IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO

STATE OF OHIO, *et al.*, Plaintiff, v. XAVIER BECERRA, in his official capacity as Secretary of Health and Human Services, *et al.*, Defendants.	Case No. 1:21-cv-675 District Judge Timothy S. Black

DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

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INTRODUCTION

Since 1970, Congress has provided funding for family-planning services through Title X of the Public Health Service Act ("PHSA"). Section 1008 of Title X provides that "[n]one of the funds appropriated under [Title X] shall be used in programs where abortion is a method of family planning." 42 U.S.C. § 300a-6. Throughout the history of the Title X program, the Department of Health and Human Services ("HHS") and its predecessor have adopted different interpretations of Section 1008. For most of that history, the agency has either permitted or required grantees to make a referral for abortion upon the request of a patient, while taking steps to ensure that grantees do not themselves use Title X funds to perform or promote abortions.

In 2019, HHS promulgated a regulation (the "2019 Rule") that prohibited grantees from making referrals for abortions, even when requested by a patient, and adopted strict guidelines requiring that grantees physically and financially separate abortion services from non-abortion services. HHS reversed course in October 2021, issuing a regulation (the "Final Rule") through notice-and-comment rulemaking that revoked the 2019 Rule and re-adopted the previously effective regulation from 2000 (the "2000 Rule"), which required referrals upon request and did not mandate strict physical and financial separation. The Final Rule explains, in detail, HHS's decision to return to its previous position and the procedures in place for the agency to ensure that its grantees comply with Section 1008.

The Plaintiffs—a group of states, including several that also participate in the Title X program as grantees—bring this challenge to the Final Rule pursuant to the Administrative Procedure Act ("APA") and assert two claims. First, they argue that the Final Rule's provisions concerning abortion referral and physical and financial separation violate Section 1008. And

second, they argue that the Final Rule is arbitrary and capricious because HHS did not sufficiently address various issues raised during the comment period.

Plaintiffs' motion for a preliminary injunction should be denied. On the merits, Plaintiffs' claims are not likely to succeed. The Final Rule's interpretation of Section 1008, which is not materially different from the interpretation the agency has embraced for most of the history of the Title X program, is entitled to *Chevron* deference as a permissible reading of an ambiguous statute. And HHS did not act arbitrarily or capriciously in promulgating the rule. To the contrary, and consistent with the APA, HHS carefully reviewed and considered over one hundred thousand comments submitted by various entities, addressed the issues that Plaintiffs now raise, and provided a reasoned basis for issuing the Final Rule. Additionally, Plaintiffs are unable to demonstrate that they will be irreparably harmed absent preliminary relief. Plaintiffs' various theories of harm, such as an increase in competition from other grantees, essentially boil down to a speculative prediction of economic loss, a hypothetical injury that is in any event not sufficiently grave to qualify as irreparable, and Plaintiffs' non-economic theories of harm fare no better. Finally, the balance of equities and public interest favor denying injunctive relief and allowing HHS to distribute Title X funds to a broader pool of grantees, thereby supporting public health through family-planning services.

BACKGROUND

I. Title X

Congress enacted Title X to "promote public health and welfare by expanding, improving, and better coordinating the family planning services and population research activities of the Federal Government." Family Planning Services & Population Research Act of 1970, Pub. L. No. 91-572, 84 Stat. 1504. Under Title X, the HHS Secretary is authorized to make grants and

enter into contracts with certain 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 (including natural family planning methods, infertility services, and services for adolescents)." 42 U.S.C. § 300(a). Section 1006(a) of the PHSA directs that "[g]rants and contracts made under this subchapter shall be made in accordance with such regulations as the Secretary may promulgate." *Id*. § 300a-4(a). And Section 1008 requires that "[n]one of the funds appropriated under this subchapter shall be used in programs where abortion is a method of family planning." *Id*. § 300a-6.

II. Prior Regulatory Interpretations

For the first 18 years of the Title X program, between the statute's enactment in 1970 and 1988, HHS interpreted Title X (and in particular Section 1008) to prohibit grantees from "promoting or encouraging abortion as a method of family planning in any way," and to "require that Title X activities be separate and distinct from any abortion activities." Ensuring Access to Equitable, Affordable, Client-Centered, Quality Family Planning Services, 86 Fed. Reg. 19,812, 19,813 (Apr. 15, 2021); *see also Mayor of Baltimore. v. Azar*, 973 F.3d 258, 267 (4th Cir. 2020) (en banc), *cert. dismissed sub nom. Becerra v. Mayor & City Council of Baltimore*, 141 S. Ct. 2618 (2021). In 1981, HHS also issued guidelines that required Title X projects to offer "nondirective" counseling about pregnancy termination, followed by referral for abortions upon request. *See* Statutory Prohibition on Use of Appropriated Funds in Programs Where Abortion is a Method of Family Planning; Standard of Compliance for Family Planning Services Projects, 53 Fed. Reg. 2922, 2923–25 (Feb. 2, 1988) (describing prior HHS regulatory interpretations). Under these guidelines, "activity which did not have the . . . principal purpose or effect of promoting abortion was permitted." *Id*. at 2,923. And Title X projects were "required to maintain a separation (that

is more than a mere exercise in bookkeeping) of their project activities from any activities in which they engage that promote or encourage abortion as a method of family planning." Standards of Compliance for Abortion-Related Services in Family Planning Service Projects, 58 Fed. Reg. 7462 (Feb. 5, 1993).

In 1988, the agency modified its approach and issued new regulations (the "1988 Rule") that "prohibited the discussion of or referral for abortion," "required grantees to maintain strict physical and financial separation between Title X projects and abortion related activities," and "prohibited lobbying, education, dues-paying, or any other activities which could be interpreted to encourage or promote abortions a method of family planning." 86 Fed. Reg. at 19,813; *see also* 53 Fed. Reg. 2922. The 1988 Rule was ultimately upheld by the Supreme Court as a "permissible construction" of Section 1008 and a rational exercise of the agency's rulemaking authority pursuant to the "broad directives provided by Congress in Title X." *Rust v. Sullivan*, 500 U.S. 173 (1991). That rule, however, "continued to be a source of controversy," Standards of Compliance for Abortion-Related Services in Family Planning Services Projects, 65 Fed. Reg. 41,270, 41,270 (July 3, 2000) (2000 Rule), and was "never implemented on a national basis," *id*. at 41,276. In February 1993, the President directed the Department to suspend the 1988 Rule and propose new regulations. *See* The Title X "Gag Rule," 58 Fed. Reg. 7455 (Jan. 22, 1993) (finding that the 1988 Rule "endangers women's lives and health by preventing them from receiving complete and accurate medical information and interferes with the doctor-patient relationship by prohibiting information that medical professionals are otherwise ethically and legally required to provide their patients"). HHS did so and adopted, on an interim basis, the compliance standards that predated the 1988 Rule. *See* 58 Fed. Reg. 7462 (Feb. 5, 1993). HHS also proposed new regulations that

would "return the program to the compliance standards operative prior to [the 1988 Rule's] issuance." 58 Fed. Reg. at 7464.

HHS finalized new regulations in 2000. *See* 65 Fed. Reg. 41,270. The 2000 Rule removed the provisions of the 1988 Rule that (1) prohibited Title X projects from counseling or referring project clients for abortion, (2) required grantees to strictly separate their Title X projects physically and financially from any abortion activities, and (3) implemented compliance standards for Title X projects designed to eliminate the promotion or encouragement of abortion as a method of family planning. *See id*. at 41,280. Under these regulatory provisions, Title X projects were "required, in the event of an unplanned pregnancy and where the patient requests such action, to provide nondirective counseling to the patient on all options relating to her pregnancy, including abortion, and to refer her for abortion, if that is the option she selects." *Id*. at 41,270. HHS affirmed that "the funding of abortions or activities that promote or encourage abortion with Title X funds has been and will continue to be prohibited," but clarified its view—consistent with HHS' "view of the statute prior to 1988"—that "the provision of neutral and factual information about abortion is not considered to promote or encourage abortion as a method of family planning." *Id*. at 41,271. The agency also made clear that it would continue to require Title X grantees to "demonstrate," by "financial records, counseling and service protocols, administrative procedures, and other means," that Title X funds are not used to "promot[e] or encourage[] abortion as a method of family planning." *Id*. at 41,276. In adopting these regulations, HHS concluded, based on its experience with implementation and enforcement, that the 1988 Rule could not work in practice and that the standards that preexisted it had "enabled the program to operate successfully during virtually its entire history." *See* 86 Fed. Reg. at 19,814.

The 2000 Rule was not subject to litigation and remained in effect until 2019, when HHS again changed course and promulgated a new rule that "essentially revive[d]" the 1988 Rule, *Baltimore*, 973 F.3d at 271. *See* Compliance with Statutory Program Integrity Requirements, 84 Fed. Reg. 7714 (Mar. 4, 2019) ("2019 Rule"). In promulgating this rule, HHS "point[ed] to no direct violations of Title X, associated laws, or the 2000 regulations," but stated a need for clarity regarding "appropriate Title X activities." 86 Fed. Reg. at 19,814. The 2019 Rule required strict physical and financial separation between abortion-related activities and Title X project activities; prohibited Title X projects from referring for abortion; and significantly restricted the ability of Title X projects to provide pregnancy options counseling. Like the 1988 Rule (but unlike the 2000 Rule), the 2019 Rule was subject to much litigation. That litigation resulted in the rule being upheld by the Ninth Circuit and enjoined in the state of Maryland by the Fourth Circuit. *See Baltimore*, 973 F.3d 258; *California v. Azar*, 950 F.3d 1067 (9th Cir. 2020) (en banc), *cert. dismissed sub nom. Am. Med. Ass'n v. Becerra*, 141 S. Ct. 2619 (2021). The Supreme Court ultimately granted the parties' voluntary stipulation of dismissal in light of HHS' stated intent to engage in a new rulemaking process to repeal the 2019 Rule. *See* Order, Case Nos. 20-429, 20-454, 20-539 (May 17, 2021).

