No. 24-_____

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

PETITION FOR A WRIT OF CERTIORARI

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
(405) 753-5939

R. Tom Hillis
Barry G. Reynolds
J. Miles McFadden
TITUS HILLIS REYNOLDS LOVE
15 E. 5th St., Suite 3700
Tulsa, OK 74103
(918) 587-6800

October 15, 2024 *Counsel for Petitioner*

QUESTIONS PRESENTED

Title X funds cannot be "used in programs where abortion is a method of family planning." 42 U.S.C. § 300a–6. And the Weldon Amendment prohibits any "Federal agency or program" from subjecting "any institutional . . . health care entity to discrimination on the basis that the health care entity does not . . . refer for abortions." Consolidated Appropriations Act, 2005, Pub. L. No. 108-447, div. F, § 508(d)(1), 118 Stat. 2809, 3163 (2004). Nevertheless, the U.S. Department of Health and Human Services has stripped all funds from Oklahoma's Title X program because the Oklahoma State Department of Health has declined to refer women for abortions after *Dobbs v. Jackson Women's Health Organization*, 597 U.S. 215 (2022).

The Questions Presented Are:

1. Whether a federal agency, through regulations, can impose upon states a funding condition that satisfies the Spending Clause when the underlying statute does not contain or is ambiguous as to that condition.

2. Whether the Weldon Amendment prohibits the federal government from requiring a state's health department to provide abortion referrals.

PARTIES TO THE PROCEEDINGS

Petitioner and Plaintiff-Appellant below

- State of Oklahoma

Respondents and Defendants-Appellees below

- U.S. Department of Health and Human Services
- Xavier Becerra, in his Official Capacity as the Secretary of the U.S. Department of Health and Human Services
- Jessica S. Marcella, in her Official Capacity as Deputy Assistant Secretary for Population Affairs; and Office of Population Affairs

LIST OF PROCEEDINGS

The following proceedings are directly related to this case within the meaning of Rule 14.1(b)(iii):

- *State of Oklahoma v. United States Department of Health and Human Services, et al.*, No. 24-6063 (10th Cir.), judgment entered on July 15, 2024.
- *State of Oklahoma v. United States Department of Health and Human Services, et al.*, No. 23-cv-1052 (W.D. Okla.), preliminary injunction denied on March 26, 2024. Final judgment not entered.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDINGS ii

LIST OF PROCEEDINGS iii

TABLE OF AUTHORITIES vii

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

INTRODUCTION 3

STATEMENT OF THE CASE 4

A. Oklahoma's Successful Title X Program 4

B. Title X, Abortion Referrals, and Weldon 5

C. Oklahoma's Revitalized Abortion Ban 7

D. Termination of Title X Funds Over Abortion Referrals 8

E. Oklahoma's Lawsuit to Recover Title X Funds 9

REASONS FOR GRANTING THE PETITION 11

I. THE TENTH CIRCUIT CONTRAVENED THIS COURT'S PRECEDENTS AND SPLIT WITH MULTIPLE CIRCUITS BY CLAIMING THAT MERE REGULATIONS CAN PROVIDE THE REQUIRED CLARITY OTHERWISE LACKING IN A SPENDING CLAUSE STATUTE 11

TABLE OF CONTENTS – Continued

Page

II. THE WELDON AMENDMENT PROHIBITS THE FEDERAL GOVERNMENT FROM DISCRIMINATING AGAINST A STATE HEALTH DEPARTMENT THAT DECLINES TO MAKE ABORTION REFERRALS..... 23

CONCLUSION..... 38

TABLE OF CONTENTS – Continued

Page

APPENDIX TABLE OF CONTENTS

OPINIONS AND ORDERS

Opinion, U.S. Court of Appeals for the Tenth Circuit (July 15, 2024)..... 1a

Dissenting Opinion of Judge Federico..... 35a

Order, U.S. District Court for the Western District of Oklahoma (March 26, 2024)..... 60a

Bench Ruling and Hearing on Motion for Preliminary Injunction (March 26, 2024)..... 61a

OTHER DOCUMENTS

U.S. HHS Program Review of the Oklahoma Title X Family Planning Project, Relevant Excerpts (May 2-5, 2016)..... 131a

U.S. HHS Letter Re: OPA Determination of Non-Compliance of The OSDH Policy (May 24, 2023) 139a

U.S. HHS Letter Re: Suspension of Award (May 25, 2023) 144a

U.S. HHS Letter Re: Notice of Termination for Award FPHPA006507 (June 27, 2023)..... 147a

Oklahoma State Department of Health Administrative Appeal of Termination of Award (July 27, 2023) 157a

Declaration of Tina Johnson, MPH, RN (January 26, 2024)..... 177a

Defendants' Opposition Brief to Plaintiff's Motion for Preliminary Injunction, Relevant Excerpts (February 23, 2024)..... 186a

TABLE OF AUTHORITIES

Page

CASES

Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy, 548 U.S. 291 (2006) 12, 15

Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176 (1982)..... 12

Bennett v. Ky. Dep't of Educ., 470 U.S. 656 (1985) 14

Burwell v. Hobby Lobby Stores, 573 U.S. 682 (2014) 37

City & Cnty. of S.F. v. Azar, 411 F.Supp.3d 1001 (N.D. Cal. 2019) 27

City and County of San Francisco v. Trump, 897 F.3d 1225 (9th Cir. 2018) 18, 20

Colorado v. U.S. Dep't of Justice, 455 F.Supp.3d 1034 (D. Colo. 2020) 18

Davis v. Monroe County Board of Education, 526 U.S. 629 (1999) 14

Dobbs v. Jackson Women's Health Organization, 597 U.S. 215 (2022) ..... i, 7, 8, 20, ... 30, 31

Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477 (2010) 19

Grace v. Barr, 965 F.3d 883 (D.C. Cir. 2020) 29

Loper Bright Enters. v. Raimondo, 144 S.Ct. 2244 (2024) 19, 20, 21, 22, 30

Moyle v. United States, 144 S.Ct. 2015 (2024) 31

TABLE OF AUTHORITIES – Continued

Page

Nat'l Family Planning & Reprod. Health Ass'n v. Gonzales, 468 F.3d 826 (D.C. Cir. 2006)..... 30

NFIB v. Sebelius, 567 U.S. 519 (2012) 12

Niz-Chavez v. Garland, 593 U.S. 155 (2021) 30

OBB Personenverkehr AG v. Sachs, 577 U.S. 27 (2015) 34

Ohio v. Becerra, 87 F.4th 759 (6th Cir. 2023)..... 7, 26, 27

Peabody Twentymile Mining v. Sec'y of Labor, 931 F.3d 992 (10th Cir. 2019) 29, 30

Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1 (1981) 3, 12, 14, 15, 17

Rust v. Sullivan, 500 U.S. 173 (1991) 3, 5, 7, 12-14, 16, 21, 22

South Dakota v. Dole, 483 U.S. 203 (1987) 11

Tennessee v. Becerra, 2024 WL 3934560 (6th Cir. Aug. 26, 2024)..... 18, 22, 34, 36

Tex. Educ. Agency v. U.S. Dep't of Educ., 992 F.3d 350 (5th Cir. 2021) 17

Texas v. Yellen, 105 F.4th 755 (5th Cir. 2024)..... 17, 22

TABLE OF AUTHORITIES – Continued

Page

UMC Physicians' Bargaining Unit of Nevada Serv. Emps. Union v. Nevada Serv. Emps. Union/SEIU Loc. 1107, 178 P.3d 709 (Nev. 2008) 26

United States v. Butler, 297 U.S. 1 (1936) 15

Virginia Department of Education v. Riley, 106 F.3d 559 (4th Cir. 1997) 17

West Virginia ex rel. Morrisey v. U.S. Dep't of Treasury, 59 F.4th 1124 (11th Cir. 2023)..... 15, 16, 19, 22

