No. 21-4235

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

STATE OF OHIO, ET AL.,
Plaintiffs-Appellants,

v.

XAVIER BECERRA, in his official capacity as Secretary of Health and Human Services, ET AL.,
Defendants-Appellees.

On Appeal from the United States District Court
for the Southern District of Ohio, No. 1:21-CV-675
Before the Honorable Timothy S. Black

BRIEF FOR PLANNED PARENTHOOD FEDERATION OF AMERICA, INC. AS AMICUS CURIAE IN SUPPORT OF APPELLEES AND AFFIRMANCE

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 21-4235 Case Name: State of Ohio, et. al. vs. Becerra, et. al.

Name of counsel: Alan Schoenfeld

Pursuant to 6th Cir. R. 26.1, Planned Parenthood Federation of America, Inc.
Name of Party
makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

No

CERTIFICATE OF SERVICE

I certify that on 3/31/2022 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/ Alan Schoenfeld

This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

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INTEREST OF AMICUS CURIAE[1]

Planned Parenthood Federation of America, Inc. (PPFA) is a leading provider of sexual and reproductive health care in the United States, delivering medical services through over 600 health centers operated by 49 affiliates. For more than one hundred years, Planned Parenthood has advocated for access to health care services, provided comprehensive, medically accurate sexual and reproductive health education, and offered the full range of sexual and reproductive health care services, including abortion. One in five women in the United States has chosen Planned Parenthood's expert care at least once in her lifetime. Planned Parenthood affiliates provide care to approximately 2.4 million individuals each year. In particular, Planned Parenthood is at the forefront of providing high-quality reproductive health care to individuals and communities facing serious barriers to obtaining such care—especially individuals with low incomes, individuals in rural and other medically underserved areas, and communities of color.

Before being forced out of the Title X program as a result of the 2019 Rule, Planned Parenthood affiliates had participated in the program since its inception

[1] All parties have consented to the filing of this amicus brief. No counsel for a party authored any part of this brief, and no person other than amicus curiae, their members, and their counsel made a monetary contribution to the preparation or submission of the brief.

over 50 years ago. Planned Parenthood was the largest Title X provider, serving 40% of the 4 million patients who received care through the program every year. PPFA therefore has an interest in ensuring that the 2021 Rule remains in effect, which is critical to avert severe negative public health consequences.

INTRODUCTION

For nearly five decades, the Title X program was an extraordinary success, serving to ensure that all individuals had access to family planning care—regardless of where they live or their economic means.[2] As HHS explained, through the Title X program, clinics "served more than 190 million clients: 182.2 million women, 8.1 million men, comprising 139.5 million adults and 50.8 million adolescents, across 50 states, the District of Columbia, and eight U.S. territories and freely associated states."[3] For nearly all of these fifty years, the rules to the Title X program remained for the most part the same, and the Plaintiff-Appellant States that operate Title X programs, including Ohio, all participated in the program *under those rules*.[4]

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[2] *See generally* Family Planning Services and Population Research Act of 1970, Pub. L. No. 91-572, 84 Stat. 1504, 1506-1508.

[3] Ensuring Access to Equitable, Affordable, Client-Centered, Quality Family Planning Services ("Proposed Rule"), 86 Fed. Reg. 19,812, 19,817 (Apr. 15, 2021).

[4] *See, e.g.*, Title X Grantee Profile: Ohio Department of Health, Off. Population Affairs (Oct. 2020), https://opa.hhs.gov/sites/default/files/2020-10/title-x-grantee-profile-oh.pdf.

In 2019, HHS issued a rule (the "2019 Rule") that restricted information Title X providers may give their pregnant patients (including by banning providers from referring their pregnant patients to abortion providers) and forced them to provide information about prenatal care to every pregnant patient—regardless of their patients' requests.[5] The 2019 Rule also imposed onerous and unnecessary requirements mandating physical separation between the Title X project and all abortion-related activity (including abortion referrals).[6] These changes—opposed by every leading health care organization in the United States[7]—forced nearly 1,000 health centers, including Planned Parenthood affiliates, out of the program.