III. The Final Rule

On April 15, 2021, HHS published a notice of proposed rulemaking (NPRM) soliciting comments on a proposal to revoke the 2019 Rule and replace it, in substantial part, with provisions of the 2000 Rule. 86 Fed. Reg. 19,812. This proposal was based on "the previous success of the program, the large negative public health consequences of maintaining the 2019 rules, the substantial compliance costs for grantees, and the lack of tangible benefits" from the 2019 Rule. *Id*. at 19,817. HHS documented the significant harm to public health that the 2019 Rule caused—

most notably, a steep reduction in the provision of Title X services, particularly among the low-income and underserved populations the program is designed to aid, that was in part tied to a reduction in the number of grantees participating in the Title X program. *See id*. at 19,816–18. The rule HHS proposed would remove the "requirements for strict physical and financial separation, allow Title X providers to provide nondirective options counseling, and allow Title X providers to refer their patients for all family planning related services desired by the client, including abortion services." *Id*. at 19,818.[1]

On October 7, 2021, after considering public comments, HHS promulgated the rule challenged in this litigation. Ensuring Access to Equitable, Affordable, Client-Centered, Quality Family Planning Services, 86 Fed. Reg. 56,144 (Oct. 7, 2021) ("Final Rule"). The Final Rule adopted the separation and referral proposals from the NPRM with only modest changes. HHS determined, based on "the evidence that has emerged since the adoption of the 2019 rule, as well as fresh consideration of the evidence that existed at the time [the 2019 Rule was adopted]," *id.* at 56,148, that the 2019 Rule:

- Dramatically reduced access to family planning and preventive health services;
- Decreased the number of providers willing to participate in the Title X program;
- Shifted the Title X program away from its history of providing client-centered quality family planning services, and instead set limits on the patient-provider relationship;
- Imposed unnecessary compliance and reporting costs with no discernible benefit; and

[1] The Rule also adopted multiple changes to modernize and strengthen the program, which are not challenged here. *See, e.g.*, 86 Fed. Reg. at 56,148-149.

- Raised the possibility of a "two-tiered healthcare system," where the low-income and other disproportionately impacted communities primarily served by the Title X program are "relegated to inferior access" by reduction in the program's scope.

Id. HHS concluded that revoking the 2019 Rule, and making certain updates and revisions to the 2000 Rule, would "strengthen the Title X program and ensure access to equitable, affordable, client-centered, quality family planning services for all clients, especially for low-income clients, while retaining the longstanding prohibition on directly promoting or performing abortion that follows from Section 1008's text and subsequent appropriations enactments." *Id*.

IV. This Lawsuit

Ohio and 11 other states filed the instant lawsuit on October 25, 2021, and moved for a preliminary injunction the same day. *See* Compl., ECF No. 1; Mot. for a Prelim. Inj. ("Mot."), ECF No. 2. Plaintiffs contend that the Final Rule reflects an impermissible construction of Section 1008 and is arbitrary and capricious for various reasons. Per the Court's November 1, 2021 scheduling order, Defendants submit this brief in opposition to Plaintiffs' motion.

LEGAL STANDARD

A preliminary injunction is an "extraordinary and drastic remedy" that "may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Fowler v. Benson*, 924 F.3d 247, 256 (6th Cir. 2019) (citation omitted). "A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 20 (2008). Where, as here, the federal government is the defendant, the last two factors merge. *Nken v. Holder*, 556 U.S. 418, 435 (2009). "Although no one factor is controlling, a finding that there is simply no likelihood of success on the merits is usually fatal." *Gonzales v. Nat'l Bd. of Med.*

Examiners, 225 F.3d 620, 625 (6th Cir. 2000). Likewise, "the existence of an irreparable injury is mandatory," and "even the strongest showing on the other three factors cannot eliminate the irreparable harm requirement." *D.T. v. Sumner Cnty. Schs.*, 942 F.3d 324, 326-27 (6th Cir. 2019) (citation omitted).

ARGUMENT

I. Plaintiffs Are Not Likely To Succeed On The Merits.

A. The Final Rule Is a Permissible Interpretation of Section 1008.

Plaintiffs principally argue that the Final Rule, which is effectively identical to the 2000 Rule that was in place for nearly two decades, and agency guidance for decades before that, is "not in accordance with law" because it violates Section 1008. *See* Mot. at 13. They argue both that Section 1008 prohibits HHS from adopting a regulation requiring Title X grantees to make abortion referrals upon request and that Section 1008 requires a higher degree of physical and financial separation between a grantees' abortion services and non-abortion services than is required under the Final Rule. Because the Final Rule is entitled to *Chevron* deference as a permissible interpretation of Section 1008, Plaintiffs' arguments should be rejected.

Courts apply a "familiar two-step test pursuant to *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984)" in determining whether to uphold an agency regulation interpreting a federal statute. *Baltimore*, 973 F.3d at 268. First, a court asks "if the statute is silent or ambiguous with respect to the issue," and "if so, whether the agency's interpretation is based on a permissible construction of the statute." *Id.* at 268–69 (internal quotation marks omitted) (quoting *Rust*, 500 U.S. at 184).[2] "[T]he court need not conclude that

[2] Plaintiffs do not dispute that the *Chevron* framework applies here. *See* Mot. at 13–14. They do not argue, for example, that the Final Rule, which was promulgated through notice-and-

the agency construction was the only one it permissibly could have adopted . . . or even the reading the court would have reached if the question initially had arisen in a judicial proceeding." *Rust*, 500 U.S. at 184 (omission in original) (quoting *Chevron*, 467 U.S. at 843 n.11).

1. The Final Rule's Referral Requirement Does Not Violate Section 1008.

In *Rust*, the Supreme Court held, at step one of the *Chevron* analysis, that the text of Section 1008 is ambiguous with regard to abortion referrals. The Court stated:

> The broad language of Title X plainly allows the Secretary's construction of the statute. By its own terms, § 1008 prohibits the use of Title X funds "in programs where abortion is a method of family planning." Title X does not define the term "method of family planning," nor does it enumerate what types of medical and counseling services are entitled to Title X funding. Based on the broad directives provided by Congress in Title X in general and § 1008 in particular, we are 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.

Id. The Court went on to say:

> The legislative history is ambiguous and fails to shed light on relevant congressional intent. At no time did Congress directly address the issues of abortion counseling, referral, or advocacy. The parties' attempts to characterize highly generalized, conflicting statements in the legislative history into accurate revelations of congressional intent are unavailing.

Id. at 185.[3] Under these circumstances, the Court concluded, "we customarily defer to the expertise of the agency." *Id.* at 186.

Because the text of Section 1008 has not changed since *Rust*, the Court must look to whether the Final Rule is a "permissible construction" of Section 1008, which prohibits funds from being "used in programs where abortion is a method of family planning." 42 U.S.C. § 300a-6.

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comment rulemaking, lacks the "force of law." *United States v. Mead Corp.*, 533 U.S. 218, 227 (2001).

[3] For these reasons, Plaintiffs' recitation of certain congressional statements should not be given weight. *See* Mot. at 3–4, 28.

The Final Rule interprets this language as a ban on the use of funds to pay for abortions, or on activities that "promote or encourage" abortion, 65 Fed. Reg. at 41,272, but treats nondirective counseling and referrals upon request as distinct activities not subject to this ban, *id.* at 41,273; *see* 86 Fed. Reg. at 56,144 (re-adopting the 2000 Rule).[4] Starting with the text, *see, e.g.*, *Sebelius v. Cloer*, 569 U.S. 369, 376 (2013), the fact that a "program" refers patients for abortion does not make that program one "where abortion is a method of family planning," since the abortion itself will necessarily take place outside of the program at issue, 86 Fed. Reg. at 56,145.[5] The term "use[d]" also connotes "volitional" "active employment" of federal funds. *Voisine v. United States*, 136 S. Ct. 2272, 2278–79 (2016). It is thus reasonable for HHS to interpret Section 1008 as prohibiting only those activities that directly promote abortions, as a method of family planning, within the Title X program (*i.e.*, *not* a referral for an abortion outside the program upon request). The Final Rule's interpretation of the "broad language" of Section 1008, *Rust*, 500 U.S. at 184, is therefore a permissible construction warranting deference.

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[4] "[W]hile a Title X project may provide a referral for abortion, which may include providing a patient with the name, address, telephone number, and other relevant factual information (such as whether the provider accepts Medicaid, charges, etc.) about an abortion provider," the Final Rule states that "the project may not take further affirmative action (such as negotiating a fee reduction, making an appointment, providing transportation) to secure abortion services for a patient." 86 Fed. Reg. at 56,150.

[5] Even in instances where an entity provides both abortion and non-abortion services, these services must be provided by different "programs" (assuming the entity receives Title X funds). The term "program" refers only to that portion of the entity receiving funds and is interchangeable with the term "project." *See* 42 U.S.C. § 300a-4 (using the terms "program" and "project" interchangeably); *see also Rust*, 500 U.S. at 196 ("Title X expressly distinguishes between a Title X *grantee* and a Tile X *project*. . . . The regulations govern the scope of the Title X *project's* activities, and leave the grantee unfettered in its other activities."). Thus, it is permissible for HHS to interpret "program" not to refer to all activities of a grantee. And, as discussed below, the Final Rule has various compliance mechanisms for ensuring that funds for a non-abortion "program" are not used to promote abortions.

