No. 24A146

IN THE SUPREME COURT OF THE UNITED STATES

STATE OF OKLAHOMA, APPLICANT

v.

DEPARTMENT OF HEALTH AND HUMAN SERVICES, ET AL.

RESPONSE IN OPPOSITION TO THE APPLICATION FOR WRIT OF INJUNCTION OR STAY OF AGENCY ACTION

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The Solicitor General, on behalf of the Department of Health and Human Services (HHS); Xavier Becerra, Secretary of HHS; HHS's Office of Population Affairs; and Lynn Rosenthal, Acting Deputy Assistant Secretary for Population Affairs, respectfully submits this response in opposition to the application for writ of injunction or stay of agency action.

This case is about the Title X program, which has provided federal grants for family-planning services since 1970. Congress authorized HHS to administer the program and to set the conditions under which funds are disbursed to grantees. For most of the program's history, those conditions have included a requirement that Title X projects offer pregnant patients nondirective counseling about prenatal care, adoption, and pregnancy termination, as well as information about where those services can be obtained if a patient requests it.

In 2021, HHS adopted a rule restoring that longstanding condition on the receipt of Title X funds. See 86 Fed. Reg. 56,144 (Oct. 7, 2021). Oklahoma and other States challenged the 2021 rule, but a district court denied a preliminary injunction and the Sixth Circuit affirmed in relevant part. See Ohio v. Becerra, 87 F.4th 759, 770-775 (2023). The States did not seek this Court's review, and the case remains pending in the district court.

In the meantime, Oklahoma's State Department of Health (OSDH) sought and obtained a Title X grant for 2022-2023, pledging that it would comply with the 2021 rule -- just as it had complied with the same requirements for decades before 2019. After Dobbs v. Jackson Women's Health Organization, 597 U.S. 215 (2022), HHS agreed to allow OSDH to comply by simply ensuring that providers in its Title X project offer patients who request pregnancy counseling or a referral the telephone number of a third-party hotline. OSDH agreed to that accommodation and thereby secured another Title X grant for 2023-2024. But it promptly reversed course, announcing that providers in its project would no longer offer interested patients the hotline number and would not otherwise comply with the 2021 rule's counseling and referral requirements. HHS therefore terminated OSDH's grant.

Oklahoma filed this suit and sought a preliminary injunction compelling HHS to renew OSDH's grant for 2024-2025 despite OSDH's

refusal to comply with the agreed-upon conditions, which are currently in effect as to every other Title X grantee in the Nation. The district court denied a preliminary injunction and the Tenth Circuit affirmed. Oklahoma now asks this Court to grant an injunction pending the filing and disposition of a petition for a writ of certiorari. The Court should reject that request for three reasons.

First, the Court is unlikely to grant Oklahoma's forthcoming petition. The Tenth Circuit's decision does not conflict with any decision of this Court or another court of appeals. To the contrary, the Sixth Circuit has already rejected a challenge to the 2021 rule; Oklahoma's reliance on an Eleventh Circuit decision concerning a different statutory scheme is misplaced; and no other court has even considered Oklahoma's argument based on the Weldon Amendment. This unusual case would also be a poor vehicle for considering the validity of the 2021 rule even if that question otherwise warranted this Court's review. Among other things, Oklahoma's choice to split its claims across two suits in two different courts means that this case presents only a subset of the relevant issues.

Second, even if this Court granted certiorari, it would likely reject Oklahoma's claims on the merits. Oklahoma principally argues that the requirements reinstated by the 2021 rule violate the Spending Clause because they are not unambiguously set forth in

Title X itself. But Congress routinely conditions federal grants on compliance with requirements contained in agency regulations, and this Court has repeatedly upheld such requirements. Oklahoma's radical reimagining of the Spending Clause would invalidate a host of regulatory conditions that have long governed federal spending programs ranging from Title X to Medicare to infrastructure funding.

Oklahoma also asserts that HHS's termination of OSDH's grant violated the Weldon Amendment, a federal conscience law barring HHS, States, and other recipients of federal funding from requiring individuals and healthcare entities to provide or refer for abortions against their religious or moral beliefs. But as Oklahoma itself conceded before the Sixth Circuit, state administrative agencies like OSDH are "not protected under" the Weldon Amendment. Br. of Appellants at 54, Ohio, supra (No. 21-4235). And even if the Amendment applied, HHS's accommodation would not have required OSDH to refer for abortions. Instead, the Title X project could have simply provided interested patients with the number for a third-party hotline.

Third, the equities do not justify extraordinary relief from this Court. Many applications on the Court's emergency docket present questions with immediate practical consequences of nationwide significance. See Labrador v. Poe, 144 S. Ct. 921, 928-929 (2024) (Kavanaugh, J., concurring in the grant of stay). Those

stakes often justify a request that this Court "assess the merits on a tight timeline" and decide whether to grant interim relief without the benefit of "full merits briefing" or "oral argument." Id. at 929-930. But this is not one of those cases. This case involves a single discretionary grant to a single state agency, and the amount of that grant ($4.5 million) is a tiny fraction of the state agency's budget. The Oklahoma legislature has already provided substitute funding to make up the shortfall created by the termination of last year's grant, and there is no reason to doubt that it can do the same this year. Even if Oklahoma could satisfy the other prerequisites for relief, the Court should not encourage the invocation of its emergency docket in cases with such modest practical stakes.

STATEMENT

A. Legal Background

1. In 1970, Congress enacted Title X of the Public Health Service Act, ch. 373, 58 Stat. 682, to make "comprehensive voluntary family planning services readily available to all persons desiring such services." Pub. L. No. 91-572, § 2(1), 84 Stat. 1504; see 42 U.S.C. 300 et seq. Title X authorizes HHS to "make grants to and enter into contracts with public or nonprofit private entities to assist in the establishment and operation of voluntary family planning projects which shall offer a broad range of acceptable and effective family planning methods and services." 42

U.S.C. 300(a). Congress provided that Title X grants "shall be made in accordance with such regulations as the [HHS] Secretary may promulgate," 42 U.S.C. 300a-4(a), and "shall be payable * * * 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-4(b). Section 1008 of Title X provides that the funds made available under the statute may not be "used in programs where abortion is a method of family planning." 42 U.S.C. 300a-6.

