No. _____

In the Supreme Court of the United States

STATE OF OKLAHOMA,

Applicant,

v.

UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, XAIVER 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,

Respondents.

To the Honorable Neil M. Gorsuch, Associate Justice of the Supreme Court of the United States and Circuit Justice for the Tenth Circuit

Application from The United States Court of Appeals for the Tenth Circuit (No. 24-6063)

EMERGENCY APPLICATION FOR WRIT OF INJUNCTION OR IN THE ALTERNATIVE FOR STAY OF AGENCY ACTION

RELIEF REQUESTED BY FRIDAY, AUGUST 30, 2024

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QUESTIONS PRESENTED

Congress has long prohibited funds appropriated under Title X from being "used in programs where abortion is a method of family planning." *Rust v. Sullivan*, 500 U.S. 173, 178 (1991) (quoting 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 (2004). Nevertheless, last year, the U.S. Department of Health and Human Services ("HHS") stripped all Title X funds from Oklahoma's longstanding and successful Title X program because the Oklahoma State Department of Health ("OSDH") declined to refer for abortions after Oklahoma's historic abortion prohibition was revitalized in the wake of *Dobbs v. Jackson Women's Health Organization*, 597 U.S. 215 (2022). Very soon, HHS will exclude Oklahoma from another year's worth of millions of dollars of Title X funds.

The questions presented are: (1) Whether HHS is violating the Constitution's Spending Clause by imposing a funding condition—abortion referrals—that this Court's precedent (*Rust*) holds is not unambiguously required by Title X; and (2) Whether HHS is violating the Weldon Amendment, which expressly protects health care organizations who decline to refer for abortions under Title X, by stripping Oklahoma's Health Department of millions of dollars for declining to refer for abortions under Title X.

PARTIES TO THE PROCEEDING

Applicant is the STATE OF OKLAHOMA. Applicant is the Plaintiff in the U.S. District Court for the Western District of Oklahoma and Appellant in the U.S. Court of Appeals for the Tenth Circuit.

Respondents are the 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 the OFFICE OF POPULATION AFFAIRS. Respondents are Defendants in the U.S. District Court for the Western District of Oklahoma and Appellees in the U.S. Court of Appeals for the Tenth Circuit.

RELATED PROCEEDINGS

In a lawsuit led by the State of Ohio in 2021, Oklahoma joined eleven other States in a facial challenge, arguing that Defendants violated the Administrative Procedure Act ("APA") with their 2021 Rule interpreting Title X. On appeal, the Sixth Circuit granted in part and denied in part the States' motion for a preliminary injunction. *See Ohio v. Becerra*, 87 F.4th 759 (6th Cir. 2023). Relying on *Rust* and *Chevron* deference, the Sixth Circuit upheld the Rule's abortion referral requirement against a facial challenge, in part because "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.'" *Id.* at 774 (citation omitted). The *Ohio* case has since been remanded, and summary judgment briefing has not yet been filed at the district court. There has been no final adjudication on the merits in that action.

In addition, the Sixth Circuit is currently evaluating Tennessee's appeal of the same subject at issue here—the federal government's stripping of millions of dollars in Title X funds solely because Tennessee objected to providing abortion referrals. *See Tennessee v. Becerra*, No. 24-5220 (6th Cir.). The Sixth Circuit held oral argument on July 18, 2024, and a decision is expected this month.

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APPLICATION

TO THE HONORABLE NEIL M. GORSUCH, ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE TENTH CIRCUIT

This Application arises from a Tenth Circuit panel's unfortunate decision to effectively ignore this Court's clear Spending Clause precedent, as well as the plain language of the Weldon Amendment, in denying Oklahoma injunctive relief.

Rust v. Sullivan, 500 U.S. 173 (1991), holds that Title X is ambiguous as to whether Title X grantees must provide abortion counseling or referrals. This clearly triggers the Spending Clause, given that Title X is a Spending Clause statute. Under this Court's Spending Clause precedent, Congress must provide *clear notice* of the obligations and impose those obligations "unambiguously." *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981). Per *Rust*, Title X does not unambiguously impose an abortion counseling or referral requirement. Therefore, HHS cannot impose an abortion counseling or referral requirement on Title X grantees. But contrary to this Court's precedent, as well as a recent Eleventh Circuit decision, the Tenth Circuit held that federal agencies can satisfy the Spending Clause's clarity requirement by *regulation* even when there is no clear and specific *statutory* basis for doing so. This holding guts the Spending Clause, shifts immense legislative power to the executive branch, and is worthy of this Court's immediate review.

In addition, the Weldon Amendment clearly protects health care organizations from being forced to provide abortion referrals. Despite this clear instruction, and HHS's express promises in its 2021 Rule that (per Weldon) it would protect all

providers and grantees from being required to provide abortion referrals, HHS has stripped Oklahoma's Health Department ("OSDH") of $4.5 million solely because OSDH will not provide abortion referrals. And it will soon do so again. Over the dissent of Judge Federico, the Tenth Circuit held that the Weldon Amendment does not apply here because the government isn't actually requiring referrals for abortions by demanding that Oklahoma provide patients with a phone number to a hotline that would instruct them on abortion. However, the United States never made this argument. It has admitted from the get-go that it *is* requiring abortion referrals *and* punishing Oklahoma for not providing them. The United States has argued instead that Oklahoma's Health Department does not qualify as a health care organization even though its employees provide on-the-ground health care. As Judge Federico explained in his dissent, the United States is plainly incorrect on this point, and the panel was therefore wrong to withhold clear congressional protections from Oklahoma and millions in health care funding from its most vulnerable citizens. Judge Federico would have granted Oklahoma an injunction, as should this Court.

For these reasons, and pursuant to Rule 22 of this Court and 28 U.S.C. § 1651, Oklahoma respectfully requests that the Court grant this Application for an injunction prohibiting Respondents from denying Oklahoma's 2024 Title X funding, pending application for and disposition of Oklahoma's petition for a writ of certiorari, and if certiorari is granted, until a judgment is issued by this Court. Alternatively, Oklahoma requests that the Court issue an order pursuant to 5 U.S.C. § 705 staying HHS's decision to strip Oklahoma's Title X funding and award it to other entities,

pending either a grant of certiorari or a remand to evaluate the case more fully in light of *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244 (2024). Respondents have agreed to voluntarily refrain from distributing the funds until Friday, August 30, 2024, to preserve Oklahoma's ability to later access its 2024 Title X allocation should Oklahoma prevail. Oklahoma thus requests relief by August 30.

