes persuasive authority. Moreover, the en banc panel subsequently denied the plaintiffs' motions for an administrative stay of the panel's order and clarified that this Court had not vacated that order, which remains in effect. Dkt.No.118.

abortion. In any event, nothing justifies enjoining aspects of the Rule never found to be unlawful or applications of the Rule to those who have not challenged it.

ARGUMENT

I. The Rule Is Lawful

The crux of plaintiffs' statutory-authority challenge is that Congress implicitly abrogated the Supreme Court's decision in *Rust* in an appropriations rider and an obscure provision of the ACA. But we previously explained why that facially implausible position is incorrect, and nothing in plaintiffs' responses rehabilitates it.

A. The Rule Falls Well Within The Secretary's Authority

1. The Appropriations Rider

Title X plainly authorizes the Rule's restrictions on referrals and counseling. If a program refers patients for, or otherwise promotes abortion as a method of family planning, then the program is one "where abortion is a method of family planning" and hence ineligible for funding under § 1008. 42 U.S.C. § 300a-6; *see* 84 Fed. Reg. 7714, 7759 (Mar. 4, 2019). Plaintiffs suggest that § 1008 merely "prohibit[s] the use of Title X *funds* for abortion" (AMA.Br.38; *see* States.Br.38), but even the preamble to HHS's 2000 regulations concluded that is "not … the better reading." 65 Fed. Reg. 41,270, 41,272 (July 3, 2000). After all, when Congress wants to prevent only the federal funding of abortion, it knows how to do so. *See* Pub. L. No. 96-123, § 109, 93 Stat. 923, 926 (1979) ("[N]one of the funds provided by this joint resolution shall be used to perform abortions."). Section 1008, by contrast, reveals "Congress' intent in Title X

that federal funds not be used to 'promote or advocate' abortion as a 'method of family planning.'" *Rust*, 500 U.S. at 195 n.4.[2]

All of this remains true notwithstanding a subsequent appropriations rider providing that Title X funds "shall not be expended for abortions" and that "all pregnancy counseling shall be nondirective." Pub. L. No. 115-245, div. B, tit. II, 132 Stat. 2981, 3070-71 (2018). If anything, that rider reinforces § 1008 by further ensuring that pregnancy counseling is not used to "direct" patients *toward* abortion. Plaintiffs' contrary arguments do not withstand scrutiny.

a. With respect to the referral restrictions, plaintiffs concede that a "failure to refer for abortion alone" is not "directive," yet contend that when considered in "combin[ation]" with a separate requirement that pregnant patients be referred for prenatal health care, these restrictions violate the appropriations rider. AMA.Br.23; *see* States.Br.22. But the prenatal-referral requirement does not direct a decision about abortion—it merely requires providers to refer women for care while they are pregnant, even if they obtain an abortion later. Gov.Br.24. And the Rule permits providers to explain that abortion is outside the scope of the program, and that if a patient wants to

[2] Invoking the 2000 regulations' preamble, the States alternatively suggest (States.Br.38 n.18) that providing abortion referrals "does not promote abortion" in violation of § 1008. But by definition, the purpose and effect of an abortion referral is to further—*i.e.*, promote—an abortion. Indeed, *Rust* observed that under the 1988 regulations, a referral "list may not be used indirectly to encourage or promote abortion, 'such as … by "steering" clients to providers who offer abortion as a method of family planning.'" 500 U.S. at 180. By that logic, referring "clients to providers who offer abortion as a method of family planning" directly "promote[s] abortion."

seek an abortion she can find information about that elsewhere, but in the meantime, they can provide her with a list of providers who can offer her care while she is pregnant. *See* 42 C.F.R. § 59.14(e)(5). Providers could even include an express disclaimer that the prenatal-care referral is a general requirement and should not be taken as directing the patient's ultimate decision about her pregnancy. And even if the required prenatal-care referral were directive, that would not justify invalidating the concededly nondirective prohibition on abortion referrals. The provisions are contained in different subsections, 42 C.F.R. §§ 59.16(a), 59.16(b)(1), which are severable, 84 Fed. Reg. at 7725.

In any event, Congress's requirement that "pregnancy counseling" be "nondirective" does not speak to the issue of "referrals," much less require HHS to allow referrals for abortion specifically. Despite conceding that "Congress and HHS have at times referred to counseling and referral separately" (AMA.Br.27 n.5), plaintiffs insist that in passing the appropriations rider, Congress must have intended "counseling" to refer to both. But even materials cited by plaintiffs frequently use the terms separately, and if counseling clearly included referrals, then none of these authorities would have needed to discuss referrals at all. For instance, plaintiffs seize on (AMA.Br.26; States.Br.26-27) statements in the Rule's preamble indicating that a separate statute, 42 U.S.C. § 254c-6(a)(1), reflects a legislative intent that "adoption information and referrals be included as part of any nondirective counseling," 84 Fed. Reg. at 7733, but that has no bearing on whether Congress considers referrals a *type* of

counseling (as opposed to something that may occur *at the same time* as counseling). And given HHS's longstanding position—reflected in this Rule and its predecessors (Gov.Br.25-26)—that referrals and counseling are distinct, plaintiffs place far too much weight on the Department's brief discussion of this separate statute. At most, the few instances they identify as implying that counseling may include referrals suggest the term "nondirective counseling" is ambiguous and thus cannot supply the clear mandate necessary to overcome both the presumption against implied repeals and the judicial deference owed to HHS's reasonable interpretation.