CONSTITUTIONAL PROVISIONS

U.S. Const. art. 1, § 8..... 1, 19

STATUTES

28 U.S.C. § 1254(1) 1

42 U.S.C. § 300..... i, 4, 13

42 U.S.C. § 300a-4(a)-(b)..... 2, 13

42 U.S.C. § 300a-6..... 2, 5, 16

Administrative Procedures Act 6

Individuals with Disabilities Education Act (IDEA)..... 17

Okla. Stat. tit. 21, § 861..... 7

Okla. Stat. tit. 63, § 1-738.3(A)(2)(d)..... 7

Okla. Stat. tit. 63, § 1-753(2) 8

TABLE OF AUTHORITIES – Continued

Page

The Weldon Amendment, Consolidated Appropriations Act, 2005, Pub. L. No. 108-447, div. F, § 508(d), 118 Stat. 2809 (2004) ..... i, 1, 3-6, 9, 10, 16, 23, 25-28, 30, 31, 32, 34-37

Title X of the Public Health Service Act enacted in 1970..... 5, 6, 13, 16, 20, 21, 24, 28

JUDICIAL RULES

Sup. Ct. R. 10(c) 37

Sup. Ct. R. 14.1(b)(iii) iii

REGULATIONS

42 C.F.R. § 59.5(a)(5)(i)-(ii) 6, 12, 33

45 C.F.R. § 88.2 27

FEDERAL RULES

53 Fed. Reg. 2922 (Feb. 2, 1988) 5

65 Fed. Reg. 41,270 (July 3, 2000) 5

84 Fed. Reg. 23,170 (May 21, 2019) 27

84 Fed. Reg. 7714 (Mar. 4, 2019) 6

86 Fed. Reg. 56,144 (Oct. 7, 2021)..... 6, 28, 29, 33

89 Fed. Reg. 2078 (Jan. 11, 2024) 27

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

BLACK'S LAW DICTIONARY (12th ed. 2024) 25

HHS Issues $11 Million in Supplemental Funding to Support the Provision of Title X Services in Oklahoma and Tennessee, HHS OFFICE OF POPULATION AFFAIRS (Sept. 22, 2023), https://opa.hhs.gov/about/news/grant-award-announcements/hhs-issues-11-million-supplemental-funding-support-provision. 9

Xavier Becerra, *HHS Secretary Becerra's Statement on Supreme Court Ruling in Dobbs* (June 24, 2022), https://www.hhs.gov/about/news/2022/06/24/hhs-secretary-becerras-statement-on-supreme-court-ruling-in-dobbs-v-jackson-women-health-organization.html. 7

OPINIONS BELOW

The Tenth Circuit's decision (App.1a) is reported at 107 F.4th 1209. The district court's order (App.60a) was issued from the bench and is unreported.

JURISDICTION

The judgment of the Tenth Circuit was entered on July 15, 2024. Oklahoma's emergency application for a writ of injunction was denied on September 3, 2024, although Justices Thomas, Alito, and Gorsuch would have granted relief. (No. 24A146). This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. art. 1, § 8

> The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States . . .

The Weldon Amendment, Consolidated Appropriations Act, 2005, Pub. L. No. 108-447, div. F, § 508(d), 118 Stat. 2809, 3163 (2004), provides:

> (1) None of the funds made available in this Act may be made available to a Federal agency

or program, or to a State or local government, if such agency, program, or government subjects any institutional or individual health care entity to discrimination on the basis that the health care entity does not provide, pay for, provide coverage of, or refer for abortions.

(2) In this subsection, the term "health care entity" includes an individual physician or other health care professional, a hospital, a provider-sponsored organization, a health maintenance organization, a health insurance plan, or any other kind of health care facility, organization, or plan.

42 U.S.C. § 300a-4(a)–(b) provides:

Grants and contracts made under this subchapter shall be made in accordance with such regulations as the Secretary may promulgate. . . .

Grants under this subchapter shall be payable in such installments and subject to such conditions as the Secretary may determine to be appropriate to assure that such grants will be effectively utilized for the purposes for which made.

42 U.S.C. § 300a-6 provides:

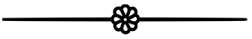
None of the funds appropriated under this subchapter shall be used in programs where abortion is a method of family planning.

INTRODUCTION

Congress enacted Title X pursuant to the Spending Clause. Thus, any obligation Congress imposes must be set forth "unambiguously." *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981). In *Rust v. Sullivan*, 500 U.S. 173 (1991), this Court held that Title X is ambiguous as to whether grantees must provide abortion counseling or referrals. Logically, then, the federal government cannot impose an abortion counseling or referral requirement on unwilling Title X grantees. The Tenth Circuit held to the contrary, however, ruling that agencies can satisfy the Spending Clause by fiat, through their own regulations. This holding splits with several circuits, guts the Spending Clause, and shifts enormous legislative power to the executive branch. It is worthy of this Court's review.

In addition, the Weldon Amendment protects health care organizations from being forced to provide abortion referrals. Despite this mandate, the U.S. Department of Health and Human Services (HHS) has stripped Oklahoma of nearly $10 million because its health department will not provide abortion referrals. Over a dissent by Judge Federico, the Tenth Circuit held that Weldon does not apply here because the government is not requiring abortion referrals by demanding that Oklahoma promote a hotline that would tell women how to get an abortion. But Defendants did not argue this below, admitting from the get-go that they are penalizing Oklahoma for refusing to give abortion referrals. And the only point of the hotline is transparently to refer women for abortions, as Judge Federico and Sixth Circuit Judge Kethledge have found.

Below, Defendants argued instead that a state agency cannot qualify as a health care organization even though its employees provide on-the-ground health care. This position cannot be squared with the Weldon Amendment's broad text, however. As such, the panel was wrong to allow HHS to withhold millions in health care funding from Oklahoma. This Court should grant certiorari and reverse.



STATEMENT OF THE CASE

A. Oklahoma's Successful Title X Program.

The Oklahoma State Department of Health (OSDH) has successfully participated in Title X projects for over half a century, offering Oklahoma's most vulnerable citizens "a broad range of acceptable and effective family planning methods" that includes family planning, infertility services, and services for adolescents. 42 U.S.C. § 300(a). At no point prior to the current controversy had Oklahoma's Title X funding received adverse treatment. App.179a, ¶ 8.

These Title X funds are vital to Oklahoma's provision of family planning services. OSDH uses the Title X grant to disburse funds and provide critical public health services in around 70 city and county health departments that reach many rural and urban communities. App.179a–180a, ¶ 12.

Depriving those communities of Title X services would be devastating. In many instances, particularly in rural Oklahoma, the county health department is one of the only access points for critical services for tens or even hundreds of miles. App.181a, ¶ 18. Many

patients whom OSDH employees see already have difficulty accessing the health care they need because of location, work schedules, or transportation issues. *Id.* Language barriers can also create difficulties in providing services, which Oklahoma has addressed with translators. App.181a, ¶ 17.

B. Title X, Abortion Referrals, and Weldon.

Enacted in 1970, Section 1008 of Title X bars grant funds from "be[ing] used in programs where abortion is a method of family planning." 42 U.S.C. § 300a–6. As such, abortion referrals were not required of grantees for the first decade or more of Title X. *See* 53 Fed. Reg. 2922, 2923, 2934 (Feb. 2, 1988). That changed via bureaucratic guidelines in 1981, *id.* at 2923, but in 1988 HHS reversed course after notice and comment, prohibiting referrals because they potentially "had the effect of promoting or encouraging abortion." *Id.* at 2933, 2945. HHS determined that this was "more consistent with" Section 1008. *Id.* at 2932.

The validity of this regulation was challenged in *Rust*. There, this Court held that Title X was ambiguous as to abortion referrals, and that, under *Chevron* deference, HHS had permissibly justified prohibiting abortion counseling and referrals as "more in keeping with the original intent of the statute." *Rust*, 500 U.S. at 187. In 1993, however, HHS suspended the 1988 Rule, and in 2000 it reinstated the requirement that Title X recipients make abortion referrals. 65 Fed. Reg. 41,270 (July 3, 2000).

In 2004, Congress started adding the Weldon Amendment as an annual rider for every HHS appropriations bill, a practice it has maintained consistently. Per the Weldon Amendment, no HHS funds:

> may be made available to a Federal agency or program . . . if such agency, program, or government subjects any institutional or individual health care entity to discrimination on the basis that the health care entity does not provide, pay for, provide coverage of, or refer for abortions.