OPINIONS BELOW

The order of the U.S. Court of Appeals for the Tenth Circuit, dated July 15, 2024, affirming denial of Oklahoma's Motion for Preliminary Injunction over the dissent of Judge Federico is attached at App. 1 and is also available at 2024 WL 3405590. The order of the U.S. District Court for the Western District of Oklahoma, dated March 26, 2024, denying Oklahoma's Motion for Preliminary Injunction is attached at App. 68. The district court announced the basis for its order during the hearing on Oklahoma's Motion for Preliminary Injunction. The transcript of the district court's hearing on Oklahoma's Motion for Preliminary Injunction is attached at App. 70. The docket number in the U.S. District Court for the Western District of Oklahoma is CIV-23-1052-HE, and the docket number in the U.S. Court of Appeals for the Tenth Circuit is 24-6063.

JURISDICTION

This Court has jurisdiction pursuant to 5 U.S.C. § 705 and 28 U.S.C. §§ 1254 and 1651.

CONSTITUTIONAL PROVISIONS INVOLVED

The Spending Clause provides in pertinent part:

> Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to … provide for the … general Welfare of the United States ...."

U.S. CONST. art. I, § 8, cl. 1.

STATEMENT OF THE CASE

I. OKLAHOMA HAS SUCCESSFULLY MANAGED TITLE X FUNDING FOR DECADES, AND THE SERVICES PROVIDED ARE VITAL TO THE STATE'S CITIZENS.

Oklahoma's Health Department has successfully participated in Title X's family planning projects for over fifty years, offering the State'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. § 300a. At no point prior to the current controversy had Oklahoma's Title X funding received adverse treatment, dating back to 1971. App. 183, ¶ 8.

These Title X funds are vital to Oklahoma's provision of family planning services. OSDH uses the Title X grant to disburse funds to and provide critical public health services in around 70 city and county health departments that reach numerous rural and urban Oklahoma communities. *Id.* at 184, ¶ 12. These county health departments are part of the frontline of healthcare in Oklahoma, and they provide comprehensive, connected care to numerous patients. *Id.* at 184–85, ¶¶ 12, 15.

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 preventative services for tens or even hundreds of miles.

Id. at 186, ¶ 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. *Id.* at 185–86, ¶ 17.

II. HISTORICALLY, HHS HAS ISSUED CONTRADICTORY TITLE X REGULATIONS.

From the outset, Title X has expressly prohibited grant funds from "be[ing] used in programs where abortion is a method of family planning." 42 U.S.C. § 300a-6. Despite this mandate, HHS has historically implemented contradictory abortion rules and regulations for Title X, depending on the presidential administration. From the mid-1970s to the late 1980s, HHS permitted—and in 1981 adopted guidelines requiring—Title X recipients to offer pregnant women "nondirective 'options counseling' on pregnancy termination (abortion) . . . followed by referral for these services if she so requests." 53 Fed. Reg. 2922, 2923 (Feb. 2, 1988).

In 1988, HHS changed course and issued a rule *prohibiting* Title X providers from making referrals for or counseling women regarding abortion. *See id.* at 2945. HHS determined that these requirements were "more consistent with" the Title X provision prohibiting abortion funding. *Id.* at 2932. The validity of this regulation was challenged in *Rust*, 500 U.S. at 173. There, this Court upheld HHS's 1988 regulation. In particular, *Rust* held that Title X was ambiguous on the point of abortion referrals, and that, under *Chevron* deference, HHS had permissibly justified its new rule prohibiting abortion counseling and referrals, which HHS had defended as "more in keeping with the original intent of the statute." *Id.* at 186–87.

However, in 1993, HHS suspended the 1988 Rule, and in 2000, it again reinstated the requirement that Title X recipients make abortion referrals upon request. 65 Fed. Reg. 41,270 (July 3, 2000). Importantly, in 2004, Congress began including the Weldon Amendment as an annual appropriations rider for every HHS appropriations bill. *See* Consolidated Appropriations Act, 2005, Pub. L. No. 108-447, div. F, § 508(d), 118 Stat. 2809, 3163 (2004). Per the Weldon Amendment, no HHS funds (which, obviously, includes Title X funds):

> 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.

Id. (emphasis added).

In 2019, in line with the Weldon Amendment, HHS promulgated *Compliance with Statutory Program Integrity Requirements*, 84 Fed. Reg. 7714 (Mar. 4, 2019). The 2019 Rule adopted much of the 1988 Rule that was upheld in *Rust*, including the prohibition on Title X grantees "perform[ing], promot[ing], refer[ring] for, or support[ing] abortion as a method of family planning . . . ." *Id*. at 7788. As in 1988, HHS concluded that this version of the regulation 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. HHS determined that prior regulations "are inconsistent" with section 1008 "insofar as they require referral for abortion as a method of family planning." *Id.* at 7723.

Finally, in 2021, HHS reversed course yet again, promulgating a regulation that it now claims requires abortion counseling and referrals. *See* 86 Fed. Reg. 56,144 (Oct. 7, 2021). Although 42 C.F.R. § 59.5(a)(5) states that "[e]ach" Title X project should "[n]ot provide abortion as a method of family planning," HHS re-added in 2021 that each project must nevertheless "[o]ffer pregnant clients the opportunity to be provided information and counseling regarding … [p]regnancy termination." *Id.* § 59.5(a)(5)(i). Further, grantees must "provide such information and counseling, provide neutral, factual information and nondirective counseling on each of the options [including pregnancy termination], and, *referral upon request*, except with respect to any option(s) about which the pregnant client indicates they do not wish to receive such information and counseling." *Id.* § 59.5(a)(5)(ii) (emphasis added). The 2021 Rule remains in effect today, and, pursuant to HHS's interpretation, generally purports to require grantees to offer abortion counseling and referrals. Oklahoma joined a facial challenge against the 2021 Rule and its requirement of abortion referrals—*i.e.*, the State has never accepted the legitimacy of the Rule's referral condition, a condition that is not in the statute, much less unambiguously so.

III. *DOBBS* ALLOWED OKLAHOMA'S HISTORICAL ABORTION BAN TO TAKE EFFECT.

On June 24, 2022, this Court issued *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215 (2022). Reversing five decades of abortion jurisprudence, *Dobbs* emphasized *repeatedly* that authority to regulate abortion was returned to the people and their elected representatives. *Id.* at 232, 256, 259, 292, 302.

Exercising that right, the people's elected representatives in Oklahoma have prohibited abortion except to preserve a woman's life, and they have made it illegal to advise a woman to obtain an abortion. *See* OKLA. STAT. tit. 21, § 861. This statute, which has been on the books in Oklahoma since Statehood in 1907, took effect immediately following *Dobbs*. As a result, in Oklahoma, advising or procuring an abortion for any woman is punishable as a felony. *Id*. More broadly, Oklahoma has sought to protect the "unborn person" or "unborn child," in a variety of ways. Indeed, 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 tasked by the Oklahoma Legislature to "[d]evelop and distribute educational and informational materials … for the purpose of achieving an abortion-free society." *Id.* § 1-753(2). And so on.

IV. HHS TERMINATED OKLAHOMA'S TITLE X FUNDING BECAUSE OKLAHOMA'S HEALTH DEPARTMENT REFUSES TO PROVIDE ABORTION REFERRALS.