Concluding that the 2019 Rule "[could] not be squared with well-accepted public health principles,"[8] HHS promulgated a new final rule (the "2021 Rule")—returning to the rules that had governed the program for almost all of its existence—which took effect on November 8, 2021.[9] Ohio and other States, despite complying with similar rules for decades, then sued and sought a

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[5] Compliance with Statutory Program Integrity Requirements, 84 Fed. Reg. 7714, 7788-7789 (Mar. 4, 2019).

[6] *Id.* at 7789.

[7] *See Mayor of Baltimore v. Azar*, 973 F.3d 258, 266 (4th Cir. 2020), *cert. granted, Cochran v. Mayor & City Council of Baltimore*, 141 S. Ct. 1369 (2021).

[8] Proposed Rule, 86 Fed. Reg. at 19,816.

[9] *See* Ensuring Access to Equitable, Affordable, Client-Centered, Quality Family Planning Services ("Final Rule"), 86 Fed. Reg. 56,144 (Oct. 7, 2021) (codified at 42 C.F.R. pt. 59).

preliminary injunction enjoining the 2021 Rule. The district court denied the motion,[10] and the States appealed, asking this Court for an injunction pending appeal. This Court held that the States failed to show that any irreparable harm "would befall them before the appeal can be resolved."[11] The States now appeal the district court's order denying a preliminary injunction enjoining the 2021 Rule.

Because the States have failed to meet the standard for a preliminary injunction and cannot show that the 2021 Rule is unlawful, PPFA urges the Court to affirm the district court's denial of the preliminary injunction—allowing HHS to restore the ability of the Title X program to provide care for our nation's most vulnerable populations.

ARGUMENT

I. THE 2021 RULE IS NECESSARY TO AVERT THE NEGATIVE PUBLIC HEALTH CONSEQUENCES FROM THE 2019 RULE

A. HHS Correctly Concluded That The 2019 Rule Had Negative Public Health Consequences

The States contend that the 2019 Rule did not cause negative public health consequences, ignoring HHS's well-supported conclusion that the Title X program served far fewer clients and provided far fewer services because of that rule. As

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[10] *See* Order Den. Pls.' Mot. for Prelim. Inj., No. 1:21-cv-675 (Dec. 29, 2021), R. 50 ("District Ct. Op.").

[11] *See* Order Den. Plaintiffs-Appellants Mot. for Inj. Pending Appeal 11, No. 21-4235 (Feb. 8, 2022), ECF No. 45-2 ("Sixth Cir. Op.").

Title X providers and many others predicted, the 2019 Rule caused a sharp drop in Title X providers, which has led to a devastating lack of accessibility to family planning services.

The extensive evidence in the administrative record shows that after the 2019 Rule became effective, "[t]he number of family planning services grantees. . . dropped precipitously,"[12] as 19 out of 90 Title X grantees, 231 subrecipients, and 945 service sites withdrew from the program.[13] As HHS explained in promulgating the 2021 Rule, after the 2019 Rule was enacted, Title X services were not available in any form in six states—Hawaii, Maine, Oregon, Utah, Vermont, and Washington—and were available only in limited form in Alaska, Connecticut, Massachusetts, Minnesota, New Hampshire, New York, and Illinois.[14] For instance, in New York, the number of Title X service sites plummeted from 174 to two.[15] The withdrawn entities included Planned Parenthood affiliates, which in 2015 had served approximately 41% of all Title X clients.[16]

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[12] Proposed Rule, 86 Fed. Reg. at 19815.

[13] Final Rule, 86 Fed. Reg. at 56146.

[14] Final Rule, 86 Fed. Reg. at 56146.

[15] Proposed Rule, 86 Fed. Reg. at 19815.

[16] Final Rule, 86 Fed. Reg. at 56174.

