No. 24-437

IN THE

Supreme Court of the United States

STATE OF OKLAHOMA,

Petitioner,

v.

UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF

GENTNER DRUMMOND
Attorney General
GARRY M. GASKINS, II
Solicitor General
ZACH WEST
Director of Special Litigation
Counsel of Record
OFFICE OF THE OKLAHOMA ATTORNEY GENERAL
313 N.E. Twenty-First Street
Oklahoma City, OK 73105
(405) 521-3921
zach.west@oag.ok.gov

ANTHONY J. FERATE
SPENCER FANE LLP
9400 Broadway Ext, Suite 600
Oklahoma City, OK 73114

R. TOM HILLIS
BARRY G. REYNOLDS
J. MILES MCFADDEN
TITUS HILLIS REYNOLDS LOVE
15 E. 5th St., Suite 3700
Tulsa, OK 74103

Counsel for Petitioner

335307

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

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REPLY BRIEF

Defendants have now had multiple chances to explain to this Court why the Tenth Circuit was correct below. But in their second bite at the apple, Defendants again fail to acknowledge, much less rebut, various key arguments Oklahoma has made. Defendants have chosen instead to sidestep and strawman, in a last-ditch effort to avoid the obvious: that they unlawfully deprived Oklahomans of critical health care funding.

On the Spending Clause, for instance, Defendants never deny that their stance amounts to a blank check to impose whatever conditions they want on grantees, no matter how disconnected from Title X those conditions are. Similarly, Defendants never respond to the observation that their position intrudes on the separation of powers. And one searches the BIO in vain for any limiting principle to Defendants' view. They do not even *try* to convince this Court that the broad power they espouse has guardrails.

Same goes for the Weldon Amendment. There, Defendants still refuse to confront their express 2021 promises to protect objecting Title X grantees. Nor do they deny that their primary argument now—that the hotline is not an abortion referral—they did not argue below. And they ignore their own admissions that they *are* requiring abortion referrals, as well as Defendant Becerra's official insistence that the government is doubling down to promote abortion. Continued silence, in the face of these prior statements, can only be construed as tacit admissions.

The arguments Defendants put forth fare no better. Rather than move the ball down the field, Defendants seem

content to repeat points rebutted in the Petition without confronting those rebuttals. In claiming that this Court's Spending Clause jurisprudence supports their position, for instance, Defendants cite two main cases—one of which Oklahoma already addressed and the other of which *is not a Spending Clause case.* And Defendants' feeble effort to deny a circuit split ignores key quotes from circuits that contradict the Tenth Circuit. As for the Weldon Amendment, Defendants fail to explain away its plain text. Defendants appear to admit they are requiring abortion referrals, but claim those referrals are not referrals under Weldon. This is nonsensical.

This Court should grant certiorari.

I. Defendants and the Tenth Circuit Contradict Defendants' Past Positions, This Court's Precedent, and Other Circuits on the Spending Clause.

Like the Tenth Circuit, Defendants insist that 42 U.S.C. § 300a-4 ("Section 1006") authorizes them to force their abortion referral requirement on unwilling Title X grantees. But as already explained, Section 1006 says nothing about abortion or referrals—much less unambiguously so. *Contra Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981) ("if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously"). Indeed, Section 1006 sets no specific conditions at all, and it cabins future conditions to Title X's "purposes."[1] Thus, in the past, discussions of

1. Defendants claim that Oklahoma forfeited reliance on this "purposes" language. BIO 17 n.4. This is absurd. "[P]urposes" is an integral part of the sole statute Defendants rely on. And the entire point of a reply is to react to the response. Below, Oklahoma argued that Title X cannot be used to require abortion referrals,

Title X and abortion referrals have revolved around other provisions that elucidate Title X's purposes. Section 1006 is not an island unto itself.

Contrary to the impression given here, Defendants' hyping of Section 1006 in this manner is new. They did not emphasize Section 1006 in the *Ohio* litigation, nor did they focus on it in the 2021 Rule when defending abortion referrals. *See* 86 Fed. Reg. 56,144, 56,153 (Oct. 7, 2021). In both instances, they argued the 2021 Rule reasonably interpreted Section 1008, which says no Title X funds "shall be used in programs where abortion is a method of family planning." 42 U.S.C. § 300a-6; *see also Ohio v. Becerra*, 87 F.4th 759, 765 (6th Cir. 2023) (the 2021 Rule "interpreted § 1008 of Title X," which is "[a]t the heart of this case"). Moreover, Defendants *touted* the ambiguity of Title X on abortion referrals in *Ohio*; and unlike here, Defendants did not imply that this ambiguity is limited to Section 1008. *Compare* Br. for Appellees, *Ohio*, 2022 WL 912088, at *11 (Mar. 25, 2022) (Government: "[T]he Supreme Court has recognized [Title X] is ambiguous on these issues"), *with* BIO 3 (Government: *Rust* "found Section 1008's language 'ambiguous'"). Defendants' insistence that Section 1006 eliminates ambiguity in Title X was apparently invented for this case.

