No. 24A146

In the Supreme Court of the United States

STATE OF OKLAHOMA,

Applicant,

v.

UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, XAVIER BECERRA, in his official capacity as the Secretary of the U.S. Department of Health and Human Services, JESSICA S. MARCELLA, in her official capacity as Deputy Assistant Secretary for Population Affairs; and OFFICE OF POPULATION AFFAIRS,

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)

RESPONSE TO DEFENDANTS' SUPPLEMENTAL MEMORANDUM

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

Oklahoma offers three responses to Defendants' supplemental memorandum. First, nothing in the Sixth Circuit's divided decision Monday addressed the Weldon Amendment. That issue simply was not before that court, as Defendants acknowledge. Supp. Memo. 4. Here, however, the Weldon Amendment has been squarely presented. And it remains the simplest and most straightforward route for an injunction or a stay, given that a ruling in Oklahoma's favor would do nothing to undermine or upset the 2021 Rule, but rather would prevent Defendants from brazenly breaking the express promises they made to objecting grantees in promulgating that rule.

Second, regarding the Spending Clause, Defendants write that "the Sixth Circuit explained that its decision was consistent with *West Virginia ex rel. Morrisey v. U.S. Department of Treasury*, 59 F.4th 1124 (11th Cir. 2023)." Supp. Memo. 2. But the Sixth Circuit's actual interaction with *Morrisey* was limited, in a 23-page opinion, to a single sentence and a footnote that cited the Tenth Circuit. Supp. Memo. App. 9a–10a & n.4. This truncated approach does not even remotely convey the nature of the Eleventh Circuit's decision in *Morrisey*. Neither the Sixth Circuit nor the Tenth Circuit ever acknowledged the Eleventh Circuit's repeated emphasis that "[a]llowing 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 (quoting *Tex. Educ. Agency v. U.S. Dep't of Educ.*, 992 F.3d 350, 362 (5th Cir. 2021)); *see also id.* ("the 'needed clarity'

under the Spending Clause 'must come directly from the statute' (quoting *Tex. Educ. Agency*, 992 F.3d at 361)); *id.* at 1148 ("Just as an agency cannot choose its own intelligible principle, it cannot provide the content that makes a funding condition ascertainable."); *id.* ("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."). The circuit split is undeniable, and it is growing.[1]

Third, Defendants' description of Judge Kethledge's partial dissent leaves much to be desired. Defendants recognize that Judge Kethledge "would have held that HHS's referral requirement likely violates Section 1008." Supp. Memo. 4. But Defendants neglect to explain *why* Judge Kethledge was interpreting Section 1008 at all. Turns out, Judge Kethledge's view is that *Rust v. Sullivan*, 500 U.S. 173 (1991), is no longer controlling after *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244 (2024). Specifically, he wrote: In "*Loper Bright*, the Chief Justice was surpassingly clear" in explaining that only the "holdings of those cases *that specific agency actions are lawful* … are still subject to statutory *stare decisis*." Supp. Memo. App. 26a (Kethledge, J., dissenting in part and concurring in the judgment in part) (quoting *Loper Bright*, 144 S. Ct. at 2273). And the "specific agency action" in *Rust*, the 1988 prohibition on referrals, "has since been rescinded." *Id.* Oklahoma made similar observations here, arguing that a remand might be appropriate given the Tenth

[1] Moreover, as can be seen from the Eleventh Circuit's citations, the split is broader than just the Eleventh versus the Tenth and Sixth Circuits. In *Texas Education Agency*, for example, the Fifth Circuit held that "[r]elying on regulations to present the clear condition, therefore, is an acknowledgement that Congress's condition was not unambiguous," and that "regulations cannot provide the clarity needed" under the Spending Clause. 992 F.3d at 361–62.

Circuit's refusal to take *Loper Bright*'s binding words into account. Okla. Appl. at 19 n.2; *see also* Okla. Reply at 8 ("The specific agency action in *Rust* (*prohibiting* referrals) is not the same as the specific agency action here (*requiring* referrals)."). In short, Judge Kethledge supports Oklahoma's position on this point and illustrates the need for a more considered review of *Rust*.

Moreover, Defendants are simply wrong that "the Sixth Circuit's resolution of Tennessee's statutory argument [contra Judge Kethledge] has no bearing on Oklahoma's application because … Oklahoma's application raised no comparable statutory argument." Supp. Memo. 4. Oklahoma's *entire Spending Clause argument* is a Title X statutory argument—that Title X is at least ambiguous as to abortion referrals, meaning they cannot be required. With *Rust* as good law, that argument was by its nature succinct, because *Rust* decided that question. All Oklahoma had to do was point to *Rust* (and explain why mere regulations are not enough). But that does not mean Oklahoma has somehow waived the ability to argue through statutory construction that, absent *Rust*, Title X is at *minimum* ambiguous as to referrals. Indeed, Oklahoma preserved the right to make such arguments at multiple points during the proceedings below. *E.g.*, App. 173 (preserving the "ability to argue … for evaluating this case absent *Chevron* entirely"). Put differently, if Judge Kethledge is correct that *Rust* is kaput and "the abortion-referral requirement violates § 1008," Supp. Memo. App. 30a, then Oklahoma should also prevail under the Spending Clause because the referral requirement would be clearly unlawful, not just ambiguous.

Respectfully submitted,

s/ *Zach West*

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