HHS data shows that the remaining 71 Title X grantees served 844,083 fewer clients in 2019, after the 2019 Rule was promulgated, as compared to 2018.[17] That amounts to a 22% overall decrease in client service.[18] The Guttmacher Institute, a nonprofit, nonpartisan corporation that specializes in research, policy analysis, and public education related to sexual and reproductive health, confirms that "there has never been as sharp a decline in the number of patients served by the [Title X] program as occurred between 2018 and 2019."[19]

Similarly, in 2020, "Title X served 1.6 million fewer family planning users than in 2019 . . . and Title X service sites delivered care to 302 fewer users per site."[20] Overall family planning encounters provided by Title X sites decreased in 2020 by almost two million.[21] Although HHS acknowledged that the COVID-19 pandemic played a role in this trend, it ultimately concluded that "the pattern of the

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[17] Final Rule, 86 Fed. Reg. at 56151.

[18] Final Rule, 86 Fed. Reg. at 56151.

[19] Final Rule, 86 Fed. Reg. at 56150 (citation omitted); Guttmacher Inst., Public Comment, *Ensuring Access to Equitable, Affordable, Client-Centered, Quality Family Planning Services (RIN 0937-AA11)* at 3 (May 17, 2021), https://www.guttmacher.org/sites/default/files/article_files/attachments/guttmacher_2021_title_x_nprm_comments.pdf.

[20] Final Rule, 86 Fed. Reg. at 56146.

[21] Final Rule, 86 Fed. Reg. at 56146.

losses in the program initiated by the 2019 [R]ule was exacerbated in 2020 for an already disrupted and weakened network."[22]

The record shows that patients who managed to receive services within that weakened network received fewer services overall. Of individuals who were either pregnant or sought pregnancy, 71,145 fewer were served at Title X sites in 2019 compared to 2018.[23] HHS data also shows that in 2019, compared to 2018, "225,688 fewer clients received oral contraceptives; 49,803 fewer clients received hormonal implants; and 86,008 fewer clients received intrauterine devices (IUDs)."[24] Title X sites provided 90,386 fewer Papanicolaou (Pap) tests (for screening for cervical cancer), 188,920 fewer clinical breast exams, 276,109 fewer human immunodeficiency virus (HIV) tests, 256,523 fewer chlamydia tests, 625,802 fewer gonorrhea tests, and 77,524 fewer syphilis tests.[25] The reduction in tests performed to detect and prevent the spread of Sexually Transmitted Infections ("STIs") is concerning, since researchers expect that STI rates, which have already

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[22] Final Rule, 86 Fed. Reg. at 56146.

[23] Final Rule, 86 Fed. Reg. at 56147.

[24] *Id*. at 56147. IUDs, one of the most effective reversible forms on contraception, are small devices placed into the uterus through the cervix by a trained medical provider to prevent pregnancy. *Intrauterine Devices (IUDs): Access for Women in the U.S.*, KAISER FAMILY FOUND. (Sept. 9, 2020), https://www.kff.org/womens-health-policy/fact-sheet/intrauterine-devices-iuds-access-for-women-in-the-u-s/.

[25] Final Rule, 86 Fed. Reg. at 56147.

increased in the wake of the pandemic, will continue to increase without the public health resources to combat them.[26]

The impact of the 2019 Rule on the ability of the program to serve communities of color and patients with low incomes was particularly severe. The 2019 Family Planning Annual Report data shows that compared to 2018, in 2019, 573,650 fewer clients under 100 percent of the federal poverty level, 139,801 fewer clients between 101 percent to 150 percent of the federal poverty level, 65,735 fewer clients between 151 percent and 200 percent of the federal poverty level, and 30,194 fewer clients between 201 percent to 250 percent of the federal poverty level received Title X services.[27] The same 2019 Family Planning Annual Report shows that in 2019, "128,882 fewer Black or African Americans; 50,039 fewer Asians; 6,724 fewer American Indians/Alaska Natives; 7,218 fewer Native Hawaiians/Pacific Islanders; and 269,569 fewer Hispanics/Latinos received Title X services."[28]

This decline in patient visits and access to care was also borne out for Planned Parenthood affiliates. Some Planned Parenthood affiliates reported

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[26] Alice Miranda Ollstein, *Covid Chaos Fueled Another Public Health Crisis: STDs*, POLITICO (Mar. 12. 2022), https://www.politico.com/news/2022/03/12/covid-std-crisis-00015717.

[27] Final Rule, 86 Fed. Reg. at 56146.