b. Plaintiffs' challenge to the Rule's treatment of counseling fares no better. Given that the Rule permits "nondirective pregnancy counseling, which may discuss abortion," 42 C.F.R. § 59.14(e)(5), plaintiffs largely train their fire on statements in the preamble. Private plaintiffs, for instance, challenge the application of guidance that "abortion must not be the only option presented," 84 Fed. Reg. at 7747, to cases where the patient seeks information solely on abortion. AMA.Br.28-29. But the neutral presentation of other options in addition to abortion—even if the patient has no interest in them—is not *directing* her to choose adoption or childbirth. Gov.Br.28. Plaintiffs invoke a statement in the 2000 regulations' preamble that "[i]f projects were to counsel on an option even where a client indicated that she did not want to consider that option, *there would be a real question* as to whether the counseling was truly nondirective or whether the client was being steered to choose a particular option." AMA.Br.29 (quoting 65 Fed. Reg. at 41,273) (emphasis added). But even that remark

did not conclude such counseling *would be* directive, and common sense confirms otherwise: merely ensuring a patient is aware of alternative options besides the one she initially focused on does not in any sense *direct* her to choose one of those alternatives. Regardless, that remark at most shows that the term "nondirective" is ambiguous and thus cannot effectuate an implied repeal or displace HHS's current interpretation. And even if requiring the discussion of additional options were somehow "directive" when a woman seeks information solely on abortion, that would not justify deeming the Rule's counseling restrictions facially invalid, let alone doing so based merely on guidance that does not appear in the regulatory text.

For their part, the States contend that the appropriations rider requires "[e]qual presentation of all options" (States.Br.20)—in essence, a fairness doctrine for pregnancy counseling. But when Congress wishes specific pregnancy options to be given equal treatment, it knows how to say so explicitly, as 42 U.S.C. § 254c-6(a)(1) reveals. *See* Gov.Br.29. Indeed, if "nondirective" already required that all pregnancy options—adoption included—be treated equally, then Congress's explicit instruction in § 254c-6(a)(1) that adoption be treated "on an equal basis" with other pregnancy options would be gratuitous. Although the States contend that § 254c-6(a)(1) merely "allocate[s] resources for a training program to ensure" compliance with the appropriations rider's alleged "preexisting requirement to treat adoption and all other legal pregnancy options equally" (States.Br.21-22), they point to no evidence that supports that conclusion. To the contrary, the lone piece of legislative history they do

cite—a congressman's statement in support of the statute—does not mention the appropriations rider and instead notes that, at the time, "40 percent of self-identified 'pregnancy counselors' in settings such as health, family planning, and social service agencies d[id] not even raise the issue of adoption with their pregnant clients." 146 Cong. Rec. H2718 (May 9, 2000).

The States further object that the Rule "does not require" Title X participants to provide counseling on abortion or any pregnancy counseling at all. States.Br.18. But in providing that "all pregnancy counseling shall be nondirective," the appropriations rider does not require *any* pregnancy counseling at all—especially in a "*preconceptional* family planning program" such as Title X, *Rust*, 500 U.S. at 202. Nor does a provider's choice to omit counseling about abortion specifically "direct" anything. The Rule's preamble contemplates that any counseling will present more than one option, *see, e.g.*, 84 Fed. Reg. at 7716, and even offering childbirth-only counseling or adoption-only counseling would not "direct" a patient to choose that option, so long as the provider did not advise a patient to do so. At most, such counseling would (implicitly) "promote" that option over the others, but nothing in the appropriations rider prohibits the promotion of childbirth or adoption. Section 1008, by contrast, does prohibit the use of Title X funds "to 'promote or advocate' abortion as a 'method of family planning,'" *Rust*, 500 U.S. at 195 n.4, which is why the Rule forbids counseling where "abortion [is] the only option presented," 84 Fed. Reg. at 7747.

