No. 20-

In the Supreme Court of the United States

AMERICAN MEDICAL ASSOCIATION, *et al.*, *Petitioners*,

v.

ALEX M. AZAR II, IN HIS OFFICIAL CAPACITY AS SECRETARY OF HEALTH AND HUMAN SERVICES, *et al.*, *Respondents.*

NATIONAL FAMILY PLANNING & REPRODUCTIVE HEALTH ASSOCIATION, *et al.*, *Petitioners*,

v.

ALEX M. AZAR II, IN HIS OFFICIAL CAPACITY AS SECRETARY OF HEALTH AND HUMAN SERVICES, *et al.*, *Respondents.*

ESSENTIAL ACCESS HEALTH, INC., *et al.*, *Petitioners*,

v.

ALEX M. AZAR II, IN HIS OFFICIAL CAPACITY AS SECRETARY OF HEALTH AND HUMAN SERVICES, *et al.*, *Respondents.*

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In 2019, the Department of Health and Human Services (HHS) issued a Rule imposing major changes on the Title X family planning program. *See* 84 Fed. Reg. 7,714 (Mar. 4, 2019). The Rule both prohibits and compels certain pregnancy-related speech between a Title X provider and her patient, proscribing abortion-related information but requiring information about non-abortion options—regardless of what the patient wants. The Rule also imposes burdensome physical-separation requirements on any Title X provider engaging in abortion-related activities outside the Title X program. All of the nation's major medical organizations opposed the Rule, explaining that it would violate fundamental medical ethics, force numerous providers out of the program, and leave patients with deficient health care. The en banc Ninth Circuit upheld the Rule against arbitrary-and-capricious and contrary-to-law challenges. The en banc Fourth Circuit invalidated the Rule on those same grounds.

The questions presented are:

1. Whether the Rule is arbitrary and capricious.

2. Whether the Rule violates the Title X appropriations act, which requires that "all pregnancy counseling" under Title X "shall be nondirective."

3. Whether the Rule violates Section 1554 of the Affordable Care Act, 42 U.S.C. § 18114, which requires that HHS "shall not promulgate any regulation" that harms patient care in any one of six ways, including by "interfer[ing] with communications" between a patient and her provider.

PARTIES TO THE PROCEEDING

Petitioners are:

- American Medical Association; Oregon Medical Association; Planned Parenthood Federation of America, Inc.; Planned Parenthood of Southwestern Oregon; Planned Parenthood Columbia Willamette; and Thomas N. Ewing, M.D.—all of which were plaintiffs in the proceeding below in the District of Oregon and appellees in the court of appeals;
- National Family Planning & Reproductive Health Association; Feminist Women's Health Center; and Deborah Oyer, M.D.—all of which were plaintiffs in the proceeding below in the Eastern District of Washington and appellees in the court of appeals;
- Essential Access Health, Inc. and Melissa Marshall, M.D.—both of which were plaintiffs in the proceeding below in the Northern District of California and appellees in the court of appeals.[*]

Respondents are:

- Alex M. Azar II, in his official capacity as the Secretary of Health and Human Services; U.S. Department of Health & Human Services; Diane Foley, M.D., in her official capacity as the Deputy Assistant Secretary, Office of Population Affairs; and the Office of Population Affairs—all

[*] Michele P. Megregian, C.N.M., a plaintiff in the District of Oregon proceeding, and Teresa Gall, a plaintiff in the Eastern District of Washington proceeding, have recently left their respective positions and are not petitioners here.

which were defendants in the proceedings below and appellants in the court of appeals.

The States of Oregon, New York, Colorado, Connecticut, Delaware, Hawaii, Illinois, Maryland, Michigan, Minnesota, Nevada, New Jersey, New Mexico, North Carolina, Rhode Island, Vermont, and Wisconsin, the Commonwealths of Massachusetts, Pennsylvania, and Virginia, and the District of Columbia were also plaintiffs in the proceeding below in the District of Oregon and appellees in the court of appeals. They are separately represented and are not petitioners here.

The State of Washington was a plaintiff in the proceeding below in the Eastern District of Washington and an appellee in the court of appeals. It is separately represented and is not a petitioner here.

The State of California was a plaintiff in the proceeding below in the Northern District of California and an appellee in the court of appeals. It is separately represented and is not a petitioner here.

CORPORATE DISCLOSURE STATEMENT

The corporate petitioners—American Medical Association; Oregon Medical Association; Planned Parenthood Federation of America, Inc.; Planned Parenthood of Southwestern Oregon; Planned Parenthood Columbia Willamette; National Family Planning & Reproductive Health Association; Feminist Women's Health Center; and Essential Access Health, Inc.—all disclose that they have no parent corporation, nor is there any publicly held corporation that owns 10% or more of their stock.

DIRECTLY RELATED PROCEEDINGS

There are three directly related proceedings within the meaning of this Court's Rule 14.1(b)(iii):

1. *Oregon* v. *Azar*: D. Or. Nos. 19-317, 19-318; 9th Cir. No. 19-35386. The district court entered a preliminary injunction on April 29, 2019, which was vacated by the en banc Ninth Circuit decision challenged in this petition.

2. *Washington* v. *Azar*: E.D. Wash. Nos. 19-3040, 19-3045; 9th Cir. No. 19-35394. The district court entered a preliminary injunction on April 25, 2019, which was vacated by the en banc Ninth Circuit decision challenged in this petition.

3. *California* v. *Azar*: N.D. Cal. Nos. 19-1184, 19-1195; 9th Cir. Nos. 19-15974, 19-15979. The district court entered a preliminary injunction on April 26, 2019, which was vacated by the en banc Ninth Circuit decision challenged in this petition.

The Rule at issue was also challenged in two other district courts:

1. *Mayor & City Council of Baltimore* v. *Azar*: D. Md. No. 19-1103; 4th Cir. Nos. 19-1614, 20-1215. The district court issued a preliminary injunction on May 30, 2019, and a permanent injunction on February 14, 2020. The permanent injunction was affirmed by the en banc Fourth Circuit on September 3, 2020.

2. *Family Planning Ass'n of Maine* v. *Azar*: D. Me. No. 19-100; 1st Cir. No. 20-1781. The district court denied the plaintiffs' motion for a preliminary injunction on July 3, 2019, and then denied the plaintiffs' motion for summary judgment and dismissed the complaint on June 9, 2020. The plaintiffs filed a notice of

appeal to the First Circuit on August 7, 2020; briefing is set to begin on November 12, 2020, and argument is not yet scheduled.

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INTRODUCTION

This case concerns challenges to an HHS Rule that warps and decimates the Title X family planning program—a vital public health program that has provided critical care to millions of people each year. Two en banc circuits are split over the Rule's validity. The

Ninth Circuit upheld it against petitioners' arbitrary-and-capricious and contrary-to-law challenges. The Fourth Circuit found that decision flawed and reached opposite conclusions, holding the Rule both arbitrary and capricious and contrary to law. *See Mayor & City Council of Baltimore* v. *Azar*, __ F.3d __, 2020 WL 5240442, at *1 (4th Cir. 2020) (en banc). This Court's review is warranted to resolve that circuit conflict on important questions of federal law, and to correct the Ninth Circuit's erroneous decision.