In 2004, Congress enacted an appropriations rider, known as the Weldon Amendment, designed to provide "conscience protection[s]" to certain individuals and healthcare entities. 150 Cong. Rec. 25,044 (statement of Rep. Weldon). The Weldon Amendment states that none of the funds provided in HHS's annual appropriations 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." Pub. L. No. 108-447, § 508(d)(1), 118 Stat. 3163 (2004). Congress has included the Weldon Amendment in each subsequent annual appropriations act for HHS. See, e.g., Pub. L. No. 118-47, Div. D, Tit. V, § 507(d)(1), 138 Stat. 703 (2024).

2. Beginning in 1981 and continuing "for much of the [Title X] program's history," HHS has required that Title X projects "[o]ffer pregnant clients the opportunity to be provided information" and "nondirective counseling" regarding "[p]renatal care and delivery," "[i]nfant care, foster care, or adoption," and "[p]regnancy termination," followed by "referral upon request." 86 Fed. Reg. at 56,150, 56,178-56,179. Those requirements allow patients to receive "complete factual information about all medical options and the accompanying risks and benefits." 65 Fed. Reg. 41,281, 41,281 (July 3, 2000). But consistent with Section 1008, HHS has explained that a Title X project may not "promote[] abortion or encourage[] persons to obtain abortion." Ibid.

Twice during the Title X program's history, HHS adopted a different policy and placed further restrictions on the type of counseling and referrals that Title X projects may provide. First, in 1988, the agency issued a rule prohibiting projects from "provid[ing] counseling concerning the use of abortion as a method of family planning or provid[ing] referral for abortion as a method of family planning." 53 Fed. Reg. 2922, 2945 (Feb. 2, 1988). In Rust v. Sullivan, 500 U.S. 173 (1991), this Court upheld that rule. Applying Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984), the Court found Section 1008's language "ambiguous" and was "unable to say that the Secretary's construction of the prohibition in § 1008 to require a ban on

counseling, referral, and advocacy within the Title X project is impermissible." Rust, 500 U.S. at 184.

Despite this Court's decision upholding the 1988 rule, the rule was "never implemented on a nationwide basis." 65 Fed. Reg. 41,270, 41,271 (July 3, 2000). In 1993, HHS suspended the 1988 rule and reverted to its pre-1988 standards. 58 Fed. Reg. 7462, 7462 (Feb. 5, 1993). In 2000, the agency issued a final rule codifying those standards, including the requirement for non-directive options counseling and referral upon request. 65 Fed. Reg. at 41,279. That rule remained in place for nearly two decades. And since 2006, Congress has explicitly acknowledged that longstanding policy by including a rider in annual Title X appropriations specifying that "all pregnancy counseling shall be non-directive." Pub. L. No. 104-134, 110 Stat. 1321-221 (1996); see Pub. L. No. 118-47, 138 Stat. 652 (2024).

In 2019, HHS issued a rule reinstating much of the 1988 rule, including the general prohibition on referrals for abortion. 84 Fed. Reg. 7714, 7747 (Mar. 4, 2019). In light of the post-1996 appropriations riders, however, the 2019 rule departed from the 1988 rule by allowing projects to "provide nondirective counseling on abortion generally as a part of nondirective pregnancy counseling." Id. at 7730; see id. at 7789. The Ninth Circuit upheld the 2019 rule, California ex rel. Becerra v. Azar, 950 F.3d 1067, 1074 (2020) (en banc), while the Fourth Circuit invalidated it,

Mayor of Baltimore v. Azar, 973 F.3d 258, 266 (2020) (en banc). This Court granted certiorari to resolve that conflict, but the parties stipulated to dismissal of the cases after HHS announced its intention to engage in further rulemaking. See Becerra v. Mayor of Baltimore, 141 S. Ct. 2618 (2021).

3. In October 2021, HHS promulgated a rule restoring the pre-2019 counseling and referral requirements. See 86 Fed. Reg. at 56,150. HHS determined that the 2019 rule's restrictions had "interfered with the patient-provider relationship," id. at 56,146; "compromised [grantees'] ability to provide quality healthcare to all clients," ibid.; and "shifted the Title X program away from its history of providing client-centered quality family planning services," id. at 56,148. HHS explained that it is "critical for the delivery of quality, client-centered care" to provide "pregnant clients the opportunity to receive neutral, factual information and nondirective counseling on all pregnancy options," in addition to "referral upon request." Id. at 56,154.

The 2021 rule explained that a referral for a patient seeking information on abortion "may" -- but need not -- "include providing a patient with the name, address, telephone number, and other relevant factual information" about a medical provider. 86 Fed. Reg. at 56,150. But HHS emphasized that a Title X project "may not take further affirmative action (such as negotiating a fee

reduction, making an appointment, providing transportation) to secure abortion services for the patient." Ibid. (citation omitted). HHS further stated that individuals and entities covered by federal conscience laws such as the Weldon Amendment "will not be required to counsel or refer for abortions in the Title X program in accordance with applicable federal law." Id. at 56,153.

4. Oklahoma and 11 other States sued the Secretary of HHS in the United States District Court for the Southern District of Ohio, seeking to preliminarily enjoin enforcement of the 2021 rule. See Ohio v. Becerra, 577 F. Supp. 3d 678 (S.D. Ohio 2021). As relevant here, the States contended that the 2021 rule "contravenes Section 1008" by "requiring referrals" on the option of abortion. Id. at 688. The district court held that the States were unlikely to succeed on the merits of that argument and denied a preliminary injunction. Id. at 690-693, 700. The Sixth Circuit affirmed in relevant part. Ohio v. Becerra, 87 F.4th 759, 770-775 (2023).

B. The Present Controversy

1. This case arises from HHS's decision to terminate OSDH's Title X grant. Congress gave HHS discretion to allocate Title X funds among competing applicants based on factors such as "the number of patients to be served" and "the extent to which family planning services are needed locally." 42 U.S.C. 300(b). A Title X grant will generally be awarded for one year, followed by "subsequent continuation awards" provided "for one year at a time."