For its part, after *Dobbs*, OSDH concluded that it could not comply with 42 C.F.R. § 59.5(a)(5)(i)(c) if it required abortion counseling and referrals, because Oklahoma law makes it a crime for any person to advise or procure an abortion for any woman. App. 319. Nevertheless, OSDH sought to find an agreeable solution that would allow it to continue receiving Title X funds while complying with Oklahoma law prohibiting abortions. App. 282. OSDH undertook extensive internal processes to determine how to comply with this HHS regulation through early 2023, but it was unable to find a solution. App. 186, ¶ 21.

On May 25, 2023, HHS sent a letter to OSDH claiming the Department was in violation of Title X and out of compliance with the terms and conditions of award FPHPA 006507, the "Oklahoma State Department of Health Family Planning Services Project" (the "Award"). App. 278. The Award totals $4.5 million in funding—money that is relied on by the Department to provide critical health care services to Oklahomans. App. 183, ¶ 9. Specifically, HHS determined that OSDH was in violation of Section 59.5(a)(5)(i)(c) because the Department would not offer pregnant clients abortion counseling and referrals.

OSDH received notice that the Award would be terminated on June 27, 2023. App. 282. One month later, OSDH administratively appealed that ruling. App. 319. While the administrative appeal was still pending, HHS announced supplemental funding, supposedly to support the provision of Title X services in Oklahoma. HHS Office of Population Affairs, *HHS Issues $11 Million in Supplemental Funding to Support the Provision of Title X Services in Oklahoma and Tennessee* (Sept. 22, 2023), https://opa.hhs.gov/about/news/grant-award-announcements/hhs-issues-11-million-supplemental-funding-support-provision. Funds that would previously have been directed to OSDH were instead reallocated to Community Health Connection, Inc. (awarded $216,000) and Missouri Family Health Council, Inc., a Missouri entity (awarded $3,250,000). *Id.*

V. OKLAHOMA SUED, SEEKING A PRELIMINARY INJUNCTION.

Because Oklahoma faced the potential loss of another $4.5 million in funding in 2024, Oklahoma sued and moved for a preliminary injunction. App. 148, 161.

Oklahoma sought an injunction prohibiting HHS from excluding Oklahoma from receiving a 2024 Title X grant on the basis that Oklahoma is not compliant with the abortion counseling and referral requirement. The district court held a hearing on March 26, 2024. App. 71. At the end of the hearing, the district court denied Oklahoma's motion with an oral ruling and issued an order to that effect the same day. App. 129–45. The district court relied in part on preclusion to deny an injunction—citing the Sixth Circuit facial challenge Oklahoma cited above. *See* App. 133–34. Oklahoma appealed on April 1, 2024. The Tenth Circuit held an expedited oral argument on May 31, 2024, and issued its opinion and judgment on July 15, 2024, denying an injunction. App. 1–37.[1] Neither the United States nor the Tenth Circuit raised or defended the district court's preclusion findings.

Judge Federico dissented at length from the panel's decision on the Weldon Amendment, arguing that Oklahoma qualifies as a health care entity and that, contrary to the panel's main holding, HHS was obviously insisting that Oklahoma provide abortion referrals. App. 38–64. And HHS's punishment, he observed, "reduces access to health care for those who need it most" in Oklahoma. App. 62. Judge Federico also criticized the panel for giving "substantial weight" to legislative history, which "should not be used here to muddy the meaning of the statutory text, especially given the muddiness of the history itself." App. 60.

[1] Although Oklahoma criticizes the decisions of the district court and the Tenth Circuit, the Attorney General is grateful to both for expediting their decisions.

REASONS FOR GRANTING THE APPLICATION

The All Writs Act, 28 U.S.C. § 1651(a), authorizes this Court to issue an injunction. An injunction pending appeal is appropriate when applicants face irreparable harm, when applicants are likely to succeed on the merits of their claims, and when the public interest would not be harmed. *Tandon v. Newsom*, 593 U.S. 61, 64 (2021) (per curiam) (citing *Roman Cath. Diocese of Brooklyn v. Cuomo*, 592 U.S. 14, 16 (2020)); *see also Does 1-3 v. Mills*, 142 S. Ct. 17, at *18 (2021) (Barrett, J., concurring). This Court may issue an injunction when the legal rights are "indisputably clear" and when injunctive relief is "necessary or appropriate in aid of the Court's jurisdiction." *Lux v. Rodrigues*, 561 U.S. 1306, 1307 (2010) (Roberts, C.J., in chambers); *Ohio Citizens for Responsible Energy, Inc. v. NRC*, 479 U.S. 1312 (1986) (Scalia, J., in chambers) (citation omitted). Justices also have discretion to issue an injunction "based on all the circumstances of the case," without the injunction "be[ing] construed as an expression of the Court's views on the merits" of the case. *Little Sisters of the Poor Home for the Aged v. Sebelius*, 571 U.S. 1171 (2014).

Oklahoma meets these stringent criteria. Oklahoma's right to relief is clear from this Court's Spending Clause decisions, which require *congressional* (not bureaucratic) clarity for a substantive condition to be imposed, and the plain text of the Weldon Amendment, which protects *all* organizations who decline to provide abortion referrals. Injunctive relief is appropriate in aid of the Court's jurisdiction because without an injunction, any favorable further review by this Court may be met without a remedy if HHS is allowed to distribute Oklahoma's 2024 Title X funding to

other entities. Oklahoma faces imminent *and* irreparable harm in funding; irreparable because the millions will likely be forever lost once HHS distributes the funds to other entities because of sovereign immunity. Oklahoma is also likely to obtain certiorari review, especially given the Tenth Circuit's split with the Eleventh Circuit over whether federal agencies can supply substantive funding requirements that are left ambiguous or unaddressed by Congress in Spending Clause legislation. The Tenth Circuit's decision dramatically shifts legislative power to the executive branch, which is inconsistent with this Court's recent opinions cabining the power and authority of executive agencies. *See, e.g.*, *Loper Bright*, 144 S. Ct. at 2244. Oklahoma respectfully requests an injunction from this Court.

Alternatively, the APA authorizes relief pending review under 5 U.S.C. § 705. Under that statute, a:

> reviewing court, including the court to which a case may be taken on appeal from or on application for certiorari or other writ to a reviewing court, may issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings.

Id. This Court has authority under the APA to issue a stay of HHS's decision to strip Oklahoma's funding to preserve the status quo for 2024 – requiring HHS to withhold funds that it, to date, has not distributed, pending this Court's review of this matter. Oklahoma therefore alternatively seeks a stay of HHS's action to strip Oklahoma's 2024 funding and award it to other entities pursuant to 5 U.S.C. § 705.