Consolidated Appropriations Act, 2005, Pub. L. No. 108-447, div. F, § 508(d), 118 Stat. 2809, 3163 (2004).

In 2019, HHS adopted much of the 1988 Rule, including the prohibition on abortion referrals. *See* 84 Fed. Reg. 7714, 7788 (Mar. 4, 2019). As in 1988, HHS concluded that this reflects "the best reading of" Section 1008, "which was intended to ensure that Title X funds are also not used to encourage or promote abortion." *Id.* at 7777. Prior regulations "are inconsistent" with Section 1008 "insofar as they require referral for abortion." *Id.* at 7723.

HHS reversed course yet again in 2021, promulgating a final rule requiring abortion counseling and referrals. *See* 86 Fed. Reg. 56,144 (Oct. 7, 2021). Specifically, each Title X project must offer pregnant clients "information and counseling regarding . . . [p]regnancy termination" and "referral upon request." 42 C.F.R. § 59.5(a)(5)(i)-(ii). In the preamble to this rule, however, HHS twice promised that—because of congressional mandates like the Weldon Amendment—"objecting providers or Title X grantees are not required to counsel or refer for abortions." 86 Fed. Reg. at 56,153.

Oklahoma joined a multistate facial challenge arguing that HHS's 2021 abortion referral requirement violated the Administrative Procedures Act. In denying a preliminary injunction, the Sixth Circuit

relied on *Rust* and *Chevron* deference, as well as the fact that "HHS pledged in the preamble to the 2021 Rule that providers and entities who are covered by federal conscience laws 'will not be required to counsel or refer for abortions in the Title X program.'" *Ohio v. Becerra*, 87 F.4th 759, 774 (6th Cir. 2023). There has been no final adjudication on the merits in that action.

C. Oklahoma's Revitalized Abortion Ban.

On June 24, 2022, this Court issued *Dobbs v. Jackson Women's Health Organization*, 597 U.S. 215 (2022). *Dobbs* emphasized repeatedly that authority to regulate abortion was returned to the people and their elected representatives. *Id.* at 232, 256, 259, 292, 302. Days later, Defendant Becerra announced, however, that HHS would "double down and use every lever we have to protect access to abortion care" after this "unconscionable" decision.[1]

Oklahomans have long prohibited abortion, and they have made it illegal to advise a woman to obtain an abortion. *See* Okla. Stat. tit. 21, § 861. On the books since 1907, this statute became enforceable following *Dobbs*. As a result, in Oklahoma, advising or procuring an abortion for any woman is a felony. More broadly, Oklahoma has long sought to protect the unborn child in a variety of ways. The State's official, published position is that abortion "terminate[s] the life of a whole, separate, unique, living human being." Okla. Stat. tit. 63, § 1-738.3(A)(2)(d). And OSDH has been required to "[d]evelop and distribute educational

---

[1] *HHS Secretary Becerra's Statement on Supreme Court Ruling in Dobbs*, HHS (June 24, 2022), https://www.hhs.gov/about/news/2022/06/24/hhs-secretary-becerras-statement-on-supreme-court-ruling-in-dobbs-v-jackson-women-health-organization.html.

and informational materials . . . for the purpose of achieving an abortion-free society." *Id.* § 1-753(2).

D. Termination of Title X Funds Over Abortion Referrals.

After *Dobbs*, OSDH undertook an extensive internal review to determine if it could comply with HHS's abortion referral requirement. App.182a, ¶ 21. OSDH offered to send patients to HHS's website, but HHS declined. App.151a–152a. HHS insisted instead that OSDH refer abortion-inclined patients to a private national hotline. OSDH initially agreed to do so, but soon concluded that it could not comply and promptly informed HHS. App.151a–154a. At no point did HHS claim this hotline was an "accommodation."

In May 2023, HHS claimed via letter that OSDH was violating Title X and the conditions of its grant. App.139a–146a. HHS insisted that OSDH's "deletion of referral to the All-Options Talk Line in this policy without any other provision for abortion referrals" was unacceptable since "projects are required to provide . . . referrals for abortion." App.142a–143a. The next month, HHS notified OSDH that the grant would be terminated because of "the deletion of referral to the All-Options Talk Line in this policy without any other provision for abortion referrals." App.154a.

One month later, OSDH administratively appealed. App.157a. While that appeal was pending, HHS announced supplemental funding, supposedly to support the provision of Title X services in Oklahoma. Funds that would previously have been directed to

OSDH were instead reallocated, including to a Missouri entity.[2]

E. Oklahoma's Lawsuit to Recover Title X Funds.

Facing the loss of another $4.5 million in funding in 2024, Oklahoma sued. Oklahoma quickly sought a preliminary injunction prohibiting HHS from denying Oklahoma a Title X grant because Oklahoma will not provide abortion counseling and referrals.

The district court denied Oklahoma's motion with an oral ruling. App.60a–61a. Although the court found irreparable harm, it concluded the State was unlikely to succeed on the merits. App.115a–130a. As an initial matter, the court found that "res judicata or claim preclusion or whatever" "rather clearly" applies because of the Sixth Circuit lawsuit, App.120a, despite the preliminary and facial nature of that case. On the Spending Clause, the court focused on whether Oklahoma was merely aware of the bureaucratic condition, and it held that conditions "can come, not only from the statute, but from the regulations pursuant to the statute." App.124a. The district court deemed the Weldon Amendment "maybe a closer question," App.125a, but nevertheless ruled against Oklahoma there, too. The court found "the more plausible interpretation" is that Oklahoma does not qualify as a health care entity because OSDH is not the "provider of the services." App.125a–126a. The court was also

---

[2] *HHS Issues $11 Million in Supplemental Funding to Support the Provision of Title X Services in Oklahoma and Tennessee*, HHS OFFICE OF POPULATION AFFAIRS (Sept. 22, 2023), https://opa.hhs.gov/about/news/grant-award-announcements/hhs-issues-11-million-supplemental-funding-support-provision.

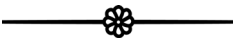
"skeptical" that Weldon applies to a "policy" objection as opposed to a "conscience" or "religious" objection. App.126a. Finally, the court indicated that Weldon was not violated because "simply by supplying a phone number, the State could meet its referral obligations." App.127a.

Oklahoma appealed. The Tenth Circuit heard argument on May 31, 2024, and issued its opinion on July 15, 2024, denying an injunction. App.1a–34a. Defendants did not defend, and the Tenth Circuit made no mention of, the district court's preclusion findings. For the Spending Clause, the Tenth Circuit found that the district court did not err in relying on the specific abortion referral regulation combined with the generic grants of condition-setting authority in Title X. App.11a–15a. The Tenth Circuit also agreed that "Oklahoma had acted voluntarily and knowingly when accepting HHS's conditions," and it found Oklahoma's sovereignty was not infringed because "Oklahoma could simply decline the grant." App.18a. For the Weldon Amendment, the court declined to address the parties' arguments about whether OSDH was a health care entity and found instead, of its own accord, that HHS was not requiring a referral for abortion at all through the hotline. App.19a–27a. In doing so, it gave "substantial weight" to the legislative history of the Weldon Amendment. App.26a.

Judge Federico dissented on the Weldon Amendment, arguing that Oklahoma qualifies as a health care entity. App.35a–59a. Contrary to the panel's main holding, he contended HHS was obviously insisting that Oklahoma provide abortion referrals. App.49a–53a. And HHS's punishment, he observed, "reduces

access to health care for those who need it most" in Oklahoma. App.57a.

Following this, Oklahoma filed an emergency application here, attempting to stop HHS from distributing Oklahoma's $4.5 million for 2024 elsewhere. In response, Defendants argued for the first time that they were not requiring abortion referrals, embracing the Tenth Circuit's novel argument. On September 3, 2024, this Court denied the emergency application, although Justices Thomas, Alito, and Gorsuch would have granted relief. Oklahoma now petitions for certiorari, seeking an injunction for Title X funding for 2025 and beyond.[3]



REASONS FOR GRANTING THE PETITION

I. THE TENTH CIRCUIT CONTRAVENED THIS COURT'S PRECEDENTS AND SPLIT WITH MULTIPLE CIRCUITS BY CLAIMING THAT MERE REGULATIONS CAN PROVIDE THE REQUIRED CLARITY OTHERWISE LACKING IN A SPENDING CLAUSE STATUTE.