[28] Final Rule, 86 Fed. Reg. at 56147.

decreases of over 25% in visits by patients at or below the federal poverty line and 30% decreases in visits by patients who typically self-pay for care.[29] Other affiliates reported decreases in patient visits from people of color, including a drop of 30% fewer patients who identify as African-American, 10% of patients who identify as Asian, and 20% fewer patients who identify as multiracial.[30]

Some Planned Parenthood affiliates reported that patients were declining more costly services like Pap tests (over three states, down by nearly 40% even prior to the COVID-19 pandemic), STI tests (15%), and breast exams (25%)—even though these tests are vital to reproductive health, and in some cases, life-saving.[31] Other affiliates reported that patients were choosing less expensive—and less effective—methods of contraception, such as birth control pills over IUDs.[32] These results have been devastating to Planned Parenthood's mission of providing care to low income and patients of color, especially because the majority of Planned Parenthood patients have incomes at or below 150% of the federal

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[29] Planned Parenthood Fed'n of Am., Public Comment, *Ensuring Access to Equitable, Affordable, Client-Centered, Quality Family Planning Services (RIN 0937-AA11)* at 9 (May 17, 2021), https://www.plannedparenthood.org/uploads/filer_public/6e/ad/6eadae40-f2b2-41f2-8fe6-bf5261aa1b00/ppfa_title_x_nprm_comment___51721.pdf.

[30] *Id.*

[31] *Id.*

[32] *Id.*

poverty level.[33] As the district court found, the decline in available Title X services caused by the 2019 Rule has "overwhelmingly affected the program's low-income users."[34] That Rule should not be restored.

B. The Providers that Remained in the Program Cannot Fill the Gap, As HHS Properly Concluded

Relying only on one declaration from the State of Ohio (and no evidence from the dozen other sister state Plaintiffs), Ohio asserts that it can remedy the current gaps in the program with the additional Title X funds it has received since the departure of Planned Parenthood's Ohio affiliates. The record belies this assertion. Although Ohio has received more than $10 million in additional Title X funds since September 2019,[35] the additional funds have done little to address the significant gap in coverage caused by Planned Parenthood's departure from the program: Ohio "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

[33] Final Rule, 86 Fed. Reg. at 56151.

[34] District Ct. Op., R. 50, Page ID # 680.

[35] Brief of Appellants, No. 21-4235, ECF No. 47, at 12-13 ("Appellants' Br.") (citing Ex. 1, Decl. of Michelle Clark ¶¶10-14, *Ohio v. Becerra*, No. 21-cv-675 (Oct. 25, 2012), ECF No. 2-1 ("Clark Decl.")).

in clients from 2019 to 2020."[36] As HHS noted, there is no "clear support for th[e] claim" that Ohio has increased the number of clients served.[37]

Regardless of Ohio's or other, unidentified efforts by other states to try to fill the gap in Title X services, research shows that providers that specialize in reproductive and family planning services, like Planned Parenthood, are more effective than other providers that do not focus specifically on reproductive health. In a 2015 report authored by the Guttmacher Institute, data showed that publicly-funded clinics with a reproductive health service focus were "significantly more likely than primary care-focused clinics" to offer each form of FDA-approved reversible contraceptive method on-site—12.1 different types of reversible methods compared to 10.5 reversible methods.[38] For instance, IUDs were offered at 83% of reproductive healthcare clinics compared to only 60% of primary care

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[36] Final Rule, 86 Fed. Reg. at 56151. Despite an additional $4 million in funding for this year, Plaintiff Ohio has only been able to increase visits per month to clinics in their program by an average of 111, amounting to over $3,000 per visit. Clark Decl. ¶16. Even if Ohio could ultimately expand its program, HHS should not have to wait, when willing and able providers like Planned Parenthood can return to the program and provide care to more patients and without delay.

[37] Brief of Appellees, No. 21-4235, ECF No. 51, at 41 ("Appellees' Br.") (quoting 86 Fed. Reg. at 56,151).