I. THIS COURT'S SPENDING CLAUSE DECISIONS ESTABLISH OKLAHOMA'S INDISPUTABLY CLEAR RIGHT TO AN INJUNCTION, AND OKLAHOMA IS LIKELY TO OBTAIN CERTIORARI REVIEW ON THIS ISSUE.

Title X was enacted under the Spending Clause, which provides that "Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to … provide for the … general Welfare of the United States ...." U.S. CONST. art. I, § 8, cl. 1. This Court has recognized four restrictions on the ability of Congress to utilize the Spending Clause, the second of which matters most in this case: 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).

As this Court has recognized, "[t]he legitimacy of Congress's exercise of the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of the contract." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 577 (2012) (citation omitted) (cleaned up). While Congress may exert influence on states by conditioning funding on certain requirements, Congress must provide *clear notice* of the obligations imposed. *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296 (2006).

Pennhurst is the seminal case from this Court on the Spending Clause. There, this Court wrote 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 (emphasis added). "Accordingly, if ***Congress*** intends to impose a condition on the grant of federal moneys, ***it*** must do so unambiguously." *Id.* (emphases added). It is

difficult to imagine language more straightforward, clear, and applicable to the circumstances here concerning Title X and abortion referrals.

Applying these principles in *Arlington*, this Court focused on the *text* of the statute to determine there was clear notice to the states. *See* 548 U.S. at 296. And for Title X's text, it is indisputably clear that Congress did *not* require abortion referrals. This Court previously recognized that very point in *Rust*, which held that 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. *Rust* analyzed § 1008 of Title X. *Id.* That section provides that "[n]one of the funds appropriated under this subchapter shall be used in programs where abortion is a method of family planning." 42 U.S.C. § 300a-6. In *Rust*, this Court considered a challenge to an HHS regulation that prohibited Title X grantees from offering abortion referrals, *id.* at 179, as opposed to the current regulation which requires grantees to make abortion referrals. Rather succinctly, this Court found that Title X is *ambiguous* on abortion referrals. *Id.* at 184.

This case is remarkably simple: Applying *Rust*'s clear holding in conjunction with the Spending Clause's clear statement requirement means that the United States cannot impose on Oklahoma an obligation to provide abortion referrals when Title X itself does not address referrals at all. The regulation, 42 C.F.R. § 59.5(a)(5)(ii), is therefore unconstitutional as applied here because it imposes an abortion referral requirement that is not unambiguously required by the Title X statute. That should end the Spending Clause analysis. After all, if Title X is ambiguous as to requiring

abortion referrals, how can a condition that grantees must provide abortion referrals be unambiguously clear in the statute? It cannot.

In resolving this question in favor of the United States, however, the Tenth Circuit went beyond the limits of the Spending Clause and effectively authorized executive branch agencies to create critical substantive conditions even where Congress did not speak. In doing so, the Tenth Circuit split with the Eleventh Circuit on the scope of federal agencies' authority under the Spending Clause. And if left unreviewed, the Tenth Circuit's opinion will be cited with favor by federal agencies as authority for those agencies seeking to exercise legislative power to impose critical and controversial requirements that are not present in Spending Clause legislation.

Specifically, the Tenth Circuit held that HHS is authorized to impose abortion referrals because mere *regulations* make that clear. App. 13–18. Disregarding *Rust*, which analyzed § 1008 of Title X, the Tenth Circuit found that different provisions in Title X authorize HHS to impose this condition: the general and generically phrased grants of rulemaking authority given to HHS to administer the Title X program. *See* App. 16 ("Title X unambiguously authorized the agency to impose conditions for federal grants."). In particular, the Tenth Circuit relied on 42 U.S.C. § 300a-4(a) (stating that "[g]rants and contracts … shall be made in accordance with such regulations as the Secretary may promulgate"), and § 300a-4(b) (providing 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"). In doing so, the Tenth Circuit sidestepped the

obvious limitation in § 300a-4(b) that any conditions imposed must be to "assure that such grants will be effectively utilized *for the purposes for which made*." (emphasis added). *See* App. 15 n.4. Given this limitation, § 300a-4(b) is plainly a procedural provision allowing HHS to require grantees to demonstrate that they are actually using the funds for the "purposes" set forth—*i.e.*, "made"—in Title X. It does *not* allow HHS free rein to impose its own substantive purposes on grantees. Nevertheless, the Tenth Circuit found this generic delegation of rulemaking authority allowed HHS to impose a substantive condition under the Spending Clause even where this Court has determined Title X is ambiguous as to that condition.

In doing so, the Tenth Circuit attempted to rely on this Court's holding in *Bennett v. Ky. Dep't of Educ.*, 470 U.S. 656 (1985). There, Kentucky appealed from a decision of the Secretary of Education ordering the state to refund certain federal funds due to misuse. *Id.* at 662-63. The Tenth Circuit latched on to the observation in *Bennett* that "Congress couldn't 'prospectively resolve every possible ambiguity concerning particular applications of the requirements,'" App. 14 (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.* This holding flies in the face of 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," *id.* at 669 (emphasis added), not that the agencies were free to impose additional requirements as they see fit. By *Bennett*'s express

terms, that is, federal agencies are limited to resolving issues and ambiguities arising from *application* of a requirement set forth by Congress. In any event, the Tenth Circuit disregarded this Court's ultimate conclusion in *Bennett* that "[t]he requisite *clarity* in this case *is provided by Title I*; States that chose to participate in the program agreed to abide by the *requirements of Title I* as a condition for receiving funds." 470 U.S. at 666 (emphases added). The requisite 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.

The other cases cited by the Tenth Circuit are no different. While this Court observed in *Davis v. Monroe County Board of Education* that the regulatory scheme surrounding Title IX *also* provided "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 referenced, yet again, *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 based on the recipient's degree of control over the harasser and the environment in which the harassment occurs.

Id. at 644 (emphases added). Such statutory clarity on abortion referrals is entirely absent from Title X. Presumably for this reason, the United States never cited *Davis* in its briefs below. Along with straightforward decisions like *Arlington*, these cases actually illustrate Oklahoma's clear legal position in this matter: that abortion counseling and referrals must be unambiguously required *by the statute*.

This point was recently addressed by the Eleventh Circuit in *West Virginia ex rel. Morrisey v. U.S. Dep't of Treasury*, 59 F.4th 1124 (11th Cir. 2023). Even though the Tenth Circuit cited *Morrisey* with favor, App. 14, the Tenth Circuit cherry picked the language from *Morrisey* it wanted to highlight without providing the full context. The panel 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." *Id.* (quoting *Morrisey*, 59 F.4th at 1148). But the Eleventh Circuit very critically qualified that statement in the same paragraph: "But the problem we confront here is not whether Congress left a gap that an agency may fill; it is the lack of an ascertainable condition in the statute. . . . 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 observed that there "is 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 which otherwise could not be enforced," *id.* at 73.