42 C.F.R. 59.8(b). "A recipient must submit a separate application to have the support continued for each subsequent year," and "continuation awards require a determination by HHS that continued funding is in the best interest of the government." Ibid. The total "anticipated period" for a grant award "will usually be for three to five years," after which the grantee must "recompete for funds." 42 C.F.R. 59.8(a). "Neither the approval of any application nor the award of any grant commits or obligates the United States in any way to make any additional, supplemental, continuation, or other award." 42 C.F.R. 59.8(c).

Once Title X funds are granted, the recipient must spend those funds "in accordance with" applicable "regulations" and "the terms and conditions of the award." 42 C.F.R. 59.9. If the recipient fails to do so, HHS may "terminate" the grant. 45 C.F.R. 75.371(c); see 45 C.F.R. 75.372(a)(1).

2. OSDH has long received Title X grants, including during the decades when HHS regulations have required Title X projects to offer nondirective options counseling and referrals upon request. See Appl. 4. In 2022, HHS awarded a Title X grant to OSDH for the period of April 2022 to March 2023. Appl. App. 8. HHS explained that a condition of that grant was OSDH's compliance with applicable regulations. Ibid. OSDH used the grant to "provide[] funding to the State's 68 county health departments," which offer "family planning public health services." Id. at 184. "OSDH also

contract[ed] with the Oklahoma City-County Health Department and the Tulsa County Health Department," which offer the same services "in Oklahoma's most heavily populated counties." Id. at 184-185.

After this Court's decision in Dobbs, OSDH initiated discussions with HHS about changing the counseling and referral policies for its Title X project in light of a new state law generally prohibiting "administer[ing]," "prescrib[ing]," or "advis[ing] or procur[ing]" an abortion. Okla. Stat. Ann. Tit. 21, § 861 (West 2015); see Appl. App. 8. OSDH proposed to "provid[e] clients seeking counseling on pregnancy termination" with a link to an HHS website. Appl. App. 284. HHS rejected that proposal as inconsistent with the 2021 rule. Ibid. But HHS proposed an accommodation under which OSDH could comply with the rule by ensuring that interested Title X patients were offered the telephone number for a national hotline that would supply the requisite nondirective counseling and referral information. Id. at 8; see id. at 284-285. OSDH agreed to that accommodation and revised its program accordingly. Id. at 8, 285. Based on that agreement, HHS approved a continuation award of $4.5 million for OSDH from April 2023 through March 2024. Ibid.; see id. at 183.

Soon thereafter, however, OSDH abruptly reversed course and stated that patients in its project who seek pregnancy counseling would not even be provided with the hotline number. Appl. App. 8. In response, HHS informed OSDH that it was violating the 2021 rule

and the terms of its grant. Ibid. HHS suspended OSDH's Title X award but gave it 30 days to bring its program into compliance. Id. at 278. After OSDH stated that it would not comply, HHS terminated OSDH's award. Id. at 8-9.

3. Although Oklahoma's challenge to the 2021 rule remained pending in the Southern District of Ohio, the State brought a separate suit in a different forum -- the Western District of Oklahoma -- seeking to preliminarily enjoin the termination of OSDH's 2023-2024 award and to compel HHS to provide further continuation awards in future years. As relevant here, Oklahoma argued that HHS's termination of the grant violated the Spending Clause and the Weldon Amendment. Appl. App. 163-171.

The district court denied the preliminary injunction. Appl. App. 69. In an oral ruling, the court determined that Oklahoma had no "reasonable prospect of prevailing" on the merits. Id. at 136-137. The court was "thoroughly unpersuaded by" Oklahoma's "arguments about the Spending Clause." Id. at 137. The court observed that "Congress has specifically said that [it] expect[s] the agency to promulgate rules" governing Title X grants. Ibid. And the court found "no serious argument to be made that the State of Oklahoma didn't know what the conditions were" when it accepted Title X funding. Ibid.

The district court was likewise "not persuaded" that HHS's termination of OSDH's grant violated the Weldon Amendment. Appl.

App. 140. The court explained that the Amendment ensures that individual providers and private entities need not "do something related to abortions contrary to their own conscience or religious beliefs." Ibid. The court concluded that the Amendment does not apply to a state administrative agency that merely "prefer[s] a different policy." Ibid. The court also emphasized that because HHS had made clear that OSDH could retain its grant "simply by supplying a phone number" of a third-party hotline, HHS was not requiring OSDH to refer women for abortions and thus would not be violating the Weldon Amendment even if it applied. Id. at 141.

The district court also addressed "the public interest," stating that "the threatened injury to the State of Oklahoma from nonissuance of the injunction" was "overblown." Appl. App. 130-131. The court was skeptical that providing the hotline number "could translate into a violation of Oklahoma law." Id. at 131. The court also emphasized "that there has already been litigation [in Ohio] between the parties on substantially the issues arising out of this same dispute," and doubted Oklahoma's interest in "reargu[ing] the same argument" or "rais[ing] other theories that might ultimately support the same claim." Id. at 133-134.

4. The Tenth Circuit affirmed. Appl. App. 2-64. The court found that Oklahoma had "fail[ed] to show a likelihood of success" on the merits and therefore did "not consider the other elements of a preliminary injunction." Id. at 37 n.19.

a. The Tenth Circuit first rejected Oklahoma's Spending Clause argument. Appl. App. 12. The court explained that "Congress instructed HHS to determine eligibility for Title X grants" through regulations, id. at 13, and made clear that grants "shall be * * * subject to such conditions as the Secretary may determine to be appropriate" in those regulations, ibid. (quoting 42 U.S.C. 300a-4(b)). Based on that language, the court reasoned that "Title X unambiguously authorized the agency to impose conditions for federal grants," and "[w]ith this authorization, HHS established the conditions for Title X grants." Id. at 16. The court thus concluded that the Spending Clause's notice requirement was satisfied because "Oklahoma could make an informed decision" about whether to accept a Title X grant. Ibid.

