No. 24-_____

In the Supreme Court of the United States

STATE OF OKLAHOMA,

Petitioner,

v.

UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Title X funds cannot be "used in programs where abortion is a method of family planning." 42 U.S.C. § 300a–6. And the Weldon Amendment prohibits any "Federal agency or program" from subjecting "any institutional . . . health care entity to discrimination on the basis that the health care entity does not . . . refer for abortions." Consolidated Appropriations Act, 2005, Pub. L. No. 108-447, div. F, § 508(d)(1), 118 Stat. 2809, 3163 (2004). Nevertheless, the U.S. Department of Health and Human Services has stripped all funds from Oklahoma's Title X program because the Oklahoma State Department of Health has declined to refer women for abortions after *Dobbs v. Jackson Women's Health Organization*, 597 U.S. 215 (2022).

The Questions Presented Are:

1. Whether a federal agency, through regulations, can impose upon states a funding condition that satisfies the Spending Clause when the underlying statute does not contain or is ambiguous as to that condition.

2. Whether the Weldon Amendment prohibits the federal government from requiring a state's health department to provide abortion referrals.

PARTIES TO THE PROCEEDINGS

Petitioner and Plaintiff-Appellant below

- State of Oklahoma

Respondents and Defendants-Appellees below

- U.S. Department of Health and Human Services
- Xavier Becerra, in his Official Capacity as the Secretary of the U.S. Department of Health and Human Services
- Jessica S. Marcella, in her Official Capacity as Deputy Assistant Secretary for Population Affairs; and Office of Population Affairs

LIST OF PROCEEDINGS

The following proceedings are directly related to this case within the meaning of Rule 14.1(b)(iii):

- *State of Oklahoma v. United States Department of Health and Human Services, et al.*, No. 24-6063 (10th Cir.), judgment entered on July 15, 2024.
- *State of Oklahoma v. United States Department of Health and Human Services, et al.*, No. 23-cv-1052 (W.D. Okla.), preliminary injunction denied on March 26, 2024. Final judgment not entered.

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OPINIONS BELOW

The Tenth Circuit's decision (App.1a) is reported at 107 F.4th 1209. The district court's order (App.60a) was issued from the bench and is unreported.

JURISDICTION

The judgment of the Tenth Circuit was entered on July 15, 2024. Oklahoma's emergency application for a writ of injunction was denied on September 3, 2024, although Justices Thomas, Alito, and Gorsuch would have granted relief. (No. 24A146). This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. art. 1, § 8

> The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States . . .

The Weldon Amendment, Consolidated Appropriations Act, 2005, Pub. L. No. 108-447, div. F, § 508(d), 118 Stat. 2809, 3163 (2004), provides:

> (1) None of the funds made available in this Act may be made available to a Federal agency

or program, or to a State or local government, if such agency, program, or government subjects any institutional or individual health care entity to discrimination on the basis that the health care entity does not provide, pay for, provide coverage of, or refer for abortions.

(2) In this subsection, the term "health care entity" includes an individual physician or other health care professional, a hospital, a provider-sponsored organization, a health maintenance organization, a health insurance plan, or any other kind of health care facility, organization, or plan.

42 U.S.C. § 300a-4(a)–(b) provides:

Grants and contracts made under this subchapter shall be made in accordance with such regulations as the Secretary may promulgate. . . .

Grants under this subchapter shall be payable in such installments and subject to such conditions as the Secretary may determine to be appropriate to assure that such grants will be effectively utilized for the purposes for which made.

42 U.S.C. § 300a-6 provides:

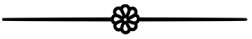
None of the funds appropriated under this subchapter shall be used in programs where abortion is a method of family planning.

INTRODUCTION

Congress enacted Title X pursuant to the Spending Clause. Thus, any obligation Congress imposes must be set forth "unambiguously." *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981). In *Rust v. Sullivan*, 500 U.S. 173 (1991), this Court held that Title X is ambiguous as to whether grantees must provide abortion counseling or referrals. Logically, then, the federal government cannot impose an abortion counseling or referral requirement on unwilling Title X grantees. The Tenth Circuit held to the contrary, however, ruling that agencies can satisfy the Spending Clause by fiat, through their own regulations. This holding splits with several circuits, guts the Spending Clause, and shifts enormous legislative power to the executive branch. It is worthy of this Court's review.

In addition, the Weldon Amendment protects health care organizations from being forced to provide abortion referrals. Despite this mandate, the U.S. Department of Health and Human Services (HHS) has stripped Oklahoma of nearly $10 million because its health department will not provide abortion referrals. Over a dissent by Judge Federico, the Tenth Circuit held that Weldon does not apply here because the government is not requiring abortion referrals by demanding that Oklahoma promote a hotline that would tell women how to get an abortion. But Defendants did not argue this below, admitting from the get-go that they are penalizing Oklahoma for refusing to give abortion referrals. And the only point of the hotline is transparently to refer women for abortions, as Judge Federico and Sixth Circuit Judge Kethledge have found.

Below, Defendants argued instead that a state agency cannot qualify as a health care organization even though its employees provide on-the-ground health care. This position cannot be squared with the Weldon Amendment's broad text, however. As such, the panel was wrong to allow HHS to withhold millions in health care funding from Oklahoma. This Court should grant certiorari and reverse.



STATEMENT OF THE CASE

A. Oklahoma's Successful Title X Program.

The Oklahoma State Department of Health (OSDH) has successfully participated in Title X projects for over half a century, offering Oklahoma's most vulnerable citizens "a broad range of acceptable and effective family planning methods" that includes family planning, infertility services, and services for adolescents. 42 U.S.C. § 300(a). At no point prior to the current controversy had Oklahoma's Title X funding received adverse treatment. App.179a, ¶ 8.

These Title X funds are vital to Oklahoma's provision of family planning services. OSDH uses the Title X grant to disburse funds and provide critical public health services in around 70 city and county health departments that reach many rural and urban communities. App.179a–180a, ¶ 12.

Depriving those communities of Title X services would be devastating. In many instances, particularly in rural Oklahoma, the county health department is one of the only access points for critical services for tens or even hundreds of miles. App.181a, ¶ 18. Many

patients whom OSDH employees see already have difficulty accessing the health care they need because of location, work schedules, or transportation issues. *Id.* Language barriers can also create difficulties in providing services, which Oklahoma has addressed with translators. App.181a, ¶ 17.

B. Title X, Abortion Referrals, and Weldon.

Enacted in 1970, Section 1008 of Title X bars grant funds from "be[ing] used in programs where abortion is a method of family planning." 42 U.S.C. § 300a–6. As such, abortion referrals were not required of grantees for the first decade or more of Title X. *See* 53 Fed. Reg. 2922, 2923, 2934 (Feb. 2, 1988). That changed via bureaucratic guidelines in 1981, *id.* at 2923, but in 1988 HHS reversed course after notice and comment, prohibiting referrals because they potentially "had the effect of promoting or encouraging abortion." *Id.* at 2933, 2945. HHS determined that this was "more consistent with" Section 1008. *Id.* at 2932.

The validity of this regulation was challenged in *Rust*. There, this Court held that Title X was ambiguous as to abortion referrals, and that, under *Chevron* deference, HHS had permissibly justified prohibiting abortion counseling and referrals as "more in keeping with the original intent of the statute." *Rust*, 500 U.S. at 187. In 1993, however, HHS suspended the 1988 Rule, and in 2000 it reinstated the requirement that Title X recipients make abortion referrals. 65 Fed. Reg. 41,270 (July 3, 2000).

In 2004, Congress started adding the Weldon Amendment as an annual rider for every HHS appropriations bill, a practice it has maintained consistently. Per the Weldon Amendment, no HHS funds:

> may be made available to a Federal agency or program . . . if such agency, program, or government subjects any institutional or individual health care entity to discrimination on the basis that the health care entity does not provide, pay for, provide coverage of, or refer for abortions.

Consolidated Appropriations Act, 2005, Pub. L. No. 108-447, div. F, § 508(d), 118 Stat. 2809, 3163 (2004).

In 2019, HHS adopted much of the 1988 Rule, including the prohibition on abortion referrals. *See* 84 Fed. Reg. 7714, 7788 (Mar. 4, 2019). As in 1988, HHS concluded that this reflects "the best reading of" Section 1008, "which was intended to ensure that Title X funds are also not used to encourage or promote abortion." *Id.* at 7777. Prior regulations "are inconsistent" with Section 1008 "insofar as they require referral for abortion." *Id.* at 7723.

HHS reversed course yet again in 2021, promulgating a final rule requiring abortion counseling and referrals. *See* 86 Fed. Reg. 56,144 (Oct. 7, 2021). Specifically, each Title X project must offer pregnant clients "information and counseling regarding . . . [p]regnancy termination" and "referral upon request." 42 C.F.R. § 59.5(a)(5)(i)-(ii). In the preamble to this rule, however, HHS twice promised that—because of congressional mandates like the Weldon Amendment—"objecting providers or Title X grantees are not required to counsel or refer for abortions." 86 Fed. Reg. at 56,153.

Oklahoma joined a multistate facial challenge arguing that HHS's 2021 abortion referral requirement violated the Administrative Procedures Act. In denying a preliminary injunction, the Sixth Circuit

relied on *Rust* and *Chevron* deference, as well as the fact that "HHS pledged in the preamble to the 2021 Rule that providers and entities who are covered by federal conscience laws 'will not be required to counsel or refer for abortions in the Title X program.'" *Ohio v. Becerra*, 87 F.4th 759, 774 (6th Cir. 2023). There has been no final adjudication on the merits in that action.

C. Oklahoma's Revitalized Abortion Ban.

On June 24, 2022, this Court issued *Dobbs v. Jackson Women's Health Organization*, 597 U.S. 215 (2022). *Dobbs* emphasized repeatedly that authority to regulate abortion was returned to the people and their elected representatives. *Id.* at 232, 256, 259, 292, 302. Days later, Defendant Becerra announced, however, that HHS would "double down and use every lever we have to protect access to abortion care" after this "unconscionable" decision.[1]

Oklahomans have long prohibited abortion, and they have made it illegal to advise a woman to obtain an abortion. *See* Okla. Stat. tit. 21, § 861. On the books since 1907, this statute became enforceable following *Dobbs*. As a result, in Oklahoma, advising or procuring an abortion for any woman is a felony. More broadly, Oklahoma has long sought to protect the unborn child in a variety of ways. The State's official, published position is that abortion "terminate[s] the life of a whole, separate, unique, living human being." Okla. Stat. tit. 63, § 1-738.3(A)(2)(d). And OSDH has been required to "[d]evelop and distribute educational

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[1] *HHS Secretary Becerra's Statement on Supreme Court Ruling in Dobbs*, HHS (June 24, 2022), https://www.hhs.gov/about/news/2022/06/24/hhs-secretary-becerras-statement-on-supreme-court-ruling-in-dobbs-v-jackson-women-health-organization.html.

and informational materials . . . for the purpose of achieving an abortion-free society." *Id.* § 1-753(2).

D. Termination of Title X Funds Over Abortion Referrals.

After *Dobbs*, OSDH undertook an extensive internal review to determine if it could comply with HHS's abortion referral requirement. App.182a, ¶ 21. OSDH offered to send patients to HHS's website, but HHS declined. App.151a–152a. HHS insisted instead that OSDH refer abortion-inclined patients to a private national hotline. OSDH initially agreed to do so, but soon concluded that it could not comply and promptly informed HHS. App.151a–154a. At no point did HHS claim this hotline was an "accommodation."

In May 2023, HHS claimed via letter that OSDH was violating Title X and the conditions of its grant. App.139a–146a. HHS insisted that OSDH's "deletion of referral to the All-Options Talk Line in this policy without any other provision for abortion referrals" was unacceptable since "projects are required to provide . . . referrals for abortion." App.142a–143a. The next month, HHS notified OSDH that the grant would be terminated because of "the deletion of referral to the All-Options Talk Line in this policy without any other provision for abortion referrals." App.154a.

One month later, OSDH administratively appealed. App.157a. While that appeal was pending, HHS announced supplemental funding, supposedly to support the provision of Title X services in Oklahoma. Funds that would previously have been directed to

OSDH were instead reallocated, including to a Missouri entity.[2]

E. Oklahoma's Lawsuit to Recover Title X Funds.

Facing the loss of another $4.5 million in funding in 2024, Oklahoma sued. Oklahoma quickly sought a preliminary injunction prohibiting HHS from denying Oklahoma a Title X grant because Oklahoma will not provide abortion counseling and referrals.