Doubling down, Defendants now claim a "familiar way for Congress to satisfy *Pennhurst*'s clear-statement requirement is to unambiguously provide that an entity

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Defendants cited Section 1006 in response, and Oklahoma replied that Section 1006 is narrower than Defendants admit. That this natural progression led to a forfeiture finding further demonstrates the wrongness of the decision below.

accepting federal funds must comply with agency regulations governing the use of those funds." BIO 13. But the first case Defendants cite in support of this supposedly "familiar way" is *Biden v. Missouri*, 595 U.S. 87 (2022) (per curiam). And *Biden* did not cite *Pennhurst*. *See Texas v. Yellen*, 105 F.4th 755, 771 (5th Cir. 2024) ("*Biden* ... was not a case about the *Pennhurst-Dole* clarity requirement."). *Biden* was not a Spending Clause decision, so it is incredibly damning that *Biden* is Defendants' go-to case for an allegedly "familiar way" to "satisfy *Pennhurst*[.]"

To be sure, one set of *Biden* plaintiffs cited *Pennhurst* once. BIO 13. But that is irrelevant, since the Court did not discuss the issue. *Cf. Brecht v. Abrahamson*, 507 U.S. 619, 631 (1993) ("[S]ince we have never squarely addressed the issue ... we are free to address ... the merits."). It is thus difficult to imagine how *Biden* could resolve an argument about the Spending Clause and regulations, especially when this Court found the actions there "fit[ ] neatly within the language of *the statute*." 595 U.S. at 93 (emphasis added). Such is not the case here, where *Rust* mandates an ambiguity finding.[2] Unsurprisingly, then, the Tenth Circuit ignored *Biden*.

Defendants echo the Tenth Circuit's reliance on *Bennett v. Kentucky Department of Education*, 470 U.S. 656 (1985), but they ignore the observation that the requisite "clarity in *Bennett* was statutory," Pet. 14, which is foreclosed

2. Distinguishing *Biden* even further, "[a]t oral argument, the Government largely conceded" that two generic grants of regulatory authority did not authorize the government's actions in that case. *Id.* at 100 (Thomas, J., dissenting).

here by *Rust*. Nor do they deny that *Bennett rejected* the argument that "any reasonable interpretation" of statutory requirements could determine "grant conditions," 470 U.S. at 670, a rejection that favors Oklahoma.

In the end, Defendants have failed to dispute that the Tenth Circuit contravened cases such as *United States v. Butler*, 297 U.S. 1 (1936), *Pennhurst*, and *Arlington Central School District Board of Education v. Murphy*, 548 U.S. 291 (2006). *See* Pet. 11–15. In *Arlington*, for example, this Court repeatedly emphasized that the Spending Clause focuses on whether "a state official would clearly understand" his obligations *from the statutory text*, 548 U.S. at 296, leading dissenters to complain that the Court was requiring conditions to "be spelled out with unusual clarity" in the statute, *id.* at 317 (Breyer, J., dissenting). *Arlington* cannot be squared with Defendants' view.

Defendants deny any "plausible" circuit split. BIO 18. This is impossible to take seriously. There is a chasm between the circuits on whether bureaucrats can create substantive conditions that satisfy the Spending Clause. Defendants simply stick their heads in the sand and pretend the quotes that squarely contradict the decision below do not exist. *See*, *e.g.*, *Yellen*, 105 F.4th at 773 ("In arguing that *statutory* ambiguity can be vitiated by *regulatory* enactments in the context of the Spending Clause, the federal defendants claim a remarkably broad power for federal administrative agencies. But this claim is remarkably wrong."); *West Virginia ex rel. Morrisey v. U.S. Dep't of Treasury*, 59 F.4th 1124, 1148 (11th Cir. 2023) ("Just as an agency cannot choose its own intelligible principle, it cannot provide the content that makes a

funding condition ascertainable."); *Tex. Educ. Agency v. U.S. Dep't of Educ.*, 992 F.3d 350, 361–62 (5th Cir. 2021) ("[r]elying on regulations ... is an acknowledgment that Congress's condition was not unambiguous"). This split deserves resolution.