1. Under the Spending Clause, if Congress wants to place conditions on a state's receipt of federal funds, it must do so unambiguously. *South Dakota v. Dole*, 483 U.S. 203, 207 (1987). "The legitimacy of Congress's exercise of the spending power thus rests on whether the State voluntarily and knowingly accepts the terms

[3] The 2024 funding has presumably gone out the door after this Court declined relief. But Oklahoma received annual Title X funds for over 50 years, and unless this Court intervenes it will likely lose all future funding, given the Tenth Circuit's opinion.

of the contract." *NFIB v. Sebelius*, 567 U.S. 519, 577 (2012) (citation omitted) (cleaned up). Although Congress may influence states by conditioning funding on certain requirements, it must provide clear notice of these requirements. *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296 (2006).

Pennhurst is the seminal Spending Clause case. There, this Court explained that "our cases have long recognized that Congress may fix the terms on which it shall disburse federal money to the States." *Pennhurst*, 451 U.S. at 17. "Accordingly, if Congress intends to impose a condition on the grant of federal moneys, *it* must do so unambiguously." *Id.* (emphasis added); *see also Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 190 n.11 (1982) (deeming this requirement of clarity "fundamental"). Applying these principles in *Arlington*, this Court focused on the plain text of the statute to determine there was clear notice. *See* 548 U.S. at 296.

Here, Congress did not require abortion referrals in Title X's text. Per *Rust*, Title X "does not speak directly to the issues of counseling, referral, advocacy, or program integrity" and is therefore ambiguous with respect to those items. 500 U.S. at 184. Applying *Rust*'s holding in conjunction with the Spending Clause's requirement of a clear statement means that HHS cannot impose on Oklahoma an obligation to provide abortion referrals when Title X does not address referrals at all. The regulation, 42 C.F.R. § 59.5(a)(5)(ii), is therefore likely unconstitutional as applied here because it imposes an abortion referral condition that is not unambiguously required by Title X.

Ruling for HHS, however, the Tenth Circuit authorized executive branch agencies to create critical

substantive conditions even where Congress did not speak clearly. Disregarding *Rust*, which analyzed Section 1008 of Title X, the Tenth Circuit found that generically phrased grants of rulemaking authority found in Section 1006 of Title X are enough to authorize HHS to require abortion referrals via regulation. App.11a–15a. Specifically, the Tenth Circuit relied on 42 U.S.C. § 300a-4(a), which states that "[g]rants and contracts . . . shall be made in accordance with such regulations as the Secretary may promulgate," and Section 300a-4(b), which provides that "[g]rants under this subchapter shall be . . . subject to such conditions as the Secretary may determine to be appropriate to assure that such grants will be effectively utilized for the purposes for which made." But neither of those provisions says anything about abortion referrals—much less unambiguously so. And the Tenth Circuit sidestepped the limitation in Section 300a-4(b) that conditions are only appropriate if they "assure that such grants will be effectively utilized *for the purposes for which made*." (emphasis added). *See* App.14a n.4. Section 300a-4(b) merely allows HHS to require grantees to demonstrate that they are using Title X funds for the "purposes" found in Title X. It does *not* allow HHS free rein to impose its own substantive policies on grantees.

Nevertheless, the Tenth Circuit found this generic delegation of rulemaking authority allowed HHS to impose, via regulation, a substantive condition under the Spending Clause even where this Court has found Title X ambiguous as to that condition. In short, the Tenth Circuit allowed an agency to create the clarity necessary to satisfy the Spending Clause. This stretches this Court's precedent past its breaking point.

The Tenth Circuit cited *Bennett v. Ky. Dep't of Educ.*, 470 U.S. 656 (1985), where Kentucky appealed an order from the Secretary of Education requiring Kentucky to refund certain funds due to misuse. *Id.* at 662–63. The Tenth Circuit latched on to the observation that "Congress couldn't 'prospectively resolve every possible ambiguity concerning particular applications of the requirements,'" App.12a (quoting *Bennett*, 470 U.S. at 669), to conclude that this Court "held that the funding conditions were unambiguous based on the combination of the statute *and* the agency's authorized regulations." *Id.* But this gloss on *Bennett* cannot be squared with Spending Clause precedent such as *Pennhurst*, and it disregards the limiting language in *Bennett* itself. *Bennett* merely states that Congress cannot resolve "every possible ambiguity concerning particular *applications* of the requirements," 470 U.S. at 669 (emphasis added), not that the agencies were free to impose additional requirements as they see fit. By *Bennett*'s terms, that is, agencies are limited to resolving ambiguities arising from *application* of a requirement set forth by Congress, whereas here we are dealing with an HHS requirement itself. Regardless, the Tenth Circuit also disregarded this Court's conclusion in *Bennett* that "[t]he requisite clarity in this case *is provided by Title I*." *Id.* at 666 (emphasis added). The clarity in *Bennett* was statutory; *Rust* forecloses that possibility here. Moreover, *Bennett* did *not* accept the government's argument that "any reasonable interpretation" of statutory requirements could determine "grant conditions." *Id.* at 670. *Bennett* is inapposite.

The other cases cited by the Tenth Circuit are no different. Though *Davis v. Monroe County Board of Education* observed that Title IX regulations also pro-

vided "funding recipients with notice that they may be liable for their failure to respond to the discriminatory acts of certain nonagents," 526 U.S. 629, 643 (1999), this Court ultimately relied, again, on *statutory* clarity:

> *The language of Title IX itself* . . . cabins the range of misconduct that the statute proscribes. The *statute's plain language* confines the scope of prohibited conduct . . .

Id. at 644 (emphases added). Such clarity on abortion referrals is absent from Title X's text. Along with decisions like *Pennhurst* and *Arlington*, these cases illustrate Oklahoma's point: that referrals must be unambiguously required *by the statute*.

2. The Tenth Circuit's ruling conflicts with several circuits. The center of attention below was *West Virginia ex rel. Morrisey v. U.S. Dep't of Treasury*, 59 F.4th 1124 (11th Cir. 2023). The Tenth Circuit quoted *Morrisey* for the point that "[W]e do not question an agency's authority to fill in gaps that may exist in a spending condition." App.12a (quoting *Morrisey*, 59 F.4th at 1148). The Tenth Circuit ignored what came next, however: "Even assuming an agency can resolve some ambiguity in a funding condition, *the condition itself must still be ascertainable on the face of the statute*." *Morrisey*, 59 F.4th at 1148 (emphasis added). "Just as an agency cannot choose its own intelligible principle, it cannot provide the content that makes a funding condition ascertainable." *Id.* For that point, the Eleventh Circuit relied on *United States v. Butler*, 297 U.S. 1 (1936), where this Court found "an obvious difference between a statute stating the conditions upon which moneys shall be expended and one effective only upon assumption of a contractual obligation to submit to a regulation . . . ," *id.* at 73.

Like in *Morrisey*, the funding condition here is not ascertainable on the face of the statute. That is the precise holding of *Rust*: "At no time did Congress directly address the issues of abortion counseling, referral, or advocacy." 500 U.S. at 185. Moreover, the only *statutory* indication of congressional intent in Title X runs in Oklahoma's favor. *See* 42 U.S.C. § 300a-6 ("None of the funds appropriated under this subchapter shall be used in programs where abortion is a method of family planning"). As a result, under the principles espoused in *Morrisey*, Oklahoma is exceedingly likely to succeed under the Spending Clause.

To be sure, the Tenth Circuit claimed *Morrisey* is distinguishable, but neither reason it gave was remotely persuasive. First, the panel said *Morrisey* is different because here, HHS "didn't create a framework to apply a confusing and ambiguous statute." App.15a. But that is *exactly* what HHS did. Title X, per this Court's precedent, *is ambiguous on abortion referrals*. Second, the panel argued that "HHS's requirement governs only counseling and referrals, not the fundamental application of the grant program." *Id.* Seemingly, the panel believes abortion referrals are small potatoes, such that HHS can require them absent congressional clarity. Oklahoma does not take that view. Nor does Congress. As the Weldon Amendment demonstrates, Congress believes abortion referrals are highly significant.