Plaintiffs object (AMA.Br.24) that HHS remarked that "present[ing]" abortion as "the only option" in counseling would violate the appropriations rider in addition to § 1008. But it is immaterial whether, under the appropriations rider, abortion-only counseling is distinguishable from childbirth-only counseling, *see* 84 Fed. Reg. at 7747, because abortion-only counseling is already prohibited under § 1008, and thus HHS's discussion of whether it is also prohibited by the appropriations rider was beside the point. *See, e.g.*, *WildEarth Guardians v. Provencio*, 923 F.3d 655, 678 (9th Cir. 2019) (concluding that agency's "inappropriate" "references" to an exemption "at most amounted to harmless error" under the APA, "as they had no effect" on the challenged agency action). And in all events, if permitting Title X providers to refrain from counseling on abortion were somehow unlawful, the remedy would merely be to invalidate and sever that aspect of the Rule. *See* 84 Fed. Reg. at 7725. But this Court need not and should not consider that question, because these plaintiffs (as opposed to Title X patients) have no standing to complain about—and are certainly not irreparably harmed by—what the Rule "allows" *other* providers to do. States.Opp.18.

c. Even if this were a closer question, settled interpretive principles would dispose of plaintiffs' construction of the appropriations rider. Plaintiffs do not dispute that there is a heightened presumption against implied repeals through appropriations legislation (Gov.Br.23), but contend that the presumption is inapplicable here. Yet their responses confirm that plaintiffs believe the rider "changed the law" by "narrow[ing]" the Department's "authority under §1008." AMA.Br.37, 40; *see* States.Br.36-39. By

definition, that is a repeal of § 1008 in relevant respect. *See National Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 663 n.8 (2007) ("Every amendment of a statute effects a partial repeal to the extent that the new statutory command displaces earlier, inconsistent commands"). If § 1008 explicitly delegated HHS authority "to prohibit Title X projects from referring their patients for abortion as a method of family planning," for instance, no one would dispute that subsequent legislation stripping the Department of that authority would constitute a repeal. That § 1008, combined with the express rulemaking authority granted under § 1006, *implicitly* delegated the same authority is irrelevant under *Chevron*. Gov.Br.31-32. And that is especially true where the Supreme Court has already authoritatively construed § 1008 to contain that delegation, a scenario none of plaintiffs' authorities address. *See* Antonin Scalia & Brian A. Garner, *Reading Law* 331 (2012) (Even when an "earlier ambiguous provision has already been construed by the jurisdiction's high court to have a meaning that does not fit as well with a later statute as another meaning," any "[l]egislative revision of law clearly established by judicial opinion ought to be by express language or by unavoidably implied contradiction.").

Plaintiffs similarly err in contending that HHS conceded that the appropriations rider shrinks "the scope of its authority" under § 1008 (AMA.Br.38), when it acknowledged, for instance, that the rider "imposed additional requirements" on the Title X program, 84 Fed. Reg. at 7720. Such general acknowledgements have no bearing on the question here—namely, whether the rider implicitly erased HHS's

preexisting authority under § 1008 to forbid referring for, or otherwise promoting, abortion as a method of family planning.

More generally, plaintiffs double down on the facially implausible theory that in 1996, Congress smuggled into an appropriations rider providing that Title X funds "shall not be expended for abortions" an implied repeal of § 1008 and silent abrogation of *Rust*, after it had tried, and failed, to do so expressly in the vetoed Family Planning Amendments Act of 1992. *See* Gov.Br.25-26, 31. Plaintiffs dismiss this history as irrelevant because "the 1988 rule had already been suspended" by HHS in 1993 when the 1996 Congress enacted the differently worded appropriations rider. AMA.Br.40; *see* States.Br.25 n.15. But the Congress responsible for the 1996 appropriations rider declined to enact the Family Planning Amendments Act of 1995, which, like its 1992 predecessor, would have required Title X projects to include "termination of pregnancy" within their "nondirective counseling and referrals." *Compare* H.R. 833, 104th Cong. § 2 (1995), *with* S. 323, 102d Cong. § 2 (1991). "Few principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language," *INS v. Cardoza-Fonseca*, 480 U.S. 421, 442-43 (1987), and that principle alone should put an end to plaintiffs' fanciful theory.

2. Section 1554 Of The Affordable Care Act

Plaintiffs are on no firmer ground in contending that § 1554 of the ACA implicitly eliminated HHS's authority to reinstate both the physical-separation

requirement and the referral and counseling restrictions, especially when the district court never applied this statutory provision to the latter.

a. To start, plaintiffs do not deny that they failed to raise this statutory argument before HHS, and the States never respond to our explanation that statutory-authority arguments are subject to waiver at least with respect to facial challenges, because agencies "have no obligation to anticipate every conceivable argument about why they might lack such statutory authority." Gov.Br.34 (quoting *Koretoff v. Vilsack*, 707 F.3d 394, 398 (D.C. Cir. 2013) (per curiam)); *cf.* States.Br.32. Instead, plaintiffs ask this Court to excuse their waiver because they made generic objections containing language that happened to resemble language in § 1554. AMA.Br.33-35; States.Br.33-34. But merely notifying HHS of *substantive* objections did not give the agency a chance to address a question of *statutory interpretation* implicating various rules of construction. *See infra* Pt. I.A.2.b. Accordingly, HHS plainly did not have an "opportunity to apply its expertise" in administering the ACA with respect to this issue. AMA.Br.35 (quotation marks omitted). By contrast, when HHS received comments relying on § 1554 in a different rulemaking (*see* States.Br.34), it responded by invoking its authority to administer § 1554 and provided interpretive arguments in addition to policy ones. *See* 83 Fed. Reg. 57,536, 57,551-52 (Nov. 15, 2018). And none of the generalized statements from this Court's precedents that plaintiffs cite establish the requisite proposition that a litigant can preserve a challenge to an agency's statutory authority without ever citing the relevant statutory provision. *See* Gov.Br.33-34.