For five decades, the Title X program has been an extraordinary success, serving to ensure that all individuals have access to family planning care—regardless of where they live or their economic means. The program provides vital health care services, like contraception, testing and treatment for sexually transmitted infections, breast and cervical cancer screening, and pregnancy testing and counseling. And, in accordance with the program's mission, these services must be provided free of charge to patients with incomes below the federal poverty level.

Since the program's inception, Section 1008 of Title X has provided that no program funds "shall be used in programs where abortion is a method of family planning." Title X projects have therefore never provided abortions, and this case is not about providing abortions. Rather, this case is about regulations that impose sweeping and harmful restrictions on a broad array of Title X services, including pregnancy counseling—none of which involves the provision of abortion.

Before the Rule, HHS had long recognized the importance of full, open communication to the patient-provider relationship and to medical ethics. Thus, for decades, HHS had consistently interpreted Section

1008 and administered the Title X program to require that providers offer pregnant patients the opportunity to receive nondirective counseling on all their medical options, including abortion. That position respects the integrity of the patient-provider relationship and is consistent with both medical ethics and HHS's own standards of care for all family planning professionals.

Moreover, through two other federal laws, Congress has constrained HHS's authority to issue regulations intruding on the patient-provider relationship. Beginning in 1996, Congress has repeatedly mandated in Title X appropriations acts that "all pregnancy counseling" under Title X "shall be nondirective" (the "Nondirective Mandate"). And in Section 1554 of the Affordable Care Act, Congress prohibited "any [HHS] regulation" that harms patient care in any one of six ways, including by interfering with patient-provider communications or violating the ethical standards of health care professionals.

In 2019, HHS issued a Rule imposing drastic changes on the Title X program. *See* 84 Fed. Reg. 7,714 (Mar. 4, 2019). The Rule requires that Title X providers *withhold* certain information about abortion from pregnant patients, contrary to a patient's stated request. And it requires providers to *force on* patients information about non-abortion options even if a patient does not want or need it. It also imposes cost-prohibitive physical-separation provisions requiring providers to establish separate facilities and to employ duplicative personnel and medical records if they engage in virtually any abortion-related activity *outside* the Title X program.

Every leading medical organization in the United States opposed the Rule. All were unequivocal that it

would violate fundamental principles of medical ethics. At the forefront was the American Medical Association, the author of the most comprehensive and authoritative medical ethical code in the country. The AMA emphasized in its comments that the patient-physician relationship is founded on candor—a point this Court itself recently underscored. *See National Inst. of Family & Life Advocates* v. *Becerra*, 138 S. Ct. 2361, 2374 (2018) ("'Doctors help patients make deeply personal decisions, and their candor is crucial.'"). The AMA thus warned that the Rule's restrictions would "dangerously interfere with the patient-physician relationship and conflict with physicians' ethical obligations." Moreover, long-serving Title X providers made clear they would be forced out of the program—resulting in a mass exodus of providers to the detriment of patients and public health. In its rulemaking, HHS said virtually nothing in response.

A divided Ninth Circuit upheld the Rule. That decision was incorrect, as the Fourth Circuit concluded. The Rule is arbitrary and capricious for several reasons, including that it "failed to recognize and address the ethical concerns of literally every major medical organization in the country." *Baltimore*, 2020 WL 5240442, at *1. The Rule is also contrary to law. It requires Title X projects to steer patients away from abortion and toward carrying a pregnancy to term, which presents a straightforward violation of the Nondirective Mandate. *Id.* at *16-20. The Rule further violates Section 1554 of the ACA, including because it "'interferes with communications' about medical options between a patient and her provider." *Id.* at *20. Finally, this Court's decision in *Rust* v. *Sullivan*, 500 U.S. 173 (1991), does not save the Rule. *Rust* held a similar 1988 rule permissible in light of *that* rulemaking's ad-

ministrative record and under federal law *as it stood at the time*. Things are different now. This Rule arises out of a different administrative record, created 30 years later, which does not support it. And this Rule is governed by two different federal laws, enacted after *Rust*, requiring that counseling be nondirective and that no HHS regulation interfere with patient-provider communications. The Rule violates both.

OPINIONS BELOW

The en banc court of appeals' opinion (App. 1a-94a) is reported at 950 F.3d 1067. A prior panel order on respondents' motion for stay pending appeal (App. 271a-289a) is reported at 927 F.3d 1068. The opinions of the district courts (App. 95a-134a, 135a-157a, 159a-269a) are reported at 389 F. Supp. 3d 898, 376 F. Supp. 3d 1119, 385 F. Supp. 3d 960.

JURISDICTION

The court of appeals entered judgment on February 24, 2020. A timely petition for rehearing was denied on May 8, 2020. App. 291a-293a. By order dated March 19, 2020, this Court extended the deadline to file any petition for a writ of certiorari to 150 days from, as relevant here, an order denying a timely petition for rehearing. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved are 5 U.S.C. § 706, 42 U.S.C. § 300a-6, 42 U.S.C. § 18114, Pub. L. No. 116-94, tit. II, 133 Stat. 2534, 2558, and 42 C.F.R. §§ 59.1-59.19. They are reproduced in the appendix to this brief. App. 295a-327a.

STATEMENT

A. Title X

The Title X program's central purpose is "to assist in making comprehensive voluntary family planning services readily available to all persons desiring such services." Pub. L. No. 91-572, § 2(1), 84 Stat. 1504, 1504 (1970). Congress created the program because modern family planning services were not then available throughout the country and often left out patients most in need. *See, e.g.*, S. Rep. No. 91-1004, at 9-12 (1970).

The Title X program has provided state-of-the-art, evidence-based family planning care to millions of people who could not otherwise afford it. Title X providers (funded through grants from HHS) have kept pace with advances in contraceptive care, and offer a broad range of essential services, including testing and counseling. As a result, the program has helped reduce rates of unintended pregnancy and abortion to historic lows.

Petitioners are leading national and state health care organizations with a deep dedication to the Title X program—including the American Medical Association, the National Family Planning & Reproductive Health Association (NFPRHA), Planned Parenthood, and Essential Access Health (Essential Access)—and individual health care professionals. The AMA is the largest professional association of physicians, residents, and medical students in the United States. It "literally wrote the book on medical ethics" (App. 124a)—the *Code of Medical Ethics*, which was the first national medical ethics code in the world and is widely recognized as the most comprehensive and authoritative ethical code for physicians.

NFPRHA, formed just after Title X was enacted, has represented the majority of the public entities and non-profit organizations in the Title X network through its history, supporting them in providing the highest levels of care on tight budgets. Essential Access has been a Title X grantee since the program's inception and for decades has administered the largest Title X provider network in the country, serving low-income patients throughout California. Before the Rule, California's Title X system served approximately one million patients annually; after just a few months under the Rule in 2019, the program's reach was reduced by more than 300,000 patients. *See* Office of Population Affairs, *Title X Family Planning Annual Report, 2019 National Summary*, at B-2 (Sept. 2020). As for Planned Parenthood, its affiliates collectively provided Title X services to an estimated 1.5 million individuals each year—approximately 40% of all patients who received care in the Title X program—until the Rule forced them out.