Again, though, it's not just *Morrisey* in this split. In 2021, in a case relied upon by *Morrisey*, the Fifth Circuit held that "[r]elying on regulations to present the clear condition . . . is an acknowledgement that Congress's condition was not unambiguous," and that "regulations cannot provide the clarity needed" under the Spending Clause. *Tex. Educ. Agency v. U.S.*

Dep't of Educ., 992 F.3d 350, 361–62 (5th Cir. 2021). The Fifth Circuit recently reaffirmed this view. *See Texas v. Yellen*, 105 F.4th 755, 774 (5th Cir. 2024) ("The promulgated regulations thus suffer from an inescapable dilemma. They are legally relevant if and only if the statute is ambiguous. . . . But if the statute is ambiguous, then it violates the Spending Clause.").

At least two additional circuits have reached similar conclusions. In *Virginia Department of Education v. Riley*, the *en banc* Fourth Circuit held that, because of the Spending Clause, the "United States Department of Education was *without authority*" to impose a condition on Virginia that was not specifically found in the Individuals with Disabilities Education Act (IDEA). 106 F.3d 559, 560 (4th Cir. 1997) (en banc) (per curiam). Echoing *Pennhurst*, the Fourth Circuit explained that "[i]n order for *Congress* to condition a state's receipt of federal funds, *Congress* must do so clearly and unambiguously." *Id.* (emphases added). Furthermore, the Fourth Circuit added, "forbidden regulation in the guise of Spending Clause condition" is not permissible. *Id.* As such, the Fourth Circuit rejected the government's argument that the court should "defer to a reasonable interpretation" of IDEA by the agency, since "[i]t is axiomatic that statutory ambiguity defeats *altogether* a claim by the Federal Government that Congress has unambiguously conditioned the States' receipt of federal monies in the manner asserted." *Id.* at 567 (Luttig, J., dissenting) (emphasis added).[4] Although the Fourth Circuit did not address a generic delegation of rulemaking authority, it held

[4] A majority of the *en banc* Fourth Circuit adopted Part I of Judge Luttig's panel dissent. *Id.* at 561.

that, for a condition under the Spending Clause, Congress must speak with "clarity" *and* "specificity." *Id.*

Further, in *City and County of San Francisco v. Trump*, the Ninth Circuit enjoined an executive order withholding funds from sanctuary cities. 897 F.3d 1225 (9th Cir. 2018). The Spending Clause, the Ninth Circuit explained, "vests *exclusive* power to Congress to impose conditions on federal grants"—"not the President." *Id.* at 1231 (emphasis added). The Ninth Circuit acknowledged that Congress could permit such withholding, but it indicated that any such delegation would have to be specific. *See, e.g.*, *id.* at 1234 ("Here, the Administration has not even attempted to show that Congress authorized it to withdraw federal grant moneys from jurisdictions that do not agree with the current Administration's immigration strategies.").[5]

On the flip side, the Tenth Circuit has just been joined by the Sixth Circuit. Embracing the Tenth Circuit's opinion, the Sixth Circuit *admitted* that the generic rulemaking authority in Title X relied upon by the government "does not illuminate the nature of any such conditions on the grant," but held that the Spending Clause is satisfied "by looking to both statutes *and* an agency's authorized regulations." *Tennessee v. Becerra*, 2024 WL 3934560, at *4 (6th Cir. Aug. 26, 2024). The abortion referral requirement, the Sixth Circuit held, is "minutia" that HHS can clarify "even

---

[5] In a decision the Tenth Circuit ignored, but effectively overruled, the District of Colorado similarly critiqued the federal government's sanctuary city approach. *See Colorado v. U.S. Dep't of Justice*, 455 F.Supp.3d 1034, 1056 (D. Colo. 2020) ("[A]gency-imposed grant conditions, even if they themselves are unambiguous, cannot be constitutional under the Spending Clause unless the statute from which they originate is also unambiguous.").

in the face of statutory ambiguity." *Id.* at *5. With such a robust split, this issue is ripe for review.

3. This case is also highly significant. The Tenth Circuit's decision, which is being adopted elsewhere, opens a cavernous exception that swallows the Spending Clause. So long as Congress has included a general delegation of rulemaking authority, as it likely has in many statutes, an agency apparently has a blank check in a Spending Clause scheme to impose whatever requirements it desires, no matter how absent they are from the statute.

This expansive view of the federal bureaucracy's rulemaking power is inconsistent with the separation of powers. "Our Constitution divided the 'powers of the new Federal Government into three defined categories, Legislative, Executive, and Judicial.'" *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 483 (2010) (citation omitted). "The Constitution carefully imposes structural constraints on all three branches, and the exercise of power free of those accompanying restraints subverts the design of the Constitution's ratifiers." *Loper Bright Enters. v. Raimondo*, 144 S.Ct. 2244, 2275 (2024) (Thomas, J., concurring) (citation omitted). "To safeguard individual liberty, '[s]tructure is everything.'" *Id.* (citation omitted). Yet the Tenth Circuit's opinion, if left to stand, ignores the structure that should be in place. "Allowing an executive agency to impose a condition that is not otherwise ascertainable in the law Congress enacted 'would be inconsistent with the Constitution's meticulous separation of powers.'" *Morrisey*, 59 F.4th at 1147 (citations omitted). "Therefore, the 'needed clarity' under the Spending Clause 'must come directly from the statute[,]'" not from Defendants'

after-the-fact regulations. *Id.* (citations omitted). Otherwise, as this matter illustrates, a federal "bureaucrat may change his mind year-to-year and election-to-election, [so] the people can never know with certainty what new 'interpretations' might be used against them." *Loper Bright*, 144 S.Ct. at 2285 (Gorsuch, J., concurring). The Tenth Circuit's view unacceptably shifts legislative power to the executive branch; it cannot stand.

Other important concerns are implicated here. This matter involves millions of dollars in Title X funding and the health of vulnerable Oklahomans, and it is hard to imagine an issue bearing more political significance than abortion and federalism. *See Dobbs*, 597 U.S. at 229 (*Roe* "sparked a national controversy that has embittered our political culture for half a century"). Put differently, the Tenth Circuit's decision undermines Oklahoma's sovereignty. HHS foisted upon Oklahoma a requirement that is reserved to the people to address. *See id.* at 232. HHS is imposing the executive branch's policy preferences on the states and upsetting the federal-state balance on this important issue. *See San Francisco*, 897 F.3d at 1235 ("Absent congressional authorization, the Administration may not redistribute or withhold properly appropriated funds in order to effectuate its own policy goals.").

Nor have the Tenth Circuit or Defendants ever conjured any real response to Oklahoma's point about giving Defendants a "blank check." To the contrary, Defendants have come close to *embracing* the idea. Defs.' Emerg. Resp., No. 24A146, at 28–29 ("Congress *did* speak when it expressly empowered the Secretary to prescribe the 'conditions' he 'may determine to be appropriate . . . '"). They certainly have offered no

limiting principle. But theirs is a theory that, if accepted, would cede immense authority to the executive branch, coming immediately on the heels of this Court holding otherwise in *Loper Bright*. This Court should not countenance courts taking two steps backward right after taking one important step forward.

Defendants have claimed that Oklahoma's theory of the Spending Clause renders *Rust* meaningless. *Id.* at 28. But if the Tenth Circuit is correct, then this Court could have easily resolved *Rust* by finding that the same generic grants of authority referenced above unambiguously gave HHS the power to impose the 1988 Rule. *Rust*, that is, was a big waste of time *under Defendants' theory*. In any event, Defendants' assertion is not necessarily true. The Spending Clause is contractual in nature, so Oklahoma's view would not seemingly negate all requirements or prohibitions of abortion referrals. Presumably, Title X grantees could still accept the conditions. Moreover, it is not obvious that prohibitions and requirements are equivalent "conditions" in this scenario, especially since one is a passive restriction that merely limits a program's scope.