The Tenth Circuit acknowledged Oklahoma's argument "that Congress's silence on counseling and referrals [in Section 1008] renders Title X ambiguous" and prevents it from providing the notice required by the Spending Clause. Appl. App. 13. But the court rejected that argument because Section 1008 "rests alongside other provisions" -- including 42 U.S.C. 300a-4(a) and (b) -- that "unambiguously direct HHS to determine the eligibility requirements" for Title X grants. Appl. App. 17.

b. The Tenth Circuit next concluded that HHS had likely not violated the Weldon Amendment. Appl. App. 21-29. The court ex-

plained that for Oklahoma to succeed on its Weldon Amendment argument, it would need to prove both that (1) OSDH "constitutes a health-care entity" under the Amendment and (2) "[t]he federal government has discriminated against [OSDH] for declining to refer pregnant women for abortions." Id. at 22. The court found it unnecessary to address the first element because it determined that Oklahoma had failed to satisfy the second. Id. at 23.

The Tenth Circuit explained that the Weldon Amendment "would apply only if HHS had required [OSDH] to make referrals for abortions." Appl. App. 23. In the court's view, HHS had not done so; instead, it had only required OSDH to "inform pregnant women of a national call-in number." Ibid. And "the mere act of sharing the national call-in number," the court reasoned, would not "constitute a referral for the purpose of facilitating an abortion." Ibid.[1]

c. Judge Federico dissented. Appl. App. 38-64. Although he "agree[d] with most of the majority's opinion," including its conclusion "that the 2021 HHS rule did not violate the Spending Clause," id. at 47 & n.4, he believed that Oklahoma was likely to succeed on its Weldon Amendment argument, id. at 39.

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[1] The Tenth Circuit also rejected Oklahoma's argument that HHS acted arbitrarily in terminating OSDH's grant. Appl. App. 30-36. Oklahoma does not renew that argument here.

ARGUMENT

An applicant seeking a stay of a lower court's decision pending the filing and disposition of a petition for a writ of certiorari must demonstrate "(1) 'a reasonable probability' that this Court will grant certiorari, (2) 'a fair prospect' that the Court will then reverse the decision below, and (3) 'a likelihood that irreparable harm will result from the denial of a stay.'" Maryland v. King, 567 U.S. 1301, 1302 (2012) (Roberts, C.J., in chambers) (brackets and citation omitted). Where, as here, an applicant asks this Court not to stay a lower court's order but instead to grant injunctive relief that the lower courts have withheld, it must establish a "significantly higher justification." Respect Maine PAC v. McKee, 562 U.S. 996, 996 (2010) (citation omitted). Such injunctions are granted "only in the most critical and exigent circumstances," such as when "the legal rights at issue are 'indisputably clear.'" Wisconsin Right to Life, Inc. v. FEC, 542 U.S. 1305, 1306 (2004) (Rehnquist, C.J., in chambers) (citations omitted). Oklahoma has not satisfied the standard for a stay, much less the more demanding standard for an injunction.

I. THIS COURT IS UNLIKELY TO GRANT CERTIORARI

This Court is unlikely to grant Oklahoma's forthcoming petition for a writ of certiorari. The Tenth Circuit's decision does not conflict with any decision of another court of appeals. And this unusual case, in this preliminary posture, would be a poor

vehicle for resolving the questions presented even if those questions otherwise warranted this Court's review.

A. Oklahoma does not contend that the Tenth Circuit's decision conflicts with any other decision addressing Title X or the 2021 rule. To the contrary, the only other court of appeals to consider the 2021 rule is the Sixth Circuit, which affirmed the denial of a preliminary injunction against the requirements at issue here. See Ohio v. Becerra, 87 F.4th. 759, 770-775 (2023). And no other court has even considered the Weldon Amendment question, which the dissent below described as one "of first impression." Appl. App. 50. Particularly because this case is "the first to address" the issue, the Court is unlikely to "grant review." Does 1-3 v. Mills, 142 S. Ct. 17, 18 (2021) (Barrett, J., concurring in the denial of application for injunctive relief).[2]

Lacking any plausible claim of a square circuit conflict, Oklahoma asserts (Appl. 18-19) that the Tenth Circuit's Spending

[2] Except for OSDH and one state entity in Tennessee, all state Title X grantees have confirmed their compliance with the 2021 rule's counseling and referral requirements. See Office of Population Affairs, HHS, Fiscal Year 2023 Title X Service Grant Awards, https://perma.cc/H2QK-P5ZX (last visited Aug. 15, 2024). Tennessee has filed a separate suit challenging the termination of the grant to its state entity. The district court denied Tennessee's motion for a preliminary injunction, see Tennessee v. HHS, No. 23-cv-384, 2024 WL 1053247 (E.D. Tenn. Mar. 11, 2024), and an appeal is pending before the Sixth Circuit, see Tennessee v. Becerra, No. 24-5220 (argued July 18, 2024). But unlike Oklahoma, Tennessee has not attempted to invoke the Weldon Amendment.

Clause analysis is inconsistent with the Eleventh Circuit's analysis of a different statutory scheme in West Virginia ex rel. Morrisey v. U.S. Department of the Treasury, 59 F.4th 1124 (2023). But the Tenth Circuit specifically distinguished Morrisey, correctly recognizing that the statute at issue there "differed" from Title X in fundamental ways. Appl. App. 17.

Morrisey involved a statutory condition barring States from using federal COVID-19 relief funding "to either directly or indirectly offset a reduction in the[ir] net tax revenue" resulting from a tax cut. 42 U.S.C. 802(c)(2)(A) (Supp. III 2021); see Morrisey, 59 F.4th at 1132. Although the statute also allowed the Treasury Department "to issue such regulations as may be necessary or appropriate to carry out th[e] section," 42 U.S.C. 802(f) (Supp. III 2021), it did not expressly state that the federal grants were subject to the conditions prescribed by Treasury Department regulations. The Eleventh Circuit held that the statutory funding condition in Section 802(c)(2)(A) was not sufficiently "ascertainable" for purposes of the Spending Clause, because States would not "know what it means to use federal funds to 'directly or indirectly offset a reduction in the[ir] net tax revenue.'" Morrisey, 59 F.4th at 1143 (brackets in original). And the court determined that the Treasury Department regulations did not "eliminate[] the constitutional problem" because Section 802(f) "says nothing about the executive agency's power to define the scope of

the offset provision" in the statute itself. Id. at 1146-1147.

Unlike the statute at issue in Morrisey, Title X expressly states that grants are "subject to such conditions as the Secretary may determine to be appropriate." 42 U.S.C. 300a-4(b). And the Eleventh Circuit "d[id] not question" that the Spending Clause is satisfied when "a state accepts federal funds" subject to "'the legal requirements in place when the grants were made,'" "including existing regulations." Morrisey, 59 F.4th at 1148 (citation omitted). That is precisely what happened here.