The problem here, like *Morrisey*, is that the funding condition is not remotely ascertainable on the face of the statute. Indeed, that is literally the holding of *Rust*: "At no time did Congress directly address the issues of abortion counseling, referrals, or advocacy." *Rust*, 500 U.S. at 185. And in fact, 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").[2] As a result, Oklahoma's legal right to Title X funding is indisputably clear under the Spending Clause.

When the Tenth Circuit noted that it isn't "bound by other circuits," App. 17, it effectively acknowledged it was creating a circuit split. To be sure, the panel tried to argue that *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." *Id.* But, per *Rust*, 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, and thus HHS

[2] This Court decided *Loper Bright* two weeks before the Tenth Circuit issued its decision below. The Tenth Circuit did not ask for supplemental briefing on *Loper Bright*, but rather dismissed its impact on *Rust* in a passing footnote because "the [Supreme] Court clarified that it was not 'call[ing] into question prior cases that [had] relied on the *Chevron* framework.'" App. 31 n.13 (quoting *Loper Bright*, 144 S. Ct. at 2273). But the panel ignored the subsequent sentence, where this Court clarified 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 (emphasis added). The "specific agency action" here is not the same as that in *Rust*; in fact, they are very nearly the opposite of each other. Thus, it is not at all clear that the Tenth Circuit's brief analysis of *Loper Bright* and *Rust* is correct. Regardless, though, Oklahoma deserves injunctive relief; either because *Rust* mandates an ambiguity finding, or because, absent *Rust* and *Chevron* deference, Title X's prohibition on abortion prohibits abortion referrals. Thus, this Court could grant Oklahoma an injunction and, instead of hearing the case, remand for a thorough analysis of *Loper Bright* and *Rust*.

can require them even absent congressional clarity. Oklahoma does not take that view, nor should it be required to.

For that reason, there is a significant likelihood that this Court would grant certiorari. While the Eleventh Circuit recognizes that agencies are not free to impose substantive requirements absent some congressional basis for doing so, the Tenth Circuit's decision opens a cavernous exception that swallows the Spending Clause. In the Tenth Circuit's view, agencies are unmoored by the statutory provisions at issue. So long as Congress has included a general delegation of rulemaking authority, as it undoubtedly has in many Spending Clause legislative schemes, an agency has a blank check. Agencies are then free to impose whatever requirements they, and the executive branch, desire. This expansive view of the federal bureaucracy's rulemaking power is inconsistent with this Court's recent decisions. *See, e.g.*, *Loper Bright*, 144 S. Ct. at 2244. It is also inconsistent with *Rust*. If the Tenth Circuit is correct, this Court in *Rust* apparently did not need to analyze Section 1008's abortion restriction at all. Turns out, this Court could have resolved *Rust* by finding that the same generic grants of rulemaking authority referenced above clearly gave HHS the power to impose the 1988 Rule. *Rust*, per this reasoning, was a big waste of time.

"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*, 144 S. Ct. at 2275 (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 the regulatory history underlying 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). Accepting the Tenth Circuit's view unacceptably shifts legislative power to the executive branch; it cannot stand.

In this case, HHS has effectively exercised the power of all three branches of government: HHS has wielded legislative authority to impose a spending condition requiring Title X grantees to offer abortion counseling and referrals, HHS has exercised executive authority by applying this condition against an unwilling provider and stripping that provider of millions of dollars, and HHS has summarily carried out judicial functions by denying Oklahoma's administrative appeal and urging the courts to defer to its judgment. This goes too far. The APA is designed to be a "check upon administrators whose zeal might otherwise have carried them to

excesses not contemplated in legislation creating their offices." *Loper Bright*, 144 S. Ct. at 2261 (quoting *United States v. Morton Salt Co.*, 338 U.S. 632, 644 (1950)). And Oklahoma seeks review in this matter to check the excesses that have stripped funding from a longstanding and successful Title X program.

Other important concerns are implicated in this matter. For instance, this Court has articulated that it expects "Congress to speak clearly when authorizing an agency to exercise powers of "vast 'economic and political significance.'" *Alabama Ass'n of Realtors v. Dep't of Health & Hum. Servs.,* 594 U.S. 758, 764 (2021) (citations omitted). This matter involves considerable economic significance, through $4.5 million in federal Title X funding, and it is hard to imagine an issue bearing more political significance. The federal-state balance is also at issue here. HHS's regulation foists upon Oklahoma a requirement concerning an issue that has been recognized as specifically reserved to the people to address in *Dobbs*. But Defendant Becerra previously announced that the *Dobbs* decision was "unconscionable" and that HHS would "double down and use every lever we have to protect access to abortion care." *HHS Secretary Becerra's Statement on Supreme Court Ruling in Dobbs v. Jackson Women's Health Organization*, U.S. DEP'T OF HEALTH & HUM. SERVS. (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. In doing so, HHS deliberately sought to impose the executive branch's policy preferences on the states, including Oklahoma, and upset the federal-state balance on this important issue. The lack of *clear notice* by *Congress* of any requirement to offer abortion

referrals renders HHS's termination of Oklahoma's Title X funding violative of the Spending Clause. Oklahoma has an indisputably clear right to relief.

II. THE WELDON AMENDMENT'S PLAIN TEXT PROTECTS OKLAHOMA'S HEALTH DEPARTMENT FROM BEING FORCED TO PERFORM ABORTION REFERRALS.

Under the APA, courts "shall … set aside agency action" that is "not in accordance with law." 5 U.S.C. § 706(2)(A). Here, despite the Weldon Amendment's clear command—that all health care organizations be free from being forced by the government to refer for abortions—HHS stripped $4.5 million in funding from the Oklahoma Health Department expressly because of OSDH's refusal to provide abortion referrals. OSDH first raised the Weldon Amendment in its July 2023 administrative appeal of HHS's 2023 decision. *See* App. 326–28. This appeal is not about 2023, however, but rather the $4.5 million or so that HHS would normally distribute to OSDH for 2024 that it plans to withhold. An injunction is necessary to prevent HHS from sending that money out the door on August 30 or soon after.

A. In declining to apply the Weldon Amendment here, the Tenth Circuit ignored the parties' arguments and agreements.

Although the district court thought the Weldon Amendment was perhaps "a closer question," App. 139, it nevertheless found that Weldon did not apply. It did so first because "the more plausible interpretation" of Weldon is that Oklahoma does not qualify as a health care entity because the State Health Department is not the "provider of the services." App. 140. The district court was also "skeptical" that Weldon applies to a "policy" objection as opposed to a "conscience" or "religious" objection. App. 140–41. Finally, the court opined that Weldon was not violated

because "simply by supplying a phone number, the State could meet its referral obligations." App. 141.