The district court denied Oklahoma's motion with an oral ruling. App.60a–61a. Although the court found irreparable harm, it concluded the State was unlikely to succeed on the merits. App.115a–130a. As an initial matter, the court found that "res judicata or claim preclusion or whatever" "rather clearly" applies because of the Sixth Circuit lawsuit, App.120a, despite the preliminary and facial nature of that case. On the Spending Clause, the court focused on whether Oklahoma was merely aware of the bureaucratic condition, and it held that conditions "can come, not only from the statute, but from the regulations pursuant to the statute." App.124a. The district court deemed the Weldon Amendment "maybe a closer question," App.125a, but nevertheless ruled against Oklahoma there, too. The court found "the more plausible interpretation" is that Oklahoma does not qualify as a health care entity because OSDH is not the "provider of the services." App.125a–126a. The court was also

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[2] *HHS Issues $11 Million in Supplemental Funding to Support the Provision of Title X Services in Oklahoma and Tennessee*, HHS OFFICE OF POPULATION AFFAIRS (Sept. 22, 2023), https://opa.hhs.gov/about/news/grant-award-announcements/hhs-issues-11-million-supplemental-funding-support-provision.

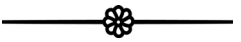
"skeptical" that Weldon applies to a "policy" objection as opposed to a "conscience" or "religious" objection. App.126a. Finally, the court indicated that Weldon was not violated because "simply by supplying a phone number, the State could meet its referral obligations." App.127a.

Oklahoma appealed. The Tenth Circuit heard argument on May 31, 2024, and issued its opinion on July 15, 2024, denying an injunction. App.1a–34a. Defendants did not defend, and the Tenth Circuit made no mention of, the district court's preclusion findings. For the Spending Clause, the Tenth Circuit found that the district court did not err in relying on the specific abortion referral regulation combined with the generic grants of condition-setting authority in Title X. App.11a–15a. The Tenth Circuit also agreed that "Oklahoma had acted voluntarily and knowingly when accepting HHS's conditions," and it found Oklahoma's sovereignty was not infringed because "Oklahoma could simply decline the grant." App.18a. For the Weldon Amendment, the court declined to address the parties' arguments about whether OSDH was a health care entity and found instead, of its own accord, that HHS was not requiring a referral for abortion at all through the hotline. App.19a–27a. In doing so, it gave "substantial weight" to the legislative history of the Weldon Amendment. App.26a.

Judge Federico dissented on the Weldon Amendment, arguing that Oklahoma qualifies as a health care entity. App.35a–59a. Contrary to the panel's main holding, he contended HHS was obviously insisting that Oklahoma provide abortion referrals. App.49a–53a. And HHS's punishment, he observed, "reduces

access to health care for those who need it most" in Oklahoma. App.57a.

Following this, Oklahoma filed an emergency application here, attempting to stop HHS from distributing Oklahoma's $4.5 million for 2024 elsewhere. In response, Defendants argued for the first time that they were not requiring abortion referrals, embracing the Tenth Circuit's novel argument. On September 3, 2024, this Court denied the emergency application, although Justices Thomas, Alito, and Gorsuch would have granted relief. Oklahoma now petitions for certiorari, seeking an injunction for Title X funding for 2025 and beyond.[3]



REASONS FOR GRANTING THE PETITION

I. THE TENTH CIRCUIT CONTRAVENED THIS COURT'S PRECEDENTS AND SPLIT WITH MULTIPLE CIRCUITS BY CLAIMING THAT MERE REGULATIONS CAN PROVIDE THE REQUIRED CLARITY OTHERWISE LACKING IN A SPENDING CLAUSE STATUTE.

1. Under the Spending Clause, if Congress wants to place conditions on a state's receipt of federal funds, it must do so unambiguously. *South Dakota v. Dole*, 483 U.S. 203, 207 (1987). "The legitimacy of Congress's exercise of the spending power thus rests on whether the State voluntarily and knowingly accepts the terms

[3] The 2024 funding has presumably gone out the door after this Court declined relief. But Oklahoma received annual Title X funds for over 50 years, and unless this Court intervenes it will likely lose all future funding, given the Tenth Circuit's opinion.

of the contract." *NFIB v. Sebelius*, 567 U.S. 519, 577 (2012) (citation omitted) (cleaned up). Although Congress may influence states by conditioning funding on certain requirements, it must provide clear notice of these requirements. *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296 (2006).

Pennhurst is the seminal Spending Clause case. There, this Court explained that "our cases have long recognized that Congress may fix the terms on which it shall disburse federal money to the States." *Pennhurst*, 451 U.S. at 17. "Accordingly, if Congress intends to impose a condition on the grant of federal moneys, *it* must do so unambiguously." *Id.* (emphasis added); *see also Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 190 n.11 (1982) (deeming this requirement of clarity "fundamental"). Applying these principles in *Arlington*, this Court focused on the plain text of the statute to determine there was clear notice. *See* 548 U.S. at 296.

Here, Congress did not require abortion referrals in Title X's text. Per *Rust*, Title X "does not speak directly to the issues of counseling, referral, advocacy, or program integrity" and is therefore ambiguous with respect to those items. 500 U.S. at 184. Applying *Rust*'s holding in conjunction with the Spending Clause's requirement of a clear statement means that HHS cannot impose on Oklahoma an obligation to provide abortion referrals when Title X does not address referrals at all. The regulation, 42 C.F.R. § 59.5(a)(5)(ii), is therefore likely unconstitutional as applied here because it imposes an abortion referral condition that is not unambiguously required by Title X.

Ruling for HHS, however, the Tenth Circuit authorized executive branch agencies to create critical

substantive conditions even where Congress did not speak clearly. Disregarding *Rust*, which analyzed Section 1008 of Title X, the Tenth Circuit found that generically phrased grants of rulemaking authority found in Section 1006 of Title X are enough to authorize HHS to require abortion referrals via regulation. App.11a–15a. Specifically, the Tenth Circuit relied on 42 U.S.C. § 300a-4(a), which states that "[g]rants and contracts . . . shall be made in accordance with such regulations as the Secretary may promulgate," and Section 300a-4(b), which provides that "[g]rants under this subchapter shall be . . . subject to such conditions as the Secretary may determine to be appropriate to assure that such grants will be effectively utilized for the purposes for which made." But neither of those provisions says anything about abortion referrals—much less unambiguously so. And the Tenth Circuit sidestepped the limitation in Section 300a-4(b) that conditions are only appropriate if they "assure that such grants will be effectively utilized *for the purposes for which made*." (emphasis added). *See* App.14a n.4. Section 300a-4(b) merely allows HHS to require grantees to demonstrate that they are using Title X funds for the "purposes" found in Title X. It does *not* allow HHS free rein to impose its own substantive policies on grantees.

Nevertheless, the Tenth Circuit found this generic delegation of rulemaking authority allowed HHS to impose, via regulation, a substantive condition under the Spending Clause even where this Court has found Title X ambiguous as to that condition. In short, the Tenth Circuit allowed an agency to create the clarity necessary to satisfy the Spending Clause. This stretches this Court's precedent past its breaking point.

The Tenth Circuit cited *Bennett v. Ky. Dep't of Educ.*, 470 U.S. 656 (1985), where Kentucky appealed an order from the Secretary of Education requiring Kentucky to refund certain funds due to misuse. *Id.* at 662–63. The Tenth Circuit latched on to the observation that "Congress couldn't 'prospectively resolve every possible ambiguity concerning particular applications of the requirements,'" App.12a (quoting *Bennett*, 470 U.S. at 669), to conclude that this Court "held that the funding conditions were unambiguous based on the combination of the statute *and* the agency's authorized regulations." *Id.* But this gloss on *Bennett* cannot be squared with Spending Clause precedent such as *Pennhurst*, and it disregards the limiting language in *Bennett* itself. *Bennett* merely states that Congress cannot resolve "every possible ambiguity concerning particular *applications* of the requirements," 470 U.S. at 669 (emphasis added), not that the agencies were free to impose additional requirements as they see fit. By *Bennett*'s terms, that is, agencies are limited to resolving ambiguities arising from *application* of a requirement set forth by Congress, whereas here we are dealing with an HHS requirement itself. Regardless, the Tenth Circuit also disregarded this Court's conclusion in *Bennett* that "[t]he requisite clarity in this case *is provided by Title I*." *Id.* at 666 (emphasis added). The clarity in *Bennett* was statutory; *Rust* forecloses that possibility here. Moreover, *Bennett* did *not* accept the government's argument that "any reasonable interpretation" of statutory requirements could determine "grant conditions." *Id.* at 670. *Bennett* is inapposite.

The other cases cited by the Tenth Circuit are no different. Though *Davis v. Monroe County Board of Education* observed that Title IX regulations also pro-

vided "funding recipients with notice that they may be liable for their failure to respond to the discriminatory acts of certain nonagents," 526 U.S. 629, 643 (1999), this Court ultimately relied, again, on *statutory* clarity:

> *The language of Title IX itself* . . . cabins the range of misconduct that the statute proscribes. The *statute's plain language* confines the scope of prohibited conduct . . .

Id. at 644 (emphases added). Such clarity on abortion referrals is absent from Title X's text. Along with decisions like *Pennhurst* and *Arlington*, these cases illustrate Oklahoma's point: that referrals must be unambiguously required *by the statute*.

2. The Tenth Circuit's ruling conflicts with several circuits. The center of attention below was *West Virginia ex rel. Morrisey v. U.S. Dep't of Treasury*, 59 F.4th 1124 (11th Cir. 2023). The Tenth Circuit quoted *Morrisey* for the point that "[W]e do not question an agency's authority to fill in gaps that may exist in a spending condition." App.12a (quoting *Morrisey*, 59 F.4th at 1148). The Tenth Circuit ignored what came next, however: "Even assuming an agency can resolve some ambiguity in a funding condition, *the condition itself must still be ascertainable on the face of the statute*." *Morrisey*, 59 F.4th at 1148 (emphasis added). "Just as an agency cannot choose its own intelligible principle, it cannot provide the content that makes a funding condition ascertainable." *Id.* For that point, the Eleventh Circuit relied on *United States v. Butler*, 297 U.S. 1 (1936), where this Court found "an obvious difference between a statute stating the conditions upon which moneys shall be expended and one effective only upon assumption of a contractual obligation to submit to a regulation . . . ," *id.* at 73.

Like in *Morrisey*, the funding condition here is not ascertainable on the face of the statute. That is the precise holding of *Rust*: "At no time did Congress directly address the issues of abortion counseling, referral, or advocacy." 500 U.S. at 185. Moreover, the only *statutory* indication of congressional intent in Title X runs in Oklahoma's favor. *See* 42 U.S.C. § 300a-6 ("None of the funds appropriated under this subchapter shall be used in programs where abortion is a method of family planning"). As a result, under the principles espoused in *Morrisey*, Oklahoma is exceedingly likely to succeed under the Spending Clause.

To be sure, the Tenth Circuit claimed *Morrisey* is distinguishable, but neither reason it gave was remotely persuasive. First, the panel said *Morrisey* is different because here, HHS "didn't create a framework to apply a confusing and ambiguous statute." App.15a. But that is *exactly* what HHS did. Title X, per this Court's precedent, *is ambiguous on abortion referrals*. Second, the panel argued that "HHS's requirement governs only counseling and referrals, not the fundamental application of the grant program." *Id.* Seemingly, the panel believes abortion referrals are small potatoes, such that HHS can require them absent congressional clarity. Oklahoma does not take that view. Nor does Congress. As the Weldon Amendment demonstrates, Congress believes abortion referrals are highly significant.

Again, though, it's not just *Morrisey* in this split. In 2021, in a case relied upon by *Morrisey*, the Fifth Circuit held that "[r]elying on regulations to present the clear condition . . . is an acknowledgement that Congress's condition was not unambiguous," and that "regulations cannot provide the clarity needed" under the Spending Clause. *Tex. Educ. Agency v. U.S.*

Dep't of Educ., 992 F.3d 350, 361–62 (5th Cir. 2021). The Fifth Circuit recently reaffirmed this view. *See Texas v. Yellen*, 105 F.4th 755, 774 (5th Cir. 2024) ("The promulgated regulations thus suffer from an inescapable dilemma. They are legally relevant if and only if the statute is ambiguous. . . . But if the statute is ambiguous, then it violates the Spending Clause.").