B. Even if the validity of the 2021 rule otherwise warranted this Court's review, this case would not be an appropriate vehicle for that review. Oklahoma and other States are separately challenging the rule in the ongoing litigation in the Southern District of Ohio. See p. 10, supra. In an apparent attempt to mitigate concerns about the inequity of its simultaneous pursuit of equivalent relief in two different courts, Oklahoma has sought to distinguish its claims here from the claims it is pursuing in the Ohio litigation. And for multiple reasons, that unusual bifurcation would make this case an unsuitable vehicle in which to consider the 2021 rule.

First, Oklahoma is not advancing the primary claim the States are pursuing in the Ohio litigation -- that is, a claim that the 2021 rule's counseling and referral requirements are facially inconsistent with Section 1008. There, the States argued that the

rule contradicts "the plain text of § 1008." Ohio, 87 F.4th at 771. Here, in contrast, Oklahoma's application raises Title X only in the context of its Spending Clause claim premised on the repeated concession that Section 1008 and Title X as a whole are silent or "ambiguous" on counseling and referrals. Appl. 1. This case thus does not present the statutory question the Sixth Circuit considered in Ohio.

Second, because Oklahoma has emphasized that it has not brought "a facial challenge to the [2021] regulation," Appl. App. 90, this case does not present any question about the facial validity of the 2021 rule's requirement that Title X projects offer nondirective counseling on pregnancy termination and "referral upon request." 42 C.F.R. 59.5(a)(5)(ii). Instead, it presents only a challenge to the particular accommodation HHS offered to Oklahoma -- directing patients to a third-party hotline. See pp. 32-35, infra.

Third, in the Ohio litigation, Oklahoma and the other States did not assert any claim under the Weldon Amendment. To the contrary, as Oklahoma acknowledges (Appl. 26 n.3), the States conceded that state entities are "not protected under any of [the federal conscience] statutes," including the Weldon Amendment. Br. of Appellants at 54, Ohio, supra (No. 21-4235). "[W]hile individual doctors working for the States might be" protected, the States observed, "no statute would free a government grantee from

complying with the referral requirement." Ibid. Oklahoma likewise did not raise the Weldon Amendment in its discussions with HHS before HHS terminated its grant. And although Oklahoma has now reversed course and asserted that OSDH is a "healthcare entity" under the Weldon Amendment because state employees provided some of the services funded under the grant, the preliminary-injunction record does not include potentially relevant facts about how the grant was administered. See pp. 34-35, infra.

II. OKLAHOMA HAS NOT ESTABLISHED A LIKELIHOOD OF SUCCESS ON THE MERITS, MUCH LESS A CLEAR ENTITLEMENT TO RELIEF

Even if Oklahoma could establish that this Court would likely grant certiorari, its request for an extraordinary injunction should be denied because the State has not shown that it is likely to succeed on the merits -- much less that it is clearly entitled to relief. Oklahoma sought and accepted a grant with full knowledge that it was agreeing to comply with counseling and referral requirements that have governed the Title X program for most of its 54-year history. HHS's enforcement of those unambiguous requirements was entirely consistent with the Spending Clause. And HHS's termination of the grant based on OSDH's refusal to ensure that patients seeking pregnancy counseling or referrals are provided with a telephone number for a third-party hotline did not violate the Weldon Amendment for multiple independent reasons.

A. Oklahoma's Spending Clause Argument Lacks Merit

The Tenth Circuit correctly rejected Oklahoma's Spending

Clause argument. Title X unambiguously authorizes HHS to impose conditions on family-planning grants. HHS imposed the conditions at issue here pursuant to that authority. And Oklahoma had clear notice of those conditions before accepting Title X funds. The Spending Clause requires nothing more.

1. The Spending Clause authorizes Congress to "lay and collect Taxes" to provide for the "general Welfare of the United States." U.S. Const. Art. I, § 8, Cl. 1. When legislating under that authority, Congress has "broad power" to "set the terms on which it disburses federal funds." Cummings v. Premier Rehab Keller, P.L.L.C., 596 U.S. 212, 216 (2022). Congress has "repeatedly employed" that power "'by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives.'" South Dakota v. Dole, 483 U.S. 203, 206 (1987) (citation omitted).

This Court has analogized Spending Clause legislation to "a contract: in return for federal funds, the States agree to comply with federally imposed conditions." Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17 (1981). And because a State cannot "knowingly accept[] the terms of the 'contract'" if it "is unaware of the conditions," the Court has required Congress to speak "unambiguously" when "impos[ing] a condition on the grant of federal moneys." Ibid. (citation omitted); see Cummings, 596 U.S. at 219.

One familiar way for Congress to satisfy Pennhurst's clear-

statement requirement is to unambiguously provide that an entity accepting federal funds must comply with agency regulations governing the use of those funds. In Biden v. Missouri, 595 U.S. 87 (2022) (per curiam), for instance, the Court considered a provision authorizing the HHS Secretary "to promulgate, as a condition of a [healthcare] facility's participation in" Medicare and Medicaid, "such 'requirements as [he] finds necessary in the interest of the health and safety of'" patients. Id. at 90 (quoting 42 U.S.C. 1395x(e)(9) (2018 & Supp. II 2020)) (brackets in original). Relying on that authority, the Secretary issued a rule "amending the existing conditions of participation in Medicare and Medicaid to add a new requirement -- that facilities ensure that their covered staff are vaccinated against COVID-19." Id. at 91. A group of States challenged that rule, arguing (among other things) that the rule violated Pennhurst. Louisiana Appl. Resp. Br. at 26-27, Missouri, supra (No. 21A241). This Court rejected the States' challenge and held that the Secretary's "rule f[ell] within the authorities that Congress has conferred upon him." Missouri, 595 U.S. at 92.