B. Statutory And Regulatory Background

Section 1008 of Title X provides that no program funds "shall be used in programs where abortion is a method of family planning." 42 U.S.C. § 300a-6. HHS's regulations have long prohibited Title X projects from providing abortions, and have required Title X grantees that provide abortions outside the Title X project to keep such activities "separate and distinct from Title X project activities." 65 Fed. Reg. 41,281, 41,282 (July 3, 2000). Since the program's inception, Title X care has been delivered by some providers who—*outside* the Title X program, with *non*-Title X funds—have also provided abortion services. And providers have long been authorized to share facilities, staff, and health records

systems with activities outside their Title X projects, including any "[n]on-Title X abortion activities." *Id.*

Moreover, for virtually the entire history of the program, HHS has made clear that Section 1008 does not prevent Title X providers from communicating with their patients about abortion in a non-directive way. *See* 65 Fed. Reg. 41,270, 41,271-41,272 (July 3, 2000). Thus, Title X regulations have long required that providers offer pregnant women the opportunity to receive nondirective counseling on all their medical options, including abortion. *See, e.g.*, *id.* at 41,270.

There was one brief exception. In 1988, HHS issued a rule that broadly prohibited Title X providers from discussing abortion with their pregnant patients. *See* 53 Fed. Reg. 2,922, 2,945 (Feb. 2, 1988). HHS also required Title X providers to "physically" separate their Title X services from abortion-related services. *Id.* at 2,940, 2,945.

Title X providers brought certain statutory and constitutional challenges to these changes, and this Court upheld the 1988 rule in *Rust* v. *Sullivan*, 500 U.S. 173 (1991). But HHS reversed itself just six months later. "[R]esponding to widespread concerns that [the 1988 rule] would interfere with the doctor-patient relationship," President George H.W. Bush issued a directive to HHS "cutting back significantly on [the rule's] scope and proscriptions." *National Family Planning & Reprod. Health Ass'n* v. *Sullivan*, 979 F.2d 227, 230, 235 (D.C. Cir. 1992). As President Bush declared: "'[P]atients and doctors can talk about absolutely anything they want, and they should be able to do that.'" *Id.* at 230. The 1988 rule was never fully implemented. When President Clinton took office, he di-

rected HHS to suspend the 1988 rule and promulgate new regulations. 58 Fed. Reg. 7,462 (Feb. 5, 1993).

Meanwhile, Congress acted to ensure that patients would have the right to receive vital medical information. In 1996, and every year since then, Congress has mandated in appropriations acts that "all pregnancy counseling" under Title X "shall be nondirective." *E.g.*, Pub. L. No. 116-94, tit. II, 133 Stat. 2534, 2558 (2019). As HHS acknowledged in the Rule here, the Nondirective Mandate requires the "meaningful presentation of options" without "'suggesting or advising one option over another.'" 84 Fed. Reg. at 7,716. That includes "present[ing] the options in a factual, objective, and unbiased manner" and ensuring that patients "take an active role in processing their experiences and identifying the direction of the interaction." *Id.* at 7,716, 7,747.

In 2000, consistent with the Nondirective Mandate, HHS issued a new rule formally repudiating the previously suspended 1988 rule. The 2000 rule required that patients be offered, and receive as requested, "nondirective counseling" on all pregnancy options, including abortion. 65 Fed. Reg. at 41,270. As HHS explained then, "[t]he policies reflected in, and interpretations reinstituted in conjunction with, the [2000 rule] … have been used by the program for virtually its entire history." *Id.* at 41,271.

HHS further recognized that the 2000 rule's requirements accord with "medical ethics and good medical care," and also implement Congress's "repeated[]" mandate "that pregnancy counseling in the Title X program be 'nondirective.'" 65 Fed. Reg. at 41,273. It found that the 1988 rule had "endanger[ed] women's lives and health by preventing them from receiving

complete and accurate medical information and interfere[d] with the doctor-patient relationship by prohibiting information that medical professionals are otherwise ethically and legally required to provide to their patients." *Id.* at 41,270.

In the 2000 rule, HHS also repudiated the 1988 rule's physical-separation requirement. Instead, the 2000 rule required Title X grantees to ensure that Title X funds were not used for any "[n]on-Title X abortion activities" and to keep such activities "separate and distinct from Title X project activities." 65 Fed. Reg. at 41,282. The 2000 rule expressly authorized "shared facilities," "common staff," and "single file system[s]." *Id.* As HHS explained, the physical separation contemplated by the 1988 rule was inconsistent "with the efficient and cost-effective delivery of family planning services." *Id.* at 41,276.

Ten years later, as part of the Affordable Care Act, Congress again acted to protect the integrity of the patient-provider relationship. Enacting a statutory prohibition on "any [HHS] regulation" that harms patient care in any one of six enumerated ways, Congress declared:

> Notwithstanding any other provision of this Act, the Secretary of Health and Human services shall not promulgate any regulation that—
>
> > (1) creates any unreasonable barriers to the ability of individuals to obtain appropriate medical care; (2) impedes timely access to health care services; (3) interferes with communications regarding a full range of treatment options between the patient and the pro-

> vider; (4) restricts the ability of health care providers to provide full disclosure of all relevant information to patients making health care decisions; (5) violates the principles of informed consent and the ethical standards of health care professionals; or (6) limits the availability of health care treatment for the full duration of a patient's medical needs.

Pub. L. No. 111-148, § 1554, 124 Stat. 119, 259 (2010) (codified at 42 U.S.C. § 18114).

C. The Rule

Despite the success of Title X under a regulatory framework largely unchanged for decades, HHS proposed major changes in June 2018. As detailed below, the proposed rulemaking was opposed by every leading health care organization in the United States, which warned of its grave consequences. Yet HHS adopted the Rule without material changes. It consists of two primary, integrated provisions.

1. The Rule's first primary provision restricts information Title X providers may give their pregnant patients and forces other information on pregnant patients—regardless of their patients' requests.

The Rule *bans* providers from referring their pregnant patients to abortion providers—even when that is the patient's expressed wish; but it *mandates* referrals for prenatal care—even when the patient has no such interest. 42 C.F.R. §§ 59.5(a)(5), 59.14(a), 59.14(b)(1). Thus, Title X providers are prohibited from telling a pregnant patient how and where she can ob-

tain an abortion, but must provide that information for prenatal care.

Title X projects may furnish patients who want an abortion a "list" of certain health care providers. 42 C.F.R. § 59.14(b)(1)(ii). But the list is distorted by design—it must be skewed to ensure that the patient *not* learn which providers offer abortions. The list may include only "comprehensive primary health care providers (including providers of prenatal care)," *id.* § 59.14(b)-(c))—not reproductive health care specialists. And although some, but not the majority, of those providers may also provide abortion as part of their comprehensive health care services, "[n]either the list nor project staff may identify which providers on the list perform abortion." *Id.* § 59.14(c)(2). Thus, the list must conceal from the patient which providers, if any, would be willing to provide abortion services.