b. In any event, plaintiffs' § 1554 argument is meritless, which is presumably why none of the 500,000-plus comments on the proposed Rule raised it. The Rule merely limits what the government chooses to fund and thus does not, for example, "create[] any unreasonable barrier" to obtaining health care. 42 U.S.C. § 18114(1). As the Supreme Court explained in *Rust*, there is a fundamental distinction between impeding something and choosing not to subsidize it, 500 U.S. at 201-02; *see* Gov.Br.34-35, and that reasoning disposes of this claim, whether it is packaged as a constitutional or statutory one.

Indeed, accepting plaintiffs' expansive construction of terms such as "creates," "impedes," or "interferes" to include a refusal to provide government subsidies would have dramatic consequences for Title X and the government's authority more generally. Under plaintiffs' theory, for instance, HHS could not even adopt a rule permitting Title X providers with conscience objections to decline to provide abortion referrals, since that rule has the effect of reallocating some funds from grantees who provide abortion referrals to ones who do not, and thus likewise presumably deprives Title X patients of "information about how and where [they] can obtain abortion services." AMA.Br.30; *see* AMA.Br.46 (accepting that Title X providers with conscience objections can decline to provide abortion referrals). If Congress had actually taken the momentous step of requiring HHS to continue devoting federal funds to particular Title X providers in perpetuity, Planned Parenthood and others presumably would have known about that decision and immediately raised the objection in the comment period.

In addition, while Plaintiffs dismiss as irrelevant (States.Br.35-36) the fact that § 1554 applies "[n]otwithstanding any other provision of this Act," 42 U.S.C. § 18114—thereby signaling that this provision may implicitly displace otherwise-applicable provisions *only in the ACA*—they never explain why Congress used that language when it repeatedly used the common phrase "notwithstanding any other provision of law" elsewhere in the ACA. *See* Gov.Br.35-36. And their observation that the "ACA" as a whole "was intended to overhaul the American health care system" (AMA.Br.40) does not make § 1554 any less of a mousehole or plaintiffs' theory any less of an elephant: "Congress … does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions," *Whitman v. American Trucking Ass'ns*, 531 U.S. 457, 468 (2001), and § 1554 qualifies as both.

B. The Secretary Provided A Reasoned Explanation

1. The Referral and Counseling Restrictions Are Reasonable

HHS reasonably adopted the prohibitions on promoting and referring for abortion because they implement the best reading of § 1008—namely, that a program that refers patients for or promotes abortion as a method of family planning is by definition a program "where abortion is a method of family planning." *See* 84 Fed. Reg. at 7759. The Supreme Court held in *Rust* that such "justifications are sufficient to support the Secretary's revised approach," 500 U.S. at 187, which is "plainly allow[ed]" by Title X, *id.* at 184. The conclusion remains true today, and HHS adequately explained its reasons for adopting the Rule over plaintiffs' objections.

a. In particular, HHS considered and responded to comments arguing that the Rule requires providers to violate medical ethics. *See* 84 Fed. Reg. at 7742, 7748. As we explained (Gov.Br.37-39), HHS concluded that those concerns were misplaced, relying on federal and state conscience laws permitting providers to take the same actions required by the Rule, and on *Rust*'s upholding of a nearly identical, but stricter, version of the referral and counseling restrictions. *See* 84 Fed. Reg. at 7742, 7748.

While plaintiffs disagree with HHS's conclusion, they fail to show that it was unreasonable. Plaintiffs dismiss the conscience statutes as irrelevant (AMA.Br.43), but those laws demonstrate that Congress and state legislatures do not believe that medical ethics require that all medical providers *must* refer for abortion. Similarly, plaintiffs argue that "*Rust* did not address whether the 1988 rule violated medical ethics" (AMA.Br.43), but the Court upheld the restrictions against a First Amendment challenge in the face of a dissent arguing that they compelled doctors to violate medical ethics. Gov.Br.38. The Court explained that a doctor was "always free to make clear that advice regarding abortion is simply beyond the scope of the program," *Rust*, 500 U.S. at 200, and the same is true under the present Rule, *see* 42 C.F.R. § 59.14(e)(5).

More fundamentally, plaintiffs' grievance is with the limited nature of the Title X program itself. Plaintiffs assert that the Rule violates medical ethics because it "prevents medical professionals from giving patients complete information" (States.Br.43), positing that, even "in the context of a government program with a limited scope," medical providers may not "withhold information a patient seeks."