The latter two points were not raised by the United States in its initial brief before the district court. Instead, the United States focused on arguing that the State Health Department was not a qualifying health care entity—the district court's first point. The Tenth Circuit majority largely ignored the United States' arguments, however. Without any briefing on point, the Tenth Circuit instead held that the phrase "refer for abortions" in Weldon was not even *implicated* by "the mere act of sharing the national call-in number." App. 23; *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 the United States was removing Oklahoma's funding for refusing to supply abortion referrals, *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 repeatedly claimed to be merely affirming the district court on this point, *e.g.*, App. 23, even the district court did not expressly go that far, *see* App. 141 (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 law firm in the

world—Oklahoma would have prevailed. It was only by going outside the arguments the parties presented that Oklahoma was denied an injunction and $4.5 million to serve "those who need it most." App. 62 (Federico, J., dissenting).

B. The district court clearly erred by finding that Oklahoma's Department of Health is not a provider of health care services.

To begin, the district court was clearly and indisputably wrong when it indicated that the Oklahoma Department of Health was not a health care entity because it was not the "provider of the services." App. 140. The Weldon Amendment's restrictions *must* apply to the State Health Department, given the plain text of Weldon and the scope of the Department's actual operations in Oklahoma. OSDH administers the Title X family planning program in Oklahoma. It does so not only by dispersing funds through 68 county health departments that provide critical public health services to rural and urban Oklahoma communities, App. 184, ¶ 12, but also by running the Title X program in those numerous county health departments with its own medically trained employees, such as nurses. *E.g.*, App. 182, ¶ 3. As Judge Federico found, "OSDH qualifies" as a health care entity under Weldon "because it engages in direct patient care at OSDH clinics." App. 52 (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. 53. Thus, he opined, OSDH is a "provider of the services." *Id.* Defendants' own 2016 review of the OSDH Title X program acknowledged as much. *See, e.g.*, App. 199 ("county health departments are OSDH administrative units"); App. 207 ("OSDH operates at least one clinic in all but

seven very rural counties"); App. 226 ("grantee" (OSDH) "is providing comprehensive family planning services including breast and cervical cancer screening").

Put differently, Weldon protects "any institutional … health care entity" from discrimination by "a Federal agency or program" because the entity declines to "refer for abortions." Consolidated Appropriations Act, 2005, Pub. L. No. 108-447, div. F, § 508(d)(1), 118 Stat. 2809 (2004). The plain language ("any"—"institutional"—"health care"—"entity") could hardly be broader, and it applies to Oklahoma's Health Department. "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 under Title X 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) (stating that "'[an] organization of any kind' is very broad language"). And the Tenth Circuit declined to address that part of the question at all, choosing instead to invent and rely on a textual argument that neither of the parties raised.[3]

[3] In *Ohio*, 87 F.4th 759, the multistate coalition told the Sixth Circuit that States are not protected under federal statutes protecting conscience in the context of abortion referrals. But the coalition cited nothing for this proposition. And because this

It is also worth noting that, up until March 2024, 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 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 the use and non-use of italics, that court saw no problem with the State "components" language in Weldon and the related Coats-Snowe Amendment). Defendants, that is, have offered no explanation for why that specific language was withdrawn. Thus, we are left with this: a regulation favoring Oklahoma was on the books for *three years* of this administration's tenure, 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). How this proves the Health Department is *not* a health care organization is beyond us.

C. The Tenth Circuit clearly erred by downplaying the 2021 Final Rule's express promises to protect grantees who object to abortion referrals.

If there were any question about whether Oklahoma's Health Department should qualify for protections from performing abortion referrals under Weldon, it

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statement conflicts with Weldon's plain text, Oklahoma disavowed that language below, and neither the Tenth Circuit majority nor dissent deemed it worthy of discussion. Given this disavowal, the Tenth Circuit's apparent acceptance of that disavowal, and the fact that the argument was made in *preliminary* context in *Ohio*, that language should not hinder Oklahoma here. Nor should the Oklahoma Attorney General's argument in *Ohio* somehow prevent Weldon from applying to the Oklahoma Health Department, which has interpreted Weldon correctly.

was put to rest by, ironically, the United States' highly touted 2021 Rule. This is because, when enacting the 2021 Rule, HHS repeatedly insisted in a preamble section entitled "Application of Conscience and Religious Freedom Statutes" that

> Under these [Title X conscience] statutes, **objecting providers or Title X grantees are not required to counsel or refer for abortions**. …
>
> [O]bjecting individuals and **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. 56,153 (Oct. 7, 2021) (emphases added). The Health Department is undeniably a Title X grantee. *See* App. 194 ("Grantee name: Oklahoma State Department of Health"). So why doesn't the 2021 Rule, and its interpretation of Weldon to protect *all* grantees and providers, require Defendants to defer to the Health Department's objection? Despite having expressly promised that "objecting providers or Title X grantees are not required to counsel or refer for abortions," 86 Fed. Reg. 56,153, HHS has now discontinued the funding of the Oklahoma Health Department—an objecting provider *and* a grantee—because it declines to refer women for abortion. This is unlawful *as recognized by HHS's Final Rule*.

The district court did not address the United States' breaking of its express 2021 promises on this point.[4] The Tenth Circuit attempted to do so, but, bizarrely, did not discuss HHS's clear pledges of referral protections in the context of *interpreting Weldon*, where Oklahoma nestled the argument. Rather, the Tenth Circuit wrongly considered HHS's promises as a standalone argument for

[4] In its appellate brief the government quoted a portion of HHS's 2021 assurance, but it conspicuously left out the word "grantee." 2024 WL 2262266, at *6, 21.

arbitrariness and capriciousness under the APA. App. 34–35. But this misses a critical point. Although a good argument can be made that HHS acted arbitrarily and capriciously by ignoring its 2021 promises, Oklahoma's assertion was instead that these promises demonstrate that the entire 2021 Final Rule was enacted with the express understanding that Weldon applied to *all* providers and grantees. That is to say, the promises show that HHS's current interpretation of Weldon clearly conflicts with the views HHS expressed when crafting the very Final Rule that HHS claims to be enforcing here. When it comes to Weldon, HHS has reversed course.

The Tenth Circuit's failure to consider these promises, or this flip-flop, as a part of its Weldon approach 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)). The Tenth Circuit rejected the import of these promises by labeling them as merely "stray" "snippets of a preamble" that are not binding and do not impact the "regulatory language [that] is otherwise clear" about abortion referrals being required. App. 34–35. There are several problems with this argument,[5] 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 enshrined in the regulations, and therefore called it a day because Tenth Circuit precedent holds that "limitations that appear in the preamble" but "do not appear in the language of the regulation" should not be "engraft[ed] …

[5] For example, the fact that HHS repeated the promise twice, in a subsection that explained the promise, undermines the Tenth Circuit's use of the word "stray."

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 binding congressional mandates. Statutes trump regulations, not the other way around.