Of course, *Rust* turned on *Chevron* deference, so there remains a question of how much weight it should carry moving forward. The Tenth Circuit did not ask for supplemental briefing on *Loper Bright*, but rather dismissed its impact on *Rust* in a footnote because "the [Supreme] Court clarified that it was not 'call[ing] into question prior cases that [had] relied on the *Chevron* framework.'" App.29a n.16 (quoting *Loper Bright*, 144 S.Ct. at 2273). But the panel ignored this Court's clarification that it was not calling into question only the "holdings of those cases that specific agency actions are lawful." *Loper Bright*, 144 S.Ct. at 2273. The "spe-

cific agency action" here is not the same as that in *Rust*; in fact, they are very nearly opposites. *See Tennessee*, 2024 WL 3934560, at *13–14 (Kethledge, J., dissenting in part). Thus, the Tenth Circuit's perfunctory analysis is likely incorrect.

Put simply, Oklahoma deserves injunctive relief; either because *Rust* mandates an ambiguity finding, or because, absent *Rust* and *Chevron* deference, Title X's prohibition on abortion likely prohibits abortion referrals. *See, e.g.*, *id.* at *15 (Kethledge, J., dissenting in part) ("HHS's abortion-referral requirement makes every Title X program one 'where abortion is a method of family planning.'").

To be sure, Defendants have insisted that a ruling in Oklahoma's favor will open the floodgates for invalidation of numerous regulations. This is difficult to square with their argument that this case has no "nationwide significance." Defs.' Emerg. Resp., No. 24A146, at 4–5. It is also a strawman; Oklahoma is not arguing that all HHS regulations are invalid. Far from it. *See, e.g.*, *Morrisey*, 59 F.4th at 1148 ("To be clear, we do not question an agency's authority to fill in gaps that may exist in a spending condition."). Oklahoma is making the limited point that a profound substantive condition this Court has found ambiguous cannot, for that very reason, be imposed by regulation under the Spending Clause. And regardless, *Loper Bright* indicates that even longstanding intrusions into the separation of powers should not be countenanced.

In the end, "[i]n 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." *Yellen*,

105 F.4th at 773. This Court should grant certiorari and reverse, as Oklahoma is likely to succeed under the Spending Clause.

II. THE WELDON AMENDMENT PROHIBITS THE FEDERAL GOVERNMENT FROM DISCRIMINATING AGAINST A STATE HEALTH DEPARTMENT THAT DECLINES TO MAKE ABORTION REFERRALS.

For twenty years, the Weldon Amendment has commanded federal agencies to protect health care organizations who decline to refer for abortions. In defiance of this mandate, HHS has stripped nearly $10 million from Oklahoma because of OSDH's refusal to provide abortion referrals. This is clearly unlawful. Oklahoma is likely to succeed on the merits of the Weldon Amendment, thus a preliminary injunction should have issued.

Again, although the district court deemed the Weldon Amendment "maybe a closer question," App.125a, it found that Weldon did not apply here for roughly three reasons: (1) Oklahoma does not qualify as a health care entity, App.125a–126a; (2) Weldon probably does not apply to a mere "policy" objection, App.126a; and (3) Oklahoma could "meet its referral obligations" "simply by supplying a phone number," App.127a. The latter two points were not raised by Defendants in their district court brief. Instead, until its emergency response before this Court, Defendants consistently focused on the argument that OSDH, as a state agency, could not be a qualifying health care entity.

The Tenth Circuit largely ignored the United States, however. Without briefing on point, the Tenth Circuit claimed that the phrase "refer for abortions" in Weldon was not even *implicated* by "the mere act of

sharing the national call-in number." App.22a; *see also id.* n.11 (recognizing that, "[o]n appeal, the parties don't address the meaning of the phrase *refer for abortions*"). Put differently, despite both parties agreeing that HHS was withholding funding for Oklahoma's refusal to refer for abortions, *see, e.g.*, U.S. 10th Cir. Br., 2024 WL 2262266, at *1–2 (acknowledging that "HHS suspended and subsequently terminated Oklahoma's grant" because it "refused to comply with" "counseling and referral requirements"), the Tenth Circuit held that what Oklahoma was refusing to do was not really a referral for abortion at all. Although the Tenth Circuit claimed to be merely affirming the district court on this point, *e.g.,* App.23a, even the district court did not go that far, at least not clearly so, *see* App.127a (opining that "simply by supplying a phone number, the State could meet its *referral* obligations" (emphasis added)).

Thus, if the Weldon discourse below had been limited to the arguments presented by the federal government—which runs perhaps the largest and most sophisticated law firm in the world—Oklahoma would likely have prevailed. It was only by going outside the parties' arguments that Oklahoma was denied millions to serve "those who need it most." App.57a (Federico, J., dissenting).

1. On the first argument, the district court was indisputably wrong to indicate that OSDH was not the "provider of the services." App.126a. Weldon's restrictions *must* apply to OSDH, given the plain text of Weldon and the scope of OSDH's operations in Oklahoma. OSDH distributes Title X funds through 68 county health departments, App.179a–180a ¶ 12, and it runs the Title X programs in numerous such

departments with its own medically trained employees, such as nurses. *E.g.*, App.178a ¶ 3. As Judge Federico found, "OSDH qualifies" under Weldon "because it engages in direct patient care at OSDH clinics." App.48a (Federico, J., dissenting). He continued: "OSDH has facilities to see patients and administer health care, is an organization that provides health care, and is an institutional plan with individual medical professionals who provide health care." App.48a–49a. Thus, OSDH is a "provider of the services." App.49a. Defendants' 2016 review of the OSDH Title X program acknowledged as much. *See* App.134a ("county health departments are OSDH administrative units"); App.135a ("OSDH operates at least one clinic in all but seven very rural counties"); App.138a ("grantee" (OSDH) "is providing comprehensive family planning services including breast and cervical cancer screening"). Oklahoma is highly likely to succeed on this point.

Textually, the Weldon Amendment protects "any institutional . . . health care entity" from discrimination by "a Federal agency or program" because the entity declines to "refer for abortions." The plain language ("any"—"institutional"—"health care"—"entity") could hardly be broader, and it applies to OSDH. "Institution," for instance, is defined as "[a]n established organization, esp. one of a *public* character . . . ." *Institution*, BLACK'S LAW DICTIONARY (12th ed. 2024) (emphasis added). That tracks with Weldon, which defines "health care entity" broadly, as "any other kind of health care . . . organization." Neither the United States nor the district court made any serious attempt to explain why a state health agency whose own employees provide on-the-ground medical services is not an

"organization" devoted to "health care" under Weldon—especially not when the phrase is prefaced by "any." *See, e.g., UMC Physicians' Bargaining Unit of Nevada Serv. Emps. Union v. Nevada Serv. Emps. Union/SEIU Loc. 1107*, 178 P.3d 709, 713 (Nev. 2008) ("'[an] organization of any kind' is very broad language"). And the Tenth Circuit declined to address that question entirely, choosing instead to rely on an argument that neither party raised.

Alternatively, Defendants have claimed that the Weldon Amendment does not apply because it "does not include government administrative agencies within its listed terms." Defs.' Emerg. Resp., No. 24A146, at 30. But OSDH is undeniably a healthcare organization, thus it *is* included within Weldon's broad terms. *See* App.48a–49a (Federico, J., dissenting). And the fact that States are also prohibited from discriminating on this same ground, Defs.' Emerg. Resp., No. 24A146, at 31, does not change that calculus. After all, what sense would it make to say that a State cannot discriminate on a certain basis, but its health care arms and employees can be discriminated against on that very same basis?

Defendants have also pointed to the *Ohio* case, where the multistate coalition (including Oklahoma) told the Sixth Circuit in passing that States are not protected under federal statutes protecting conscience in the context of abortion referrals. *See* Br. of Appellants at 53–54, *Ohio v. Becerra*, No. 21-4235 (6th Cir. Feb. 22, 2022). But the coalition cited nothing for this proposition. And because this statement conflicts with the Weldon Amendment's plain text, Oklahoma disavowed that language below, and neither the panel nor dissent deemed it worthy of discussion. Given this, and

the fact that the argument was made in a preliminary context in *Ohio*, that language should not hinder Oklahoma here. Nor should the Oklahoma Attorney General's disavowed assertion in *Ohio* prevent Weldon from applying to OSDH, which has interpreted Weldon correctly all along, *see* App.166a–171a, and helped convince the Attorney General of its views.