AMA.Br.43-44. But that theory contravenes the Supreme Court's reasoning in *Rust*. Title X creates a limited program, focused on preconception services, and in that context, the doctor-patient relationship is not "sufficiently all encompassing so as to justify an expectation on the part of the patient of comprehensive medical advice." 500 U.S. at 200. And because Title X "does not provide post conception medical care, … 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." *Id.* Congress's limitations on the program no more violate a physician's ethical responsibilities than her First Amendment rights.

b. Because HHS reasonably concluded that the referral and counseling restrictions do not force Title X grantees to violate medical ethics, plaintiffs cannot override that reasoned determination by threatening a "mass exodus of providers." States.Br.41; *see* AMA.Br.44-46. Plaintiffs' assertion that the Rule forces providers to leave Title X depends on their incorrect premise that it requires violations of medical ethics, and they cite 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 those entities who will take their place. Indeed, similar threats did not alter the outcome in *Rust* (Gov.Br.40), and plaintiffs offer no reason why this case should be different.

Regardless, HHS reasonably predicted that any withdrawing incumbent providers likely will be replaced by new providers who were previously discouraged

from joining the program by the abortion-referral requirement in the 2000 rule, or who will otherwise be willing to compete for and accept federal funds under the Rule. Unlike the agency decision in *National Lifeline Ass'n v. FCC*, 921 F.3d 1102, 1113 (D.C. Cir. 2019), in which the FCC relied on "no evidence" in predicting that existing providers would provide services in areas they had previously not served, HHS's prediction here was supported by the administrative record. HHS explained that, "under the 2000 regulations, some individuals and entities may have chosen not to apply to provide Title X services because they anticipated they would be pressured to counsel or refer for abortions," 84 Fed. Reg. at 7780, and it pointed to data showing that a substantial number of medical professionals would limit the scope of their practice if forced to provide services that violated their conscience, *id.* at 7781 n.139. In addition, HHS had received input from "supportive commenters not[ing] 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 information." *Id.* at 7744. HHS also expected the Rule's new application criteria favoring innovative approaches for underserved populations to "encourag[e] broader and more diverse applicants." *Id.* at 7718. Accordingly, the Department predicted that the Rule may "lead to an increase in the number of health care providers who apply and receive funding under the Title X program, thus decreasing current gaps in family planning services in certain areas of the country." *Id.* at 7780.

Those predictions have been borne out, with new providers emerging as a result of the Rule's referral provisions, as evidenced by recent challenges to the abortion-referral requirement in the 2000 regulations brought by current and prospective Title X grantees on the basis of statutory and constitutional protections for religious beliefs. *See Obria Group, Inc. v. HHS*, No. 19-905 (C.D. Cal.) (voluntarily dismissed June 13, 2019); *Vita Nuova, Inc. v. Azar*, No. 19-532 (N.D. Tex.) (filed July 3, 2019). Plaintiffs dismiss the significance of such lawsuits, reasoning that "nothing prevents a provider with 'deep religious objections' from participating under the 2000 rules." AMA.Br.46. But HHS was permitted to consider the emergence of new providers regardless of its views on their reasons for deciding to participate, and the existence of such lawsuits alone confirms the reasonableness of HHS's prediction.

In any event, while HHS's longstanding policy has been to "not enforce" the abortion-referral requirement in the 2000 regulations when doing so would violate federal conscience statutes, 84 Fed. Reg. at 7746; *see* AMA.SER205-06; 73 Fed. Reg. 78,072, 78,087 (Dec. 19, 2008)—a fact that further supports the view that medical ethics do not *require* such referrals—HHS sensibly concluded that providers with conscience objections may nevertheless have been "deterred from" participating in the program out of concern that "they would be forced to violate their religious belief or moral conviction" under the plain text of the 2000 regulations, 84 Fed. Reg. at 7780; *see id.* at 7783-84 (similar); *cf. Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973) ("[T]he statute's very existence may cause" individuals "to refrain from constitutionally protected

speech."). Accordingly, HHS reasonably did not "anticipate that there will be a decrease in the overall number of facilities offering services." 84 Fed. Reg. at 7782. And more generally, HHS explained, it could not precisely "anticipate future turnover in grantees"—which hinges on the decisions of various independent actors—meaning any such "calculations would be purely speculative, and, thus, very difficult to forecast or quantify." *Id.*

Finally, plaintiffs fault HHS for "fail[ing] to account for the serious adverse health outcomes its Rule would cause" (AMA.Br.47), but HHS does not err in failing to consider consequences of a scenario it reasonably predicts will not happen. While plaintiffs point to data regarding the consequences of gaps in Title X services (AMA.Br.47), HHS reasonably predicted such gaps would not occur. In any event, HHS concluded that "compliance with statutory program integrity provisions is of greater importance" than the "cost" of departing from the status quo, 84 Fed. Reg. at 7783, and the APA does not permit courts to second-guess that policy judgment.[3]

2. The Physical-Separation Requirement Is Reasonable

Plaintiffs fare no better in arguing that the Rule's physical-separation requirement is arbitrary and capricious, a claim that even the district court did not rely on in support of its order. ER27-32. The 2000 regulations already mandate financial separation, *see*

[3] Nor are the Rule's referral restrictions unreasonable because they may sometimes result in "a delayed abortion." AMA.Br.48. Any such delay stems from Congress's choice to exclude programs "where abortion is a method of family planning" from Title X, a choice the Rule implements. *See* 84 Fed. Reg. at 7748.