Rust supports this conclusion. Although the Court upheld the opposite reading of Section 1008 from that adopted by the Final Rule, the fact that the Court ruled the text of Section 1008 ambiguous means that there are at least two permissible readings. A "statute is ambiguous" if it is "capable of being understood in two or more possible senses or ways." *Chickasaw Nation v. United States*, 534 U.S. 84, 90 (2001) (quoting Webster's Ninth New Collegiate Dictionary 77 (1985)). If one of the permissible readings of Section 1008 prohibits grantees from making referrals for abortion, and there are at least two permissible readings, then logically the opposite reading—that Section 1008 permits grantees to make referrals—must also be permissible.[6] Notably, HHS guidelines prior to the 1988 Rule required referrals for abortion, as was discussed in lower court decisions, and the *Rust* Court did not suggest that those prior interpretations were unreasonable. *See New York v. Sullivan*, 899 F.2d 401, 405–06 (2d Cir. 1989) (describing guidelines from 1981 as requiring referral for abortion); *Massachusetts v. Secretary of Health & Human Servs.*, 899 F.2d 53, 62 (1st Cir. 1989) (en banc) ("[T]he 1981 Program Guidelines issues by HHS specifically require nondirective counseling for pregnant women . . . ."); *see also Rust*, 500 U.S. at 186 (confirming that an agency's interpretation is "entitled to deference" even where "'it represents a sharp break with prior interpretations' of the statute in question" (quoting *Chevron*, 467 U.S. at 862)). Put differently, if the Supreme Court did not believe that Section 1008 allowed for a rule requiring referrals upon request, as had been the

[6] The Final Rule not only permits but *requires* referrals on request. However, this distinction is immaterial to the *Chevron* analysis in this case, and Plaintiffs do not appear to argue otherwise. Nothing in the text of Section 1008 prevents HHS from requiring grantees to provide a service that is not covered by the ban on use of funds in "programs where abortion is a method of family planning." So if Section 1008's ban on the use of funds does not unambiguously extend to abortion referrals upon request, then HHS may choose either to permit or require that grantees make such referrals.

case prior to 1988, it would have said that the statute unambiguously requires that result at the first step of the *Chevron* analysis.

The history of Title X regulations also belies Plaintiffs' argument that the Final Rule violates Section 1008. In all relevant respects, the Final Rule re-adopts the 2000 Rule, which was in place for nearly twenty years prior to the implementation of the 2019 Rule. And for most of the period prior to the 2000 Rule, HHS's interpretation of Section 1008 either permitted or required referrals for abortion upon request. *See supra* pp. 3–6. Indeed, the result that Plaintiffs claim Section 1008 requires—an outright ban on referrals—has only been embraced by the agency during two short periods since Title X was enacted in 1970—from 1988 to 1993 and from 2019 to the implementation of the Final Rule. *See Baltimore*, 973 F.3d at 268–72. And during this entire history, "[n]o court has found the decades-long practice of referral upon request to violate" Section 1008. 86 Fed. Reg. at 56,156. Moreover, the Final Rule's interpretation has endured "decades of close Congressional oversight, including annual Title X appropriations riders, and a specific annual line item appropriation through which Congress can be—and has been—quite clear as to how the agency should operate." *Id.* at 56,150. Courts "normally accord particular deference to an agency interpretation of 'longstanding' duration." *Barnhart v. Walton*, 535 U.S. 212, 220 (2002) (quoting *N. Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 522 n.12 (1982)). Thus, the fact that the Final Rule is not materially different from the agency's interpretation of Section 1008 that has governed for nearly forty years, with only two short interruptions, means that this interpretation should not be disturbed now.

Finally, several other statutes indicate that where Congress intends to legislate regarding abortion referrals in addition to abortions, it tends to do so explicitly. In 1996, Congress passed the Coats-Snowe Amendment to the PHSA, which prohibits discrimination against an entity that

"refuses to undergo training in the performance of induced abortions, to require or provide such training, to perform such abortions, or to provide referrals for such training or such abortions." Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, tit. V, § 515, 110 Stat. 1321, 1321-245 (codified at 42 U.S.C. § 238n(a)). And starting in 2004, Congress included the Weldon Amendment as a rider in health care appropriations bills preventing HHS from discriminating against an entity that refuses to "provide, pay for, provide coverage of, or provide referrals for abortions." Consolidated Appropriations Act, 2005, Pub. L. No. 108-447, tit. V, § 508, 118 Stat. 2890, 3163 (2004); *see California*, 950 F.3d at 1079 & n.5 (discussing the Coats-Snowe Amendment and the Weldon Amendment).[7] In contrast, Section 1008 applies to "programs where abortion is a method of family planning," and does not explicitly cover "programs where abortion or referral for abortion is a method of family planning." *Cf. N.Y. Tel. Co. v. N.Y. State Dep't of Lab.*, 440 U.S. 519, 537–38 (1979) ("[W]hen Congress wished to impose or forbid [a particular condition], it did so explicitly . . . ."). Given this statutory background, it is reasonable for HHS to adopt an interpretation of Section 1008 that draws this distinction.

2. Section 1008 Does Not Require a Higher Degree of Physical and Financial Separation.

Plaintiffs also assert that the Final Rule conflicts with Section 1008 because it does not sufficiently require that grantees physically and financially separate abortion services from non-abortion services. To the contrary, the Final Rule permissibly interprets Section 1008 and is thus entitled to *Chevron* deference.

[7] Plaintiffs do not argue that the Final Rule is "not in accordance with law" because it violates the Coats-Snowe Amendment or the Weldon Amendment. *See also* 86 Fed. Reg. at 56,153 (discussing federal conscience statutes and noting that "objecting individuals and grantees will not be required to counsel or refer for abortions in the Title X program in accordance with applicable federal law").

Again, the Supreme Court in *Rust* has already determined that Section 1008 is ambiguous, and that holding extended to the issue of physical and financial separation. The Court stated that the 1988 Rule's "program integrity requirements," which required strict separation similar to the 2019 Rule, are "a permissible construction of the statute and are not inconsistent with congressional intent." *Rust*, 500 U.S. at 188. "[T]he legislative history is clear about very little, and program integrity is no exception. The statements relied upon by petitioners to infer such an intent are highly generalized and do not directly address the scope of § 1008." *Id.* at 188–89. The Court thus deferred to the agency's interpretation, noting that, "[w]hile petitioners' interpretation of the legislative history" requiring more integrated family planning services "may be a permissible one, it is by no means the only one." *Id.* at 189.

Since Section 1008 is ambiguous as to the separation requirements, the Court must defer to HHS so long as the interpretation embodied by the Final Rule is a permissible reading of the statute. The Final Rule, which re-adopts the 2000 Rule, provides the following instructions to grantees regarding separation of funds:

> Separation of Title X from abortion activities does not require separate grantees or even a separate health facility, but separate bookkeeping entries alone will not satisfy the spirit of the law. Mere technical allocation of funds, attributing federal dollars to non-abortion activities, is not a legally supportable avoidance of section 1008.

86 Fed. Reg. at 56,150 (quoting Provision of Abortion-Related Services in Family Planning Services Projects, 65 Fed. Reg. 41,281, 41,282 (July 3, 2000)).

As set forth in a 2000 notice of interpretations:

> Certain kinds of shared facilities are permissible, so long as it is possible to distinguish between the Title X supported activities and non-Title X abortion-related activities: (a) A common waiting room is permissible, as long as the costs are properly pro-rated; (b) common staff is permissible, so long as salaries are properly allocated and all abortion related activities of the staff members are performed in a program which is entirely separate from the Title X project; (c) a hospital offering abortions for family planning purposes and also housing a Title X

> project is permissible, as long as the abortion activities are sufficiently separate from the Title X project; and (d) maintenance of a single file system for abortion and family planning patients is permissible, so long as costs are properly allocated.

65 Fed. Reg. at 41,282.

The Final Rule is a permissible interpretation of Section 1008. Indeed, the text of Section 1008 provides no indication whatsoever about the degree of separation that a grantee must maintain between abortion services and non-abortion services. The Final Rule ensures that funds are not used "in programs where abortion is a method of family planning," 42 U.S.C. § 300a-6, by requiring separation beyond "[m]ere technical allocation of funds" and "separate bookkeeping entries," 86 Fed. Reg. at 56,150. Since *Rust* held that the stricter separation requirements of the 1988 Rule were permissible and indicated that a rule that actually *promotes* integration of abortion and non-abortion services would also be permissible, *see Rust*, 500 U.S. at 188, it must be the case that the Final Rule's approach falling somewhere in the middle is also permissible. Notably, the Final Rule's requirements are similar to those in place prior to the 1988 Rule at issue in *Rust*, and nowhere did the *Rust* Court suggest that those requirements were impermissible. Indeed, as with referrals, the Final Rule's approach is consistent with the agency's position for almost the entire history of Title X, and no court has ever held that more separation is required. As such, HHS's "longstanding" interpretation should be given "particular deference." *Barnhart*, 535 U.S. at 220.

A contrary ruling would be unmanageable. Plaintiffs say that "the Court need not define with precision the outer bounds of Section 1008." Mot. at 14. But that reservation rings hollow; were the Court to declare the Final Rule insufficient in this regard without giving precise guidance about what sort of separation *is* mandated by Section 1008, HHS—and Title X grantees—would be left uncertain about the statutory requirements. Plaintiffs appear to want the Court to put the 2019 Rule back in place by declaring the strict physical-and-financial-separation requirements to be unambiguously required by the statute. *But see Baltimore*, 973 F.3d at 296 (affirming a

permanent injunction of the 2019 Rule as to the State of Maryland). Such an outcome would amount to the Court implementing a detailed regulatory scheme whole cloth from a one-sentence statute that says nothing on the subject. The Court should reject that result.