Moreover, even when a patient specifically requests information about abortion *only*, practitioners must disregard the patient's decision. If a practitioner provides any information about abortion, then the patient must *also* be counseled about other options she does not want and must be told about the "risks and side effects to … [the] unborn child." 84 Fed. Reg. at 7,747. But a practitioner need not even respond to the patient's request for information *at all*. Practitioners are authorized to counsel on only some, non-abortion options; they may rebuff questions about abortion and provide no information in response to patient queries. *Id.* at 7,789. In other words, "a patient may come in seeking an abortion, but the only counseling done is on prenatal care." *Baltimore*, 2020 WL 5240442, at *18.

The Rule's second primary provision imposes onerous physical-separation requirements on any Title X

grantee that engages in "prohibited activities," 84 Fed. Reg. at 7,789—virtually anything concerning abortion. The "prohibited activities" are defined by cross-reference to other sections of the Rule, including the speech-based restrictions. *Id.* Thus, Title X projects must not only use separate facilities, systems, and personnel from those involved in providing abortion care outside Title X, but also from any activities HHS might deem to "encourage, promote, or advocate" abortion. *Id.* at 7,788, 7,789.

The physical-separation requirements go substantially further than the 1988 rule and require a more extreme degree of physical distance and duplication: separate office entrances and exits, workstations, phone numbers, email addresses, and health records, for example. Notably, similar factors had been proposed in the 1988 rule, but were then removed when it was promulgated. *Compare* 52 Fed. Reg. 33,210, 33,214 (Sept. 1, 1987), *with* 53 Fed. Reg. at 2,945.

2. The comments in opposition to HHS's proposed rulemaking were extensive and unequivocal about its many flaws. Commenters explained that the proposed rule was contrary to medical ethics, would result in a mass exodus of providers from the Title X program, would leave many patients across the country without access to the program, and would result in deficient patient care and serious adverse health outcomes.

Concerning medical ethics, "'literally all of the nation's major medical organizations'" expressed "'grave … concerns.'" *Baltimore*, 2020 WL 5240442, at *10. At the forefront was the AMA. It warned in its comments that the proposal would "dangerously interfere with the patient-physician relationship and conflict with physicians' ethical obligations" to offer patients open

and frank information about their medical options—the lynchpin of proper medical care. *See* CA4 SJA187-189.[*] The American College of Obstetricians and Gynecologists, American Academy of Family Physicians, American Academy of Nursing, American Academy of Pediatrics, and American College of Physicians all raised similar concerns. *See, e.g.*, *Baltimore*, 2020 WL 5240442, at *10. HHS has since conceded that "no 'professional organization of any kind'" has taken the position that its rulemaking is in line with medical ethics. *Id.*

Long-serving Title X providers and grantees, some of which had participated in the program since its inception, further warned that the Rule would result in a mass exodus of providers from the Title X program and harm patient care. Planned Parenthood providers and four States "notified HHS that they would have to exit the Title X program because the restrictions are 'fundamentally at odds with the professional and ethical obligations of health care professionals.'" *Baltimore*, 2020 WL 5240442, at *10. Title X providers also documented the enormous costs of compliance with the Rule—in particular, the hundreds of thousands of dollars necessary to comply with the physical-separation requirements—which would "'lead to the shuttering of a number of invaluable clinics across the nation.'" *Id.* at *14.

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[*] This petition cites the Ninth Circuit and Fourth Circuit records on appeal. The excerpts of record appended to the Brief for Appellants (respondents here) before the Ninth Circuit (No. 19-35386, Dkt. No. 28-1) are cited as "CA9 ER." As for the Fourth Circuit, the supplemental joint appendix is cited as "CA4 SJA" (No. 19-1614, Dkt. 109).

Thus, as the comments made clear, the Rule imposed a destructive Hobson's choice on Title X providers, forcing them to "choose" between two bad options. They would have to exit Title X, lose federal funding, close clinics, reduce services, and lay off staff—disrupting and delaying care for patients, and especially those with low incomes, who would no longer be ensured free care. *See, e.g.*, CA4 SJA371-373. Or, if providers sought to hang on and continue providing at least some, diminished Title X care for their needy patients, they would have to offer care that no longer met the family planning standards HHS itself had established and conform to a Rule that undermined the functioning of this public health program in myriad ways. *See, e.g.*, CA4 SJA273-310.

HHS adopted the proposed rule in materially identical form, largely disregarding the comments described above. Thus, for example, HHS "merely stated—with no support—that it 'disagree[d]'" with the unanimous conclusion of medical authorities that the Rule violates medical ethics. *Baltimore*, 2020 WL 5240442, at *10. HHS also estimated that a Title X provider would face a cost of $30,000 to comply with the physical-separation requirements—less than 5% of the cost reflected in the administrative record—and provided "no justification … for [that] amount." *Id.* at *14-15. And again with no support, HHS stated that it believed the Rule would "contribute to more clients being served, gaps in service being closed, and improved client care." 84 Fed. Reg. at 7,723.

D. Procedural Background

1. Immediately after HHS issued the Rule, petitioners filed lawsuits in Oregon, Washington, and California, and then moved for preliminary injunctions. Pe-

titioners argued that the Rule was arbitrary and capricious and contrary to law—specifically, the Nondirective Mandate and Section 1554 of the ACA—and that the harms and equities favored an injunction. The basis for federal jurisdiction was 28 U.S.C. § 1331.

All three district courts agreed, preliminarily enjoining the Rule. App. 98a, 156a, 269a. Those courts all found every preliminary-injunction factor in petitioners' favor. Moreover, they rejected HHS's principal argument that the Rule should be upheld under this Court's decision in *Rust*. *See, e.g.*, App. 110a-112a. As the decisions made clear, this case concerns a different administrative record and different governing law, enacted after *Rust*—the Nondirective Mandate and Section 1554 of the ACA. *See, e.g.*, *id.* Finally, each court underscored the harms that would result from the Rule—most important, to patients and public health. As one court found, the Rule "will result in less contraceptive services, … less early breast cancer detection, less screening for cervical cancer, less HIV screening, … less testing for sexually transmitted disease," "more unintended pregnancies," and "more women suffering adverse reproductive health symptoms." App. 97a, 129a-130a.

2. HHS appealed and moved for a stay of all three injunctions pending appeal. A motions panel of the Ninth Circuit granted the stay. App. 289a.

Petitioners sought en banc reconsideration of the stay decision, which the court granted. CA9 Dkt. 85. HHS acknowledged that, because the motions panel's stay order had been "vacated," the preliminary injunctions remained in effect. *See* CA9 Dkt. 115 at 2; *see also* CA9 Dkt. 125 at 10, 14-16. But the en banc court then issued a divided order stating that the motions panel's

stay order "remain[ed] in effect," which allowed HHS to enforce the Rule. CA9 Dkt. 118 at 3.