At least two additional circuits have reached similar conclusions. In *Virginia Department of Education v. Riley*, the *en banc* Fourth Circuit held that, because of the Spending Clause, the "United States Department of Education was *without authority*" to impose a condition on Virginia that was not specifically found in the Individuals with Disabilities Education Act (IDEA). 106 F.3d 559, 560 (4th Cir. 1997) (en banc) (per curiam). Echoing *Pennhurst*, the Fourth Circuit explained that "[i]n order for *Congress* to condition a state's receipt of federal funds, *Congress* must do so clearly and unambiguously." *Id.* (emphases added). Furthermore, the Fourth Circuit added, "forbidden regulation in the guise of Spending Clause condition" is not permissible. *Id.* As such, the Fourth Circuit rejected the government's argument that the court should "defer to a reasonable interpretation" of IDEA by the agency, since "[i]t is axiomatic that statutory ambiguity defeats *altogether* a claim by the Federal Government that Congress has unambiguously conditioned the States' receipt of federal monies in the manner asserted." *Id.* at 567 (Luttig, J., dissenting) (emphasis added).[4] Although the Fourth Circuit did not address a generic delegation of rulemaking authority, it held

[4] A majority of the *en banc* Fourth Circuit adopted Part I of Judge Luttig's panel dissent. *Id.* at 561.

that, for a condition under the Spending Clause, Congress must speak with "clarity" *and* "specificity." *Id.*

Further, in *City and County of San Francisco v. Trump*, the Ninth Circuit enjoined an executive order withholding funds from sanctuary cities. 897 F.3d 1225 (9th Cir. 2018). The Spending Clause, the Ninth Circuit explained, "vests *exclusive* power to Congress to impose conditions on federal grants"—"not the President." *Id.* at 1231 (emphasis added). The Ninth Circuit acknowledged that Congress could permit such withholding, but it indicated that any such delegation would have to be specific. *See, e.g.*, *id.* at 1234 ("Here, the Administration has not even attempted to show that Congress authorized it to withdraw federal grant moneys from jurisdictions that do not agree with the current Administration's immigration strategies.").[5]

On the flip side, the Tenth Circuit has just been joined by the Sixth Circuit. Embracing the Tenth Circuit's opinion, the Sixth Circuit *admitted* that the generic rulemaking authority in Title X relied upon by the government "does not illuminate the nature of any such conditions on the grant," but held that the Spending Clause is satisfied "by looking to both statutes *and* an agency's authorized regulations." *Tennessee v. Becerra*, 2024 WL 3934560, at *4 (6th Cir. Aug. 26, 2024). The abortion referral requirement, the Sixth Circuit held, is "minutia" that HHS can clarify "even

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[5] In a decision the Tenth Circuit ignored, but effectively overruled, the District of Colorado similarly critiqued the federal government's sanctuary city approach. *See Colorado v. U.S. Dep't of Justice*, 455 F.Supp.3d 1034, 1056 (D. Colo. 2020) ("[A]gency-imposed grant conditions, even if they themselves are unambiguous, cannot be constitutional under the Spending Clause unless the statute from which they originate is also unambiguous.").

in the face of statutory ambiguity." *Id.* at *5. With such a robust split, this issue is ripe for review.

3. This case is also highly significant. The Tenth Circuit's decision, which is being adopted elsewhere, opens a cavernous exception that swallows the Spending Clause. So long as Congress has included a general delegation of rulemaking authority, as it likely has in many statutes, an agency apparently has a blank check in a Spending Clause scheme to impose whatever requirements it desires, no matter how absent they are from the statute.

This expansive view of the federal bureaucracy's rulemaking power is inconsistent with the separation of powers. "Our Constitution divided the 'powers of the new Federal Government into three defined categories, Legislative, Executive, and Judicial.'" *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 483 (2010) (citation omitted). "The Constitution carefully imposes structural constraints on all three branches, and the exercise of power free of those accompanying restraints subverts the design of the Constitution's ratifiers." *Loper Bright Enters. v. Raimondo*, 144 S.Ct. 2244, 2275 (2024) (Thomas, J., concurring) (citation omitted). "To safeguard individual liberty, '[s]tructure is everything.'" *Id.* (citation omitted). Yet the Tenth Circuit's opinion, if left to stand, ignores the structure that should be in place. "Allowing an executive agency to impose a condition that is not otherwise ascertainable in the law Congress enacted 'would be inconsistent with the Constitution's meticulous separation of powers.'" *Morrisey*, 59 F.4th at 1147 (citations omitted). "Therefore, the 'needed clarity' under the Spending Clause 'must come directly from the statute[,]'" not from Defendants'

after-the-fact regulations. *Id.* (citations omitted). Otherwise, as this matter illustrates, a federal "bureaucrat may change his mind year-to-year and election-to-election, [so] the people can never know with certainty what new 'interpretations' might be used against them." *Loper Bright*, 144 S.Ct. at 2285 (Gorsuch, J., concurring). The Tenth Circuit's view unacceptably shifts legislative power to the executive branch; it cannot stand.

Other important concerns are implicated here. This matter involves millions of dollars in Title X funding and the health of vulnerable Oklahomans, and it is hard to imagine an issue bearing more political significance than abortion and federalism. *See Dobbs*, 597 U.S. at 229 (*Roe* "sparked a national controversy that has embittered our political culture for half a century"). Put differently, the Tenth Circuit's decision undermines Oklahoma's sovereignty. HHS foisted upon Oklahoma a requirement that is reserved to the people to address. *See id.* at 232. HHS is imposing the executive branch's policy preferences on the states and upsetting the federal-state balance on this important issue. *See San Francisco*, 897 F.3d at 1235 ("Absent congressional authorization, the Administration may not redistribute or withhold properly appropriated funds in order to effectuate its own policy goals.").

Nor have the Tenth Circuit or Defendants ever conjured any real response to Oklahoma's point about giving Defendants a "blank check." To the contrary, Defendants have come close to *embracing* the idea. Defs.' Emerg. Resp., No. 24A146, at 28–29 ("Congress *did* speak when it expressly empowered the Secretary to prescribe the 'conditions' he 'may determine to be appropriate . . . '"). They certainly have offered no

limiting principle. But theirs is a theory that, if accepted, would cede immense authority to the executive branch, coming immediately on the heels of this Court holding otherwise in *Loper Bright*. This Court should not countenance courts taking two steps backward right after taking one important step forward.

Defendants have claimed that Oklahoma's theory of the Spending Clause renders *Rust* meaningless. *Id.* at 28. But if the Tenth Circuit is correct, then this Court could have easily resolved *Rust* by finding that the same generic grants of authority referenced above unambiguously gave HHS the power to impose the 1988 Rule. *Rust*, that is, was a big waste of time *under Defendants' theory*. In any event, Defendants' assertion is not necessarily true. The Spending Clause is contractual in nature, so Oklahoma's view would not seemingly negate all requirements or prohibitions of abortion referrals. Presumably, Title X grantees could still accept the conditions. Moreover, it is not obvious that prohibitions and requirements are equivalent "conditions" in this scenario, especially since one is a passive restriction that merely limits a program's scope.

Of course, *Rust* turned on *Chevron* deference, so there remains a question of how much weight it should carry moving forward. The Tenth Circuit did not ask for supplemental briefing on *Loper Bright*, but rather dismissed its impact on *Rust* in a footnote because "the [Supreme] Court clarified that it was not 'call[ing] into question prior cases that [had] relied on the *Chevron* framework.'" App.29a n.16 (quoting *Loper Bright*, 144 S.Ct. at 2273). But the panel ignored this Court's clarification that it was not calling into question only the "holdings of those cases that specific agency actions are lawful." *Loper Bright*, 144 S.Ct. at 2273. The "spe-

cific agency action" here is not the same as that in *Rust*; in fact, they are very nearly opposites. *See Tennessee*, 2024 WL 3934560, at *13–14 (Kethledge, J., dissenting in part). Thus, the Tenth Circuit's perfunctory analysis is likely incorrect.

Put simply, Oklahoma deserves injunctive relief; either because *Rust* mandates an ambiguity finding, or because, absent *Rust* and *Chevron* deference, Title X's prohibition on abortion likely prohibits abortion referrals. *See, e.g.*, *id.* at *15 (Kethledge, J., dissenting in part) ("HHS's abortion-referral requirement makes every Title X program one 'where abortion is a method of family planning.'").

To be sure, Defendants have insisted that a ruling in Oklahoma's favor will open the floodgates for invalidation of numerous regulations. This is difficult to square with their argument that this case has no "nationwide significance." Defs.' Emerg. Resp., No. 24A146, at 4–5. It is also a strawman; Oklahoma is not arguing that all HHS regulations are invalid. Far from it. *See, e.g.*, *Morrisey*, 59 F.4th at 1148 ("To be clear, we do not question an agency's authority to fill in gaps that may exist in a spending condition."). Oklahoma is making the limited point that a profound substantive condition this Court has found ambiguous cannot, for that very reason, be imposed by regulation under the Spending Clause. And regardless, *Loper Bright* indicates that even longstanding intrusions into the separation of powers should not be countenanced.

In the end, "[i]n arguing that statutory ambiguity can be vitiated by regulatory enactments in the context of the Spending Clause, the federal defendants claim a remarkably broad power for federal administrative agencies. But this claim is remarkably wrong." *Yellen*,

105 F.4th at 773. This Court should grant certiorari and reverse, as Oklahoma is likely to succeed under the Spending Clause.

II. THE WELDON AMENDMENT PROHIBITS THE FEDERAL GOVERNMENT FROM DISCRIMINATING AGAINST A STATE HEALTH DEPARTMENT THAT DECLINES TO MAKE ABORTION REFERRALS.

For twenty years, the Weldon Amendment has commanded federal agencies to protect health care organizations who decline to refer for abortions. In defiance of this mandate, HHS has stripped nearly $10 million from Oklahoma because of OSDH's refusal to provide abortion referrals. This is clearly unlawful. Oklahoma is likely to succeed on the merits of the Weldon Amendment, thus a preliminary injunction should have issued.

Again, although the district court deemed the Weldon Amendment "maybe a closer question," App.125a, it found that Weldon did not apply here for roughly three reasons: (1) Oklahoma does not qualify as a health care entity, App.125a–126a; (2) Weldon probably does not apply to a mere "policy" objection, App.126a; and (3) Oklahoma could "meet its referral obligations" "simply by supplying a phone number," App.127a. The latter two points were not raised by Defendants in their district court brief. Instead, until its emergency response before this Court, Defendants consistently focused on the argument that OSDH, as a state agency, could not be a qualifying health care entity.

The Tenth Circuit largely ignored the United States, however. Without briefing on point, the Tenth Circuit claimed that the phrase "refer for abortions" in Weldon was not even *implicated* by "the mere act of

sharing the national call-in number." App.22a; *see also id.* n.11 (recognizing that, "[o]n appeal, the parties don't address the meaning of the phrase *refer for abortions*"). Put differently, despite both parties agreeing that HHS was withholding funding for Oklahoma's refusal to refer for abortions, *see, e.g.*, U.S. 10th Cir. Br., 2024 WL 2262266, at *1–2 (acknowledging that "HHS suspended and subsequently terminated Oklahoma's grant" because it "refused to comply with" "counseling and referral requirements"), the Tenth Circuit held that what Oklahoma was refusing to do was not really a referral for abortion at all. Although the Tenth Circuit claimed to be merely affirming the district court on this point, *e.g.,* App.23a, even the district court did not go that far, at least not clearly so, *see* App.127a (opining that "simply by supplying a phone number, the State could meet its *referral* obligations" (emphasis added)).

Thus, if the Weldon discourse below had been limited to the arguments presented by the federal government—which runs perhaps the largest and most sophisticated law firm in the world—Oklahoma would likely have prevailed. It was only by going outside the parties' arguments that Oklahoma was denied millions to serve "those who need it most." App.57a (Federico, J., dissenting).