[38] Zolna & Frost, *Publicly Funded Family Planning Clinics in 2015: Patterns and Trends in Service Delivery Practices and Protocols* 11 (2016), https://www.guttmacher.org/report/publicly-funded-family-planning-clinic-survey-2015.

clinics.[39] And among all clinics studied that provided IUDs, reproductive-focused clinics were more likely than primary-care focused clinics to offer same-day insertion—49% versus 32%.[40] In fact, the study found that "clinics that specialized in the provision of reproductive health care were significantly more likely to have dispensing protocols that facilitate initiation and continuation of oral contraceptives and LARC [long-acting reversible contraceptive] methods."[41] Reproductive healthcare-focused clinics, as compared to primary-care focused clinics, were also more likely to screen for cervical cancer using conventional or liquid-based Pap tests.[42]

Planned Parenthood specifically has proven itself to be more capable of providing specialized reproductive care even when compared against other Title X grantees. For example, between 76% and 77% of Title X grantees provide highly effective and long-acting contraceptive options such as copper and hormonal

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[39] Zolna & Frost, *Publicly Funded Family Planning Clinics in 2015: Patterns and Trends in Service Delivery Practices and Protocols* 11 (2016), https://www.guttmacher.org/report/publicly-funded-family-planning-clinic-survey-2015.

[40] *Id.* at 17.

[41] *Id.* at 18.

[42] *Id.* at 13.

IUDs.[43] For Planned Parenthood affiliates, that number is 99%.[44] Blocking these specialized providers from the program by restoring the 2019 Rule will harm patients and prevent the program from operating as well as it could and should.

II. THE 2021 RULE CORRECTLY RECOGNIZES THAT "PHYSICAL SEPARATION" IS UNNECESSARY UNDER THE LAW

The States assert that the 2021 Rule improperly "permit[s] an enormous amount of financial and physical integration" and allows Title X funds to be used in programs where "abortion is a method of family planning."[45] Not so. This interpretation repeatedly takes HHS's warning against intertwining "the abortion element" in family planning services with other aspects of the program, out of context. And, as the district court found, the States' assertion "elides the distinction between a Title X 'grantee' and a Title X 'program' or 'project.'"[46] Under the 2021 Rule, the Title X project is the set of activities the grantee agreed to perform with the Title X funds. The grantee is not barred from engaging in

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[43] Bornstein et al., *Access to Long-Acting Reversible Contraception Among U.S. Publicly Funded Health Centers* Table 2 (2018), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6750753/pdf/nihms-1049461.pdf.

[44] *Id.*

[45] Appellants' Br., ECF No. 47, at 24-25.

[46] District Ct. Op., R. 50, Page ID # 661.

other activities outside of the project or program.[47] Rather, the Rule requires that if a Title X grantee engages in any activities that are not within the scope of the program, the "Title X-supported project" must be "separate and distinguishable from those other activities."[48] The Supreme Court, as the district court correctly noted, specifically recognized "this possibility in *Rust* [*v. Sullivan*]" when it found that a "'Title X grantee can continue to perform abortions, provide abortion-related services, and engage in abortion advocacy' as long as it 'conduct[s] those activities through programs that are separate and independent from the project that receives Title X funds.'"[49]

Contrary to the States' assertion, HHS has ensured compliance with this separation requirement—through regular grant reports, compliance monitoring visits, third-party audits, compliance guidance, and grantee education—for

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[47] Provision of Abortion-Related Services in Family Planning Services Projects, 65 Fed. Reg. 41281, 41282 (July 3, 2000) (incorporated into the Final Rule by reference at 86 Fed. Reg. at 56,150).

[48] 65 Fed. Reg. at 41282.