Plaintiffs contend that their reading of Section 1008, which apparently prohibits *any* overlap in a grantee's abortion and non-abortion services, flows from the principle that "[m]oney is fungible." Mot. at 16 (quoting *Holder v. Humanitarian Law Project*, 561 U.S. 1, 31 (2010)). But the fungibility of money cannot be taken to its logical extreme without completely eliminating the basic accounting principle that funds can be allocated for specific purposes. As one court has concluded, "as a matter of law, the freeing-up theory cannot justify withdrawing all state funds from otherwise eligible entities merely because they engage in abortion-related activities disfavored by the state." *Planned Parenthood of Cent. & N. Ariz. v. Arizona*, 718 F.2d 938, 945 (9th Cir. 1983); *see also Planned Parenthood of Minn. v. Minnesota*, 612 F.2d 359, 362 (8th Cir. 1980) (rejecting "[t]he argument that the money given to Planned Parenthood by the state might free-up other money which would be used for abortions" and finding "that Planned Parenthood's accounting procedures are more than adequate to insure that state money is not used for abortions nor allowed to free-up other money for abortions"). Indeed, the Supreme Court later limited the reach of this theory, noting that *Holder* was specific to the context "where the record indicated that support for [terrorist] organizations' nonviolent operations was funneled to support their violent activities." *Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 570 U.S. 205, 220 (2013). The Final Rule prohibits such funneling of Title X funds, so the concerns of *Holder* are not present here. Moreover, the Supreme Court noted that, "if the Government's argument [that money is

fungible] were correct . . . much of the reasoning of . . . *Rust* would have been beside the point." *Id.*[8]

> Finally, the NPRM and the Final Rule both address these arguments. The NPRM states:
>
> > The 2019 rule's separation requirements also claimed to be addressing questions of "fungibility" and a concern that Title X funds might be "intentionally or unintentionally" co-mingling with activities not allowed under the statute. As noted, close oversight for decades under the 2000 rules uncovered no misallocation of Title X funds by grantees. Moreover, courts have long since held that governments cannot restrict access to funds for one activity simply because it may "free up" funds for another activity. Because of the 2019 rule, appropriations that would otherwise be used to carry out the purposes of the Title X program, providing a broad range of family planning services to individuals (including confidential services to minors), are now being diverted to increased infrastructure costs resulting from the separation requirement as well as the micro-level monitoring and reporting now required of grantees. None of these burdensome additional requirements provide discernible compliance benefits, particularly not to public health. As many commenters and at least one court emphasized, the 2019 rule was a solution in search of a problem, a solution whose severe public health consequences caused much greater problems.

86 Fed. Reg. at 19,816–17 (citations omitted). And the Final Rule states:

> The Department disagrees that Title X grant funds allow for the "creation of slush funds" or that those funds are "fungible." As stated above, the Department has multiple methods by which it confirms that grant funds are spent for grant purposes, and it has concluded that grantees comply, not just with section 1008, but with Congressional directives and other requirements of the program. Again, the 2019 rule could point to no significant compliance issues related to the diversion of Title X grant funds, and a fresh review of decades of evidence has uncovered no such issues.

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[8] Plaintiffs argue that "a program that directly or indirectly subsidizes abortion as a method of family planning is a 'program where abortion is a method of family planning.'" Mot. at 16. But Section 1008 does not say "directly or indirectly." In another recent case in this district, Ohio challenged a statute that prohibited a State from using certain federal funds "to either directly or indirectly offset" state tax cuts. *Ohio v. Yellen*, No. 1:21-cv-181, 2021 WL 2712220, at *3 (S.D. Ohio July 1, 2021), *appeal filed*, No. 21-3787 (6th Cir. Sep. 3, 2021). Ohio, again pointing to the fungibility of money, argued that the "indirectly" phrasing was effectively a ban on any state tax cuts. *See* Combined Motion for a Preliminary Injunction and Memorandum in Support of the Motion, *Ohio*, No. 1:21-cv-181 (S.D. Ohio Mar. 17, 2021), ECF No. 3 at 5, available at 2021 WL 1624920. Because Section 1008 does not contain any analogous phrase about "indirectly" subsidizing abortion, Plaintiffs' argument here is misplaced.

86 Fed. Reg. at 56,150.

The Final Rule's conclusion that the strict physical-and-financial-separation requirements are not required by the statute and that other compliance measures are sufficient to ensure that Title X funds are not used to subsidize abortions is reasonable and warrants deference. Plaintiffs' Section 1008 challenge should be rejected.

B. The Final Rule Is Not Arbitrary And Capricious.

Plaintiffs' arbitrary-and-capricious claims fare no better. Agency action must be upheld in the face of an arbitrary and capricious challenge so long as the agency "articulate[s] a satisfactory explanation for [the] action including a rational connection between the facts found and the choice made." *Little Sisters of Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2383 (2020) (citation omitted). A court's review is "narrow" and it "is not to substitute its judgment for that of the agency." *Hosseini v. Nelson*, 911 F.3d 366, 371 (6th Cir. 2018) (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)); *see also Kentucky Coal Ass'n v. TVA*, 804 F.3d 799, 801 (6th Cir. 2015) (APA standard is not an "invitation for judicial second-guessing"). Under this "deferential" standard, a court "simply ensures that the agency has acted within a zone of reasonableness and, in particular, has reasonably considered the relevant issues and reasonably explained the decision." *FCC v. Prometheus Radio Project*, 141 S. Ct. 1150, 1158 (2021). Critically, "mere policy disagreement is not a basis for a reviewing court to declare agency action unlawful." *N.C. Fisheries Ass'n, Inc. v. Gutierrez*, 518 F. Supp. 2d 62, 95 (D.D.C. 2007); *accord Coal. for Advancement of Reg'l Transp. v. Fed. Highway Admin.*, 576 F. App'x 477, 488-89 (6th Cir. 2014).

Plaintiffs argue that two aspects of the Final Rule are arbitrary and capricious: (1) its "approach to financial and physical separation" and (2) its requirement that providers make, in

certain circumstances, abortion referrals. Mot. at 21. But these disagreements with the policy judgments contained in the Rule are no basis to invalidate agency action under the deferential arbitrary and capricious standard of review.

1. HHS's Decision to Revoke the 2019 Rule's Separation Requirements Is Reasonable.

The 2019 Rule "required grantees to maintain strict physical and financial separation between Title X projects and abortion related activities, to be determined by the 'facts and circumstances' of each grantee." 86 Fed. Reg. at 19,813. But as HHS explained in the Final Rule, these "burdensome additional requirements"—without which the Title X program has operated successfully for nearly its entire existence—"provide [no] discernible compliance benefits" and actually undermine the "core purpose of Title X." 86 Fed. Reg. at 56,145. Resources spent on the "increased infrastructure costs" and "micro-level monitoring and reporting" imposed by the 2019 Rule are necessarily not devoted to "provid[ing] a broad range of family planning services." *Id*. This judgment was a reasonable one for HHS to make, and its conclusion is well-supported in the Rule. *See, e.g.*, *California*, 950 F.3d at 1096 (emphasizing that courts "defer to the agency's expertise in identifying the appropriate course of action").

After reviewing the costs imposed by the 2019 Rule, HHS undertook a "fresh review" of the actual evidence of noncompliance that motivated that rule's separation requirements. 86 Fed. Reg. at 56,145; *see, e.g.*, *Am. Petroleum Inst. v. EPA*, 906 F.2d 729, 738 n.11 (noting that "an agency is certainly entitled to change course"). HHS reviewed over 30 reports reviewing the Title X program over the past 45 years and discovered "only minor compliance issues with grantees"—and even those were contained in just "two GAO reports from the 1980s," in which GAO recommended "only more specific guidance, not a substantial reworking of the regulations" and "found no evidence that Title X funds had been used for abortions or to advise clients to have

abortions." 86 Fed. Reg. at 56,145. In short, HHS determined that there had "been no evidence of compliance issues regarding section 1008 by Title X grantees that would justify the greatly increased compliance costs for grantees and oversight costs for the federal government the 2019 rule required." *Id*. It is to precisely this type of weighing of costs and benefits that a court should defer when applying the APA standard of review. *E.g.*, *California*, 950 F.3d at 1096 ("We are also prohibited from 'second-guessing the [agency]'s weighing of risks and benefits and penalizing [it] for departing from the . . . inference and assumptions' of others." (quoting *Dep't of Com. v. New York*, 139 S. Ct. 2551, 2569 (2019)); *see also COMPTEL v. FEC*, 978 F.3d 1325, 1335 (D.C. Cir. 2020) (noting that "agencies are expected to reevaluate the wisdom of their policies in response to changing factual circumstances"). HHS's analysis easily survives arbitrary and capricious review, and Plaintiffs' arguments to the contrary are unavailing.

1. Plaintiffs are incorrect to contend that the Final Rule does not adopt "any alternative to keep Title X funds from being used to subsidize abortion," Mot. at 21, or that the Final Rule's separation requirements are "incredibly relaxed," *id*. at 22. As HHS explained, in "readopting the 2000 rule," it also reinstated policies designed to ensure grantees' separation of Title X funds and abortion-related activities that had been in place for much of the program's history. 86 Fed. Reg. at 56,150. In addition, "[a]ll Title X grantees are subject to 45 CFR part 75." *Id*. at 56,152; *see also* 42 C.F.R. § 59.9 (requiring that Title X funds "be expended solely for the purpose for which the funds were granted in accordance with the approved application and budget" and the standards set forth in generally applicable agency grant regulations). Through these procedures, HHS's Office of Population Affairs ("OPA") "closely monitors Title X grantee compliance through regular grant reports, compliance monitoring visits, and legally required audits, and it has done so since the beginning of the program." 86 Fed. Reg. at 56,145; *see also, e.g.*, 45 C.F.R. § 75.302

(requiring that grantees establish management systems and records for the source and use of federal funds); *id.* § 75.303 (establishing controls to guarantee compliance with federal award statutes and regulations). In all the years of the Title X program, OPA has uncovered "no misallocation of Title X funds by grantees" and no "instance where grantees were co-mingling funds with activities not allowed under the statute or regulations." 86 Fed. Reg. at 56,145.