Put differently, the Tenth Circuit apparently misunderstood what HHS was doing in making those promises. HHS was *not* interpreting or adding onto a regulation; rather, it was explaining what binding mandates like Weldon require *regardless of what the regulations say*. This is not conjecture, as HHS admitted exactly that point in the preamble. *See* 86 Fed. Reg. 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*." (emphasis added)). Moreover, HHS expressly labeled the subsection in which they made these promises "Application of Conscience and Religious Freedom *Statutes* to Title X." 86 Fed. Reg. 56,153 (emphasis added).[6] By finding that HHS's promises to protect objectors were irrelevant and meaningless because HHS did not place them in the Final Rule's regulations, the Tenth Circuit completely lost the plot.

What the Tenth Circuit should have done was compare the promises HHS made in 2021 *to the Weldon Amendment* and find that HHS's broad 2021 assurances accurately mirror the broad text of Weldon. In doing so, it should have found that

[6] To be sure, HHS should have included Weldon's protections in its regulations. But its neglecting to do so does not somehow nullify the binding nature of Weldon.

HHS taking the opposite position on Weldon now, when it actually matters to a particular grantee, cuts against adopting HHS's current view. *See Loper Bright*, 144 S. Ct. at 2265 (overruling *Chevron*, which "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 preambles *are* a helpful interpretive tool. *See, e.g.*, *Peabody*, 931 F.3d at 998 ("A preamble no doubt contributes to the general understanding of a statute ...." (quoting *Nat'l Wildlife Fed'n v. EPA*, 286 F.3d 554, 569–70 (D.C. Cir. 2002)). For example, this Court recently defended its reliance on the preamble to a proposed rule, pointing out that the preamble 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); *see also Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 149 (2012) ("Additional guidance concerning the scope of the outside salesman exemption can be gleaned … from the preamble to the 2004 regulations."). By doing none of these things, and instead holding that HHS's breaking of the express promises it made to grantees in 2021 meant absolutely nothing, the Tenth Circuit clearly erred.

Tellingly, Defendants have never addressed Defendant Becerra's labeling of *Dobbs* as "unconscionable" and his simultaneous insistence that Defendants would "double down and use every lever we have to protect access to abortion care." *See supra* at 22. The obvious conclusion to be drawn from this language is that Becerra's orders were taken seriously at HHS, such that all obstacles to promoting abortion—including Defendants' own 2021 promises—have been ignored. The Tenth Circuit

tried to explain these statements away, but it simultaneously whitewashed the actual quotes and claimed, wrongly, that "Oklahoma doesn't explain how HHS tried to circumvent *Dobbs*." App. 19 n.7. Oklahoma explained this perfectly well: After *Dobbs*, Defendants made the decision to "double down" to "protect access to abortion care," and then it ignored its own promises by forcing States to provide abortion referrals.

D. The Weldon Amendment's plain text protects all objectors, regardless of their reasons for declining to refer for abortions.

Again, 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. 140–41. But one can search the text of the Weldon Amendment over and again and not find any indication that the reason *why* a "health care entity does not … refer for abortions" matters. Nothing in Weldon indicates Congress is concerned with the reason behind a health care entity's refusal. Rather, Congress has straightforwardly prohibited federal agencies from discriminating against "*any*" Title X healthcare entities who refuse to refer for abortions, for whatever reason. That choice, and the Health Department's refusal, deserve respect.

The Tenth Circuit did not directly opine on this ruling from the district court, although it did claim at one point that the "statutory focus" of Weldon is "on the referring entity's purpose." App. 26 & n.13. In dissent, Judge Federico correctly pointed out 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. 56 (Federico, J., dissenting). Moreover, he observed, "[a]lthough one point of contention

in this litigation is whether the referral requirement violates state law, no authority has been uncovered that would require Oklahoma to prove its legal position is correct to be protected from discrimination by the Weldon Amendment." *Id*. In the end, "[t]he Weldon Amendment is silent as to whether a health care entity must state its basis for objecting, or why it does not refer for abortions." *Id.* This is clearly correct.

Whether grounded in policy or in state law, the Health Department's objection is protected. Thus, to resolve this emergency motion, or this appeal more broadly, there is no need for this Court to make any ruling on what Oklahoma law requires. *Cf. Moyle v. United States*, 144 S. Ct. 2015, 2021 (2024) (Barrett, J., concurring) ("Since this suit began in the District Court, 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. 57 (Federico, J., dissenting).

E. The Tenth Circuit clearly erred in holding, contrary to the views of both parties, that the United States is not requiring abortion referrals.

The Tenth Circuit placed the bulk of its Weldon chips on an argument that neither party addressed on appeal. The panel acknowledged that the Weldon Amendment would apply "if HHS had required the health department to make *referrals for abortions*." App. 23. It held, however, that, despite the United States having declined to make this argument, *id.* n.11, the phrase "refer for abortions" does not protect Oklahoma's objection here because HHS told Oklahoma it could comply with HHS's abortion referral mandate by providing women with a phone number to a national hotline. In short, referring women to this hotline does not constitute

referring them "for" an abortion, at least according to the Tenth Circuit majority, because "the call-in number offered an opportunity to supply neutral information *regarding* an abortion." App. 25. This was incorrect on multiple levels, as Judge Federico explained in his dissent.

The Tenth Circuit repeatedly claimed that it was merely affirming the district court on this point. *See, e.g.*, App. 23 ("[T]he district court didn't err by tentatively rejecting Oklahoma's argument that the mere act of sharing the national call-in number would constitute a referral for the purpose of facilitating an abortion."). But, again, the district court did not reach this conclusion. To the contrary, it stated that "simply by supplying a phone number, the State could meet its *referral* obligations." App. 141 (emphasis added). Whatever the district court meant by this statement, it was *not* that the proposed HHS approach somehow removed the application of the word "referral" entirely to the present scenario. The Tenth Circuit's focus on this point was its own innovation, not the district court's.

In any event, HHS's position from the beginning here has been that it *can* require Oklahoma to provide abortion referrals under its regulations, *and* that its phone number proposal *counts as an abortion referral*. For example, in a May 24, 2023, letter to OSDH claiming that OSDH was violating "the terms and conditions of your grant," HHS explained that Oklahoma'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. 281 (emphasis added). And it was not deemed an acceptable revision because under HHS's current regulations, "projects are required

to provide referrals upon client request, **including referrals for abortion**." *Id.* (emphasis added). HHS made the same statements in its June 27, 2023 "Termination Notice." *See* App. 285 (deeming unacceptable "the deletion of referral to the All-Options Talk Line in this policy without any other provision for abortion referrals"). HHS repeated similar points in its briefs to the district court and Tenth Circuit. *See* App. 389 ("OPA's decision to terminate OSDH's Title X funding was based on the interpretation of § 1008 set forth in the 2021 Rule—*i.e.*, that Title X programs must provide, if requested, counseling on and *referral for abortions*." (emphasis added)); App. 396–97 ("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." (emphasis added)); U.S. 10th Cir. Br., 2024 WL 2262266, at *10 ("HHS therefore decided to terminate Oklahoma's award. HHS noted that the applicable regulations require that Title X projects provide … 'referrals upon client request,' including for abortion.").