1. On the first argument, the district court was indisputably wrong to indicate that OSDH was not the "provider of the services." App.126a. Weldon's restrictions *must* apply to OSDH, given the plain text of Weldon and the scope of OSDH's operations in Oklahoma. OSDH distributes Title X funds through 68 county health departments, App.179a–180a ¶ 12, and it runs the Title X programs in numerous such

departments with its own medically trained employees, such as nurses. *E.g.*, App.178a ¶ 3. As Judge Federico found, "OSDH qualifies" under Weldon "because it engages in direct patient care at OSDH clinics." App.48a (Federico, J., dissenting). He continued: "OSDH has facilities to see patients and administer health care, is an organization that provides health care, and is an institutional plan with individual medical professionals who provide health care." App.48a–49a. Thus, OSDH is a "provider of the services." App.49a. Defendants' 2016 review of the OSDH Title X program acknowledged as much. *See* App.134a ("county health departments are OSDH administrative units"); App.135a ("OSDH operates at least one clinic in all but seven very rural counties"); App.138a ("grantee" (OSDH) "is providing comprehensive family planning services including breast and cervical cancer screening"). Oklahoma is highly likely to succeed on this point.

Textually, the Weldon Amendment protects "any institutional . . . health care entity" from discrimination by "a Federal agency or program" because the entity declines to "refer for abortions." The plain language ("any"—"institutional"—"health care"—"entity") could hardly be broader, and it applies to OSDH. "Institution," for instance, is defined as "[a]n established organization, esp. one of a *public* character . . . ." *Institution*, BLACK'S LAW DICTIONARY (12th ed. 2024) (emphasis added). That tracks with Weldon, which defines "health care entity" broadly, as "any other kind of health care . . . organization." Neither the United States nor the district court made any serious attempt to explain why a state health agency whose own employees provide on-the-ground medical services is not an

"organization" devoted to "health care" under Weldon—especially not when the phrase is prefaced by "any." *See, e.g., UMC Physicians' Bargaining Unit of Nevada Serv. Emps. Union v. Nevada Serv. Emps. Union/SEIU Loc. 1107*, 178 P.3d 709, 713 (Nev. 2008) ("'[an] organization of any kind' is very broad language"). And the Tenth Circuit declined to address that question entirely, choosing instead to rely on an argument that neither party raised.

Alternatively, Defendants have claimed that the Weldon Amendment does not apply because it "does not include government administrative agencies within its listed terms." Defs.' Emerg. Resp., No. 24A146, at 30. But OSDH is undeniably a healthcare organization, thus it *is* included within Weldon's broad terms. *See* App.48a–49a (Federico, J., dissenting). And the fact that States are also prohibited from discriminating on this same ground, Defs.' Emerg. Resp., No. 24A146, at 31, does not change that calculus. After all, what sense would it make to say that a State cannot discriminate on a certain basis, but its health care arms and employees can be discriminated against on that very same basis?

Defendants have also pointed to the *Ohio* case, where the multistate coalition (including Oklahoma) told the Sixth Circuit in passing that States are not protected under federal statutes protecting conscience in the context of abortion referrals. *See* Br. of Appellants at 53–54, *Ohio v. Becerra*, No. 21-4235 (6th Cir. Feb. 22, 2022). But the coalition cited nothing for this proposition. And because this statement conflicts with the Weldon Amendment's plain text, Oklahoma disavowed that language below, and neither the panel nor dissent deemed it worthy of discussion. Given this, and

the fact that the argument was made in a preliminary context in *Ohio*, that language should not hinder Oklahoma here. Nor should the Oklahoma Attorney General's disavowed assertion in *Ohio* prevent Weldon from applying to OSDH, which has interpreted Weldon correctly all along, *see* App.166a–171a, and helped convince the Attorney General of its views.

Defendants have their own, more significant about-face to contend with. Up until March 2024—well after this lawsuit was filed—45 C.F.R. § 88.2 stated that "[a]s applicable, components of State or local governments may be health care entities under the Weldon Amendment. . . . " 84 Fed. Reg. 23,264 (May 21, 2019). Defendants have retorted that this regulation was vacated by multiple courts. They did not previously cite these decisions, however, presumably because none of them ruled on the specific language saying Weldon protects state "components." The closest one came to doing so, as far as Oklahoma can tell, counseled in *favor* of that language. *See City & Cnty. of S.F. v. Azar*, 411 F. Supp. 3d 1001, 1015–18 (N.D. Cal. 2019) (indicating, through use and non-use of italics, that the court took no issue with the "components" language). Defendants have offered no explanation for why that specific language was withdrawn. Thus, we are left with this: a regulation stating that Weldon applies to states was on the books for most of this administration, only to be rescinded *after* this lawsuit was filed, in a rule that does not mention the provision. *See* 89 Fed. Reg. 2078 (Jan. 11, 2024).

On top of that, when enacting the 2021 rule, HHS repeatedly insisted in a preamble section entitled "Application of Conscience and Religious Freedom Statutes" that

> Under these statutes, objecting providers or Title X grantees are not required to counsel or refer for abortions. . . .
>
> [O]bjecting . . . grantees will not be required to counsel or refer for abortions in the Title X program in accordance with applicable federal law.

86 Fed. Reg. at 56,153. The Health Department is undeniably a Title X grantee. *See* App.132a ("Grantee name: Oklahoma State Department of Health"). So why doesn't the 2021 Rule, and its promise to protect *all* grantees and providers, require Defendants to defer to OSDH's objection? Despite having expressly assured objecting providers and grantees that they "are not required to counsel or refer for abortions," 86 Fed. Reg. at 56,153, HHS has now discontinued the funding of OSDH—an objecting provider *and* a grantee—because it declines to refer for abortion. This is unlawful.

The district court did not address Defendants' 2021 promises in explaining its ruling. The Tenth Circuit attempted to do so, but, bizarrely, did not discuss them while interpreting the Weldon Amendment, where Oklahoma made the argument. Rather, the Tenth Circuit wrongly considered the promises as a standalone argument for arbitrariness and capriciousness. App.32a. Although a good argument can be made that HHS arbitrarily and capriciously ignored its 2021 promises, Oklahoma's assertion was instead that these promises demonstrate that the 2021 rule was enacted with the understanding that Weldon applied to *all* providers and grantees. The promises show that HHS's current interpretation conflicts with the views HHS expressed when crafting the same rule that HHS claims to be

enforcing here. The Tenth Circuit's failure to consider these promises in relation to Weldon was clearly erroneous. *See Grace v. Barr*, 965 F.3d 883, 900 (D.C. Cir. 2020) ("[W]hen departing from precedents or practices, an agency must 'offer a reason to distinguish them or explain its apparent rejection of their approach.'" (citation omitted)).

In any event, the Tenth Circuit rejected the import of these promises by labeling them "stray" "snippets of a preamble" that are not binding and do not impact the "regulatory language [that] is otherwise clear." App.32a. There are several problems with this argument,[6] but the primary one is that the Tenth Circuit made the wrong comparison. The Tenth Circuit compared the promises to the final rule's regulations, didn't see those promises in the regulations, and called it a day because (in the Tenth Circuit) "limitations that appear in the preamble" but "do not appear in the language of the regulation" should not be "engraft[ed] . . . onto the [regulatory] language." *Peabody Twentymile Mining v. Sec'y of Labor*, 931 F.3d 992, 998 (10th Cir. 2019). As should be obvious, though, this *Peabody* logic cannot apply when the "limitations" *do* appear in congressional mandates. Statutes trump regulations, regardless of whether the regulations mention the statutes or not.

The Tenth Circuit, that is, missed the point. HHS was not interpreting or discussing a regulation; rather, it was explaining what binding mandates like Weldon require *regardless of what the regulations say*. HHS admitted this in the preamble. *See* 86 Fed. Reg. at

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[6] For example, HHS repeating the promise twice, in a subsection explaining the promise, is not a "stray" usage.

56,153 ("[A]s the DC Circuit pointed out when the Weldon Amendment was enacted . . . 'a valid statute always prevails over a conflicting regulation,' *Nat'l Family Planning & Reprod. Health Ass'n v. Gonzales*, 468 F.3d 826 (D.C. Cir. 2006). This is true whether an overriding statute is incorporated into regulatory text or not."). By finding that HHS's promises to protect objectors were meaningless because HHS did not place them into regulations, the Tenth Circuit completely lost the plot.

What the Tenth Circuit should have done was find that HHS's 2021 assurances accurately mirror the Weldon Amendment's broad text. It should have then found that HHS taking the opposite position now, when it matters to a particular grantee, cuts against Defendants. *Cf. Loper Bright*, 144 S.Ct. at 2265 (*Chevron* "demand[ed] that courts mechanically afford *binding* deference to agency interpretations, including those that have been inconsistent over time"). It also should have acknowledged that a "preamble no doubt contributes to the general understanding of a statute. . . . " *Peabody*, 931 F.3d at 998 (citation omitted). For example, this Court recently defended its citation to a preamble, pointing out that it showed "that even the party now urging otherwise once read the statute just as we do." *Niz-Chavez v. Garland*, 593 U.S. 155, 168 (2021). By instead holding that HHS's (broken) promises meant nothing, the Tenth Circuit erred.

The Tenth Circuit should also have accounted for the most likely explanation for Defendants' broken promises: their open contempt for *Dobbs*. Defendants have never addressed Defendant Becerra's labeling of *Dobbs* as "unconscionable" and his insistence that Defendants would "double down and use every lever we

have to protect access to abortion care." The Tenth Circuit tried to explain these statements away, but it simultaneously whitewashed the quotes and claimed, wrongly, that "Oklahoma doesn't explain how HHS tried to circumvent *Dobbs*." App.17a n.7. Oklahoma explained this perfectly well: After *Dobbs*, Defendants made the decision to "double down" to "protect access to abortion care," and then ignored their own promises by forcing objecting States to provide abortion referrals.

2. Next, the district court was "skeptical" that the Weldon Amendment applies to a State's "policy" objection as opposed to a "conscience" or "religious" objection. App.126a. But Weldon gives no indication that the reason *why* a "health care entity does not . . . refer for abortions" matters. Congress is not concerned with the reason. Rather, it has straightforwardly prohibited federal agencies from discriminating against "*any*" health care entities who refuse to refer for abortions, for whatever reason. That choice, and OSDH's refusal, deserve respect.

The Tenth Circuit did not opine directly on the district court's skepticism, although it did claim the "statutory focus" of Weldon is "on the referring entity's purpose." App.24a & n.13. Judge Federico countered that "[t]he statute says nothing, not even a hint, about the referring entity's purpose. Rather, the statute is a command to government agencies or programs that they cannot discriminate against health care entities." App.51a. Whether grounded in policy or law, OSDH's objection is protected. Thus, there is no need for this Court to determine what Oklahoma law requires. *Cf. Moyle v. United States*, 144 S.Ct. 2015, 2021 (2024) (Barrett, J., concurring) ("Since this suit began . . . Idaho law has significantly

changed—twice."). "Here, the text and purpose of the Weldon Amendment align to put the focus on agency discrimination, not a detailed probe as to why an entity does not refer for abortions." App.52a (Federico, J., dissenting).

3. The Tenth Circuit placed its Weldon Amendment chips on an argument that neither party addressed. The panel acknowledged that Weldon would apply "if HHS had required the health department to make *referrals for abortions*." App.21a. It held, however, that the phrase "refer for abortions" does not protect Oklahoma's objection because Oklahoma could provide women with a phone number to a national hotline. Referring women to this hotline does not refer them "for" abortion, per the Tenth Circuit, because "the call-in number offered an opportunity to supply neutral information *regarding* an abortion"—not *for* abortion. App.23a. This argument is highly unlikely to prevail.

To begin, the Tenth Circuit repeatedly claimed it was merely affirming the district court on this point. *See, e.g.*, App.25a. But again, the district court did not reach this conclusion. Rather, it stated that "simply by supplying a phone number, the State could meet its *referral* obligations." App.127a (emphasis added). Whatever the district court meant by this statement, it was *not* that the proposed HHS approach somehow removed the concept of an abortion referral from the present scenario entirely. The Tenth Circuit's focus on this point was its own innovation.

In any event, HHS's position from the beginning has been that its phone number counts as a referral *for* abortion. For example, in the May 2023 letter accusing OSDH of violating "the terms and conditions of your grant," HHS explained that OSDH's "deletion of

referral to the All-Options Talk Line in this policy *without any other provision for abortion referrals*" is not an "acceptable revision[]." App.142a–143a (emphasis added). And why was it not acceptable? Because "projects are required to provide referrals upon client request, *including referrals for abortion*." *Id.* (emphasis added). HHS made the same statements in its June 2023 Termination Notice. *See* App.154a (deeming unacceptable "the deletion of referral to the All-Options Talk Line in this policy without any other provision for abortion referrals"). And below, Defendants stated: "Because that [2021] rule requires grantees to provide *abortion referrals* upon request, OPA declined to continue funding OSDH's grant when OSDH would not certify that it would do so." App.189a (emphasis added); *see also* U.S. 10th Cir. Br., 2024 WL 2262266, at *10.