[49] District Ct. Op., R. 50, Page ID # 662 (quoting *Rust v. Sullivan*, 500 U.S. 173, 196 (1991)); *see also Planned Parenthood of Central N.C. v. Cansler*, 877 F. Supp. 310, 327-33 (M.D.N.C. 2012) (holding provisions of North Carolina's 2011 budget that disqualified Planned Parenthood from the Title X program to be unconstitutional because, *inter alia*, it violated the Supremacy Clause); *Valley Family Planning v. North Dakota*, 661 F.2d 99, 100-01 (8th Cir. 1981) (affirming the district court's declaratory judgment that the state statute prohibiting Title X funding for entities that perform or encourage patients to obtain abortions violates the Supremacy Clause).

decades.[50] Between 1993 and 2019, HHS monitoring found no direct diversion of grant funds that would justify the greatly increased compliance and oversight costs the 2019 Rule required.[51] The district court, accordingly, found that HHS's decision to re-implement the 2000 Rule's monitoring and enforcement policies, as opposed to the 2019 Rule's separation guidelines, is "especially persuasive because [the agency] can rely on decades of experience using precisely these monitoring and enforcement mechanisms with minimal compliance issues."[52]

Likewise, the district court properly rejected the States' argument that the 2021 Rule subsidizes abortions because Title X funds are "fungible."[53] The government, as a matter of law, cannot restrict access to funds for one activity simply because it may free up funds for another activity.[54] Moreover, because the

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[50] Final Rule, 86 Fed. Reg. at 56,145.

[51] Proposed Rule, 86 Fed. Reg. at 19,816. Rather than rebutting this claim, the States wrongly claim that "an agency cannot cite the absence of compliance issues that it had no ability to detect as evidence that there were no such issues." Appellants' Br., ECF No. 47, at 37. But on review for arbitrary and capricious decision-making—as the district court noted—it is not necessary to "wade into the reliability of reports covering 45 years from three separate federal agencies." District Ct. Op., R. 50, Page ID # 670.

[52] District Ct. Op., R. 50, Page ID # 670.

[53] District Ct. Op., R. 50, Page ID # 664.

[54] *See Babbitt v. Planned Parenthood of Cent. & N. Ariz.*, 479 U.S. 925 (1986) (summarily affirming *Planned Parenthood of Cent. & N. Ariz. v. Arizona*, 718 F.2d 938, 945 (9th Cir. 1983)) (concluding that "as a matter of law, the freeing-up theory cannot justify withdrawing all state funds from otherwise eligible

2019 Rule still allowed abortion providers to receive Title X funds so long as they complied with the onerous separation requirements, the 2019 Rule—by the States' logic—also permitted Title X funds to subsidize abortions. The States, therefore, fail to explain how restoring that Rule would address their claims.

III. THE 2021 RULE CORRECTLY RECOGNIZES THAT APPROPRIATE MEDICAL REFERRALS ARE ESSENTIAL FOR ETHICAL, EVIDENCE-BASED PATIENT CARE AND IN ACCORDANCE WITH LAW

The States also claim that HHS failed to consider whether "mandating referrals was consistent with medical ethics" when it promulgated the 2021 Rule.[55] As the district court noted, the record contradicts that contention.[56] HHS considered the 2019 Rule's prohibition on referrals and noted that "appropriate referrals with nondirective counseling have been the practice and implicit standard of care in Title X programs for essentially its entire history."[57] As such, the CDC and HHS have long included "[r]eferral to appropriate providers of follow-up care" in the case of a positive pregnancy test, at the request of the client, in their

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entities merely because they engage in abortion-related activities disfavored by the state").

[55] Appellants' Br., ECF No. 47, at 42-43.

[56] District Ct. Op., R. 50, Page ID # 677. In addition, referrals are not mandated unless they are requested by the patient; it is the 2019 Rule that required that patients receive a referral (for prenatal care) regardless of patient wishes. *See* 84 Fed. Reg. 7714.

[57] Proposed Rule, 86 Fed. Reg. at 19,816.

recommendations for Quality Family Planning Services ("QFP").[58] *All* major medical organizations—which uniformly take the position that the 2019 Rule's prohibition against using Title X funds to refer a patient, upon the patient's request, was contrary to medical ethics and best practice—opposed the 2019 Rule and supported the 2021 Rule's re-adoption of a patient-centric approach.[59] Accordingly, as the district court found, HHS did consider and adequately address medical ethics relating to abortion referrals.[60]

The States further contend that the 2021 Rule is improper because "if providers are *obligated* to give an abortion referral to any Title X patient who seeks an abortion . . . then the program is one where 'abortion' is a 'method of family planning.'"[61] This contention ignores the fact that by the Rule's own terms, a Title X project may not promote or encourage abortion, and may not take further affirmative action to secure abortion services for the patient beyond a mere

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[58] *See* Ctrs. for Disease Control & Prevention, Morbidity & Mortality Weekly Report, Providing Quality Family Planning Services: Recommendations of CDC and the U.S. Office of Population Affairs 14 (Apr. 25, 2014, updated Mar. 11, 2016), https://www.cdc.gov/mmwr/preview/mmwrhtml/rr6304a1.htm.