Similarly, in Bennett v. Kentucky Department of Education, 470 U.S. 656 (1985), the Court considered Spending Clause legislation providing States with "federal grants to support compensatory education programs for disadvantaged children." Id. at 659. When accepting the funds, States "gave assurances" that the funds

"would be used" in accordance with "statutory and regulatory requirements." Id. at 663. This Court upheld an effort to recoup funds from a State that had "violated existing statutory and regulatory provisions" governing the use of funds. Id. at 670. In so doing, the Court rejected the State's argument that Pennhurst "bar[red] recovery of [the] misused * * * funds because the State did not accept the grant with 'knowing acceptance' of its terms." Id. at 665. "States that chose to participate in the program," the Court explained, "agreed to abide by the requirements of Title I as a condition for receiving funds." Id. at 666. And those requirements were found not only in "statutory provisions," but also in "regulations[] and other guidelines provided by the Department." Id. at 670.

2. Applying those principles here, Title X plainly satisfies Pennhurst's clear-statement rule. Congress expressly provided that "[g]rants and contracts made under this subchapter shall be made in accordance with such regulations as the Secretary may promulgate" and 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." 42 U.S.C. 300a-4(a) and (b). Those provisions are not materially different from those in Missouri and Bennett, or in countless other statutes requiring federal grant recipients to comply with agency

regulations as a condition of the grants.[3] Acting pursuant to Section 300a-4, HHS promulgated the 2021 rule requiring Title X grant recipients to comply with the counseling and referral obligations at issue here. See 86 Fed. Reg. at 56,177 (citing 42 U.S.C. 300a-4 as authority).

Oklahoma thus had "clear notice" that it would need to follow HHS regulations governing its grant, including the regulation addressing counseling and referral. Pennhurst, 451 U.S. at 25. Indeed, Oklahoma has applied for and accepted Title X funds for more than 50 years, see Appl. App. 183, without suggesting any lack of clarity that compliance with HHS regulations is a condition

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[3] See, e.g., 23 U.S.C. 124(j)(2)(E) (Supp. III 2021) (requiring recipients of certain infrastructure grants to follow "all applicable Federal laws (including regulations)"); 42 U.S.C. 254b(k)(3)(N) (requiring health center grantees to comply with "applicable Federal statutes, regulations, and the terms and conditions of the Federal award"); 42 U.S.C. 1437f(d)(2)(C) (requiring recipients of low-income housing assistance to comply with applicable "regulations"); 42 U.S.C. 1793(f)(2) (providing grants for school breakfast programs that "shall be carried out in accordance with applicable nutritional guidelines and regulations issued by the Secretary"); 42 U.S.C. 2000d-1 (authorizing federal agencies to adopt "rules, regulations, or orders" to effectuate Title VI's prohibition on race discrimination and to terminate funding to grantees that fail to comply); 49 U.S.C. 5309(c)(4) (stating that transit grants "shall be subject to all terms, conditions, requirements, and provisions that the Secretary determines to be necessary or appropriate"); 54 U.S.C. 302902(b)(1)(D) (requiring States receiving National Park Service grants for historic preservation to follow such "terms and conditions as the Secretary may consider necessary or advisable").

of those grants. Oklahoma was accordingly able to "exercise [its] choice" to accept Title X funds "knowingly, cognizant of the consequences of [its] participation" in the program. Pennhurst, 451 U.S. at 17. And because participation in Title X is of course "voluntary," Oklahoma could have "forgo[ne] the benefits of federal funding" rather than complying with the conditions on that funding. Id. at 11. Title X's statutory and regulatory scheme thus comfortably satisfies the Spending Clause.

3. Oklahoma's contrary arguments lack merit. Oklahoma primarily asserts (Appl. 14) that because Title X itself does not unambiguously "require abortion referrals," HHS may not condition Title X grants on recipients' compliance with the 2021 rule's counseling and referral requirements. See Rust v. Sullivan, 500 U.S. 173, 184 (1991) (finding Section 1008 "ambiguous" as to "the issues of counseling" and "referral"). But that assertion ignores Section 300a-4 (quoted above), which unambiguously requires grant recipients to comply with HHS regulations governing the use of grant funds.

Oklahoma appears to maintain that Congress could not condition participation in Title X on compliance with regulatory requirements adopted by HHS, and instead had to set forth all grant conditions in the statute itself. This Court has never suggested that the Spending Clause imposes such a requirement, which would

radically alter Title X and countless other federal spending programs. For example, Medicare's "Conditions of Participation" for hospitals alone span some 48 pages in the Code of Federal Regulations. 42 C.F.R. Pt. 482 (capitalization altered; emphasis omitted); see p. 26 n.3, supra (listing other examples). On Oklahoma's view, all of those conditions are invalid because they are not specifically set forth in the statute.

Oklahoma's view would also necessarily mean that the regulations upheld in Rust -- the very case on which Oklahoma itself chiefly relies -- violated the Spending Clause. The Court held that Title X was "ambiguous" on "counseling, referral, advocacy, [and] program integrity" because the statute "does not speak directly to [those] issues." Rust, 500 U.S. at 184, 187. But the Court nonetheless upheld the 1988 rule's requirements addressing those topics. Id. at 187, 189-190. On Oklahoma's view of the Spending Clause, all of the requirements of the 1988 rule were necessarily invalid because -- as Rust recognized -- they were not "unambiguously required by the Title X statute," Appl. 14.

Oklahoma insists (Appl. 15) that the Tenth Circuit's decision "authorize[s] executive branch agencies to create critical substantive conditions even where Congress did not speak." But Congress did speak when it expressly empowered the Secretary to prescribe the "conditions" he "may determine to be appropriate to assure that [Title X] grants will be effectively utilized for the

purposes for which made." 42 U.S.C. 300a-4(b). Contrary to Oklahoma's suggestion (Appl. 16), Section 300a-4 is not merely a "generic" "procedural provision." Rather, like the provision at issue in Missouri, it includes "broad language" "authoriz[ing] the Secretary to impose conditions on the receipt of" federal funds; and just as there, those conditions may be substantive -- not merely "bureaucratic rules regarding the technical administration" of the program. 595 U.S. at 93-94.[4]

B. Oklahoma's Weldon Amendment Argument Lacks Merit

Oklahoma's Weldon Amendment argument fares no better than its Spending Clause argument. The Weldon Amendment provides that annually appropriated HHS funds, including Title X funds, may not be "made available to a Federal agency or program, or to a State or local government, if such agency, program, or government subjects

[4] In a footnote, Oklahoma suggests (Appl. 19 n.2) that the Court could "remand for a thorough analysis" of Loper Bright Enterprises v. Raimondo, 144 S. Ct. 2244 (2024), suggesting that the 2021 rule exceeds HHS's authority because "absent Rust and Chevron deference, Title X's prohibition on abortion prohibits abortion referrals." Oklahoma pressed a version of that facial challenge to the 2021 rule in the Ohio case, but it has failed to raise such a challenge here. See pp. 20-21, supra. And the Tenth Circuit has already addressed Loper Bright's relevance, noting that this Court "clarified that it was not 'calling into question prior cases that had relied on the Chevron framework'" and that Loper Bright thus provides no reason to depart from Rust. Appl. App. 31 n.16 (quoting Loper Bright, 144 S. Ct. at 2273) (brackets and citation omitted). There is no basis for a remand to consider the effect of a decision that the Tenth Circuit has already addressed on a claim that Oklahoma has not raised in this case.