Defendants clearly deemed the phone number as an abortion referral. As a result, until their emergency response here, Defendants never made the argument that the hotline was an "accommodation" and not a referral for abortion. Indeed, Defendants never once used the word "accommodation" below. Defendants made no effort in their emergency response to explain this last-second shift, nor did they acknowledge their contrary statements. Moreover, Defendants admitted that the phone number still "compl[ies] with the [2021] rule." Defs'. Emerg. Resp., No. 24A146, at 12. But that rule requires *abortion* referrals. *See* 42 C.F.R. § 59.5(a)(5)(i)–(ii) (requiring "referral upon request" for "pregnancy termination"); 86 Fed. Reg. at 56,149 (proposed rule "requires referral for abortion when requested"). Defendants' gamesmanship should not be rewarded, especially not in service of trampling on important protections granted by Congress. *See*

Tennessee, 2024 WL 3934560, at *15 (Kethledge, J., dissenting in part) ("Courts enforce legal rules, rather than allow parties patently to circumvent them.").

Defendants' failure to make the "not a referral" argument should have been the end of the matter. *See OBB Personenverkehr AG v. Sachs,* 577 U.S. 27, 38 (2015) ("Absent unusual circumstances—none of which is present here—we will not entertain arguments not made below."). But rather than bind the United States to its litigation decisions, the Tenth Circuit instead declined to consider *Oklahoma*'s observation at oral argument that the "call-in number hadn't provided neutral information"—in part because the argument "didn't appear in Oklahoma's appellate briefs." App.23a n.12. If an argument needed to appear in the appellate briefs for it to matter, then the Tenth Circuit's ruling should never have happened. In sum, the Tenth Circuit panel based its Weldon Amendment rejection on an argument Defendants did not make while rejecting a rebuttal to that argument on the ground that Oklahoma did not make it (in time). This makes a mockery of waiver.[7]

Regardless, the majority held that Oklahoma was not being required to refer *for* abortions because the call-in number was simply "a way for Oklahoma to provide pregnant women with information about various family-planning options." App.24a. This cannot qualify

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[7] The Tenth Circuit also rejected Oklahoma's point about bias because it was not in the record. But at argument, counsel referenced the hotline's website, a link to which is in the record. App.141a. Among other things, the site blasts "hostile states" and "racist . . . health care and legal systems" that dare protect the unborn. Okla. Emerg. Appl., No. 24A146, at 37. This could have been considered, under judicial notice or otherwise.

as a referral *for* abortion under Weldon, supposedly, because "the act of sharing the call-in number would create both a referral *for* and *against* an abortion depending on the pregnant woman's decision after getting the same information." App.25a. But under this reasoning, no requirement would ever qualify as an abortion referral, even something as direct as the provision of the name, number, and location of an abortion clinic. Women, after all, would still be free to change their mind after receiving this information. The Tenth Circuit's logic requires an abortion to be completed every time for the initial requirement to qualify as an abortion referral. This would render the important Weldon Amendment a nullity.

As Judge Federico explained, the only reason to use the hotline in Oklahoma would be to direct someone toward abortion. App.50a (Federico, J., dissenting). "If the patient desires information about options that are not abortion," he observed, "there would be no need for a referral to a national hotline." *Id*. Moreover, the history of this case makes little sense if abortion referrals are not at issue: "OSDH was saying explicitly to HHS that it could not comply . . . because the only pregnancy option not available in Oklahoma is abortion." App.51a (Federico, J., dissenting). As shown above, HHS *agreed* that it was terminating Oklahoma's funding because of abortion referrals. In the end,

> HHS discriminated against OSDH on the basis that it does not . . . refer for abortions. OSDH's non-compliance with the referral requirement was raised as a legitimate objection to not run afoul of state law and policy. There is nothing in the Weldon Amendment, the record of this case, or the parties' argu-

> ments that requires more to trigger the anti-discrimination provision.

App.53a (Federico, J., dissenting).

Nevertheless, in their emergency response Defendants argued that Weldon is not triggered unless a woman is directed straight to a medical provider. Defs.' Emerg. Resp., No. 24A146, at 32. But OSDH is not required to ignore reality: "[I]f a patient requests a referral, an Oklahoma provider would reasonably assume it is solely to explore the option of pregnancy termination . . . ." *Id.* at 55 (Federico, J., dissenting). Judge Kethledge emphasized this point in the Sixth Circuit, as well, observing that "the 'hotline' would supply the patient with the same information . . . that handing her a printed list of abortion providers would. That indeed would transparently be the whole point of the exercise." *Tennessee*, 2024 WL 3934560, at *15 (Kethledge, J., dissenting in part). Indeed, Defendants here admitted that the patients are referred to the hotline "to obtain information about abortion and any subsequent referral to a specific provider." Defs.' Emerg. Resp., No. 24A146, at 33 (emphases added). Weldon does not set an impossibly high standard for abortion referrals.

In support of its decision on abortion referrals, the Tenth Circuit gave "substantial weight" to the Weldon Amendment's legislative history. App.26a. But the primary quote cited simply says Weldon would not affect "the provision of abortion-related information or services *by willing providers*." *Id.* (emphasis added) (citation omitted). Here, HHS is trying to force abortion referrals on an *unwilling* provider, which is the entire point of Weldon. At most, the legislative history is a "mixed bag" on Weldon, and it "should not be used

here to muddy the meaning of the statutory text." App.53a–55a (Federico, J., dissenting). That text makes Oklahoma likely to succeed on the merits here.

4. Whether the Weldon Amendment is likely to apply here is an "important question of federal law" that "should be . . . settled by this Court." S.Ct. R. 10(c). Oklahoma is facing a substantial bureaucratic intrusion on state sovereignty, federalism, and the separation of powers, in direct defiance of a straightforward congressional mandate. And this Court has time and again granted certiorari to protect conscientious objectors and the like from federal overreach. *See, e.g.*, *Burwell v. Hobby Lobby Stores*, 573 U.S. 682, 692 (2014) (ruling for Oklahomans and against HHS). It should do so here, as well.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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October 15, 2024

Counsel for Petitioner

APPENDIX TABLE OF CONTENTS

OPINIONS AND ORDERS

OTHER DOCUMENTS

OPINION, U.S. COURT OF APPEALS FOR THE TENTH CIRCUIT (JULY 15, 2024)

PUBLISH

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

STATE OF OKLAHOMA,

Plaintiff-Appellant,

v.

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

Defendants-Appellees,

STATES OF MISSISSIPPI; ALABAMA; ALASKA; ARKANSAS; FLORIDA; GEORGIA; IDAHO; INDIANA; IOWA; KANSAS; KENTUCKY; LOUISIANA; MISSOURI; MONTANA; NEBRASKA; NORTH DAKOTA; OHIO; SOUTH CAROLINA; SOUTH DAKOTA; TENNESSEE; TEXAS; UTAH; WEST VIRGINIA; WYOMING;THE AMERICAN ASSOCIATION OF PRO-LIFE OBSTETRICIANS & GYNECOLOGISTS; THE CHRISTIAN MEDICAL & DENTAL ASSOCIATIONS; THE CATHOLIC

MEDICAL ASSOCIATION; THE NATIONAL ASSOCIATION OF CATHOLIC NURSES, USA; CONSTITUTIONAL ACCOUNTABILITY CENTER; AMERICAN CIVIL LIBERTIES UNION; AMERICAN CIVIL LIBERTIES UNION OF OKLAHOMA; CENTER FOR REPRODUCTIVE RIGHTS; LAWYERING PROJECT,

Amici Curiae.

No. 24-6063

Appeal from the United States District Court
for the Western District of Oklahoma
(D.C. No. 5:23-CV-01052-HE)

Before: BACHARACH, EBEL, and FEDERICO,
Circuit Judges.

BACHARACH, Circuit Judge.

This case involves a congressional program to award grants for family-planning projects. When the program was created, Congress instructed the Department of Health and Human Services to establish eligibility requirements. HHS complied, and its requirements included nondirective counseling and referrals for all family-planning options, including abortion.

The grant recipients included Oklahoma. But Oklahoma expressed concern to HHS about the eligibility requirements, insisting that new state laws prohibited counseling and referrals for abortions. HHS responded by proposing that Oklahoma supply individuals with neutral information about family-planning options (including abortion) through a national

call-in number. Oklahoma rejected this proposal, so HHS terminated the grant.

Oklahoma challenged termination of the grant and moved for a preliminary injunction. The district court denied the motion, determining that Oklahoma wasn't likely to succeed on the merits.

On appeal, Oklahoma argues that it would likely succeed for three reasons: (1) the spending power didn't allow Congress to delegate eligibility requirements to HHS, (2) HHS's eligibility requirements violated a statute known as *the Weldon Amendment*, and (3) HHS acted arbitrarily and capriciously. We reject these arguments:

1. **Spending Power:** The Constitution's spending power prohibits Congress from imposing ambiguous conditions on states in exchange for federal funds. Did the district court err in treating Title X of the Public Health Service Act as unambiguous? We answer no, concluding that the court didn't err when it determined that
   - Title X had likely been unambiguous in conditioning eligibility on satisfaction of HHS's requirements and
   - Oklahoma had likely acted knowingly and voluntarily in accepting HHS's requirements.
2. **The Weldon Amendment:** A federal law, known as *the Weldon Amendment*, prohibits distribution of funds to a federal or state agency that discriminates against a health-care entity for declining to provide referrals

for abortions. *See* Consolidated Appropriations Act, 2005, Pub. L. No. 108-447, div. F, § 508(d), 118 Stat. 2809, 3163 (2004). Did the district court err when it concluded that Oklahoma hadn't shown a likely violation of the Weldon Amendment? We answer no. HHS had proposed use of a national call-in number, which would supply neutral information about family-planning options, and Oklahoma didn't show a likelihood that the sharing of this call-in number would constitute a referral for the purpose of an abortion.

3. **Arbitrary and Capricious Action:** Oklahoma argues that HHS acted arbitrarily and capriciously, raising three sub-issues.

   The first sub-issue is whether HHS strayed from Title X in creating the eligibility requirements. We answer no, concluding that the district court didn't err when it concluded that the eligibility requirements had likely fallen within HHS's delegation of statutory authority.

   The second sub-issue is whether Oklahoma demonstrated a likely violation of HHS's regulations. We answer no. In our view, the district court didn't err by rejecting Oklahoma's proof of a likely violation.

   The third sub-issue is whether the district court erred by concluding that Oklahoma had failed to show a likely disregard of relevant factors. We answer no, concluding the district court didn't err by determining that HHS had likely considered all the relevant

factors, such as recent changes in precedent on abortion and the impact on Oklahoma.

Background

1. Congress Empowers HHS to Administer the Title X Grant Program

In 1970, Congress enacted Title X of the Public Health Service Act, which created a grant program for family-planning projects. 42 U.S.C. §§ 300(a), 300a-4(c); Family Planning Services and Population Research Act, Pub. L. No. 91-572, 84 Stat. 1504, 1508 (1970). Under Title X, Congress authorized HHS to determine eligibility requirements for the funds. 42 U.S.C. § 300a-4(a)-(b).

Most Title X funds flow to state and local governmental agencies, which distribute the funds to other entities providing health-care services. *See Nat'l Family Planning & Reproductive Health Ass'n, Inc. v. Gonzales*, 468 F.3d 826, 828 (D.C. Cir. 2006). The grants initially last one year, but can be continued upon HHS's approval. 42 C.F.R. § 59.8(a)-(b). HHS may terminate a grant if the recipient violates the conditions, including any regulatory requirements. *See* 45 C.F.R. §§ 75.371(c), 75.372(a)(1).

2. HHS Terminates Oklahoma's Grant

In 2021, HHS enacted a rule imposing conditions on the grant funds. Ensuring Access to Equitable, Affordable, Client-Centered, Quality Family Planning Services, 86 Fed. Reg. 56,144 (Oct. 7, 2021); *see* 42

C.F.R. § 59.1 *et seq*. In this rule, HHS renewed two earlier conditions[1]:

1. Nondirective Counseling: Projects must "[o]ffer pregnant clients the opportunity" to receive "neutral, factual information and nondirective counseling" regarding various family-planning options, including abortion. 42 C.F.R. § 59.5(a)(5)(i)-(ii).