Defendants' efforts to distinguish cases on the other side of this split are meritless. Most prominently, Defendants claim *Morrisey* dealt with a "different statutory scheme." BIO 18. But a circuit split is not limited to two courts interpreting a single statute differently; courts apply the same principles to a variety of statutes. In any event, *Morrisey* and this case are very similar. Both involved a state Spending Clause challenge to a controversial regulatory condition that the government defended based on generic implementation language. The Eleventh Circuit rejected this defense, whereas the Tenth Circuit approved—creating a circuit split. *Compare Morrisey*, 59 F.4th at 1148 ("[T]he condition itself must still be ascertainable on the face of the statute."), *with* App.14a ("Oklahoma could make an informed decision based on the combination of Title X's language and HHS's conditions."). Defendants retort that, unlike the statute in *Morrisey*, Title X authorizes bureaucratic "conditions," BIO 19, but there is no material difference between that language—cabined to Title X's "purposes"—and the broad authorization in *Morrisey* "to issue such regulations as may be necessary or appropriate," 59 F.4th at 19 (citation omitted). The term "condition," here, is not a magic word that makes the Spending Clause disappear.

Strangely, Defendants claim *Virginia Department of Education v. Riley*, 106 F.3d 559 (4th Cir. 1997) (per curiam) (en banc), is distinguishable because "the Fourth Circuit

held that an agency was 'without authority' to impose a condition that was not 'even implicitly' contemplated by the relevant statute." BIO 20. But that is exactly what Oklahoma has argued about Title X and abortion referrals. To the extent Defendants believe *Riley*'s statute was clear whereas Title X is ambiguous, and this ambiguity should favor Defendants, Defendants would turn the Spending Clause on its head. Defendants next argue that *City and County of San Francisco v. Trump*, 897 F.3d 1225 (9th Cir. 2018), is distinguishable because the government there failed "to show that Congress authorized it to withdraw federal grant moneys from jurisdictions" that opposed certain immigration policies, whereas here "Congress expressly authorized HHS to impose grant conditions," BIO 20. But in *Trump*, in this very quote, the Ninth Circuit indicated Congress must say *specifically* that funds could be stripped for immigration obstruction. Defendants, on the other hand, claim no specificity is required. Finally, Defendants assert that *Texas Education Agency*, 992 F.3d 350, "did not squarely resolve any Spending Clause issue." BIO 20. This is grossly misleading. The Fifth Circuit centered its relevant analysis on the Spending Clause and *Pennhurst*. *See Texas Educ. Agency*, 992 F.3d at 361–62. It was an immunity case, but that was because the issue was whether an agency could "require states to waive immunity to receive federal funds" without congressional clarity. *Id.* at 362. In the end, these cases are not materially distinguishable, and they all contradict the Tenth Circuit.

Out of options, Defendants fall back on insisting that Oklahoma's position will invalidate numerous regulations. BIO 12, 15–16 & n.3. But Oklahoma already addressed this, Pet. 22, and Defendants offer no specific rebuttals.

Oklahoma adds two additional points here. First, it is difficult to square Defendants' simultaneous claim that Section 1006 is "different" from other statutes such that a circuit split does not exist, and its claim that Oklahoma's view would invalidate "countless" regulations. BIO 14, 18. Second, rulings like Oklahoma seeks here have been on the books in multiple circuits for years, and the sky has not fallen.

Again, it is Defendants' view that has dramatic implications for federalism, the separation of powers, and administrative law, Pet. 19–23, points to which Defendants offer no response. Indeed, Defendants decline to offer any limiting principle. Per Defendants, Title X grantees are on notice, forevermore, that HHS may impose any conditions it wants. Could HHS not require, say, the *performance* of abortions? Defendants might claim Section 1008 bars such a requirement, but that is Oklahoma's point. Like any statute, Section 1006 must be interpreted with the rest of Title X. And this Court *has already done that*, finding ambiguity. Certiorari is warranted.

II. Defendants and the Tenth Circuit Wrongly Evade the Key Protections of the Weldon Amendment.

Defendants fail to counter the breadth of the plain text of the Weldon Amendment. In arguing that Weldon does not protect government agencies, BIO 21–22, Defendants ignore that Weldon protects "any *institutional* ... health care entity," and that "institution" is associated with organizations "of a *public* character," Pet. 25 (quoting Black's Law Dictionary (12th ed. 2024) (emphasis added)). Likewise, Defendants make no effort to interpret the phrase "any other kind" (of health care organization), *id.*,

which casts an extremely broad net. Without analysis on these key points, or any explanation as to why their regulation stating that Weldon protects state "components" was only withdrawn *after* this lawsuit began, BIO 22–23 n.6, Defendants' arguments fall far short.

Following the Tenth Circuit, Defendants also insist that the hotline does not count as a "referral" "for" abortions under Weldon. BIO 23–24. But Defendants do not deny—because they cannot—that they omitted this argument below. Pet. 32–34. Nor do Defendants deny that they have repeatedly, in the record, labeled the hotline an abortion referral. *Id.* This alone should doom Defendants.