[59] Proposed Rule, 86 Fed. Reg. at 19,816 ("The 2019 [R]ule abandoned this client centered approach over the objection of every major medical organization without any countervailing public health rationale.").

[60] District Ct. Op., R. 50, Page ID # 677.

[61] Appellants' Br., ECF No. 47, at 27 (emphasis in original).

referral,[62] which may only include a "name, address, telephone number, and other relevant factual information" such as whether the provider accepts Medicaid.[63]

Nor does a referral for a service outside the program, as the States argue, bring that service within the program.[64] The States attempt to draw parallels between patient-requested referrals for abortion services and hypothetical government-funded programs that mandate electroshock therapy referrals by psychiatrists and root canals referrals by dentists. But these analogies fail to consider the distinction between a Title X project or program and a Title X grantee.[65] A project can include certain government-funded health care services as a subset of the broader services provided by the grantee. HHS regulations only concern the scope of the Title X project and "leave the grantee unfettered in its other activities."[66] As the district court explained, providers can offer additional services that are "not part of the menu of low-cost services" and "providing a referral for it does not put it on the menu."[67]

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[62] Provision of Abortion-Related Services in Family Planning Services Projects, 65 Fed. Reg. at 41281.

[63] 65 Fed. Reg. at 41281.

[64] *See* Appellants' Br., ECF No. 47, at 27.

[65] *See Rust*, 500 U.S. at 196.

[66] *See id*; *see also* Final Rule, 86 Fed. Reg. at 56,149 ("Counseling for abortion, including referral when requested, has never been held to constitute a violation of section 1008.").

[67] District Ct. Op., R. 50, Page ID # 665-66.

A referral for abortion made by a Title X grantee to a non-Title X program therefore does not bring abortion within the scope of the Title X project. Instead, decades of agency practice suggest that requiring "mere referrals" upon request is a manageable standard. Providers like Planned Parenthood work to ensure that patients have every referral they need, including for such things as behavioral health or care for high blood pressure, which may be outside of the scope of the services provided in the Title X program and are not brought within the scope of the program by virtue of the referral.[68]

IV. THE RE-ENTRY OF EXPERIENCED TITLE X PROVIDERS TO THE TITLE X PROGRAM IS IN THE PUBLIC INTEREST

HHS promulgated the 2021 Rule to address the substantial negative public health consequences of the 2019 Rule. The new Rule has already increased the number of the Title X providers, and that trend will continue since HHS recently announced on March 30 that it is awarding $256.6 million in Title X funding.[69]

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[68] Planned Parenthood Fed'n of Am., Public Comment, *Ensuring Access to Equitable, Affordable, Client-Centered, Quality Family Planning Services (RIN 0937-AA11)* at 26 (May 17, 2021), https://www.plannedparenthood.org/uploads/filer_public/6e/ad/6eadae40-f2b2-41f2-8fe6-bf5261aa1b00/ppfa_title_x_nprm_comment___51721.pdf.

[69] Off. Population Affairs, *HHS Awards $256.6 Million to Expand and Restore Access to Equitable and Affordable Title X Family Planning Services Nationwide*, HHS.GOV, *https://opa.hhs.gov/about/news/grant-award-announcements/hhs-awards-256-million-expand-and-restore-access-equitable* (last visited Mar. 30, 2022).