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." Pub. L. No. 118-47, Div. D, Tit. V, § 507(d)(1), 138 Stat. 703 (2024). As the Tenth Circuit explained, "Oklahoma must prove two elements" to succeed on its Weldon Amendment claim: (1) OSDH "constitutes a health-care entity"; and (2) HHS "has discriminated against [OSDH] for declining to refer pregnant women for abortions." Appl. App. 22. Oklahoma has not carried its burden as to either element. And even if it had, it still would not have established OSDH's right to continued Title X funding because it appears that at least some services under OSDH's grant were provided by non-state entities, and the Weldon Amendment would not justify OSDH's refusal to allow those entities to provide the phone number for the third-party hotline upon a patient's request.

1. As a threshold matter, a state administrative agency like OSDH is not a "health care entity" under the Weldon Amendment. The Amendment defines "'health care entity'" to "include[] 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." § 507(d)(2), 138 Stat. 703. That definition does not include government administrative agencies within its listed terms. To the contrary, the Amendment's

sole mention of "State or local government[s]" is in describing the actors that are barred from "subject[ing]" other entities "to discrimination." § 507(d)(1), 138 Stat. 703. That further confirms that Congress did not extend the Amendment's protection to state administrative agencies as potential victims of discrimination.

Oklahoma now asserts (Appl. 26) that OSDH qualifies as a "health care entity" because it falls within the statutory definition's residual phrase, "any other kind of health care facility, organization, or plan," § 507(d)(2), 138 Stat. 703. But especially when read in context, that language does not naturally include a state administrative agency. And Oklahoma took precisely the opposite position in the Ohio litigation. There, it represented to the Sixth Circuit that States are "not protected under" the Weldon Amendment, explaining that "while individual doctors working for the States might be" protected, the Amendment does not apply to "a government grantee." Br. of Appellants at 54, Ohio, supra (No. 21-4235). Oklahoma was right before: State administrative agencies do not qualify as "health care entities" under the Weldon Amendment; and as such an entity, OSDH cannot invoke the Amendment's protections here.[5]

[5] While a 2019 HHS regulation stated without analyzing the statutory text that "components of State or local governments may be health care entities under the Weldon Amendment," 84 Fed. Reg. 23,170, 23,264 (May 21, 2019), that regulation has been rescinded

2. Even if OSDH could qualify as a "health care entity," the Weldon Amendment still would not apply because HHS has not discriminated against OSDH for refusing to "refer for abortions." § 507(d)(1), 138 Stat. 703; see Appl. App. 23. A "referral" is "[t]he act or an instance of sending or directing to another for information, service, consideration, or decision." Black's Law Dictionary 1533 (11th ed. 2024); see The New Oxford American Dictionary 1423 (2d ed. 2005) ("an act of referring someone or something for consultation, review, or further action"). And the preposition "for" is "'a function word to indicate purpose'" or "'an intended goal.'" Appl. App. 24 (citation omitted). It therefore "link[s] conduct to a particular purpose." Ibid. Accordingly, "[t]he combined phrase (refer for) * * * suggests that the Weldon Amendment prohibits discrimination against entities for refusing to refer individuals for the purpose of getting abortions." Ibid.

Here, HHS did not terminate OSDH's grant because OSDH refused to refer individuals to medical providers for the purpose of obtaining abortions. Rather, HHS terminated the grant because OSDH refused to ensure that interested patients received a "national call-in number" for a hotline whose third-party operators would

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in relevant part through notice-and-comment rulemaking. See 89 Fed. Reg. 2078, 2081-2082 (Jan. 11, 2024).

satisfy the requirement to "supply neutral information" about family-planning options, including abortion. Appl. App. 25; see id. at 280 (HHS grant termination letter). A clinic thus could have responded to a patient's request for information about abortion by saying: "We cannot discuss abortion with you or direct you to an abortion provider, but you may call this hotline for nondirective information about your options." That statement is not a referral for abortion within the meaning of the Weldon Amendment, and HHS did not violate the Amendment by requiring OSDH to ensure that interested patients received the hotline number.

Oklahoma also contends (Appl. 34-35) that HHS's actions violate the Weldon Amendment because HHS's grant termination cited the 2021 rule, which requires Title X projects to provide a "referral upon request" "on each of the [family-planning] options," including "[p]regnancy termination." 42 C.F.R. 59.5(a)(5)(i)(C) and (ii). But as this case illustrates, HHS does not interpret the rule to require the sort of referral addressed by the Weldon Amendment -- a direction to a medical provider for the purpose of obtaining an abortion. Instead, HHS interprets the rule to allow objecting grantees to refer individuals to a third-party hotline to obtain information about abortion and any subsequent referral to a specific provider. And because this case is not a challenge to the rule but instead a challenge to a specific grant termina-

tion, the question here is not whether the rule's referral requirement is facially consistent with the Weldon Amendment or could be applied in a manner inconsistent with the Amendment. Instead, the only question presented here is whether HHS violated the Weldon Amendment by requiring OSDH to ensure that interested patients receive the number for a third-party hotline. It did not.