As a result, while the appeal proceeded, "roughly one in every four Title X service sites … withdr[ew] from the Title X program … , which slashed the national patient capacity in half." *Baltimore*, 2020 WL 5240442, at *11 n.9. Those resulting withdrawals included Planned Parenthood providers, "which alone served roughly 40 percent of Title X patients." *Id.* Moreover, HHS recently reported that "[a]s a result of the … Rule, … the number of Title X service sites was reduced by 945 sites," and the "number of family planning users served in 2019 … was 21% lower than in 2018"—despite the Rule being in effect for only a few months. *See* Office of Population Affairs, *Title X Family Planning Annual Report, 2019 National Summary*, at ES-2 (Sept. 2020); *see also supra* p.7 (describing harm to the Essential Access Title X network in California). Six States now lack any Title X provider. *See* Office of Population Affairs, *Title X Family Planning Directory* (Aug. 2020).

3.a. The en banc Ninth Circuit, in a 7-4 decision, vacated the preliminary injunctions and, going further, upheld the Rule on the merits. App. 5a. The court did not have before it the full administrative record, as the majority acknowledged. App. 25a-27a & n.11. Nonetheless, the majority concluded that "[t]he record before [it] is sufficient to resolve plaintiffs' challenges" (App. 25a), and held that the Rule was valid.

In rejecting petitioners' contrary-to-law claims, the majority invoked this Court's decision in *Rust*, which upheld the 1988 rule under the law at that time, and explained that it would view those claims through an implied-repeal framework. Thus, the majority conclud-

ed, petitioners "must provide evidence" that Congress intended to overrule *Rust* in enacting the Nondirective Mandate or Section 1554. App. 27a-28a. According to the majority, petitioners failed to satisfy that standard. *Id.*

The majority acknowledged that the Nondirective Mandate "amended Title X by expressly requiring all pregnancy counseling to be nondirective." App. 29a n.13. The majority also acknowledged that the Rule prohibits abortion referrals but compels prenatal care referrals—regardless of what a patient requests. App. 29a, 36a. But the majority concluded that the term "counseling" does not include referrals, and, even if it did, nothing in the Nondirective Mandate "requires the provision of referrals for abortion on the same basis as referrals for prenatal care and adoption." App. 40a.

Turning to Section 1554, the majority again invoked *Rust*, relying heavily on the constitutional analysis in that decision. In *Rust*, this Court held that the 1988 rule did not unconstitutionally burden a woman's right to abortion because it concerned only a funding restriction, which, for constitutional purposes, "'places no governmental obstacle in the path of a woman who chooses to terminate her pregnancy.'" 500 U.S. at 201. According to the majority, the same reasoning should apply under Section 1554; thus, the majority saw a distinction between what it described as "§ 1554's prohibition on direct interference with certain health care activities and the … Rule's directives that ensure government funds are not spent for an unauthorized purpose." App. 46a. As a result, the majority concluded, the Rule "does not implicate" Section 1554. App. 48a.

Finally, the majority held that the Rule is not arbitrary and capricious, even though the administrative

record was not before the court. It broadly deferred to HHS's purported "'predictive judgments'" and "'expertise'" and concluded that HHS "properly examined the relevant considerations and gave reasonable explanations." App. 50a-51a, 68a.

b. Four judges dissented. App. 69a.

The dissent explained that the majority's reliance on *Rust* was misplaced because "Congress has … chosen to disburse public funds differently since the days of *Rust*" through the Nondirective Mandate and has also enacted Section 1554. App. 71a. And the Rule violates the Nondirective Mandate, the dissent concluded, because the Rule is "nothing but directive"; "patients are steered toward childbirth at every turn." App. 73a. The Rule also violates the plain terms of Section 1554 of the ACA by, among other things, interfering with communications between a patient and her provider, 42 U.S.C. § 18114(3), and violating the ethical standards of health professionals, *id.* § 18114(5). App. 79a-82a. *Rust*'s constitutional holding, the dissent reasoned, did not change that conclusion. "That a congressional decision not to subsidize abortion does not burden the abortion right in the *constitutional* sense … has no bearing whatsoever on whether an agency has overstepped its statutory authority." App. 82a.

Finally, the dissent concluded that the majority erred by deciding the merits of petitioners' APA claims without the administrative record. App. 83a-84a. The court should have addressed only the "*likelihood* of success on the merits," and under that standard, petitioners should have prevailed. App. 84a. The dissent focused on multiple problems with the Rule, including that it failed to offer a reasoned justification for its "dramatic shift in policy" (App. 86a); failed to respond

meaningfully to the record evidence that the Rule violates medical ethics (App. 87a n.13); and offered an explanation for its cost-benefit analysis that runs contrary to the evidence before the agency (App. 88a-94a).

REASONS FOR GRANTING THE PETITION

I. THE EN BANC FOURTH AND NINTH CIRCUITS ARE SPLIT OVER THE VALIDITY OF THE RULE

The en banc Ninth Circuit's decision is in irreconcilable conflict with the en banc Fourth Circuit's decision in *Mayor & City Council of Baltimore* v. *Azar*, __ F.3d __, 2020 WL 5240442 (4th Cir. 2020) (en banc). In *Baltimore*, the Fourth Circuit ruled for the challengers on the very same grounds that the Ninth Circuit rejected. Thus, as the dissent in *Baltimore* recognized, there is a clear "circuit split" over the validity of the Rule. *Id.* at *29, *53 (Richardson, J., dissenting). In Maryland, the Rule has been suspended; everywhere else, it continues to undermine this vital federal public health program. This conflict—between two en banc circuits on important questions of federal law affecting an essential federal health care program—warrants this Court's review.

1. The Ninth Circuit held that the Rule is "not arbitrary and capricious because," it concluded, "HHS properly examined the relevant considerations and gave reasonable explanations." App. 68a. The Fourth Circuit held the opposite—that the Rule "was promulgated in an arbitrary and capricious manner." *Baltimore*, 2020 WL 5240442, at *1, *9-15.

The Fourth Circuit's analysis focused on two core problems and explained why the Ninth Circuit's reasoning is flawed in both respects. First, the Fourth Circuit concluded, HHS "failed to recognize and ad-

dress the ethical concerns of literally every major medical organization in the country." *Baltimore*, 2020 WL 5240442, at *1. HHS "merely stated" that it "'disagrees'" and "'believes'" the Rule is "'not inconsistent' with medical ethics." *Id.* at *11. But that cursory and unexplained conclusion was insufficient under this Court's precedent. *See id.* at *10, *12 (citing *Motor Vehicle Mfrs. Ass'n of U.S., Inc.* v. *State Farm Mut. Auto. Ins.*, 463 U.S. 29, 56-57 (1983)). And the Fourth Circuit considered and rejected as "unpersuasive" the Ninth Circuit's decision. *Id.* at *13. Among other reasons, "the Ninth Circuit's discussion of medical ethics nowhere mentions the precise issue raised here: HHS's failure to justify or explain its conclusion that the … Rule is consistent with medical ethics in the face of overwhelming contrary evidence." *Id.* at *13.