2. Referral on Request: Projects must also provide a referral regarding all options when requested. *Id.* § 59.5(a)(5)(ii). The referral may include the provider's name, address, phone number, and other factual information. 86 Fed. Reg. 56,144, 56,150 (Oct. 7, 2021). But the project "may not take further affirmative action . . . to secure abortion services for the patient," like negotiating fees, making an appointment, or providing transportation. *Id.*

In 2022, HHS approved a grant to Oklahoma's health department for the period April 2022 to March 2023. In approving the grant, HHS reminded Oklahoma that it needed to comply with Title X and the 2021 rule.

While the grant was in place, the Supreme Court issued *Dobbs v. Jackson Women's Health Organization*, stating that there is no constitutional right to an abortion. 597 U.S. 215 (2022). Following the decision, HHS informed grant recipients that *Dobbs* didn't affect the obligation to continue offering nondirective

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[1] Through this rule, HHS readopted the regulations in place from 2000 to 2019. 86 Fed. Reg. 56,144; 56,144 (Oct. 7, 2021).

counseling and referrals regarding all family-planning options, including abortions.

Months later, Oklahoma proposed to change its policies, citing changes in state law. HHS rejected Oklahoma's proposal, saying that the changes had violated the 2021 rule. But HHS suggested that Oklahoma could satisfy the requirement by passing along a national call-in number, which would supply neutral information regarding various family-planning options.

In March 2023, Oklahoma accepted the grant and agreed to pass along the call-in number. So HHS approved continuation of the grant until March 2024. A short time later, however, Oklahoma decided to stop sharing information about the call-in number. With this decision, HHS informed Oklahoma that it was violating the 2021 rule. When Oklahoma refused to continue telling individuals about the call-in number, HHS terminated the grant.

Discussion

1. We Apply the Abuse-of-Discretion Standard to the District Court's Denial of a Preliminary Injunction

Oklahoma challenged HHS's termination and sought a preliminary injunction to keep the grant in place during the litigation. To obtain the preliminary injunction, Oklahoma needed to show that

- it was likely to succeed on the merits,
- the denial of the preliminary injunction would create irreparable harm,
- the balance of equities favored a preliminary injunction, and

- the preliminary injunction would be consistent with the public interest.

Derma Pen, LLC v. 4EverYoung Ltd., 773 F.3d 1117, 1119 (10th Cir. 2014). Applying these elements, the district court denied the motion for a preliminary injunction on the ground that Oklahoma hadn't shown likely success on the merits.

1.1 We Apply the Abuse-of-Discretion Standard to the District Court's Conclusions on Likelihood of Success

Oklahoma sought judicial review under the Administrative Procedure Act, arguing that it was likely to succeed on the claims involving constraints involving the spending clause, violation of the Weldon Amendment, and arbitrariness and caprice in terminating Oklahoma's grant. We review the district court's decision on likelihood of success under the deferential abuse-of-discretion standard. *See, e.g.*, *Diné Citizens Against Ruining Our Env't v. Jewell*, 839 F.3d 1276, 1281 (10th Cir. 2016) ("Because each of these elements [including the likelihood-of-success element] is a prerequisite for obtaining a preliminary injunction, we will not reverse the district court's denial of injunctive relief unless we are persuaded that the court abused its discretion as to all [elements]."); *Verlo v. Martinez*, 820 F.3d 1113, 1128-37 (10th Cir. 2016) (applying the abuse-of-discretion standard to review the district court's determination on likelihood of success).

We apply this standard based on the realities of decisions on preliminary injunctions, where the "district court almost always faces an abbreviated set of facts and must hypothesize the probable outcome of

a case." *Resol. Tr. Corp. v. Cruce*, 972 F.2d 1195, 1198 (10th Cir. 1992); *see also FTC v. Weyerhaeuser Co.*, 665 F.2d 1072, 1083 (D.C. Cir. 1981) (Ginsburg, J.) (noting that rulings on motions for a preliminary injunction often involve "time pressure" and incomplete records). Given these realities, we regard likelihood of success as only a tentative conclusion. *See Homans v. City of Albuquerque*, 366 F.3d 900, 904-05 (10th Cir. 2004) ("Courts repeatedly have emphasized that a decision as to the likelihood of success is tentative in nature and not binding at a subsequent trial on the merits."). We generally leave these tentative conclusions to "the sound discretion of the trial court." *Resol. Tr. Corp.*, 972 F.2d at 1198. For issues involving questions of law, however, we conduct de novo review. *See Derma Pen, LLC v. 4EverYoung Ltd.*, 773 F.3d 1117, 1119-20, 1120 n.2 (10th Cir. 2014) (explaining that we apply de novo review to legal determinations involved in the inquiry on likelihood of success).

Because Oklahoma is seeking judicial review of agency action under the Administrative Procedure Act, the district court had to reach a tentative conclusion based on the standard that would govern the final decision. *See Aposhian v. Barr*, 958 F.3d 969, 978-79, 989 (10th Cir. 2020) (reviewing likelihood of success in light of the standard of review that would apply for the final decision), *abrogated on other grounds by Garland v. Cargill*, 602 U.S. 406 (2024). When reaching a final decision, the district court can set aside HHS's termination of the grant only if HHS had acted in a way that was

- "procedurally defective,"
- "arbitrary or capricious in substance,"

- "manifestly contrary to [a] statute," or
- unconstitutional.

Ukeiley v. EPA, 896 F.3d 1158, 1164 (10th Cir. 2018); *see United States v. Mead Corp.*, 533 U.S. 218, 227 n.6 (2001) (explaining that review under the Administrative Procedure Act includes constitutional questions); *People for Ethical Treatment of Prop. Owners v. U.S. Fish & Wildlife Serv.*, 852 F.3d 990, 999 (10th Cir. 2017) (same).[2] So in reviewing the district court's tentative conclusions on likelihood of success, we consider the standard that will apply at the final stage.

2. The District Court Didn't Err in Tentatively Concluding That Oklahoma Hadn't Proven a Violation of the Spending Power

Oklahoma argues that the spending power didn't allow Congress to delegate eligibility to HHS. We reject this argument.

Under the spending power, Congress can "lay and collect Taxes, . . . to pay the Debts and provide for the common Defence and general Welfare of the United States." U.S. Const. art. I, § 8. This language allows Congress to "fix the terms on which it shall disburse federal money to the [s]tates." *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981). The disbursement creates a kind of contract, where states

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[2] In the body of its opening brief, Oklahoma requests a stay pending appeal. Because we affirm the district court's denial of the preliminary injunction, the motion for a stay is moot. *See, e.g.*, *Walmer v. U.S. Dep't of Def.*, 52 F.3d 851, 856 (10th Cir. 1995) (concluding that a stay was dissolved upon affirmance of the district court's ruling on a preliminary injunction).

agree to federally imposed conditions in exchange for federal funds. *Id*. Given the contractual nature of the terms, two requirements exist:

1. Congress may impose conditions on federal grants only when the conditions are unambiguous.

2. The state must voluntarily and knowingly accept the terms of the "contract."

Id.

2.1 Title X Likely Authorizes HHS to Impose the Disputed Condition

Oklahoma argues that Title X is ambiguous, preventing HHS from imposing conditions related to counseling and referral. For this argument, Oklahoma relies on § 1008 of Title X, which prohibits the use of federal funds "in programs where abortion is a method of family planning." 42 U.S.C. § 300a-6.

Oklahoma regards § 1008 as ambiguous based on the Supreme Court's opinion in *Rust v. Sullivan*, 500 U.S. 173 (1991). There the Court had to decide whether § 1008 prohibited HHS from enacting a rule banning nondirective counseling and referrals. *Id.* at 179-80. For that decision, the Court concluded that congressional silence rendered § 1008 ambiguous on counseling and referrals. *Id.* at 184. Oklahoma relies on *Rust* to argue that Congress's silence on counseling and referrals renders Title X ambiguous for purposes of the spending power.

Though § 1008 itself didn't require the availability of counseling and referrals, Congress instructed HHS to determine eligibility for Title X grants. *See* 42

U.S.C. § 300a-4(a) ("Grants and contracts . . . shall be made in accordance with such regulations as the Secretary may promulgate."); *id.* § 300a-4(b) ("Grants under this subchapter shall be . . . subject to such conditions as the Secretary may determine to be appropriate to assure that such grants will be effectively utilized for the purposes for which made."). The district court didn't err in tentatively concluding that this delegation to HHS wouldn't violate the spending power.

The Supreme Court considered a similar delegation to an agency in *Bennett v. Kentucky Department of Education*, 470 U.S. 656 (1985). There the agency tried to recoup a federal grant from a state, arguing that the state had knowingly and voluntarily accepted unambiguous conditions. *Id.* at 658-59.

The Supreme Court agreed with the agency. *Id.* at 669. Under the grant program, Congress authorized the agency to set grant conditions. 20 U.S.C §§ 241e(a), 241f(a)(1), 242(b) (1976). The Supreme Court allowed this delegation to the agency, explaining that Congress couldn't "prospectively resolve every possible ambiguity concerning particular applications of the requirements." *Bennett*, 470 U.S. at 669; *see also W. Va. ex rel. Morrisey v. U.S. Dep't of the Treasury*, 59 F.4th 1124, 1148 (11th Cir. 2023) ("[W]e do not question an agency's authority to fill in gaps that may exist in a spending condition.").[3]

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[3] When the spending power was adopted, Congress had already begun delegating grant conditions to the executive branch. For example, Congress created a benefits program for the army in 1790, stating that payments would follow "regulations . . . directed by the President." Act of Apr. 30, 1790, ch. 10, § 11, 1 Stat. 119, 121; *see also* Act of Sept. 29, 1789, ch. 24, 1 Stat. 95,

Despite this authorization, the state grantee invoked the spending power, arguing that ambiguity in the law prevented deference to the agency's interpretations. Br. for the Respondent at 24-30, *Bennett v. Ky. Dep't of Educ.*, 470 U.S. 656 (1985) (No. 83-1798), 1984 WL 565692; *see also id.* at 22-27 (arguing that the recipient of the grant should not be penalized for interpreting an ambiguous statute differently than the agency).

But the Supreme Court held that the funding conditions were unambiguous based on the combination of the statute and the agency's authorized regulations: "We agree with the [agency] that the [state grantee] clearly violated *existing* statutory and regulatory provisions . . . . " *Bennett*, 470 U.S. at 670 (emphasis added); *see id.* (considering exercises of the spending power based on both the "the statutory provisions" and "the regulations . . . and other guidelines provided by the [the agency] at th[e] time" that funding had been accepted); *see also Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 643 (1999) (holding that agencies' unambiguous regulations satisfy the notice requirements under the spending power); *South Dakota v. Dole*, 483 U.S. 203, 206 (1987) ("Congress . . . has repeatedly employed the spending power 'to further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives.'" (emphasis added) (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 474 (1980))).

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95 (similarly delegating executive authority to administer a pension program for wounded Revolutionary War veterans).

Bennett's reasoning applies here. Like the statute in *Bennett*, Title X unambiguously authorized the agency to impose conditions for federal grants. *See* 42 U.S.C. § 300a-4(b);[4] *see also* 86 Fed. Reg. 56,144, 56,154 (Oct. 7, 2021) (explaining the critical nature of nondirective counseling and referrals for the delivery of services under Title X). With this authorization, HHS established the conditions for Title X grants. So Oklahoma could make an informed decision based on the combination of Title X's language and HHS's conditions.

Oklahoma points to *West Virginia ex rel. Morrisey v. U.S. Department of the Treasury*, 59 F.4th 1124 (11th Cir. 2023). There the Eleventh Circuit said that the Treasury Department had violated the spending power by interpreting an ambiguous tax offset provision in a stimulus act. *Id.* at 1146-48. We aren't bound by other circuits. *United States v. Carson*, 793 F.2d 1141,

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[4] In its reply brief, Oklahoma points to Congress's authorization, arguing that it limits HHS's rulemaking power. Appellant's Reply Br. at 7-8 (discussing statutory language that instructs HHS to impose conditions to assure that grants are "utilized for the purposes for which made" (quoting 42 U.S.C. § 300a-4(b))). We need not address this argument because it didn't appear in the opening brief. *United States v. Hunter*, 739 F.3d 492, 495 (10th Cir. 2013).