84 Fed. Reg. at 7715; 65 Fed. Reg. at 41,276, and HHS reasonably determined that physical separation also is necessary to address the risk that taxpayer funds will be used to promote abortion—the same rationale approved in *Rust*.

Plaintiffs disagree with that conclusion, but the Supreme Court held in *Rust* that HHS's predictive judgement about how best to comply with § 1008 was a reasonable basis for the same requirement. 500 U.S. at 187. As in *Rust*, HHS justified its policy by explaining that the prior regulations "failed to implement properly the statute." *Id.* And HHS considered and discussed the reliance interests, comments received, and the previous approaches, ultimately "reaffirm[ing the] reasoned determination" it made in 1988. 84 Fed. Reg. at 7724. Indeed, plaintiffs do not even address HHS's conclusion that subsidizing abortion through collocation of Title X clinics and abortion clinics would violate § 1008. *See id.* at 7766.

Instead, plaintiffs observe that the 1988 regulations partially relied upon reports from the Office of Inspector General (OIG) and the General Accounting Office (GAO), which, they contend, cannot be considered after "[t]hirty years have passed." AMA.Br.50. In issuing the Rule here, however, HHS did not rely on those reports, but rather the basic economic principle that collocation of Title X and abortion clinics necessarily results in financial support for abortion-related activities and the perception that Title X clinics offer abortion-related services—an explanation plaintiffs have yet to refute. That justification is no less reasonable now than it was thirty years ago. Nor is there any indication that *Rust* would have come out differently had HHS not relied on

the OIG and GAO reports in issuing the 1988 regulations. To the contrary, in the lead-up to *Rust*, the First Circuit rejected an arbitrary-and-capricious challenge to the 1988 regulations notwithstanding its conclusion that those "reports provide[d] a very slim reed of support." *Massachusetts v. HHS*, 899 F.2d 53, 63 (1st Cir. 1990) (en banc), *abrogated on other grounds by Rust*, *supra*.

Plaintiffs also argue that HHS underestimated compliance costs for incumbent Title X grantees (AMA.Br.48-49; States.Br.44-45), but HHS, which administers the Title X program, is best situated to consider the potential effects on that program and it expressly did so. *See* 84 Fed. Reg. at 7781-82. Although commenters "provided extremely high cost estimates based on assumptions that they would have to build new facilities," HHS reasonably anticipated "that entities will usually choose the lowest cost method to come into compliance," such as "shift[ing] their abortion services" to one of their multiple "distinct facilities." *Id.* at 7781. And in any event, HHS "acknowledg[ed] that there is substantial uncertainty regarding the magnitude of the[] effects" of the physical-separation requirement, and provided an "estimate" of "an average" that was "an increase from [the] averaged estimate … in the proposed rule." *Id.* at 7781-82. Thus, in considering compliance costs and the possibility that some incumbent providers might withdraw from the program, HHS simply made a different judgment than plaintiffs, which it of course was permitted to do. *See Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

Nothing in the APA requires an agency to defer to the views of any particular commenter over the agency's own. Rather, the agency must consider significant comments and provide a reasoned response. *See Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1203 (2015). Having considered the Rule's effects on incumbent Title X providers, HHS concluded that the Rule was warranted to comply with Title X notwithstanding those predicted costs. That decision was not irrational simply because plaintiffs disagree with HHS's predictive judgments or ultimate conclusion that the benefits outweighed the costs. *See* Gov.Br.24.

II. Merits Aside, The Preliminary Injunction Must Be Vacated

A. The Balance Of The Equities Precludes Injunctive Relief

1. Plaintiffs' asserted injuries to public health are, as a unanimous motions panel of this Court acknowledged, speculative and "minor relative to the harms to the Government." Dkt.No.58, at 26. To start, their warnings of dire public-health consequences depend on crediting their own "predictions about the effect of implementing the Final Rule[] over HHS's predictions that implementation of the final rule will have the *opposite* effect." *Id.* at 25. Specifically, they depend on plaintiffs' view that only the existing network of Title X providers can provide effective care. *See, e.g.*, States.Br.47. HHS, however, came to the opposite conclusion: that public health would benefit from the Rule, which would "contribute to more clients being served, gaps in service being closed, and improved client care." 84 Fed. Reg. at 7723. While the net effect of the Rule is necessarily "difficult to quantify," *id.* at 7783, HHS's predictions

about changes to the Title X provider landscape are entitled to greater deference than plaintiffs' speculation that only existing providers can serve Title X patients well.