Plaintiffs' argument here is largely a restatement of their statutory argument that Section 1008 requires the strict separation requirements of the 2019 Rule. As discussed above, that is not the case, *see supra* pp. 14–19, and *Rust* makes clear that Title X affords HHS wide discretion in determining the requisite amount of separation to ensure that Title X funds are not used for improper purposes. *See Rust*, 500 U.S. at 184, 188–89 (recognizing that "the legislative history is clear about very little," that Title X imbues HHS with "broad directives" to manage the program, and that an interpretation of the relevant statute and legislative history that would prohibit the imposition of strict physical and financial requirements "may be a permissible one" as well). HHS was entitled to draw on its experience applying both the 2019 Rule's separation requirements, as well as those set forth in the many years that preceded that rule, and to determine that the stricter separation requirements are not necessary to ensure compliance with Section 1008 (and thus do not justify their substantial additional cost on the regulated community and the government). *See, e.g.*, *California*, 950 F.3d at 1100 (according deference to HHS's determination about what is necessary to ensure compliance with Section 1008 and predictions about "the behavior of grantees and prospective grantees"); *Nat'l Lime Ass'n v. EPA*, 233 F.3d 625, 635 (D.C. Cir. 2000) (deferring

to the "informed discretion of" an agency's determination about the requirements necessary to ensure compliance with agency standards).[9]

Plaintiffs similarly miss the mark in suggesting that HHS did not "justify its choice of this alternative over other, more-demanding separation requirements." Mot. at 22. An agency is not required to "consider all policy alternatives in reaching its decision," but must only "address obviously germane alternatives proposed by commenters during the notice-and-comment period." *Am. Ass'n of Cosmetology Sch. v. DeVos*, 258 F. Supp. 3d 50, 75 (D.D.C. 2017). HHS expressly did so here when it considered whether to "maintain many elements of the 2019 rule and to impose additional restrictions on grantees." 86 Fed. Reg. at 56,176. After considering this approach, HHS determined that it "would exacerbate the trends of reduced Title X grantees, subrecipients, service sites, and clients served that [HHS] observed under the 2019 Rule." *Id.*; *see California*, 950 F.3d at 1100, 1100 n.31 (rejecting argument that HHS acted arbitrary and capriciously by "rely[ing] on its own predictions" and "reject[ing] those submitted by commenters opposing the [rule]," and noting that an agency "may reasonable decide not to rely on the opinions of outside commenters, even where they claim expertise"); *FBME Bank Ltd. v. Mnuchin*, 249 F. Supp. 3d 215, 222 (D.D.C.

[9] This reasoning also rebuts Plaintiffs' meritless contention that "the absence of 'evidence of compliance issues' does not imply the absence of compliance issues." Mot. at 23. That argument assumes that the 2019 Rule's strict separation requirements are required by Section 1008, and that any activity that would run afoul of that separation requirement would run afoul of Section 1008. Because that premise is not true, and because HHS does have procedures in place to ensure that Title X funds are not used for improper purposes (including in programs where abortion is a method of family planning), HHS could rationally rely on the absence of compliance issues prior to 2019 to conclude that the additional burdens imposed by the 2019 Rule outweighed any benefits.

2017) ("There is no requirement . . . that an agency respond to significant comments in a manner that satisfies the commenter.").[10]

2. Plaintiffs also argue that the Final Rule's conclusions regarding the "negative public health consequences" of the Final Rule are "not supported by the evidence on which it relied." Mot. at 25. This is incorrect. HHS extensively detailed the impact that the 2019 Rule had in terms of reducing the number of providers, the number of services provided, and the quality of those services. *See generally* 86 Fed. Reg. at 56,145–49. In sum, that rule "dramatically reduced access to family planning and preventive health services that are essential for hundreds of thousands of clients, especially for the low-income clients Title X was specifically created to serve." *Id*. at 56,148; *see id*. at 56,150 (noting that "numerous comments spoke to the types of clients they have not been able to serve and the nature of services that are being lost because clients cannot afford those services"). *See Saint Mary's Cement v. EPA*, 782 F.3d 280, 286 (6th Cir. 2015) ("[W]e are at our 'most deferential' when 'reviewing an agency's scientific determinations' about issues within its expertise." (citation omitted)).

Plaintiffs posit that HHS "placed undue emphasis on the size of the Title X program," improperly equating the fact that patients did not receive services through the Title X program with a lack of any care at all. Mot. at 25. But as HHS explained, "[w]hile some states and organizations were able to provide family planning and related preventive health services in the absence of Title X funding, the comments made clear that they were not providing the full scope of services provided under the Title X program," or according to the "the same standards." 86

[10] As discussed above, none of this is changed by Plaintiffs' reliance on the truism—which in this case is not a legally significant factor—that "[m]oney is fungible." Mot. at 22. *See supra* pp. 17–18.

Fed. Reg. at 56,151–52. Moreover, HHS determined that the provision of such services was not "sustainable for the long term," based on comments indicating that, in order to provide them, organizations were required to "eliminate[e] other critical services" and states had to rely on "emergency or one-time funds." *Id*. at 56,152.[11]

More fundamentally, Plaintiffs ignore the nature of the Title X program, which HHS emphasized is designed to "prioritize and increase family planning services to low-income clients." 86 Fed. Reg. at 56,146–47. "The Title X program is the only federal grant program dedicated to providing comprehensive family planning and related preventive health services. . . . For many clients, Title X clinics are their only ongoing source of healthcare and health education." *Id*. at 56,147. It was reasonable for HHS to conclude that a drastic reduction in the services provided through this critical federal program would have a negative impact on the public health that the program is designed to promote. *See Tenn. Envt'l Council v. TVA*, 32 F. Supp. 3d 876, 888 (E.D. Tenn. 2014) ("[C]onsiderable discretion is afforded to agencies to define the purpose and need of a project."); *California*, 950 F.3d at 1096 n.28 ("agency had discretion to rely on its own expertise, even if, as an original matter, a court might find contrary views more persuasive" (citation omitted)).

Plaintiffs are also wrong to contend that HHS "irrationally concluded that the 2019 Rule had permanently decreased the number of patients and grantees participating in Title X." Mot. at 28. HHS assembled two years of data showing decreases in both the number of grantees and the number of services provided. Even putting aside the disruptions caused by COVID-19—which HHS emphasized "exacerbated" a network that had already been "disrupted and weakened" by the

[11] HHS thus explicitly considered Plaintiffs' contention that "[e]vidence shows that existing grantees were willing and capable of increasing services to provide for community needs," Mot. at 28, and took a different view, as it was entitled to do.

2019 Rule, 86 Fed. Reg. at 56,146—the data clearly reflects that the 2019 Rule "directly resulted in a significant loss of grantees, subrecipients, and service sites, and close to one million fewer clients served from 2018 to 2019." *Id*. at 56,151. Plaintiffs may disagree with HHS's ultimate policy decision, but the Department specifically addressed the concern that the provision of Title X services would improve after COVID-19, and utilized its expertise to determine that it was "unlikely that the number of clients served or services provided would increase to pre-2019 levels or above without a change to the 2019 rule." *Id*. at 56,152. And as noted above, agencies "are expected to reevaluate the wisdom of their policies in response to changing factual circumstances," *COMPTEL*, 978 F.3d at 1335, so HHS did not need to await further negative public health consequences before taking reasoned action to stem those consequences and promote the goals of the Title X program. This is sufficient to satisfy the APA. *See, e.g.*, *Inv. Co. Inst. v. Commodity Futures Trading Comm'n*, 720 F.3d 370, 380 (D.C. Cir. 2013) (rejecting argument that "amounts to nothing more than [a] policy disagreement"); *California*, 950 F.3d at 1001 (affording "substantial deference" to HHS's "predictive judgments within the scope of [its] expertise" about the number of Title X grantees and services provided).

Plaintiffs' last argument on this point is that HHS's calculation relied on the "unsupported" assumption that "none of the grantees who remained in the program after the 2019 Rule saw new or additional users *because of* the 2019 Rule." Mot. at 30. Plaintiffs attempt to hold HHS to an impossible standard—it is not clear how HHS would know the reason a particular Title X patient received Title X services, and Plaintiffs offer no evidence to the contrary. But in any event, Plaintiffs' quibbling with the numbers aside, there is no dispute that the "net change" in the number of patients that received Title X services following the 2019 Rule was a decrease and that far fewer patients received services across the entire federal program. *See, e.g.*, 86 Fed. Reg. at 56,146

(noting that 19 grantees, 231 subrecipients, and 945 service sites withdrew from the Title X program after the 2019 Rule and that, as result, the program "provided services to 844,083 fewer clients in 2019 compared to 2018"). Despite that drastic overall reduction in patients, Plaintiffs point to the fact that seven (out of 50) states experienced a "meaningful increase in the number of Title X clinics" to imply an increase in overall demand for Title X services "*because of* the 2019 Rule." Mot. at 30-31. But again, the numbers clearly show that the overall demand for Title X services decreased over this period, and it was certainly not irrational for HHS instead to rely on the more representative experience of the Title X program as a whole and its own expertise.

3. Plaintiffs next suggest that the Rule "completely neglects to consider reliance issues." Mot. at 31. But Plaintiffs have no legally cognizable interests in the continued receipt of Title X grants under the conditions they prefer. Title X grants only obligate HHS to provide funds to the grantee for one year (while sometimes providing HHS with the option of issuing non-competitive continuation grants for several additional years), 42 C.F.R. § 59.8(b), and HHS's Title X regulations provide that "[n]either 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 with respect to any approved application or portion of an approved application," *id*. § 59.8(c). In contrast to the agency actions at issue in the cases Plaintiffs cite,[12] the Final Rule here concerns only discretionary funding decisions, which cannot create legally cognizable reliance interests—and certainly not beyond the stated duration (generally one year) of

[12] *See DHS v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1914 (2020) (agency was required to at least consider potential reliance interests where it reversed a five-year old policy on which recipients could have relied to "enroll[] in degree programs, embark[] on careers, start[] businesses, purchase[] homes, and even marr[y] and [have] children"); *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117 (2016) (agency reversed, without explanation, a policy regarding the application of a statutory exemption that had been in place for more than 30 years).

a Title X grant. *Cf. Janus v. Am. Fed'n of State, Cty., & Mun. Emps.*, 138 S. Ct. 2448, 2484 (2018) (discounting asserted reliance interests because the relevant "contract provisions . . . will expire on their own in a few years' time"). And in any event, the 2019 Rule was only in place for a little more than two years, so this case does not involve any "longstanding policies" any more than it involves "serious reliance interests." *Regents*, 140 S. Ct. at 1913.

4. Finally, the Court should reject out of hand the argument that HHS "failed to consider the degree to which eliminating these requirements and replacing them with the 2000-era guidance would erode public support for the Title X program." Mot. at 32. As HHS explained, the Final Rule readopts the 2000 Rules, which "reflected compliance standards that had been in effect for nearly the entirety of the Title X program, had been widely accepted by grantees, had enabled the Title X program to operate successfully, and had not resulted in any litigation." 86 Fed. Reg. at 56,145. In other words, the "decades-old compromise" to which Plaintiffs refer, Mot. at 32, has largely involved the regulatory standards to which they now object in this lawsuit.