Second, the Fourth Circuit concluded that HHS "arbitrarily estimated the cost of the physical separation of abortion services." *Baltimore*, 2020 WL 5240442, at *1. HHS claimed a cost of $30,000 per Title X project, and the Ninth Circuit found that sufficient. App. 60a n.32. The Fourth Circuit disagreed. As it explained, "there [were] multiple comments estimating the likely cost to comply … to be much higher than $30,000," and HHS, again, had "no response." *Baltimore*, 2020 WL 5240442, at *14-15. There was "no justification in the … Rule for the $30,000 amount," which appeared to have been "pulled from thin air." *Id.* at *15. Again relying on this Court's precedent, the Fourth Circuit concluded, "'[i]f judicial review is to be more than an empty ritual, it must demand something better than the explanation offered for the action taken in this case.'" *Id.* (quoting *Department of Commerce* v. *New York*, 139 S. Ct. 2551, 2576 (2019)).

2. The Ninth Circuit held that the Rule "do[es] not violate" the Nondirective Mandate. App. 40a. Again, the Fourth Circuit held the opposite, concluding that the Rule "violates the Nondirective Mandate." *Baltimore*, 2020 WL 5240442, at *20. Contrary to the Ninth Circuit's reasoning, the Fourth Circuit concluded that the Nondirective Mandate does apply to referrals, relying on the Rule itself, statutes, medical practice, and common sense. *Id.* at *16-18. Moreover, even apart from referrals, the Fourth Circuit found that "HHS's attempt to *appear* nondirective is deceptive and at odds with reality." *Id.* at *18. Contrary to a patient's wishes, the Rule requires counseling on non-abortion options and even authorizes a practitioner to counsel exclusively on non-abortion options. *Id.*

3. The Ninth Circuit held that the Rule does not violate Section 1554 of the ACA. App. 48a. Again, the Fourth Circuit held the opposite. *Baltimore*, 2020 WL 5240442, at *20-21. The Fourth Circuit catalogued the numerous ways in which the Rule violates Section 1554, including that it "quite clearly 'interferes with communications' about medical options between a patient and her provider." *Id.* at *20. And highlighting the AMA's strong opposition to the Rule "for its interference in the patient-physician relationship and violation of ethical standards," the court concluded that the "attempt to hoodwink patients" by providing a list of providers without identifying which ones perform abortions creates "'unreasonable barriers'" and "'impedes timely access'" to health care services. *Id.*

4. Finally, the Ninth Circuit relied heavily on *Rust* in upholding the Rule. Once again disagreeing, the Fourth Circuit held that *Rust* provided the Rule no cover. *Rust* addressed a different administrative record and "did not purport to speak to medical ethics re-

quirements." *Baltimore*, 2020 WL 5240442, at *11. *Rust* also did not speak to the statutory challenges to the Rule because both the Nondirective Mandate and Section 1554 of the ACA, enacted after *Rust*, changed the governing law. *Id.* at *19, *21.

II. THE NINTH CIRCUIT'S DECISION IS ERRONEOUS

A. The Rule Is Arbitrary And Capricious

This Court's precedents set forth two principles governing agency decisionmaking that HHS's rulemaking abandoned and that the Ninth Circuit failed to correct. First, an agency must base its decision "'on a consideration of the relevant factors'" and may not "'entirely fail[] to consider [an] important aspect of the problem.'" *Department of Homeland Sec.* v. *Regents of Univ. of Cal.*, 140 S. Ct. 1891, 1905, 1913 (2020). Second, an agency may not "change[] course" from an existing policy without accounting for "'serious reliance interests,'" *id.* at 1913, and providing "a reasoned explanation for the change," *Encino Motorcars, LLC* v. *Navarro*, 136 S. Ct. 2117, 2125 (2016).

HHS failed to consider the extensive, unequivocal evidence before it that the Rule would force Title X providers to violate their medical ethics and, closely related, that the Rule would have devastating effects on patients and the public health. The AMA—the leading national association of physicians—warned that the Rule would put physicians in the position of "withhold[ing] information that their patients need to make decisions about their care" (CA4 SJA188), and would violate, among other things, their obligation to "[h]onor a patient's request not to receive certain medical information" (AMA, *Code of Medical Ethics* § 2.1.3 (2016)). Many long-serving Title X providers under-

scored this ethical problem and explained that providers would leave the program in droves as a result of the Rule. CA4 SJA371-373; CA4 SJA276.

In response, HHS was required to articulate a "genuine justification[]," *New York*, 139 S. Ct. at 2575-2576, and "offer a 'rational connection between the facts found and the choice made,'" *State Farm*, 463 U.S. at 52. HHS failed to do so—it stated simply that it "disagree[d]," and "believe[d] that the final rule adequately accommodates … ethical obligations while maintaining the integrity of the Title X program." 84 Fed. Reg. at 7,724. That conclusory assertion is insufficient under this Court's precedent. *See Baltimore*, 2020 WL 5240442, at *10-12.

Rust does not remedy that deficiency, and the Ninth Circuit was incorrect to find that it does (App. 64a-65a). All *Rust* said was that the 1988 regulations did not intrude upon the patient-physician relationship to the point of violating the First Amendment. 500 U.S. at 200. That statement says nothing about whether HHS's failure to consider medical ethics 30 years later in *this* rulemaking is arbitrary and capricious. *See Baltimore*, 2020 WL 5240442, at *11.

Also insufficient was HHS's consideration of the negative consequences the Rule would have for patients and public health, as detailed in the administrative record with evidence and based on past experiences. For example, one expert commenter detailed the harms to public health that have occurred when reproductive health care providers have lost public funding in the past—including HIV outbreaks and spikes in unintended pregnancies. *See* CA4 SJA461-462, 467. Commenters further catalogued the various ways that the Rule diminishes access to effective contraceptives,

thus undercutting the program's central purpose. *See, e.g.*, CA4 SJA274.

In response, HHS stated, contrary to the record, that it was "not aware, either from its own sources or from commenters, of actual data that could demonstrate a causal connection between the … rulemaking and an increase in unintended pregnancies, births, or costs associated with either." 84 Fed. Reg. at 7,775. HHS cannot simply brush aside evidence of patient harm. *See State Farm*, 463 U.S. at 55-56.

HHS similarly failed to consider evidence that the Rule would cause Planned Parenthood providers, which served 40% of Title X patients, and other Title X providers to leave the program. *See State Farm*, 463 U.S. at 43. The administrative record established that other safety-net family-planning providers would be unable to absorb all the patients of those that leave the program, leaving many patients without access, or with diminished access, to vital, life-saving services. *See, e.g.*, CA4 SJA161-162; CA4 SJA372. HHS's response, again, was insufficient: It simply asserted, citing no evidence, that the Rule "will contribute to more clients being served, gaps in service being closed, and improved client care." 84 Fed. Reg. at 7,723.

The Ninth Circuit ignored or otherwise blessed these fundamental errors of agency decisionmaking. Thus, the court of appeals did not address HHS's failure to cite any evidence in the record—beyond its own unsupported assumptions—that the various harms commenters flagged would not take hold. The court stated that "HHS's predictive judgments about the Final Rule's effect on the availability of Title X services are entitled to deference." App. 58a. But agency predictions about the likely effects of a rule "'must be

based on some logic and evidence, not sheer speculation.'" *Sorenson Commc'ns Inc.* v. *FCC*, 755 F.3d 702, 708 (D.C. Cir. 2014); *see also National Lifeline Ass'n* v. *FCC*, 921 F.3d 1102, 1113 (D.C. Cir. 2019). Here, there was nothing supporting HHS's reasoning; there was simply its "disagreement" with the evidence before it.