HHS could hardly have been clearer that it viewed the phone number as a referral *for* abortion. As a result, the United States has never embraced the argument that by just requiring Oklahoma to give women a phone number it was not requiring an abortion referral at all. Nor could it, since that would be an admission that it was abandoning enforcement of its highly touted abortion referral regulation. Instead, the United States has repeatedly focused on arguing that Oklahoma's Health Department does not qualify as a "health care entity" under the Weldon Amendment.

The government's failure to make or preserve the "not a referral" argument on appeal should have been the end of the matter. But rather than bind the United States to its litigation decisions, the panel 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. 25 n.12. What's good for the goose should have been good for the gander. If an argument needed to appear in the appellate briefs for it to matter, then the Tenth Circuit's entire holding should never have happened. Even worse, though, the only reason Oklahoma's observation about the obvious bias of the call-in number was not raised until oral argument was because the United States never argued that this alleged neutrality somehow meant that it had abandoned the abortion referral requirement. In sum, the Tenth Circuit panel based its Weldon Amendment rejection on an argument the United States did not make while rejecting a rebuttal to that argument on the ground that Oklahoma did not make it (in time). This arbitrary approach makes a mockery of the concept of waiver.

The panel also rejected Oklahoma's point about non-neutrality because it "rested on evidence beyond the record." *Id.* But at oral argument, counsel pointed the panel to the publicly available website of the organization behind the phone number, App. 314, an organization that is clearly advocating for abortion. This could have been considered under judicial notice. Although the website has a thin veneer of neutrality, the website's most recent press releases tout "abortion access," "abortion justice," and the organization's legal efforts to "stop" a State's abortion ban. *See For Media*, All-

Options, https://www.all-options.org/for-media/. Moreover, under the "Find Support" tab the website links to the "Hoosier Abortion Fund," which is designed to "cover the costs of an abortion in another state" for those in Indiana who want an abortion but are legally prohibited from obtaining one. *See Hoosier Abortion Fund*, All-Options, https://www.all-options.org/find-support/haf/. The organization's 2022–23 official report touts this "Abortion Fund," as well as its "Activist Squad," and it devotes considerable ink to promoting "self-managed abortion with pills" as "accessible and empowering," as well as "a very medically safe way to end a pregnancy." All-Options 2022–23 Annual Report at 1–2, *available at* https://www.all-options.org/for-media/. Meanwhile, it offers strident criticism of "hostile states" and "racist … health care and legal systems" that would dare protect the unborn. *Id.* at 2. Neutral, indeed.

Regardless, the majority held that Oklahoma was not being required to refer *for* abortions because the call-in number was proposed simply "as a way for Oklahoma to provide pregnant women with information about various family-planning options." App. 26. This cannot qualify as a referral *for* abortion under Weldon, per the majority, 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. 27. 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, or even upon arriving at the clinic. The majority's logic essentially requires an abortion to be completed 100 percent of

the time for the initial requirement to qualify as an abortion referral. This view would render the important Weldon Amendment a complete nullity.

In reality, as Judge Federico explained in dissent, the only reason to ever use the hotline number in Oklahoma would be to direct someone toward abortion, since that is the only "option that is unlawful in Oklahoma." App. 54–55 (Federico, J., dissenting). "If the patient desires information about options that are not abortion, 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 aren't 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. 55 (Federico, J., dissenting). Indeed, as the quotes above show, HHS *agreed* that it was terminating Oklahoma's funding because it refused to perform abortion referrals. *See supra* at 34. Thus, at the end of the day,

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

App. 58 (Federico, J., dissenting).

Finally, the majority gave "substantial weight" to the Weldon Amendment's legislative history; in particular, to the "statutory sponsor's explanation of his amendment." App. 28. But the primary quote cited by the majority simply says that 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 OSDH—an unwilling provider. That is the entire point of

Weldon, and the quote does nothing to support the panel's decision. Overall, as Judge Federico points out, the legislative history is a "mixed bag" on Weldon, open to multiple interpretations, and it "should not be used here to muddy the meaning of the statutory text." App. 60 (Federico, J., dissenting).

III. OKLAHOMA FACES IRREPARABLE HARM, AND AN INJUNCTION WILL AID THIS COURT'S JURISDICTION AND REVIEW.

Without an injunction, any further review by this Court may be met without a remedy if HHS is allowed to distribute Oklahoma's funding to other entities. Oklahoma faces imminent irreparable harm in funding that will likely be forever lost once HHS distributes it elsewhere. HHS has announced supplemental funding, supposedly to support the provision of Title X services in Oklahoma, and funds that would previously have been directed to the Health Department will instead be reallocated to Missouri entities. Last year, "Community Health Connection, Inc. was awarded $216,000 in newly authorized federal funds, while Missouri Family Health Council, Inc. was awarded $3,250,000 in supplemental funds." App. 162. The United States has never denied that this money was the same that would have gone to Oklahoma. The grant funding for this cycle will be sent by the close of the fiscal year in September 2024, and Oklahoma will lose another $4.5 million in funding if an injunction does not issue. Respondents have agreed to temporarily hold the amount of funding Oklahoma would have received pending this Court's decision on this matter. However, once this funding is distributed, Oklahoma will not likely be able to recoup the funds as monetary damages due to sovereign immunity as there is no way for Oklahoma or the federal government to claw back distributions from entities that

received funding. *Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs*, 594 U.S. 758, 764-65 (2021) (stating that risk of significant financial harm with no guarantee of eventual recovery constitutes irreparable harm). Oklahoma's loss of funding alone constitutes irreparable harm, and granting an injunction will be in aid of this Court's jurisdiction and ability to later provide a remedy for Oklahoma.

IV. THE PUBLIC INTEREST AND EQUITIES FAVOR AN INJUNCTION.

Where, as here, the Government is the opposing party, the last factors merge: the government's interest is the public interest. *Nken v. Holder*, 556 U.S. 418, 435 (2009). Reinstating Oklahoma's ability to receive Title X funding advances the public interest by allowing the Health Department to continue to offer services as it historically has done. The public interest would also be advanced since, as recognized in *Dobbs*, regulation of "abortion must be returned to the people and their elected representatives." 597 U.S. at 292. Oklahoma has exercised its right to determine policy on this issue. As such, the public interest will only be undercut by HHS's decision to suspend and terminate funding based on abortion concerns under a statute that expressly prohibits funding from going to programs promoting abortion.

CONCLUSION

Oklahoma respectfully requests that this Application be granted and an emergency injunction or a stay under 5 U.S.C. § 705 be issued by August 30, 2024, that prohibits the United States from withholding 2024 Title X funds from Oklahoma because it declines to provide abortion referrals.

Respectfully submitted,

s/ *Zach West*

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