Defendants have their own, more significant about-face to contend with. Up until March 2024—well after this lawsuit was filed—45 C.F.R. § 88.2 stated that "[a]s applicable, components of State or local governments may be health care entities under the Weldon Amendment. . . . " 84 Fed. Reg. 23,264 (May 21, 2019). Defendants have retorted that this regulation was vacated by multiple courts. They did not previously cite these decisions, however, presumably because none of them ruled on the specific language saying Weldon protects state "components." The closest one came to doing so, as far as Oklahoma can tell, counseled in *favor* of that language. *See City & Cnty. of S.F. v. Azar*, 411 F. Supp. 3d 1001, 1015–18 (N.D. Cal. 2019) (indicating, through use and non-use of italics, that the court took no issue with the "components" language). Defendants have offered no explanation for why that specific language was withdrawn. Thus, we are left with this: a regulation stating that Weldon applies to states was on the books for most of this administration, only to be rescinded *after* this lawsuit was filed, in a rule that does not mention the provision. *See* 89 Fed. Reg. 2078 (Jan. 11, 2024).

On top of that, when enacting the 2021 rule, HHS repeatedly insisted in a preamble section entitled "Application of Conscience and Religious Freedom Statutes" that

> Under these statutes, objecting providers or Title X grantees are not required to counsel or refer for abortions. . . .
>
> [O]bjecting . . . grantees will not be required to counsel or refer for abortions in the Title X program in accordance with applicable federal law.

86 Fed. Reg. at 56,153. The Health Department is undeniably a Title X grantee. *See* App.132a ("Grantee name: Oklahoma State Department of Health"). So why doesn't the 2021 Rule, and its promise to protect *all* grantees and providers, require Defendants to defer to OSDH's objection? Despite having expressly assured objecting providers and grantees that they "are not required to counsel or refer for abortions," 86 Fed. Reg. at 56,153, HHS has now discontinued the funding of OSDH—an objecting provider *and* a grantee—because it declines to refer for abortion. This is unlawful.

The district court did not address Defendants' 2021 promises in explaining its ruling. The Tenth Circuit attempted to do so, but, bizarrely, did not discuss them while interpreting the Weldon Amendment, where Oklahoma made the argument. Rather, the Tenth Circuit wrongly considered the promises as a standalone argument for arbitrariness and capriciousness. App.32a. Although a good argument can be made that HHS arbitrarily and capriciously ignored its 2021 promises, Oklahoma's assertion was instead that these promises demonstrate that the 2021 rule was enacted with the understanding that Weldon applied to *all* providers and grantees. The promises show that HHS's current interpretation conflicts with the views HHS expressed when crafting the same rule that HHS claims to be

enforcing here. The Tenth Circuit's failure to consider these promises in relation to Weldon was clearly erroneous. *See Grace v. Barr*, 965 F.3d 883, 900 (D.C. Cir. 2020) ("[W]hen departing from precedents or practices, an agency must 'offer a reason to distinguish them or explain its apparent rejection of their approach.'" (citation omitted)).

In any event, the Tenth Circuit rejected the import of these promises by labeling them "stray" "snippets of a preamble" that are not binding and do not impact the "regulatory language [that] is otherwise clear." App.32a. There are several problems with this argument,[6] but the primary one is that the Tenth Circuit made the wrong comparison. The Tenth Circuit compared the promises to the final rule's regulations, didn't see those promises in the regulations, and called it a day because (in the Tenth Circuit) "limitations that appear in the preamble" but "do not appear in the language of the regulation" should not be "engraft[ed] . . . onto the [regulatory] language." *Peabody Twentymile Mining v. Sec'y of Labor*, 931 F.3d 992, 998 (10th Cir. 2019). As should be obvious, though, this *Peabody* logic cannot apply when the "limitations" *do* appear in congressional mandates. Statutes trump regulations, regardless of whether the regulations mention the statutes or not.

The Tenth Circuit, that is, missed the point. HHS was not interpreting or discussing a regulation; rather, it was explaining what binding mandates like Weldon require *regardless of what the regulations say*. HHS admitted this in the preamble. *See* 86 Fed. Reg. at

---

[6] For example, HHS repeating the promise twice, in a subsection explaining the promise, is not a "stray" usage.

56,153 ("[A]s the DC Circuit pointed out when the Weldon Amendment was enacted . . . 'a valid statute always prevails over a conflicting regulation,' *Nat'l Family Planning & Reprod. Health Ass'n v. Gonzales*, 468 F.3d 826 (D.C. Cir. 2006). This is true whether an overriding statute is incorporated into regulatory text or not."). By finding that HHS's promises to protect objectors were meaningless because HHS did not place them into regulations, the Tenth Circuit completely lost the plot.

What the Tenth Circuit should have done was find that HHS's 2021 assurances accurately mirror the Weldon Amendment's broad text. It should have then found that HHS taking the opposite position now, when it matters to a particular grantee, cuts against Defendants. *Cf. Loper Bright*, 144 S.Ct. at 2265 (*Chevron* "demand[ed] that courts mechanically afford *binding* deference to agency interpretations, including those that have been inconsistent over time"). It also should have acknowledged that a "preamble no doubt contributes to the general understanding of a statute. . . . " *Peabody*, 931 F.3d at 998 (citation omitted). For example, this Court recently defended its citation to a preamble, pointing out that it showed "that even the party now urging otherwise once read the statute just as we do." *Niz-Chavez v. Garland*, 593 U.S. 155, 168 (2021). By instead holding that HHS's (broken) promises meant nothing, the Tenth Circuit erred.

The Tenth Circuit should also have accounted for the most likely explanation for Defendants' broken promises: their open contempt for *Dobbs*. Defendants have never addressed Defendant Becerra's labeling of *Dobbs* as "unconscionable" and his insistence that Defendants would "double down and use every lever we

have to protect access to abortion care." The Tenth Circuit tried to explain these statements away, but it simultaneously whitewashed the quotes and claimed, wrongly, that "Oklahoma doesn't explain how HHS tried to circumvent *Dobbs*." App.17a n.7. Oklahoma explained this perfectly well: After *Dobbs*, Defendants made the decision to "double down" to "protect access to abortion care," and then ignored their own promises by forcing objecting States to provide abortion referrals.

2. Next, the district court was "skeptical" that the Weldon Amendment applies to a State's "policy" objection as opposed to a "conscience" or "religious" objection. App.126a. But Weldon gives no indication that the reason *why* a "health care entity does not . . . refer for abortions" matters. Congress is not concerned with the reason. Rather, it has straightforwardly prohibited federal agencies from discriminating against "*any*" health care entities who refuse to refer for abortions, for whatever reason. That choice, and OSDH's refusal, deserve respect.

The Tenth Circuit did not opine directly on the district court's skepticism, although it did claim the "statutory focus" of Weldon is "on the referring entity's purpose." App.24a & n.13. Judge Federico countered that "[t]he statute says nothing, not even a hint, about the referring entity's purpose. Rather, the statute is a command to government agencies or programs that they cannot discriminate against health care entities." App.51a. Whether grounded in policy or law, OSDH's objection is protected. Thus, there is no need for this Court to determine what Oklahoma law requires. *Cf. Moyle v. United States*, 144 S.Ct. 2015, 2021 (2024) (Barrett, J., concurring) ("Since this suit began . . . Idaho law has significantly

changed—twice."). "Here, the text and purpose of the Weldon Amendment align to put the focus on agency discrimination, not a detailed probe as to why an entity does not refer for abortions." App.52a (Federico, J., dissenting).