3. Finally, even if Oklahoma could show that OSDH is a "health care entity" protected by the Weldon Amendment and that the mere provision of the hotline number constitutes a referral for abortion within the meaning of the Amendment, it still would not be entitled to relief. The Amendment provides that a health care entity may not be subjected to discrimination "on the basis that the health care entity does not * * * refer for abortions." § 507(d)(1), 138 Stat. 703 (emphasis added). At most, that would mean that HHS could not require that OSDH itself provide covered referrals -- it would not allow OSDH to prevent any other providers funded by the grant from providing referrals. And although the preliminary-injunction record contains limited information about how services were provided under OSDH's grant, it appears that at least some services were provided by other entities.

Oklahoma's declarant in the district court stated that OSDH disbursed its Title X funding "to the State's 68 county health departments ('County Partners')," which provide the relevant services. Appl. App. 184. Oklahoma now suggests (Appl. 25-26) that

at least some of the providers in the county health departments are OSDH employees. But the State's declarant also explained that in the State's "most heavily populated counties," OSDH does not provide services itself but instead "contracts with the Oklahoma City-County Health Department and the Tulsa County Health Department." Appl. App. 184-185. Oklahoma has not asserted that those contractors are part of OSDH, and it has elsewhere described them as "autonomous offices managed outside of state government." Transparent Oklahoma Performance, Oklahoma State Department of Health (Apr. 11, 2024), https://oklahoma.gov/top/agency/340.html.

Oklahoma has never suggested that those local contractors object to providing interested patients with the hotline number. And it has not attempted to explain how OSDH could transform the shield provided by the Weldon Amendment into a sword empowering it to prohibit other willing providers from making referrals. Accordingly, even if Oklahoma were likely to prevail on both its argument that OSDH itself is a "health care entity" and its argument that merely providing the hotline number is a referral within the meaning of the Weldon Amendment, that still would not justify its refusal to allow any provider within its Title X project to make such referrals. And that refusal would have justified HHS's decision to terminate OSDH's grant even if Oklahoma's Weldon Amendment arguments were correct. See 45 C.F.R. 75.371(c).

III. THE EQUITIES DO NOT JUSTIFY EXTRAORDINARY RELIEF

Even if Oklahoma could satisfy the other requirements for an injunction, the "equities" and "relative harms" to the parties would still counsel against relief. Hollingsworth v. Perry, 558 U.S. 183, 190 (2010) (per curiam). Any harm to Oklahoma resulting from the loss of a modest amount of discretionary funding is far outweighed by the harm the public would suffer if HHS were prevented from enforcing its longstanding counseling and referral requirements.

A. The principal harm that Oklahoma identifies (Appl. 39) is the loss of "$ 4.5 million in funding" for OSDH's Title X project. But that sum is a small fraction of the $541.2 million in federal funding that OSDH currently receives. Appl. App. 188 ¶ 29. And it is an even smaller fraction of OSDH's overall budget, which was nearly $629 million in the most recent fiscal year.[6] In 2023, Oklahoma had sufficient revenue to appropriate additional state funds for family-planning projects when its federal Title X grant was in jeopardy. Id. at 187 ¶ 23. Oklahoma provides no reason to doubt that its legislature can make further appropriations, saying only that "there is no guarantee" that it will. Ibid. Nor does Oklahoma deny that other entities in the State

[6] See Oklahoma, FY 2025 Executive Budget: Historical Data, 83-89, https://oklahoma.gov/content/dam/ok/en/omes/documents/bud25hd.pdf (last visited Aug. 15, 2024).

have received Title X funds, or that those entities can step in to provide family-planning services if OSDH chooses not to. See C.A. App. 404 ¶ 26.

Contrary to Oklahoma's characterization (Appl. 39), the $4.5 million grant at issue here is not "Oklahoma's funding." Oklahoma has no right to continued receipt of Title X funds. Instead, HHS regulations clearly state that "continuation awards" -- like the one OSDH asks this Court to compel -- "require a determination by HHS that continued funding is in the best interest of the government," and that the past award of a grant does not "commit[] or obligate[] the United States in any way to make any additional, supplemental, continuation, or other award." 42 C.F.R. 59.8(b) and (c). The discretionary, year-by-year nature of Title X grants thus undercuts Oklahoma's claimed harm.

Oklahoma also suggests (Appl. 40) that HHS's actions infringe its sovereign "right to determine [abortion] policy." That is wrong. Nothing in this case affects Oklahoma's ability to restrict abortion within its borders. Nor is it apparent how referring patients to a hotline -- as HHS proposed -- could plausibly violate Oklahoma's restriction on "administer[ing]," "prescrib[ing]," or "advis[ing] or procur[ing]" an abortion. Okla. Stat. Ann. Tit. 21, § 861 (West 2015); see Appl. App. 131. But in any event, OSDH is free to follow its own understanding of state abortion law and policy, while simply "declin[ing] the [Title X] subsidy." Rust,

500 U.S. at 199 n.5. As the Court explained in Rust, States are "in no way compelled to operate a Title X project"; they "can choose between accepting Title X funds -- subject to the Government's conditions," or "declining the subsidy and financing their own unsubsidized program." Ibid.

B. On the other side of the balance, enjoining the grant termination in this case would cause irreparable harm to the government and patients served by Title X projects. See Nken v. Holder, 556 U.S. 418, 435 (2009) (recognizing that the government's interest and the public interest "merge"). "Any time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." King, 567 U.S. at 1303 (Roberts, C.J., in chambers) (brackets and citation omitted). A fortiori that must be true for the federal government, which is responsible for implementing Acts of Congress that serve and protect the people of all the States. See Labrador v. Poe, 144 S. Ct. 921, 923 (2024) (Gorsuch, J., concurring in the grant of stay) ("'[T]here is always a public interest in prompt execution' of the law, absent a showing of its unconstitutionality.") (citation omitted). Here, HHS's counseling and referral requirements implementing Title X date back to 1981 and have been in effect for most of the program's history.

Enjoining HHS's termination of Oklahoma's grant would also harm the patients served by Title X programs. HHS determined that

counseling and referral are "critical for the delivery of quality, client-centered care." 86 Fed. Reg. at 56,154. Without them, patients would be deprived of neutral information about "all pregnancy options." Ibid. That runs squarely counter to Title X's fundamental goal: ensuring that patients are "offer[ed] a broad range of acceptable and effective family planning methods and services." 42 U.S.C. 300(a).

CONCLUSION

The application should be denied.

Respectfully submitted.

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