The awards include twelve grants awarded to Planned Parenthood affiliates, as well as grants to other experienced grantees forced out by the 2019 Rule who can now return to the program.[70]

The States incorrectly argue that reversal will promote the public interest because "there is no indication that anyone is being *substantially* harmed" by the 2019 Rule and that Planned Parenthood has "served more patients and provided more services after exiting the program than it did while a part of the program."[71]

First, as Appellees note, 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."[72] The States also ignore the harm to patients in the 13 states not before the Court where Title X services were rendered completely unavailable (Hawaii, Maine, Oregon, Utah, Vermont, and Washington)[73] or decimated (Alaska, Connecticut, Illinois, Massachusetts, Minnesota, New Hampshire, and New York)[74] because of the 2019 Rule.

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[70] *Id.*

[71] Appellants' Br., ECF No. 47, at 55.

[72] Appellees' Br., ECF No. 51, at 23-24 (quoting 86 Fed. Reg. at 56151-52).

[73] Final Rule, 86 Fed. Reg. at 56146.

[74] Final Rule, 86 Fed. Reg. at 56146.

Second, the States misuse HHS's observation that Planned Parenthood served more individuals the year it exited the Title X program in 2019 than it did the prior year to imply that Planned Parenthood has been able to sustain the same level of patient care despite being forced out of the Title X Program by the 2019 Rule. In fact, Planned Parenthood's most recent annual report, on which this observation relies, includes data from Planned Parenthood affiliates with fiscal years that ended in June 2019 (before the Rule required compliance in August 2019). Therefore, the annual report is not representative of patient volume after the 2019 Rule took effect.

In addition, many Planned Parenthood affiliates have been able to continue providing high-quality medical services to patients only because of tireless fundraising efforts. These efforts have forced Planned Parenthood affiliates to bear the administrative burdens and expenses of raising money—time and effort that could otherwise be used for providing quality patient care. Charitable donations and grants, moreover, are a much less reliable source of funding than Title X. Some Planned Parenthood affiliates face significant budget deficits, and the piecemeal replacement funding that Planned Parenthood has cobbled together to fund family planning services since the 2019 Rule took effect means that the level of care that patients receive depends on where they live in the country, since a significant portion of fundraising efforts are based locally.

Appellees correctly note that after losing Title X funding, Planned Parenthood affiliates "had to adjust their sliding fee scales, pushing more costs onto … clients."[75] For example, Planned Parenthood's Michigan affiliate reported that, after the loss of Title X funding, patients who were not enrolled in Medicaid were paying approximately 13% more for services.[76]

The States are therefore wrong to assert that enjoining the 2021 Rule is in the public interest, or that HHS acted arbitrarily and capriciously in promulgating it. As the district court found, "[t]he 2019 Rule harms our most vulnerable members of society daily."[77] The 2021 Rule better serves the Title X program and its patients by ensuring that experienced providers are allowed to re-enter and remain in the program—to provide evidence-based and ethically appropriate care to a higher volume of the patients who need it.

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[75] Appellees' Br., ECF No. 51, at 25 (quoting 86 Fed. Reg. at 56,151).

[76] Planned Parenthood Fed'n of Am., Public Comment, *Ensuring Access to Equitable, Affordable, Client-Centered, Quality Family Planning Services (RIN 0937-AA11)* at 9 (May 17, 2021), https://www.plannedparenthood.org/uploads/filer_public/6e/ad/6eadae40-f2b2-41f2-8fe6-bf5261aa1b00/ppfa_title_x_nprm_comment___51721.pdf

[77] District Ct. Op., R. 50, Page ID # 680.

CONCLUSION

For the foregoing reasons, this Court should affirm the district court's denial of the States' motion for a preliminary injunction.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g)(1), the undersigned hereby certifies that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and Fed. R. App. P. 29(a)(5).

1. Exclusive of the exempted portions of the brief, as provided in Fed. R. App. P. 32(f), the brief contains 4,943 words.

2. The brief has been prepared in proportionally spaced typeface using Microsoft Office 365 in 14-point Times New Roman font. As permitted by Fed. R. App. P. 32(g)(1), the undersigned has relied upon the word count feature of this word processing system in preparing this certificate.

/s/ Alan E. Schoenfeld
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March 31, 2022

CERTIFICATE OF SERVICE

I hereby certify that on this 31st day of March, 2022, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit using the appellate CM/ECF system. Counsel for all parties to the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

/s/ Alan E. Schoenfeld
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