2. HHS's Decision to Revoke the 2019 Rule's Abortion Referral Prohibition Is Reasonable.

Plaintiffs also make four arguments that HHS did not adequately respond to comments addressing the provision of the Final Rule requiring that grantees provide abortion referrals upon request. These arguments lack merit, and the Court should reject them.

First, Plaintiffs assert that the Final Rule's determination that the 2019 Rule caused negative public-health effects is flawed. Mot. at 33. Second, they say that the Final Rule inadequately addresses the concern that the referral requirement could cause a loss of public support in the Title X program. *Id.* Plaintiffs do not elaborate on either of these points beyond incorporating their previous arguments about the physical-and-financial-separation requirements. *Id.* As explained above, those arguments should be rejected. *See supra* pp. 20-28.

Third, Plaintiffs argue that the Final Rule does not sufficiently explain the departure from the 2019 Rule's conclusion that "in most instances when a referral is provided for abortion, that referral necessarily treats abortion as a method of family planning." Mot. at 33 (quoting 84 Fed. Reg. at 7717). They also repeat their arguments that the Final Rule does not adequately explain how HHS ensures that Title X funds are not used for abortions, *id.* at 33–34, to which Defendants have already responded, *see supra* pp. 20-28. In any event, HHS provided a detailed explanation as to how the Final Rule complies with Section 1008. *See generally* 86 Fed. Reg. at 56,149–50. The Final Rule also explains why HHS abandoned the 2019 Rule, noting specifically that, "[i]n the wake of the 2019 rule, both private organizations and states withdrew from the program, leaving multiple states without any Title X providers and the agency struggling to meet its mandate to provide family planning services for low-income populations in areas of high need." *Id.* at 56,150. Thus, "[t]he program is returning to the program requirements in operation for the majority of its history because those requirements best serve individual clients and the public health." *Id.* This explanation satisfies the APA's requirement that the agency have "good reasons for the new policy," and the change in policy is therefore not arbitrary and capricious. *Encino Motorcars*, 136 S. Ct. at 2126; *see also FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) ("The [APA] makes no distinction . . . between initial agency action and subsequent agency action undoing or revising that action. . . . [I]t suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency *believes* it to be better . . . .").

Finally, the Court should reject Plaintiffs' argument that HHS failed to address concerns that certain states raised in a comment regarding medical ethics. Mot. at 34–35; *see also* ECF No. 2-2, at 13–14 (comments of Ohio and twenty other states). The issue of medical ethics arose

during the notice-and-comment period for the 2019 Rule banning grantees from making referrals for abortion. The *Baltimore* court summarized some of the comments as follows:

> Several medical organizations submitted comments to HHS about the [2019] Rule, and *all of them* stated that the Final Rule would violate the established principles of medical ethics. For example, the American College of Obstetricians and Gynecologists ("ACOG")—which comprises 90% of the nation's obstetricians-gynecologists—cautioned that the Final Rule "would put the patient-physician relationship in jeopardy by placing restrictions on the ability of physicians to make available important medical information, permitting physicians to withhold information from pregnant women about the full range of their options, and erecting greater barriers to care, especially for minority populations."

Baltimore, 973 F.3d at 276–77.

Similar concerns were raised in comments by the American Medical Association ("AMA"), the American Academy of Family Physicians, the American Academy of Nursing, the American Academy of Pediatrics, the American College of Physicians, Planned Parenthood Federation of American, and the States of Washington, New York, Hawaii, and Oregon. *Id.* at 277. Indeed, "no professional organization of any kind takes the position that the [2019] Rule's restrictions on referrals are in line with medical ethics." *Id.* (internal quotation marks omitted). The *Baltimore* court concluded that HHS's response to these comments failed to "address head-on the arguments of all of these medical organizations." *Id.* *But see California*, 950 F.3d at 1102–03 (concluding that HHS's explanation of the 2019 Rule sufficiently addressed the concerns of major medical organizations).

In 2021, when HHS decided to revoke the 2019 Rule, it addressed the issue of medical ethics and effectively endorsed the position put forth by these major medical organizations. The NPRM states that the 2019 Rule's ban on referrals was not "in accordance with the ethical codes of major medical organizations." 86 Fed. Reg. at 19,817. And the Final Rule refers to numerous comments from the 2019 rulemaking:

> One organization commented that "the Final Rule makes it impossible for us to provide healthcare and information to patients consistent with medical ethics and evidence-based standards of care." Another organization stated that the 2019 rule "would fundamentally compromise the relationship our patients have with us as trusted providers of this most personal and private healthcare." Another organization said that "the new regulations interfere with a healthcare provider's ability to provide healthcare in accordance with accepted standards of care for reproductive health." Still another said, "these new rules require our providers to deprive their patients of the information and services they need to make and carry out fully informed decisions about their reproductive health. Our providers' ethical and professional responsibilities do not allow this."

86 Fed. Reg. at 56,146. By recognizing these concerns and revoking the 2019 Rule, HHS considered and addressed the "important aspect" of medical ethics in abortion referrals. *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 645 (2007) (quoting *State Farm*, 463 U.S. at 43).

Plaintiffs raise two objections to HHS's treatment of this issue.[13] First, they suggest that HHS should not have trusted that the major medical organizations truly represented a consensus on medical ethics, claiming in particular that ACOG supports "eugenic abortion" and "ought not be taken seriously." Mot. at 34. *But see Baltimore*, 973 F.3d at 276 (noting that ACOG represents 90% of the nation's obstetricians-gynecologists). Although an agency must consider and address all "important aspects of the problem," *State Farm*, 463 U.S. at 43, it is not under an obligation to respond to attacks from one commenter lodged against the reputation of another commenter. The Final Rule thus reasonably does not address Plaintiffs' characterization of ACOG's legal briefing in cases unrelated to Title X. *See* Mot. at 34. Second, Plaintiffs argue that, rather than relying on the opinions of medical organizations, HHS should have instead deferred to state laws on medical ethics, which, they say, conflict with the Final Rule's referral requirement. Mot. at 34–35

[13] Notably, these objections arise only in a few paragraphs of one fourteen-page letter, in a rulemaking process that garnered thousands of comments from various entities. *See* ECF No. 2-2, at 13–14.

(collecting such law). The laws that Plaintiffs cite, however, provide generally that a medical provider cannot be forced to perform an abortion or participate in an abortion procedure. None of these laws make any mention of *referrals*. *See infra* pp. 40-42 (discussing these State laws); *see also supra* note 7 (noting that the Final Rule incorporates federal conscience statutes). The State laws are thus not in conflict with the ethics rules of the major medical organizations, nor are they in conflict with the Final Rule.[14]

II. Plaintiffs Have Failed to Establish the Requisite Showing of Irreparable Harm.

"A preliminary injunction is an extraordinary remedy never awarded as of right." *Winter*, 555 U.S. at 24. Plaintiffs are not entitled to this "extraordinary remedy" because, among other things, they cannot show that they are "likely to suffer irreparable harm in the absence of preliminary relief." *Id.* at 20, 22. Showing "the existence of an irreparable injury" is "mandatory" when a party is seeking a preliminary injunction. *D.T.*, 942 F.3d at 327 ("[A] plaintiff *must* present the existence of an irreparable injury to get a preliminary injunction."). To merit the "extraordinary remedy of a preliminary injunction," the injury "'must be both certain and immediate,' not 'speculative or theoretical.'" *Id.* (quoting *Benisek v. Lamone*, 138 S. Ct. 1942, 1943 (2018); *Mich. Coal. Of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 154 (6th Cir. 1991)).

A. Plaintiffs Are Not Entitled to Preliminary Relief Based on Increased Competition for Title X Funding.

Plaintiffs contend that they will be irreparably harmed in the absence of a preliminary injunction because, come January 2022, they "will be made to compete with abortion providers"

[14] Indeed, two of the states whose laws Plaintiffs cite, New York and Oregon, commented in 2019 that they would have to leave the Title X program because the 2019 Rule conflicted with their understanding of medical ethics. *Baltimore*, 973 F.3d at 277.

for Title X grants. *See* Mot. at 36. But a mere increase in *competition* will not necessarily lead to harm, let alone the type of irreparable harm needed to warrant a preliminary injunction.

As an initial matter, the record only contains a single declaration from a single state (Ohio) regarding its status as a Title X grantee and setting out specific facts regarding the possibility of increased competition for Title X grants. *See* Decl. of Michelle Clark, ECF No. 2-1. The Complaint alleges that some—though not all—of the Plaintiff States are currently Title X grantees, and it alleges that those states will face greater competition for Title X grants due to the Final Rule. *See* Compl. ¶ 24. But, other than Ohio, none of the states offer any evidence (or even specific allegations) regarding the potential for and extent of increased competition in each state, and the generalized allegations in the Complaint are not sufficient to meet the Plaintiffs' burden to show irreparable harm. Without more information, these states have not established the existence of a certain and immediate injury, let alone an irreparable one. When seeking a preliminary injunction, "[t]he movant 'must address each of the [preliminary injunction] factors regardless of its strength, and provide [the court] with facts and affidavits supporting each of these assertions." *Time Warner Cable Midwest LLC v. Pennyrile Rural Elec. Co-Op. Corp.*, No. 5:15-cv-45-TBR, 2015 WL 1280818, at *2 (W.D. Ky. Mar. 20, 2015) (quoting *Ohio ex rel. Celebrezze v. Nuclear Regulatory Com.*, 812 F.2d 288, 291 (6th Cir. 1987)); *see also Cal. Ass'n of Private Postsecondary Schs. v. DeVos*, 344 F. Supp. 3d 158, 170 (D.D.C. 2018) ("To permit the Court to evaluate the nature and extent of the alleged irreparable injury, the movant bears the burden of presenting 'specific details regarding the extent to which [its] business will suffer.'" (quoting *Nat'l Ass'n of Mortg. Brokers v. Bd. of Governors of the Fed. Res. Sys.*, 773 F. Supp. 2d 151, 181 (D.D.C. 2011))). Because the vast majority of the Plaintiff States (other than Ohio) have not provided any evidence regarding the potential for or extent of increased competition under the Final Rule, they have not met their

burden of establishing irreparable harm. This is particularly true for the three Plaintiff States that are not direct Title X grantees, who do not even allege—let alone show—that they could be subject to increased competition as a result of the Final Rule.