HHS also failed to consider the significant reliance interests of patients and providers in an established and trusted network of Title X projects, and did not adequately explain the need for its departure from the status quo. *See FCC* v. *Fox Tel. Stations, Inc.*, 556 U.S. 502, 515 (2009). Where, as here, an agency does "'not writ[e] on a blank slate,'" it must "weigh any such interests against competing policy considerations." *Regents of Univ. of Cal.*, 140 S. Ct. at 1915.

HHS undertook no such consideration. Nothing in the administrative record suggests, for example, that HHS considered that Title X providers, in reliance on HHS's longstanding regulations, had invested significant resources to build facilities that can accommodate both Title X projects and other programs to efficiently provide health care services to low-income people—and thus would not be able to bear the costs of compliance with the physical-separation requirements. Indeed, commenters explained, citing actual cost estimates and past experience, that those requirements were likely to cost approximately $625,000 per affected site. *E.g.*, CA4 SJA388. HHS ignored this and claimed, without evidence, that those requirements would cost $30,000 per site. 84 Fed. Reg. at 7,782; *see Baltimore*, 2020 WL 5240442, at *15. HHS further failed to account for any costs beyond the first year, which are likely to reach into the millions of dollars. *See* CA4 SJA388-389; *Baltimore*, 2020 WL 5240442, at *15 (requiring agency to

provide a "figure that makes at least some modicum of sense").

Yet HHS pressed forward with the physical-separation requirements, providing no "reasoned explanation" for this dramatic departure from its longstanding position. *See Encino Motorcars*, 136 S. Ct. at 2125-2126. HHS provided no evidence of misuse of Title X funds, nor any evidence that the budgeting, program review, and audit processes, with which Title X providers had long complied, were not an adequate safeguard. HHS thus resorted to speculation about the "risk[s]" of "appearance[s]," "perception[s]," and "potential" misuse of funds. 84 Fed. Reg. at 7,764-7,765. Such speculation cannot justify imposing extremely onerous costs on Title X grantees. *See National Lifeline*, 921 F.3d at 1114-1115; *Sorenson Commc'ns*, 755 F.3d at 708-709.

B. The Rule Violates The Nondirective Mandate

The Ninth Circuit acknowledged that the Nondirective Mandate "amended Title X by expressly requiring all pregnancy counseling to be nondirective," but then concluded that the Rule complies with that mandate. That conclusion was erroneous.

As the Fourth Circuit concluded, the Rule "'is nothing but directive,'" *Baltimore*, 2020 WL 5240442, at *16—skewing the counseling by a Title X project in favor of continuing a pregnancy to term and away from abortion. It is directive in at least three ways: (1) It bans referrals for abortion but mandates referrals for prenatal care—regardless of what a patient wants; (2) it requires Title X providers, when giving a pregnant patient a list of comprehensive care providers in the community, to conceal information about whether

any are abortion providers, even in response to a specific patient request; and (3) it requires the project to speak to a patient about options she does not want, even when she seeks information only about abortion.

Those requirements necessarily "suggest[] or advis[e] one option over another." 84 Fed. Reg. at 7,716. Under the Rule, if a patient tells her provider that she wants an abortion, the provider must refuse to provide her a referral and instead must provide a referral for care she neither needs nor requested—information about prenatal care. 42 C.F.R. §§ 59.5(a)(5), 59.14(a), 59.14(b)(1). This necessarily steers a patient toward carrying a pregnancy to term against the patient's wishes. Similarly, the Title X project can only provide a list containing comprehensive primary health care providers—reflecting either exclusively those who do *not* provide abortion or a majority of whom do not—and may *not* identify which, if any, of the providers on the list actually provide abortion. *Id.* §§ 59.14(b)-(c). As a result, a patient seeking an abortion will face delay and confusion if she attempts to use the list to find a provider that does provide abortion, if one exists. Finally, the Rule enlists providers in trying to override the patient's intent to obtain an abortion, by requiring counseling on non-abortion options the patient does not want. 84 Fed. Reg. at 7,747; *see Baltimore*, 2020 WL 5240442, at *17-18; CA9 ER19.

HHS has argued that a "failure" to refer a patient for abortion does not direct a patient to do anything. That argument fails. This case concerns HHS's requirements that projects *withhold* that information in response to patient requests and *force on* patients information about non-abortion options that they do not want or need. Those requirements are directive, for as HHS recognized, "[n]ondirective counseling is designed

to assist the patient in making a free and informed decision" and "involves presenting the options in a factual, objective, and unbiased manner." 84 Fed. Reg. at 7,747. Presenting information about how and where clients can obtain certain services, while suppressing that information about other services, is not "'objective'" or "'unbiased'" and steers a patient toward carrying a pregnancy to term. *Baltimore*, 2020 WL 5240442, at *17; *see also id.* at *18 ("Being required to refuse (not failing) to refer a patient to a physician who performs abortions when the patient has requested as much, and instead, referring her for prenatal care, is far from neutral.").

The Ninth Circuit's decision to the contrary rests on faulty conclusions. First, the court erroneously held that "'pregnancy counseling'" does not include "referrals." App. 34a. In so doing, the court deferred to HHS's "interpretation" of "'counseling' as a concept that is distinct from the term 'referrals,'" deeming it "reasonable and consistent with common usage." App. 30a. But "counseling" and "referrals" are not distinct concepts, as reflected in HHS's own Rule and clinical standards, the relevant statutes, medical practice, and common sense. As the Fourth Circuit concluded, HHS's purported interpretation, one that appears "*nowhere* in … the Rule" itself, is "nothing but a convenient litigation position which does not support" the Rule. *Baltimore*, 2020 WL 5240442, at *16-17.

In the Rule, HHS stated that "nondirective pregnancy counseling can include counseling on adoption, and *corresponding referrals* to adoption agencies." 84 Fed. Reg. at 7,730 (emphasis added). It also stated that "Title X providers may provide adoption counseling, information and referral … *as part of nondirective postconception counseling*." *Id.* at 7,733-7,734 (empha-

sis added). Even HHS's own evidence-based clinical standards for "Pregnancy Testing and Counseling" state that "[pregnancy] test results should be presented to the client, followed by a discussion of options and appropriate referrals." CDC & OPA, *Providing Quality Family Planning Services* 13-14 (Apr. 24, 2014). HHS's argument that pregnancy counseling does not include referrals is not only incorrect but also at odds with its own positions.

In addition, Congress has made clear in a related statute that "referrals" are "included in nondirective counseling." 42 U.S.C. § 254c-6(a)(1) (instructing HHS to make grants to train health-center staff "in providing adoption information *and referrals* to pregnant women on an equal basis with all other courses of action *included in nondirective counseling* to pregnant women." (emphasis added)); *see also Graham Cty. Soil & Water Conservation Dist.* v. *United States ex rel. Wilson*, 559 U.S. 280, 290 (2010) ("'[A] legislative body generally uses a particular word with a consistent meaning in a given context.'"). Indeed, in describing that statute in the Rule here, HHS explained that "Congress … expressed its intent that postconception adoption information and referrals be included as part of any nondirective counseling in Title X projects." 84 Fed. Reg. at 7,733.