3. The Tenth Circuit placed its Weldon Amendment chips on an argument that neither party addressed. The panel acknowledged that Weldon would apply "if HHS had required the health department to make *referrals for abortions*." App.21a. It held, however, that the phrase "refer for abortions" does not protect Oklahoma's objection because Oklahoma could provide women with a phone number to a national hotline. Referring women to this hotline does not refer them "for" abortion, per the Tenth Circuit, because "the call-in number offered an opportunity to supply neutral information *regarding* an abortion"—not *for* abortion. App.23a. This argument is highly unlikely to prevail.

To begin, the Tenth Circuit repeatedly claimed it was merely affirming the district court on this point. *See, e.g.*, App.25a. But again, the district court did not reach this conclusion. Rather, it stated that "simply by supplying a phone number, the State could meet its *referral* obligations." App.127a (emphasis added). Whatever the district court meant by this statement, it was *not* that the proposed HHS approach somehow removed the concept of an abortion referral from the present scenario entirely. The Tenth Circuit's focus on this point was its own innovation.

In any event, HHS's position from the beginning has been that its phone number counts as a referral *for* abortion. For example, in the May 2023 letter accusing OSDH of violating "the terms and conditions of your grant," HHS explained that OSDH's "deletion of

referral to the All-Options Talk Line in this policy *without any other provision for abortion referrals*" is not an "acceptable revision[]." App.142a–143a (emphasis added). And why was it not acceptable? Because "projects are required to provide referrals upon client request, *including referrals for abortion*." *Id.* (emphasis added). HHS made the same statements in its June 2023 Termination Notice. *See* App.154a (deeming unacceptable "the deletion of referral to the All-Options Talk Line in this policy without any other provision for abortion referrals"). And below, Defendants stated: "Because that [2021] rule requires grantees to provide *abortion referrals* upon request, OPA declined to continue funding OSDH's grant when OSDH would not certify that it would do so." App.189a (emphasis added); *see also* U.S. 10th Cir. Br., 2024 WL 2262266, at *10.

Defendants clearly deemed the phone number as an abortion referral. As a result, until their emergency response here, Defendants never made the argument that the hotline was an "accommodation" and not a referral for abortion. Indeed, Defendants never once used the word "accommodation" below. Defendants made no effort in their emergency response to explain this last-second shift, nor did they acknowledge their contrary statements. Moreover, Defendants admitted that the phone number still "compl[ies] with the [2021] rule." Defs'. Emerg. Resp., No. 24A146, at 12. But that rule requires *abortion* referrals. *See* 42 C.F.R. § 59.5(a)(5)(i)–(ii) (requiring "referral upon request" for "pregnancy termination"); 86 Fed. Reg. at 56,149 (proposed rule "requires referral for abortion when requested"). Defendants' gamesmanship should not be rewarded, especially not in service of trampling on important protections granted by Congress. *See*

Tennessee, 2024 WL 3934560, at *15 (Kethledge, J., dissenting in part) ("Courts enforce legal rules, rather than allow parties patently to circumvent them.").

Defendants' failure to make the "not a referral" argument should have been the end of the matter. *See OBB Personenverkehr AG v. Sachs,* 577 U.S. 27, 38 (2015) ("Absent unusual circumstances—none of which is present here—we will not entertain arguments not made below."). But rather than bind the United States to its litigation decisions, the Tenth Circuit instead declined to consider *Oklahoma*'s observation at oral argument that the "call-in number hadn't provided neutral information"—in part because the argument "didn't appear in Oklahoma's appellate briefs." App.23a n.12. If an argument needed to appear in the appellate briefs for it to matter, then the Tenth Circuit's ruling should never have happened. In sum, the Tenth Circuit panel based its Weldon Amendment rejection on an argument Defendants did not make while rejecting a rebuttal to that argument on the ground that Oklahoma did not make it (in time). This makes a mockery of waiver.[7]

Regardless, the majority held that Oklahoma was not being required to refer *for* abortions because the call-in number was simply "a way for Oklahoma to provide pregnant women with information about various family-planning options." App.24a. This cannot qualify

---

[7] The Tenth Circuit also rejected Oklahoma's point about bias because it was not in the record. But at argument, counsel referenced the hotline's website, a link to which is in the record. App.141a. Among other things, the site blasts "hostile states" and "racist . . . health care and legal systems" that dare protect the unborn. Okla. Emerg. Appl., No. 24A146, at 37. This could have been considered, under judicial notice or otherwise.

as a referral *for* abortion under Weldon, supposedly, because "the act of sharing the call-in number would create both a referral *for* and *against* an abortion depending on the pregnant woman's decision after getting the same information." App.25a. But under this reasoning, no requirement would ever qualify as an abortion referral, even something as direct as the provision of the name, number, and location of an abortion clinic. Women, after all, would still be free to change their mind after receiving this information. The Tenth Circuit's logic requires an abortion to be completed every time for the initial requirement to qualify as an abortion referral. This would render the important Weldon Amendment a nullity.

As Judge Federico explained, the only reason to use the hotline in Oklahoma would be to direct someone toward abortion. App.50a (Federico, J., dissenting). "If the patient desires information about options that are not abortion," he observed, "there would be no need for a referral to a national hotline." *Id*. Moreover, the history of this case makes little sense if abortion referrals are not at issue: "OSDH was saying explicitly to HHS that it could not comply . . . because the only pregnancy option not available in Oklahoma is abortion." App.51a (Federico, J., dissenting). As shown above, HHS *agreed* that it was terminating Oklahoma's funding because of abortion referrals. In the end,

> HHS discriminated against OSDH on the basis that it does not . . . refer for abortions. OSDH's non-compliance with the referral requirement was raised as a legitimate objection to not run afoul of state law and policy. There is nothing in the Weldon Amendment, the record of this case, or the parties' argu-

> ments that requires more to trigger the anti-discrimination provision.

App.53a (Federico, J., dissenting).

Nevertheless, in their emergency response Defendants argued that Weldon is not triggered unless a woman is directed straight to a medical provider. Defs.' Emerg. Resp., No. 24A146, at 32. But OSDH is not required to ignore reality: "[I]f a patient requests a referral, an Oklahoma provider would reasonably assume it is solely to explore the option of pregnancy termination . . . ." *Id.* at 55 (Federico, J., dissenting). Judge Kethledge emphasized this point in the Sixth Circuit, as well, observing that "the 'hotline' would supply the patient with the same information . . . that handing her a printed list of abortion providers would. That indeed would transparently be the whole point of the exercise." *Tennessee*, 2024 WL 3934560, at *15 (Kethledge, J., dissenting in part). Indeed, Defendants here admitted that the patients are referred to the hotline "to obtain information about abortion and any subsequent referral to a specific provider." Defs.' Emerg. Resp., No. 24A146, at 33 (emphases added). Weldon does not set an impossibly high standard for abortion referrals.

In support of its decision on abortion referrals, the Tenth Circuit gave "substantial weight" to the Weldon Amendment's legislative history. App.26a. But the primary quote cited simply says Weldon would not affect "the provision of abortion-related information or services *by willing providers*." *Id.* (emphasis added) (citation omitted). Here, HHS is trying to force abortion referrals on an *unwilling* provider, which is the entire point of Weldon. At most, the legislative history is a "mixed bag" on Weldon, and it "should not be used

here to muddy the meaning of the statutory text." App.53a–55a (Federico, J., dissenting). That text makes Oklahoma likely to succeed on the merits here.

4. Whether the Weldon Amendment is likely to apply here is an "important question of federal law" that "should be . . . settled by this Court." S.Ct. R. 10(c). Oklahoma is facing a substantial bureaucratic intrusion on state sovereignty, federalism, and the separation of powers, in direct defiance of a straightforward congressional mandate. And this Court has time and again granted certiorari to protect conscientious objectors and the like from federal overreach. *See, e.g.*, *Burwell v. Hobby Lobby Stores*, 573 U.S. 682, 692 (2014) (ruling for Oklahomans and against HHS). It should do so here, as well.

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
ajferate@spencerfane.com

R. Tom Hillis
Barry G. Reynolds
J. Miles McFadden
TITUS HILLIS REYNOLDS LOVE
15 E. 5th St., Suite 3700
Tulsa, OK 74103
(918) 587-6800
thillis@titushillis.com
reynolds@titushillis.com
jmcfadden@titushillis.com

October 15, 2024

Counsel for Petitioner