In any event, plaintiffs' predictions are necessarily predicated on their view of the merits. Plaintiffs' assertion that incumbent providers "will be compelled to leave the program" due to "ethical and professional" objections to the referral and counseling restrictions (AMA.Br.51), depends on their claim that those restrictions force providers to violate medical ethics. And to the extent that plaintiffs suggest these objections are independent of medical ethics, such preferences cannot overcome the government's significant interest in enforcing its reasonable interpretation of § 1008. Similarly, plaintiffs' assertion that the physical-separation requirement "would be prohibitively expensive" (AMA.Br.51), depends on crediting their predictions as to those costs over HHS's reasoned judgment.

2. On the other side of the ledger, the government has a significant interest in enforcing statutes, *see Maryland v. King*, 567 U.S. 1301 (2012) (Roberts, C.J., in chambers)—an interest that is heightened when the Supreme Court has already upheld the government's construction of a statute now reflected in a regulation that plaintiffs seek to enjoin. The government also has a weighty interest in declining to promote abortion through federal funds, *see, e.g.*, *Rust*, 500 U.S. at 192-93, particularly when the Supreme Court has already upheld HHS's judgment that certain activities would do so (in violation of law), and sanctioned the remedial steps HHS proposes to ensure that taxpayer dollars are not being used for that purpose. Indeed, plaintiffs' asserted

harms—the closure of certain clinics and curtailment of lawful Title X services—confirm that, under the 2000 regulations, Title X funds were used to promote abortion.

That HHS awarded grants after the Rule was issued but before it took effect (AMA.Br.55) is of no moment. Once the Rule took effect, grantees were required to abide by its restrictions. HHS simply chose not to artificially delay the start of a new grant cycle by approximately a month, and thereby create a gap in services, merely because the relevant statutory 60-day window had not run.

B. The Preliminary Injunction Is Overbroad In Multiple Respects

1. The Nationwide Injunction Is Inappropriate

a. At a minimum, constitutional and equitable principles require vacating the preliminary injunction insofar as it provides nationwide relief. Gov.Br.46-50. Plaintiffs fail to respond to this Court's concerns that nationwide injunctions "deprive appellate courts of a wider range of perspectives," deny "non-parties … the right to litigate in other forums," and encourage "forum shopping." *California v. Azar*, 911 F.3d 558, 583 (9th Cir. 2018); *see* Gov.Br.49. Nor do they deny that such injunctions create an inequitable "one-way-ratchet" under which a victory by the government will not stop other challengers from "run[ning] off to the 93 other districts for more bites at the apple." *City of Chicago v. Sessions*, 888 F.3d 272, 298 (7th Cir. 2018) (Manion, J., concurring in the judgment and dissenting in part); *see* Gov.Br.49. Indeed, affirming a nationwide injunction here would effectively nullify the government's successful efforts in defending against another (nationwide) preliminary-injunction motion, *Family*

Planning Ass'n of Maine v. HHS (*Maine Family Planning*), No. 19-100, 2019 WL 2866832 (D. Me. July 3, 2019); and obtaining a stay of another preliminary injunction from the Fourth Circuit, *Mayor & City Council of Baltimore v. Azar*, No. 19-1614, 2019 WL 3072302 (4th Cir. July 2, 2019).

The States nevertheless claim that the Rule's nationwide impact necessitates nationwide relief (States.Br.52), but cases such as *Gill v. Whitford*, 138 S. Ct. 1916 (2018) and *California*, 911 F.3d at 584, confirm that this theory is untenable. *See* Gov.Br.48. Their contention that nationwide relief is required by the APA's "set aside" language in 5 U.S.C. § 706 similarly fails. States.Br.51-52. That part of the APA does not apply to a request for a *preliminary* injunction, and the APA provision authorizing courts to issue interim relief in an APA action allows them to do so only "[t]o the extent necessary to prevent irreparable injury." 5 U.S.C. § 705; *see, e.g.*, *California*, 911 F.3d at 582-84 (vacating nationwide scope of preliminary injunction in APA challenge). And even with respect to permanent relief, the APA does not specify whether a challenged agency action should be "set aside" *as applied to the plaintiff* or facially. *See Los Angeles Haven Hospice, Inc. v. Sebelius*, 638 F.3d 644, 665 (9th Cir. 2011) (vacating nationwide scope of permanent injunction in APA challenge); *Virginia Soc'y for Human Life, Inc. v. FEC*, 263 F.3d 379, 393-94 (4th Cir. 2001) (same). More generally, given that the form of relief under the APA remains equitable in nature (*see* 5 U.S.C. § 703), § 706 does not speak clearly enough to work "a major departure from the long tradition of equity practice," *Weinberger v. Romero-Barcelo,* 456 U.S. 305, 320 (1982).