Even if we were to consider this argument, we would reject it. The statute explicitly allows HHS to impose conditions that it "determine[s] to be appropriate." 42 U.S.C. § 300a-4(b) (emphasis added). In the 2021 rule, HHS explained why it believed that the requirement for nondirective counseling and referrals would be critical to accomplish the purposes of Title X. *See* 86 Fed. Reg. 56,144, 56,154 (Oct. 7, 2021). We could disturb HHS's determination only if it had been procedurally defective, arbitrary or capricious, or manifestly contrary to a statute. *See* Discussion–Part 1.1, above.

1147 (10th Cir. 1986). But even if *Morrisey* were binding, its circumstances differed in two ways.

First, the Treasury Department created a regulatory framework for the statutory offset provision because the statute itself was confusing and ambiguous. *Morrisey*, 59 F.4th at 1133-34, 1146. But HHS's requirements didn't create a framework to apply a confusing and ambiguous statute.

Second, the Eleventh Circuit said that this generic statutory language hadn't authorized the Treasury Department to interpret a major question of the stimulus act. *Id.* at 1147. The Eleventh Circuit explained that "[t]he Constitution does not allow the [Treasury Department] to supply content without which the [o]ffset [p]rovision literally could not function." *Id.* at 1148. By contrast, HHS's requirement governs only counseling and referrals, not the fundamental application of the grant program.

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The district court didn't err when it tentatively concluded that Oklahoma couldn't show a violation of the spending power. Oklahoma points out that § 1008 is silent on counseling and referrals. But § 1008 rests alongside other provisions of Title X that unambiguously direct HHS to determine the eligibility requirements. So the district court didn't err by tentatively determining that the spending power hadn't prevented Congress's delegation of eligibility requirements to HHS.

2.2 Oklahoma Likely Agreed Voluntarily and Knowingly to HHS's Requirement for Nondirective Counseling and Referrals

The Supreme Court has explained that even when the law is unambiguous, the spending power prohibits Congress from "surpris[ing] participating States with post acceptance or 'retroactive' conditions." *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 25 (1981). So we must consider the conditions that existed when the state accepted the federal funds. *See Bennett v. Ky. Dep't of Educ.*, 470 U.S. 656, 670 (1985) (rejecting a challenge under the spending power because "the State agreed to comply with . . . the legal requirements in place when the grants were made").

In our view, the district court didn't err when it tentatively determined that Oklahoma had knowingly and voluntarily agreed to the requirements for nondirective counseling and referrals. Oklahoma accepted the grants for 2022 and 2023 after HHS had enacted the 2021 rule, including the requirements regarding nondirective counseling and referrals.[5] And Oklahoma continued complying with these requirements even after *Dobbs* had triggered a change in state law. When concerns emerged, HHS proposed use of a national call-in number and Oklahoma accepted the proposal. *See* Background–Part 2, above.[6]

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[5] Oklahoma points out that it objected to the conditions stated in HHS's 2021 rule. But the existence of an objection reflects awareness of HHS's conditions.

[6] Oklahoma argues that acceptance of the 2022 and 2023 grants doesn't matter because it would have been impossible to agree to the conditions for the 2024 grant period. Even if we were to credit this argument, Oklahoma's challenge would fail. If we were to

Given these circumstances, the district court could tentatively conclude that Oklahoma had voluntarily and knowingly accepted the grant with awareness of HHS's eligibility requirements.

2.3 The District Court Didn't Err in Tentatively Determining That HHS Hadn't Violated Oklahoma's Sovereignty

Finally, Oklahoma suggests that HHS's 2021 rule violates the spending power by encroaching on state sovereignty.[7] For this suggestion, Oklahoma assumes that HHS's requirements force Oklahoma to violate state criminal law. But Oklahoma likely couldn't use its state criminal law to dictate eligibility requirements for the grants. *See Planned Parenthood Fed'n of Am., Inc. v. Heckler*, 712 F.2d 650, 663 (D.C. Cir. 1983) ("Although Congress is free to permit the states to establish eligibility requirements for recipients of Title X funds, Congress has not delegated that power to the states."); *Valley Fam. Plan. v. North Dakota*, 661 F.2d 99, 102 (8th Cir. 1981) (deferring to HHS's interpretation when state law conflicted with a regulation on referrals regarding abortions).[8] After all, if

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focus on the upcoming period, Oklahoma could simply decline the grant rather than accept HHS's conditions. *See Rust v. Sullivan*, 500 U.S. 173, 199 n.5 (1991) ("The recipient is in no way compelled to operate a Title X project; to avoid the force of the regulations, it can simply decline the subsidy.").

[7] Oklahoma points out that the HHS Secretary publicly disagreed with the Supreme Court's opinion in *Dobbs v. Jackson Women's Health Organization*, 597 U.S. 215 (2022), and surmises that HHS deliberately tried to circumvent the opinion. But Oklahoma doesn't explain how HHS tried to circumvent *Dobbs*.

[8] Oklahoma also suggests that by giving the funds to another entity, HHS encourages that entity to violate Oklahoma law. But

compliance with the requirements would entail a state crime, Oklahoma could simply decline the grant. *See Rust v. Sullivan*, 500 U.S. 173, 199 n.5 (1991) ("The recipient is in no way compelled to operate a Title X project; to avoid the force of the regulations, it can simply decline the subsidy.").[9]

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We conclude that the district court didn't err in its tentative conclusions that

- the combination of Title X and the HHS requirements doesn't violate the spending power and
- Oklahoma had acted voluntarily and knowingly when accepting HHS's conditions.

So we uphold the district court's rejection of Oklahoma's challenge under the spending power.

3. The District Court Didn't Err When Tentatively Concluding that HHS Hadn't Violated the Weldon Amendment

Oklahoma also relies on a statutory provision known as *the Weldon Amendment*. Since 2004, Congress

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the district court didn't err in tentatively concluding that Oklahoma had failed to substantiate that risk. *See* Appellant's Opening Br. at 29-30 (stating only that another grantee "*risks* violating Oklahoma law" (emphasis added)).

[9] Under state law, Oklahoma generally can't use a federal grant to encourage a woman to get an abortion "except to the extent required for continued participation in a federal program." Okla. Stat. tit. 63 § 1-741.1(B). This law doesn't "prohibit a physician from discussing options with a patient through nondirective counseling." *Id.*

has adopted the amendment every year when appropriating funds to HHS. *See Nat'l Family Planning & Reproductive Health Ass'n, Inc. v. Gonzales*, 468 F.3d 826, 827 (D.C. Cir. 2006).

Oklahoma argues that HHS violated the Weldon Amendment by

- subjecting Oklahoma's health department (a health-care entity) to discrimination for declining to make referrals for abortions and
- forcing Oklahoma (a state government) to discriminate against other entities receiving funds under the statewide grant.

3.1 HHS's Proposal for the National Call-in Number Was Unlikely to Constitute a Referral for the Purpose of Facilitating an Abortion

The Weldon Amendment provides:

> None of the funds made available in this Act may be made available to a Federal agency or program, or to a State or local government, if such agency, program, or government subjects any institutional or individual health care entity to discrimination on the basis that the health care entity does not provide, pay for, provide coverage of, or refer for abortions.[10]

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[10] The Weldon Amendment says that federal funds will not "be made available" to a federal agency that discriminates against a grantee. *See* text accompanying note. Given this language, a violation could arguably result in a denial of funds to HHS. This is not the remedy that Oklahoma wants; Oklahoma wants to receive the grant rather than strip HHS of funding. But HHS

Consolidated Appropriations Act, 2005, Pub. L. No. 108-447, div. F, § 508(d)(1), 118 Stat. 2809, 3163 (2004); *see also* Consolidated Appropriations Act, 2023, Pub. L. No. 117-328, div. H, § 507(d)(1), 136 Stat. 4459, 4908 (2022) (enacting the amendment for the fiscal year ending September 30, 2023); Further Consolidated Appropriations Act, 2024, H.R. 2882, 118th Cong. div. D, § 507(d)(1) (2024) (enacting the amendment for the fiscal year ending September 30, 2024). Interpreting this language involves a legal question that we review de novo. *See, e.g.*, *Sinclair Wyo. Refin. Co. v. EPA*, 887 F.3d 986, 990 (10th Cir. 2017). In conducting de novo review, we start with the Weldon Amendment's language. *Thomas v. Metro. Life Ins. Co.*, 631 F.3d 1153, 1161 (10th Cir. 2011). We give this language its "ordinary, everyday" meaning unless the context suggests otherwise. *Navajo Nation v. Dalley*, 896 F.3d 1196, 1213 (10th Cir. 2018).

Based on the Weldon Amendment's language, Oklahoma must prove two elements for success on the merits:

1. The entity claiming discrimination (the Oklahoma health department) constitutes a health-care entity.
2. The federal government has discriminated against the Oklahoma health department for declining to refer pregnant women for abortions.

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doesn't question Oklahoma's right to the grant upon proof of discrimination. HHS instead argues that it didn't violate the Weldon Amendment.

Oklahoma relies on the first element, insisting that its health department constitutes a health-care entity. But the district court relied on the second element, concluding that Oklahoma likely couldn't show discrimination for refusing to refer women for abortions.[11] In our view, this tentative conclusion fits the statutory language.

The Weldon Amendment would apply only if HHS had required the health department to make referrals for abortions. HHS recognized that Oklahoma had criminal laws prohibiting abortion. So HHS informed Oklahoma that it could inform pregnant women of a national call-in number. HHS explained that the number would provide neutral, nondirective information about family-planning options. When informed of this option, Oklahoma expressed dissatisfaction. But the district court didn't err by tentatively rejecting Oklahoma's argument that the mere act of sharing the national call-in number would constitute a referral for the purpose of facilitating an abortion.

To interpret the Weldon Amendment, we consider the use of prepositions limiting the scope of the provision. *See Kientz v. Comm'r, SSA*, 954 F.3d 1277,

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[11] On appeal, the parties don't address the meaning of the phrase refer for abortions. But we must independently interpret the statutory phrase irrespective of the parties' positions. *See WWC Holding Co., Inc. v. Sopkin*, 488 F.3d 1262, 1276 n.10 (10th Cir. 2007) ("[W]e are not limited to the parties' positions on what a statute means, because we review a question of statutory construction de novo."); *see also A.M. v. Holmes*, 830 F.3d 1123, 1146 n.11 (10th Cir. 2016) (stating that we can affirm based on our statutory interpretation even if the appellee had relied on a different ground to affirm).

1282 (10th Cir. 2020) (relying on the limiting function of the preposition *on* to interpret a statute). The amendment uses the preposition *for* to connect abortion with the referral. The preposition *for* means because of or on account of. 6 *Oxford English Dictionary* 25 (2d ed. 1989); *see also Merriam-Webster Dictionary*, http://www.merriam-webster.com/dictionary/for (last visited June 20, 2024) (defining *for* "as a function word to indicate purpose," "an intended goal," and "the object . . . of a perception, desire, or activity"). So we generally consider the preposition *for* to link conduct to a particular purpose. *See Muñoz v. Garland*, 71 F.4th 1174, 1177 (9th Cir. 2023) (interpreting the preposition *for* to indicate a purpose); *Chamber of Com. of U.S. v. U.S. Dep't of Lab.*, 885 F.3d 360, 373 (5th Cir. 2018) (same); *Murfey v. WHC Ventures, LLC*, 236 A.3d 337, 346 (Del. 2020) (stating that the preposition *for* links the conduct at issue to a particular purpose).

The combined phrase (refer for) thus suggests that the Weldon Amendment prohibits discrimination against entities for refusing to refer individuals for the purpose of getting abortions. But HHS required only that the Title X project offer pregnant women "the opportunity to be provided information and counsel regarding . . . [p]regnancy termination." 42 C.F.R. § 59.5(a)(5)(i)(c) (emphasis added). The term regarding is neutral, unlike the term *for* in the Weldon Amendment. *See American Heritage College Dictionary* 1149 (3d ed. 1997) (defining the preposition regarding as "[i]n reference to; with respect to; concerning"). Given the neutral wording of the requirement, the district court didn't err when it tentatively determined that reference to a national

call-in number wouldn't involve a referral for an abortion. Instead, the call-in number offered an opportunity to supply neutral information regarding an abortion. Oklahoma rejected the option of a national call-in number, but didn't question the neutrality of the information provided.[12]

The dissent suggests two reasons why use of the call-in number would constitute a referral for an abortion based on a pregnant woman's use of the information:

1. An Oklahoma provider would reasonably assume that any pregnant woman's request for the call-in number would involve an interest in exploring the possibility of an abortion.