In any event, Defendants' arguments supporting the Tenth Circuit's innovated position are wrong, for reasons already addressed. *See* Pet. 32–36. For example, Defendants claim the Weldon Amendment requires "a direction to a medical provider for the purpose of obtaining an abortion," BIO 24, but nothing in Weldon requires a referral directly to a medical provider. Nor would any such requirement make sense. *See* Pet. 36. And Defendants' additional arguments are meritless, as well. The definitions of "referral" Defendants cite, for example, apply to the hotline. *E.g.*, BIO 23 ("'referral' is '[t]he act or an instance of sending or directing to another for information").

Defendants' arguments on this point boil down to claiming, with a straight face, that the hotline is not actually meant to be a referral "for the purpose of obtaining abortions." *Id.* Even ignoring the record here, it is impossible to square this with: (1) the regulation in question, which requires a "referral upon request"

for "pregnancy termination," and (2) Becerra's official insistence in 2022 that his agency would "double down and use every lever we have to protect access to abortion care." Pet. 7, 30-31, 33. Defendants ignore Becerra entirely, and they claim meekly that they do not "interpret" their own regulation "to require the sort of abortion referral addressed by the Weldon Amendment." BIO 24. Defendants' newfound position is that the hotline is and is not an abortion referral, at the same time. It's Schrödinger's referral.

Floundering, Defendants find it significant that "Oklahoma ... did not raise the Weldon Amendment in its discussions with HHS before HHS terminated its grant." BIO 28. But cited or not, Weldon prohibits Defendants from discriminating against objectors. Moreover, Oklahoma *did* raise Weldon well before this lawsuit, giving Defendants plenty of time to comply. App.156a–176a. The insinuation that Oklahoma did not object in time is groundless.

Finally, Defendants reiterate the argument they made for the first time in their emergency response that, if Weldon applies, it still "would not allow OSDH to prevent any *other* providers funded by the grant from providing referrals." BIO 25. This is mistaken. Per Defendants' own 2021 promises—which Defendants brush past, yet again—a grantee is a grantee and may abstain from referral involvement, period. Pet. 28 (HHS: "[O]bjecting ... grantees will not be required to counsel or refer for abortions in the Title X program."). Regardless, Defendants' argument has little foundation in the record, and their conclusion on this point—that the total denial of funds was justified—does not follow. Even if accepted, the argument would mean this Court should order a partial

injunction. That Defendants are apparently willing to contemplate this is telling.

For these reasons and more,[3] this Court should grant certiorari.

III. This is a Good Vehicle for Review.

Defendants deem this case inappropriate for certiorari, but they offer scant support for that position. Most prominently, their effort to deny a circuit split on the Spending Clause collapses with even a hint of scrutiny. As such, the absence of circuit development on the Weldon Amendment should not keep this Court from protecting Oklahoma's rights, especially when the intersection of federal conscience protections and abortion undeniably presents "an important question of federal law" here. Sup. Ct. R. 10(c); *see also*, *e.g.*, Br. of Amici Curiae of 19 Members of Congress at 1–4 (explaining the importance of properly interpreting Weldon's "robust[ ]" protections). Moreover, this Court has been given competing judicial opinions, thanks to Judge Federico, and Oklahoma should not be required to wait decades to enforce the plain text of an important law that has been on the books since 2004.

Defendants primarily call this case "unusual" and a "poor vehicle" for review because of the *Ohio* litigation, but they admit "Oklahoma is not advancing the primary claim the States are pursuing in the *Ohio* litigation." BIO 27. The idea that this Court should not review an as-applied

3. Additionally, Defendants do not defend the Tenth Circuit's "substantial" reliance on legislative history, Pet. 36–37, nor do they explain or defend the hotline's obvious bias, Pet. 34 n.7.

challenge here just because a legally distinct multistate facial challenge exists elsewhere is preposterous. If anything, the opposite is true: "For a host of good reasons, courts usually handle constitutional claims case by case, not en masse." *Moody v. NetChoice, LLC*, 603 U.S. 707, 723 (2024).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

GENTNER DRUMMOND
Attorney General
GARRY M. GASKINS, II
Solicitor General
ZACH WEST
Director of Special Litigation
Counsel of Record
OFFICE OF THE OKLAHOMA ATTORNEY GENERAL
313 N.E. Twenty-First Street
Oklahoma City, OK 73105
(405) 521-3921
zach.west@oag.ok.gov

ANTHONY J. FERATE
SPENCER FANE LLP
9400 Broadway Ext,
Suite 600
Oklahoma City, OK 73114

R. TOM HILLIS
BARRY G. REYNOLDS
J. MILES MCFADDEN
TITUS HILLIS REYNOLDS LOVE
15 E. 5th St., Suite 3700
Tulsa, OK 74103

Counsel for Petitioner