Even setting aside issues of proof, Plaintiffs offer little legal support for their claim that an increase in competition necessarily constitutes irreparable injury. Notably, each of the cases that Plaintiffs cite addresses standing, not irreparable harm. *See, e.g.*, *Sherley v. Sebelius*, 610 F.3d 69, 72 (D.C. Cir. 2010) (discussing "[t]he doctrine of competitor standing"); *Planned Parenthood of Greater Wash. & N. Idaho v. U.S. Dep't of Health & Hum. Servs.*, 946 F.3d 1100, 1108 (9th Cir. 2020) (same). The fact that an alleged injury may be sufficient to establish standing does not automatically raise it to the level of irreparable harm. *See Cal. Ass'n of Private Postsecondary Schs.*, 344 F. Supp. 3d at 170 ("A prospective injury that is sufficient to establish standing, however, does not necessarily satisfy the more demanding burden of demonstrating irreparable injury."); *cf. Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (noting that "the requirement for substantial proof is much higher" in the context of a motion for preliminary injunctive relief than at other stages of litigation). Otherwise, a preliminary injunction would cease to be an "extraordinary remedy" and would instead be a common response to any agency action that, however slightly, "tilts the playing field for parties that were already competing." *Planned Parenthood*, 946 F.3d at 1108.[15]

[15] While it is true that courts have found that increased competition can constitute irreparable injury, those cases differ in an important respect from this one—namely, they involve not only increased competition, but potentially *unfair* competition stemming from the very conduct sought to be enjoined. *See, e.g.*, *Basicomputer Corp v. Scott*, 973 F.2d 507, 512 (6th Cir. 1992) (treating as irreparable the harm caused by "the loss of *fair competition* that results from the breach of a non-competition covenant") (emphasis added). Here, there is no suggestion that health care providers that may seek to reenter the program are receiving some sort of competitive advantage, only that there will be some level of competition at all.

Nevertheless, Plaintiffs contend that this increased competition will result in irreparable harm because they will not be able to recover grant money that may be awarded to other grantees. In other words, the actual harm that concerns the Plaintiffs is economic—*i.e.*, the potential loss of Title X funding to other grant applicants. But it is well-settled that "economic loss does not, in and of itself, constitute irreparable harm." *Wis. Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985); *see also Celebrezze*, 812 F.2d at 290 ("agree[ing] with the District of Columbia Circuit that economic loss does not constitute irreparable harm, in and of itself" and citing *Wisconsin Gas* approvingly). This is true even if the economic loss is unrecoverable. As a number of courts have recognized, "[t]o demonstrate irreparable injury, a plaintiff must show that it will suffer harm that is 'more than simply irretrievable; it must also be serious in terms of its effect on the plaintiff.'" *Hi-Tech Pharmacal Co. v. FDA*, 587 F. Supp. 2d 1, 11 (D.D.C. 2008) (quoting *Gulf Oil Corp. v. Dep't of Energy*, 514 F. Supp. 1019, 1026 (D.D.C. 1981)). In other words, while "irrecoverable financial loss *may* constitute irreparable injury in some cases, . . . a party asserting such a loss is not relieved of its obligation to demonstrate that its harm will be 'great.'" *N. Air Cargo v. U.S. Postal Serv.*, 756 F. Supp. 2d 116, 125 n.6 (D.D.C. 2010); *see also, e.g.*, *Allina Health Servs. v. Sebelius*, 756 F. Supp. 2d 61, 67–68 (D.D.C. 2010) (noting that "an inability to recover lost profits or payments does not always constitute irreparable harm" and collecting cases); *Otsuka Pharm. Co. v. Burwell*, No. GJH-15-852, 2015 WL 1962240, at *11 (D. Md. Apr. 29, 2015) ("That [a plaintiff] is unable to recover monetary damages from [a defendant] does not . . . automatically make its harm irreparable."). "Otherwise, a litigant seeking injunctive relief against the government would always satisfy the irreparable injury prong, nullifying that requirement in such cases." *CoverDyn v. Moniz*, 68 F. Supp. 3d 34, 49 (D.D.C. 2014).

Even the cases cited by Plaintiffs recognize that not all economic losses warrant a preliminary injunction. *See* Mot. at 36 (quoting *Tex. Children's Hosp. v. Burwell*, 76 F. Supp. 3d 224, 244 n.7 (D.D.C. 2014); then quoting *Performance Unlimited, Inc. v. Questar Publishers, Inc,*, 52 F.3d 1373, 1382–83 (6th Cir. 1995)). In *Texas Children's Hospital*, for example, the court recognized that "'[t]he fact that economic losses may be unrecoverable does not absolve the movant from its considerable burden of proving that those losses are certain, great and actual.'" 76 F. Supp. 3d at 242 (quoting *Nat'l Mining Ass'n v. Jackson*, 768 F. Supp. 2d 34, 54 (D.D.C. 2011)). In that case, the court concluded that although the plaintiffs themselves might not be driven out of business, the "programs they provide may be." *Id.* at 244 n.7. Thus even in that case, the court considered not just whether the losses were recoverable, but also their magnitude and impact. Similarly, in *Performance Unlimited*, the plaintiff demonstrated not just any unrecoverable economic loss, but "[t]he impending loss of financial ruin of [its] business." 52 F.3d at 1382; *see also id.* at 1382–83.

Here, Plaintiffs have not offered any evidence (or even argument) that the potential economic losses attributable to increased competition for Title X grants rises to the level of irreparable harm. As noted above, Plaintiffs have not submitted *any* evidence that any state other than Ohio will experience increased competition for Title X grants as a result of the Final Rule. Instead, they simply claim that because some of the Plaintiff States are Title X grantees, and because additional health care providers are likely to seek Title X grants due to the passage of the Final Rule, those states will necessarily be subject to increased competition. But because the states have not submitted declarations, it is not possible to assess whether and to what extent competition may increase. And even Ohio does not so much as speculate about the extent to which its Title X grants might be reduced, or the impact that will have on its continued functioning. *See, e.g.*, Clark

Decl. ¶ 18. Thus, even if Ohio were to lose some Title X grant funding due to increased competition, it has not shown that this loss would "so devastat[e] its ability to carry out its mission that it will be unable to accept and implement the grant it d[oes] receive." *Experience Works, Inc. v. Chao*, 267 F. Supp. 2d 93, 96 (D.D.C. 2003). Because Plaintiffs have not shown that they will experience economic losses that would lead to the "financial ruin" or closure of their programs, they have not established an irreparable injury that would warrant a preliminary injunction. *See id.* at 97 (holding that a $21.1 million reduction in funding, while "a very serious financial blow to Plaintiff," does not amount to irreparable harm).

B. Ohio Is Not Entitled to Preliminary Relief Because It May Reduce Services Provided with Title X Funding or Because of Hypothetical Reputational Harms.

Plaintiffs also advance two arguments regarding irreparable harm specifically limited to Ohio, neither of which are sufficient to warrant a preliminary injunction.

First, Ohio argues that if it receives less money (due to increased competition for Title X funding), it will be forced "to reduce its services (or spend other state money to make up the difference)," Mot. at 36, but that argument is unavailing. A reduction in federal funding (and a corresponding reduction in services) does not, in itself, constitute an irreparable injury in all circumstances. After all, "the reality is that all applicants for federal funds run this kind of risk of decreased funding." *Experience Works, Inc.*, 267 F. Supp. 2d at 96. Thus, a plaintiff seeking a preliminary injunction must show not just any reduction in services, but a significant reduction that threatens the very existence of those services. *See Tex. Children's Hosp.*, 76 F. Supp. 3d at 244 n.7 (finding irreparable harm where even if plaintiffs would not be driven out of business, "the programs they provide might be"); *see also Experience Works, Inc.*, 267 F. Supp. 2d at 96. Ohio makes no such showing.

Notably, Ohio offers no estimates of the reduction in services that will occur if it is forced to compete with Planned Parenthood of Greater Ohio or other healthcare providers for Title X funding. The only evidence in the record that could demonstrate a possible reduction in services is the comparison of the number of visits through the Ohio Department of Public Health before and after the 2019 Rule went into effect, and that evidence suggests a much more modest reduction in services. From January 1, 2018 through December 31, 2018, "the Ohio Department of Health serviced 59,602 visits through its Title X program." Clark Decl. ¶ 16. The following year, Ohio serviced 58,261 visits after receiving an additional $2 million in funding in September 2019 when Planned Parenthood left the Title X program. *Id.* From January 1 through September 30, 2021 (after Ohio received $8.8 million in Title X funding for grant year 2020–2021 and 2021–2022), Ohio reported servicing 45,703 visits, which it calculates as "an average of about 111 more visits per month than [the Ohio Department of Health] served in 2018." *Id.* Notably, Ohio did not provide any information that would demonstrate whether this higher average might be due to factors other than funding (e.g., a month-by-month comparison that would show whether more visits typically occur in the earlier part of the year compared to the last three months). Moreover, it is not at all apparent that Ohio would return to its 2018 funding levels even if Planned Parenthood of Greater Ohio competes for a Title X grant award. But even setting that aside, a reduction of 111 visits per month amounts to slightly more than a 2% reduction in visits per month across the state, and there is no evidence that it will drive the programs that Ohio offers out of business. *See Experience Works, Inc.*, 267 F. Supp. 2d at 97 ("While Plaintiff may well suffer operational disruptions and inefficiencies, which in turn may affect the quality of its services, these are simply not the kind of devastating irreparable economic losses that are contemplated under the case law."). To the extent that Ohio contends that competition will lead to an even more dramatic reduction in

services, that claim is unsupported by the record and thus merely "speculative" and "theoretical" rather than "certain and immediate." *D.T.*, 942 F.3d at 327. Accordingly, Ohio has not established irreparable injury based on a possible reduction in services.[16]

Ohio's suggestion that it will face "reputational damage" fails to establish irreparable harm for much the same reason. After all, even if the Ohio Department of Health experiences a modest reduction in services, it is unlikely that patients will lose trust in the state's ability to provide needed services. Indeed, if some number of patients chose to receive services from another health care provider with Title X funding (thus reducing the burden on the Ohio Department of Health to provide some number of services), patients who continue to seek care through the Ohio Department of Health may not experience any reduction in service availability. Once again, then, the harm asserted by Ohio is merely hypothetical, rather than certain and imminent. Additionally, although "reputational injury has been held to be a form of irreparable harm" in some cases, it typically arises where the reputation injury stems from "unfair competition," not just a loss of funding. *See, e.g.*, *La.-Pac. Corp. v. James Hardie Bldg. Prods., Inc.*, 335 F. Supp. 3d 1002, 1021 (M.D. Tenn. 2018), *aff'd*, 928 F.3d 514 (6th Cir. 2019); *Lorillard Tobacco Co. v. Amouri's Grand Foods, Inc.*, 453 F.3d 377, 382 (6th Cir. 2006). Thus, even if Ohio experiences some amount of reputational damage, it does not rise to the level of irreparable harm that would warrant a preliminary injunction.