Thus, both Congress and HHS have recognized that pregnancy counseling includes referrals. So has the medical profession, which "'recognize[s] referrals as part of counseling.'" *Baltimore*, 2020 WL 5240442, at *18. "'As commonly understood by medical practitioners and in daily medical practice, counseling patients may include and, in some cases, must include, providing referrals.'" *Id.*

Second, the Ninth Circuit held that the term "nondirective" does not require providers to present all options on an "equal" basis. App. 31a. That conclusion missed the point, and incorrectly characterized petitioners' arguments. The Nondirective Mandate's operating principles are provider neutrality and patient-directed treatment—*i.e.*, where the patient "identif[ies] the direction of the interaction," 84 Fed. Reg. at 7,716. But the Rule requires Title X providers to steer patients who have stated they want an abortion away from that option and toward continuing a pregnancy to term. Such counseling—*against a patient's wishes*—is directive and thus violates Congress's mandate that "all pregnancy counseling" under Title X "shall be nondirective."

C. The Rule Violates Section 1554 Of The ACA

Section 1554 of the ACA is clear: HHS "*shall not* promulgate *any* regulation" that harms patient care in any one of six enumerated ways, including by interfering with communications between provider and patient or violating the ethical standards of health care professionals. 42 U.S.C. § 18114 (emphasis added). The Ninth Circuit decided that the Rule "does not implicate § 1554." App. 48a. That conclusion conflicts with the statute's plain terms.

First, the Ninth Circuit held that the Rule could not "impose burdens on health care providers and their clients" under Section 1554 because the Rule "merely reflect[ed] Congress's choice not to subsidize certain activities." App. 43a. In support, the Ninth Circuit invoked this Court's constitutional holding in *Rust*. App. 43a-46a. But that holding is inapposite, as the Fourth Circuit recognized. *Baltimore*, 2020 WL 5240442, at *21. On a constitutional challenge, the appropriate

comparator is the situation where Congress had not enacted Title X at all, because the constitutional question is whether the government, generally, has interfered with the right. That is not true of the statutory inquiry under Section 1554, where Congress has "enact[ed] statutory requirements and protections that exceed the constitutional floor." App. 81a (Paez, J., dissenting). "That a congressional decision not to subsidize abortion does not burden the abortion right in the *constitutional* sense … has no bearing whatsoever on whether an agency has overstepped its statutory authority." App. 82a.

Second, the Ninth Circuit concluded that Section 1554 was confined to provisions within the ACA and does not affect Title X, invoking the prefatory clause "[n]otwithstanding any other provision of this Act." App. 47a. That reading finds no home in the statute's text. The "notwithstanding" clause makes clear that Section 1554 may not be narrowed by *any* other provision—*including, but not limited to*, "other provisions *of the ACA*." *Baltimore*, 2020 WL 5240442, at *21 n.21. Section 1554 prohibits "*any* regulation" issued by HHS that harms patient care in any one of six ways. 42 U.S.C. § 18114 (emphasis added). Congress's choice of the word "any" without qualification demonstrates its broad sweep. *See Ali* v. *Federal Bureau of Prisons*, 552 U.S. 214, 219 (2008) ("'[T]he word 'any' has an expansive meaning[.]'").

The Ninth Circuit otherwise made no serious attempt to harmonize the Rule with Section 1554's plain terms. Nor is there any way to do so. The Rule dictates what a provider must and must not say to a patient about her pregnancy options, and thus "interferes with communications regarding a full range of treatment options between the patient and the provider."

42 U.S.C. § 18114(3). It further "restricts the ability of health care providers to provide full disclosure of all relevant information to patients making health care decisions." *Id.* § 18114(4). And it contravenes "the ethical standards of health care professionals" by prohibiting Title X projects from providing pregnant patients with information about all of their options. *Id.* § 18114(5). The AMA's *Code of Medical Ethics* states, for example, that medical professionals must "[p]resent relevant information accurately and sensitively, in keeping with the patient's preferences," and that "withholding information without the patient's knowledge or consent is ethically unacceptable." AMA, *Code of Medical Ethics*, §§ 2.1.1(b), 2.1.3; *see, e.g.*, CA4 SJA189; CA9 ER39-40; CA9 ER49-50; *see supra* pp.13-14, 23-24.

Section 1554 preserves providers' duty of candor with their patients, in accordance with the "ethical standards" that it invokes. Congress recognized that candor is fundamental to the patient-provider relationship and, thus, proper medical care. Indeed, as this Court recently underscored, "'[d]octors help patients make deeply personal decisions, and their candor is crucial.'" *National Inst. of Family & Life Advocates* v. *Becerra*, 138 S. Ct. 2361, 2374 (2018). That principle is especially important in the context of Title X, a program designed to reach patients with low incomes, many of whom have limited knowledge of and ability to navigate the health care system. Yet the Rule's restrictions contravene that principle and run afoul of Section 1554's protections, thereby "'undermin[ing] the trust that is necessary for facilitating healthy doctor-patient relationships and, through them, successful treatment outcomes.'" *Baltimore*, 2020 WL 5240442, at *20.

III. THE QUESTIONS PRESENTED ARE IMPORTANT

The Ninth Circuit's decision conflicts with the Fourth Circuit's decision and is erroneous. Those reasons alone warrant this Court's review. But it bears emphasis that the questions presented are important. They concern the integrity of the patient-provider relationship, founded on open and honest communications, the lynchpin of proper medical care. And they arise in the context of a vitally important federal health care program, with significant real-world consequences that undermine Congress's purpose and conflict with its mandates for the program.

Millions of people have depended on Title X since its inception, receiving critical family planning and sexual health care each year. And under a long-settled regulatory framework, the Title X program has been a resounding success. For 50 years, grants to reproductive health care providers have dramatically reduced unintended-pregnancy and abortion rates and have provided low-income individuals millions of screenings for cancer, sexually transmitted infections, and HIV. Title X's impact is hard to overstate; "[f]or six in 10 women who obtain contraceptive care at a Title X-funded site[], that provider was their only source of medical care over the past year." CA4 SJA151.

The Rule reverses that progress and hobbles the program. "[A]s of late February 2020," the Fourth Circuit recognized, "roughly one in every four Title X service sites ha[s] withdrawn from the Title X program in response to the … Rule, which slashed the national patient capacity in half, 'jeopardizing care for 1.6 million female patients nationwide.'" *Baltimore*, 2020 WL 5240442, at *11 n.9. Indeed, HHS just recently acknowledged that, as a result of the Rule, Title X ser-

vices sites decreased by 945 sites and the number of annual patients served in 2019 fell by 21%—despite the rule being in effect for only a few months. *See supra* pp.17; *see also supra* p.7. These facts underscore how HHS's unsupported assumptions about supposed salutary benefits were and continue to be out of step with reality.

Thus, the consequences of the Rule are clear and stark—and already occurring. They "will be borne by the millions of women who turn to Title X-funded clinics for lifesaving care and the very contraceptive services that have caused rates of unintended pregnancy—and abortion—to plummet." App. 94a.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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