b. Rather than defend the scope of the actual injunction, the private plaintiffs retreat to contending that any injunction should cover all of their members and affiliates. *See* AMA.Br.58-60. But even here, they fail to rebut our showing that granting relief beyond those specific members the organizations relied upon for standing would be impermissibly overbroad. Gov.Br.48-50. Any loss of "efficiency" associated with organizational standing (AMA.Br.59), for instance, is no excuse for dispensing with the court's "constitutionally prescribed role … to vindicate the individual rights of the people appearing before it," such that "[a] plaintiff's remedy must be tailored to redress the plaintiff's particular injury." *Gill*, 138 S. Ct. at 1933-34. And plaintiffs do not even contest that similar problems can plague both nationwide injunctions and injunctions sweeping in members of an organization who have neither participated in nor are bound by the litigation, as illustrated by the fact that a member of an organizational plaintiff in a related challenge lost its own motion for a preliminary injunction yet benefited from the injunction that the organization secured. *See Maine Family Planning*, 2019 WL 2866832; Gov.Br.49-50.

Rather, plaintiffs incorrectly assert that the government "waived" its jurisdictional argument about the proper scope of the injunction under Article III (AMA.Br.58), which cannot be forfeited in any event. In the proceedings below, the government opposed plaintiffs' request for a nationwide injunction and explained that any injunction should be no broader than necessary to redress any injury shown by the plaintiffs. *See* D.Ct. Dkt.90, at 61-65. On appeal, the government simply specified that

the private organizational plaintiffs have not established injury beyond a handful of members at best. Nor has this Court held that an organizational plaintiff is invariably entitled to an injunction providing complete relief to every one of its members, as plaintiffs suggest. AMA.Br.59. At most, this Court has simply assumed, without analysis, that an injunction should provide complete relief to the members of a particular organization, *see Easyriders Freedom F.I.G.H.T. v. Hannigan*, 92 F.3d 1486, 1496, 1501-02 (9th Cir. 1996), but such "drive-by jurisdictional rulings," "assumed without discussion by the Court," cannot be considered precedential, *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 91 (1998), a principle that equally disposes of plaintiffs' reliance on *Massachusetts v. Bowen*, 679 F. Supp. 137 (D. Mass. 1988). *See* AMA.Br.59.

2. The Injunction Of Severable Provisions Is Improper

Finally, plaintiffs offer little defense of the district court's (unexplained) decision to enjoin every provision of the Rule after analyzing only some of them. Gov.Br.50-51. Although they suggest it is the government's duty to justify severability (AMA.Br.56), it is *plaintiffs'* burden to justify why an injunction is necessary with respect to each provision, and they have 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]"). Likewise, "postpon[ing]" lawful, severable provisions cannot, by definition, be "necessary to prevent irreparable injury," rendering the States' reliance on 5 U.S.C. § 705 (States.Br.51) entirely misplaced.

Even though only "strong evidence" can overcome the presumption that the valid provisions of a law containing a severability clause should be left intact, *National Mining Ass'n v. Zinke*, 877 F.3d 845, 862 (9th Cir. 2017), plaintiffs dismiss the preamble's severability statement with the bare assertion that the other provisions "could not function on their own." States.Br.52; *see* AMA.Br.56. But provisions that have nothing to do with abortion—such as the requirement that Title X projects comply with state and local laws that mandate reporting of sexual abuse, 42 C.F.R. § 59.17—can easily operate without the referral restrictions and physical-separation requirement. Likewise, the requirement that Title X projects physically separate their permissible activities from "prohibited" ones can still function even if abortion referrals are no longer among the forbidden actions. AMA.Br.56; *see, e.g.*, 42 C.F.R. § 59.16(a)(2)(iii) (prohibiting projects from using Title X funds to attend "events or conferences during which the grantee or subrecipient engages in lobbying"). And even if *requiring* referrals for *prenatal care* were invalid, that would not justify preventing HHS from *prohibiting* referrals for *abortion*. *See supra* Pt. I.A.1.a.

CONCLUSION

The district court's preliminary injunction should be vacated in whole or at least as to its overbroad scope.

Respectfully submitted,

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STATEMENT OF RELATED CASES

The following related cases are currently pending in this Court: *National Family Planning & Reproductive Health Ass'n v. Azar*, No. 19-35394; *Washington v. Azar*, No. 19-35394; *California v. Azar*, No. 19-15974; *Essential Access Health, Inc. v. Azar*, No. 19-15979.

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) and Ninth Circuit Rule 32-1 because it contains of 6,991 words, according to the count of Microsoft Word.

s/ Jaynie Lilley
Jaynie Lilley

CERTIFICATE OF SERVICE

I hereby certify that on July 19, 2019, I filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. All participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

s/ Jaynie Lilley
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