[16] Nor can Ohio rely on any alleged harm to the beneficiaries of its medical services, as a "plaintiff seeking a preliminary injunction must establish that *he* is likely to . . . suffer irreparable harm in the absence of preliminary relief," rather than relying on purported harm to third parties. *Winter*, 555 U.S. at 20 (emphasis added). And there is no reason to believe that medical services in general would decline as a result of increased competition for Title X funding. To the contrary, if Ohio loses any grant funding through increased competition, that loss would reflect a finding that other applicants would better serve clients in the proposed service area.

Finally, it bears noting that increased competition for Title X grants will likely lead to an overall *increase* in services throughout the state of Ohio. As explained in the Final Rule, Family Planning Annual Report (FPAR) data from Ohio shows that—notwithstanding decreased competition when Planned Parenthood exited the Title X program in August 2019—"the state experienced a 10 percent decline in service sites between 2018 and 2020, an 18 percent decline in clients from 2018 to 2019, and a 57 percent decline in clients from 2019 to 2020."[17] 86 Fed. Reg. at 56,151.

C. Plaintiffs Are Not Irreparably Harmed By the Referral Requirement

Finally, Plaintiffs contend that they will be irreparably harmed by the Final Rule because it will "force[]" the states "to support abortion by making referrals upon request." Mot. at 37. As an initial matter, that argument ignores the fact that the states have a choice whether to comply with the Rule or to withdraw from the Title X program. *See Agency for Int'l Dev.*, 570 U.S. at 214 ("[A]s a general matter, if a party objects to a condition on the receipt of federal funding, its recourse is to decline the funds."); *cf. Planned Parenthood of Greater Ohio v. Hodges*, 917 F.3d 908, 911–12 (6th Cir. 2019) ("Private organizations do not have a constitutional right to obtain governmental funding to support their activities."). This is a decision all recipients of federal funds must make, and it does not, on its own, constitute irreparable harm.

Plaintiffs insist that there is no repairing the "damage done" by the referral requirement, but they fail to explain what that "damage" actually entails or how it rises to the level of irreparable harm. *See* Mot. at 37. Plaintiffs' claim of irreparable harm is particularly curious because many

[17] The Final Rule further explains that "[w]hile many states and territories experienced a decline in clients from 2019 to 2020 due to COVID-19, Ohio's percentage decline in clients from 2019 to 2020 ranked 18th in order of states from largest decline to smallest decline." 86 Fed. Reg. at 56,151.

of the Plaintiff States, including Ohio, participated in the Title X program under the 2000 Rule, which also required referrals for abortion upon request. The Plaintiff States offer no explanation why a condition of federal funding that they agreed to for years will suddenly cause them irreparable harm, solely because that condition was briefly abandoned by the 2019 Rule.

Moreover, the Final Rule does not require the states to "support abortion," either in the sense of endorsing the practice or financing abortions. Plaintiffs contend that many states have enacted "laws designed to withhold the State's imprimatur from the practice of abortion," Mot. at 37, but many of the statutes cited are much narrower than that description would suggest. More specifically, most of the cited statutes put limits on the use of public funds to pay for abortion services, but make no mention of referrals. For example, the cited Ohio statute provides that "[u]nless required by the United States Constitution or by federal statute, regulation, or decisions of federal courts, state and local funds may not be used for payment or reimbursement for abortion services" except in certain circumstances. Ohio Rev. Code § 5101.56(A); *see also id.* § 5101.56(D) (specifying that funds also may not be used for "anesthesia, laboratory tests, or hospital services" associated with abortion services). Similarly, the cited Arizona statute provides that no "federal funds passing through the state treasury or the treasury or any political subdivision of th[e] state may be expended for payment to any person or entity for the performance of any abortion unless the abortion is necessary to save the life of the woman having the abortion" or "allocated for training to perform abortions." *See* Ariz. Rev. Stat. Ann. § 35-196.02(A) or (C). The cited Florida statute merely restricts health insurance plans purchased "in whole or in part with any state or federal funds" from providing coverage for abortion except in limited circumstances. Fla. Stat. Ann. § 627.66996(1). And even if Plaintiffs would prefer that state-funded clinics not make

abortion referrals upon request, it does not follow that the Final Rule has wrought irreparable harm simply by imposing a condition on grants that is inconsistent with that preference.

III. The Balance of Equities and the Public Interest Weigh Against A Preliminary Injunction.

The balance of hardships and the public interest weigh against issuing an injunction here. When the government is a party, these two inquiries merge. *Nken*, 556 U.S. at 435. Plaintiffs insist that an injunction "will not cause substantial harm to others," Mot. at 37, but that argument ignores that "[t]here is inherent harm to an agency in preventing it from enforcing regulations that Congress found to be in the public interest to direct that agency to develop." *Cornish v. Dudas*, 540 F. Supp. 2d 61, 65 (D.D.C. 2008); *Seaside Civic League, Inc. v. U.S. Dep't of Housing & Urb. Dev.*, No. 14-1823-RMW, 2014 WL 2192052, at *3 (N.D. Cal. May 23, 2014). More importantly, it overlooks HHS's assessment, discussed in the Final Rule itself, that the 2019 Rule led to a "drastic reduction" in clients that organizations were able to serve. *See* 86 Fed. Reg. at 56,150; *see also id.* at 56,151–52 (discussing how the 2019 Rule "dramatically reduced access to essential family planning and related preventive health services for hundreds of thousands of clients, especially for the low-income clients Title X was specifically created to serve" and specifically addressing the reduction in service sites and clients in Ohio between 2018 and 2020).

Plaintiffs focus on the fact that Planned Parenthood "served more patients and provided more services after exiting the program than it did while a part of the program," Mot. at 37 (citing 86 Fed. Reg. at 56,174), but ignore the fact that, as explained in the Final Rule, "Planned Parenthood affiliates . . . indicated that without Title X funding, they have had to adjust their sliding fee scales, pushing more costs onto the clients[,] . . . . result[ing] in clients forgoing recommended tests, lab work, STI testing, clinical breast exams, and Pap tests in large numbers," in some clients "choosing less effective methods of birth control due to costs," and in some cases "push[ing] their

clients into seeking care elsewhere, interrupting their continuity of care." 86 Fed. Reg. at 56,151–52. They also overlook the reality that "emergency, one-time, and private funding made available to replace the loss of Title X funding has strained state budgets and could not be sustained," suggesting that there might be larger reductions in care in the future as alternative funding disappears. *Id.* at 56,151 (footnote omitted). And even if some organizations are able to provide services through alternative funding, the fact remains that "[t]he Title X program is the only federal grant program dedicated to providing comprehensive family planning and related preventative health services," and in many cases, Title X clinics are "the only ongoing source of healthcare and health education" for their clients, *id.* at 56,147, and it is not in the public interest to hamstring the program's efforts to fully deploy funds to provide critical care to patients nationwide.

IV. Any Relief Should Be Narrowly Tailored.

At a minimum, any injunction should be no broader than necessary to provide Plaintiffs with relief and should be limited to those states that have shown that they will be harmed in the absence of such relief. "The Court's constitutionally prescribed role is to vindicate the individual rights of the people appearing before it," and thus the "plaintiff's remedy must be tailored to redress *the plaintiff's particular injury*." *See Gill v. Whitford*, 138 S. Ct. 1916, 1921, 1933–34 (2018) (emphasis added); *see also Lewis v. Casey*, 518 U.S. 343, 357 (1996). And principles of equity require that injunctions "be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 765 (1994). Notwithstanding these principles, Plaintiffs ask this Court to enjoin the government "from implementing or enforcing the Final Rule," presumably on a nationwide basis, *see* Mot. at 1; *see also id.* at 39, but they offer no explanation why a nationwide injunction is necessary to address their alleged injuries, nor could they. Plaintiffs' purported injuries occur entirely within their own

borders, as they contend that they will be forced to compete with additional Title X grantees within their own state and that they will be harmed by being forced to "support" abortions. And of the Plaintiff States seeking a preliminary injunction, all but one neglected to provide any evidence at all in support of their claims of irreparable harm, a "mandatory" element of seeking preliminary relief. *D.T.*, 942 F.3d at 327. Regardless of whether these alleged harms warrant a preliminary injunction at all, they certainly should not support enjoining the Final Rule from going into effect in states where it will have no impact on Plaintiffs. Accordingly, any preliminary injunction in this case should extend solely to Ohio—the only state to provide any evidence to support its claim or irreparable injury.

CONCLUSION

For the foregoing reasons, Plaintiffs' motion for preliminary injunction should be denied.

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Respectfully submitted

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