2. If a pregnant woman gets an abortion after using the national call-in number, her decision to get an abortion turns the referral into one for the purpose of getting an abortion.

These arguments rest on a misunderstanding of the call-in number, speculation about a caller's purpose,

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[12] At oral argument, Oklahoma suggested that the call-in number hadn't provided neutral information, citing evidence outside the record. We decline to consider this argument because it didn't appear in Oklahoma's appellate briefs and rested on evidence beyond the record. *See United States v. Anthony*, 22 F.4th 943, 952 (10th Cir. 2022) ("We do not consider arguments raised for the first time at oral argument."); *United States v. Kennedy*, 225 F.3d 1187, 1191 (10th Cir. 2000) ("This court will not consider material outside the record before the district court.").

and disregard of the statutory focus on the referring entity's purpose rather than the pregnant woman's.[13]

HHS proposed use of the call-in number as a way for Oklahoma to provide pregnant women with information about various family-planning options. Apart from the dissent, no one has suggested

- that individuals will contact Oklahoma to obtain information about the call-in number or
- that Oklahoma would use the call-in number only for individuals asking about abortions.

See Verlo v. Martinez, 820 F.3d 1113, 1125-26 (10th Cir. 2016) (stating that when reviewing a district court's preliminary-injunction ruling, we restrict our inquiry to facts in the district court's record). To the contrary, HHS provided the national call-in number as a way for Oklahoma to answer questions about *all* options available to pregnant women. For example, a woman might ask: "I'm pregnant, what are my options?" Appellant's App'x vol. 3, at 591. Given that question, HHS would require Oklahoma to provide the call-in number for nondirective counseling about "prenatal care, adoption, foster care . . . and also pregnancy termination." *Id*.

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[13] The dissent states that the Weldon Amendment unambiguously renders use of the national call-in number a referral for abortion. But the dissent doesn't identify anything in the statutory text for this interpretation. Instead, the dissent relies solely on the possibility that a pregnant woman might decide to get an abortion after learning about her options. This reliance not only rests on speculation, but also disregards the statutory focus on the referring entity's purpose rather than how the pregnant woman would use the information.

The pregnant woman's ultimate decision doesn't show a likelihood that the court will ultimately regard use of the national call-in number as a referral for an abortion. HHS said that the call-in number provided neutral information about abortions, and Oklahoma's briefs and evidence presented no reason to question the neutrality of the information. Given the neutrality of the call-in information, the Weldon Amendment requires us to focus on the purpose of the referring entity (Oklahoma) rather than the pregnant women using the information. Otherwise, the act of sharing the call-in number would create both a referral for and against an abortion depending on the pregnant woman's decision after getting the same information.

Based on the statutory language and the record, the district court didn't err when tentatively concluding that the act of sharing the call-in number wouldn't constitute a referral for pregnant women to get abortions.[14] This interpretation is supported by the statutory sponsor of the Weldon Amendment. The sponsor explained that the Weldon Amendment wouldn't "affect access to abortion [or] the provision of abortion-related information or services by willing providers." 150 Cong. Rec. H10,090 (daily ed. Nov. 20,

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[14] HHS points out that Congress annually reenacts the Weldon Amendment, including in the fifteen years that the amendment existed alongside HHS's requirements in 2000 for nondirective counseling and referrals. *See* 86 Fed. Reg. 56,144, 56,153 (Oct. 7, 2021) (discussing the longstanding coexistence of the amendment and the nondirective counseling-and-referral requirement). HHS theorizes that this longstanding coexistence shows that Congress didn't intend for the amendment to abrogate HHS's requirements concerning counseling and referrals. But we need not address this theory.

2004) (statement of Rep. Weldon).[15] We give substantial weight to the statutory sponsor's explanation of his amendment. *Fed. Energy Admin. v. Algonquin SNG, Inc.*, 426 U.S. 548, 564 (1976); *Nat'l Credit Union Admin. Bd. v. Nomura Home Equity Loan, Inc.*, 764 F.3d 1199, 1232 (10th Cir. 2014).

The dissent characterizes Oklahoma's objection as sincere. Dissent at 20. Even if Oklahoma had sincerely considered use of the national call-in number as a referral for abortion under the Weldon Amendment, the language in the amendment doesn't entrust health-care entities with the authority to define referral for abortion. Given the statutory language and the sponsor's explanation, the district court didn't err by tentatively concluding that the national call-in number wasn't a referral for the purpose of facilitating an abortion.

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[15] In addition, the statutory sponsor explained that the amendment had two other objectives:

1. Protection of individual health-care providers like "nurses, technicians, and doctors" who don't want to "participate in an abortion, perform an abortion, or be affiliated with doing an abortion"

2. Protection of health-care entities from being forced by the government to provide abortion services, citing examples of state governments forcing hospitals to perform elective abortions or build abortion clinics

150 Cong. Rec. H10,090. In these ways, the statutory sponsor explained that the amendment would prevent action to force participation in abortions—not to prevent the sharing of neutral information about abortions.

The statutory sponsor's explanation seems to fit the statutory phrasing, which addresses referrals for abortions. This language suggests a bar on referrals for the purpose of facilitating abortions rather than on the sharing of neutral information regarding all family-planning options. The district court thus didn't err when tentatively concluding that the act of sharing the call-in number wouldn't constitute a referral for the purpose of facilitating an abortion.

3.2 HHS Likely Didn't Force Oklahoma to Discriminate Against Other Health-Care Entities

Oklahoma also argues that HHS forced the state to discriminate against other health-care entities that refuse to make referrals for abortions. But HHS clarified that Oklahoma could distribute the grant funds to other health-care entities as long as Oklahoma itself passed along the call-in number. *See* 65 Fed. Reg. 41,270, 41,274 (July 3, 2000) (specifying that while "grantees may not require individual employees who have objections to provide such counseling . . . in such cases the grantees must make other arrangements to ensure that the service is available to Title X clients who desire it"); 86 Fed. Reg. 56,144, 56,148, 56,153 (Oct. 7, 2021) (readopting this requirement with the 2021 rule). Given HHS's clarification, the district court didn't err in tentatively concluding that Oklahoma hadn't compelled Oklahoma to discriminate against other healthcare entities.

* * *

The district court didn't err when it tentatively concluded that HHS hadn't

- discriminated against Oklahoma for declining to make referrals for abortions or
- forced Oklahoma to discriminate against other health-care entities.

4. The District Court Didn't Err By Tentatively Concluding That HHS Hadn't Acted Arbitrarily and Capriciously

Finally, Oklahoma argues that HHS acted arbitrarily and capriciously in terminating the grant. But the district court didn't err in tentatively rejecting Oklahoma's characterization of HHS's actions as arbitrary or capricious.

4.1 The District Court Didn't Err By Tentatively Concluding That HHS Had Complied With Title X

Oklahoma argues that HHS misinterpreted § 1008 of Title X, which prohibits use of Title X for "programs where abortion is a method of family planning." 42 U.S.C. § 300a-6. Oklahoma and ten other states presented a similar argument in *Ohio v. Becerra*, 87 F.4th 759, 770-75 (6th Cir. 2023). But *Ohio* involved a facial challenge to HHS's requirement. *Id.* Here Oklahoma presents an as-applied challenge, focusing on termination of a grant based on the state's refusal to pass along the national call-in number.

Section 1008 is silent on the issue of counseling and referrals. *See Rust v. Sullivan*, 500 U.S. 173, 184 (1991) ("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."). Given Congress's silence, the Supreme

Court held that HHS could enact requirements on counseling and referrals. *Id.* at 185.[16]

When a judgment is issued, the district court will presumably need to decide whether HHS strayed from Title X. But here our inquiry is limited, considering only whether the district court erred when tentatively concluding that HHS had complied with Title X. In our view, the district court's tentative conclusion wasn't erroneous. *See Ohio v. Becerra*, 87 F.4th 759, 772 (6th Cir. 2023) (relying on *Rust* to conclude that HHS can "treat referrals as either falling inside or outside § 1008's prohibition, so long as [HHS] adequately explains its choice").

4.2 The district court didn't err by tentatively finding compliance with HHS's regulations

Oklahoma also argues that HHS acted inconsistently with its own requirements, pointing to three snippets:

1. The phrase allowable under state law in 42 C.F.R. § 59.5(b)(6)
2. The phrase in close physical proximity in 42 C.F.R. § 59.5(b)(8)

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[16] In *Rust v. Sullivan*, the Supreme Court applied a two-part test that had been established in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Roughly two weeks ago, the Court overruled *Chevron*. *Loper Bright Enters. v. Raimondo*, 603 U.S. ___, Nos. 22-451, 22-1219, 2024 WL 3208360, at *21 (June 28, 2024). But the Court clarified that it was not "call[ing] into question prior cases that [had] relied on the *Chevron* framework." *Id.*

3. Two sentences in HHS's preamble

An agency acts arbitrarily and capriciously when it violates its own regulations. *N.M. Farm & Livestock Bureau v. U.S. Dep't of Interior*, 952 F.3d 1216, 1231 (10th Cir. 2020). We grant substantial deference to an agency's interpretation of its own regulations unless the interpretation is unreasonable, plainly erroneous, or inconsistent with the plain language. *Oxy USA Inc. v. U.S. Dep't of Interior*, 32 F.4th 1032, 1044 (10th Cir. 2022).

Oklahoma first relies on an HHS regulation that requires Title X projects to provide for performance of family-planning services "under the direction of a clinical services provider, with services offered within their scope of practice and allowable under state law, and with special training or experience in family planning." 42 C.F.R. § 59.5(b)(6) (emphasis added). According to Oklahoma, this regulation prohibits HHS from forcing Oklahoma to violate its laws.

Even if Oklahoma were correct, its argument would turn on the meaning of HHS's phrase allowable under state law. HHS interpreted this phrase to ensure that non-physician health-care providers can direct family-planning programs so long as the providers are qualified under state law. HHS's explanation is supported by the commentary accompanying the 2001 rule. *See* 86 Fed. Reg. 56,144, 56,163-64 (Oct. 7, 2021) (explaining that HHS added this regulatory language, including the phrase allowable under state law, because "other healthcare providers . . . have authority to direct family planning programs and should be included within the regulation"). This commentary indicates that the phrase allowable under state law is meant to expand the categories of

qualified providers. Given HHS's explanation and the commentary, the district court didn't err by tentatively concluding that HHS had correctly interpreted its regulation.

Oklahoma also points to a second HHS regulation, which requires Title X projects to "[p]rovide for coordination and use of referrals and linkages with [other health-care entities], who are in close physical proximity to the Title X site, when feasible . . . . " 42 C.F.R. § 59.5(b)(8) (emphasis added). According to Oklahoma, the use of a national call-in number would violate the requirement of close physical proximity. But the regulation requires physical proximity only when feasible. *See* Appellant's App'x vol. 3, at 457 (HHS guidance on the 2021 rule, stating that "[t]here are no geographic limits for Title X recipients making referrals for their clients"). Oklahoma hasn't explained how it would be feasible to make referrals in close proximity to a Title X site within the state.

Oklahoma also argues that the call-in number can't be feasible when the requirement forces a state to violate its own criminal law. This argument likely rests on a misreading of the regulation.

The regulation appears to modify the physical-proximity requirement, which would permit referrals to distant providers when nearby referrals aren't possible; the language doesn't necessarily modify the basic requirements regarding nondirective counseling and referrals. In these circumstances, the district court didn't err by tentatively concluding that HHS's regulatory interpretations hadn't been arbitrary or capricious.

Finally, Oklahoma points to two stray sentences from the preamble to the 2021 rule:

1. "[O]bjecting providers or Title X grantees are not required to counsel or refer for abortions."
2. "[O]bjecting individuals and grantees will not be required to counsel or refer for abortions in the Title X program in accordance with applicable federal law."

86 Fed. Reg. 56,144, 56,163 (Oct. 7, 2021).

We reject arguments based on snippets of a preamble when the regulatory language is otherwise clear. *See Sierra Club v. EPA*, 964 F.3d 882, 893 (10th Cir. 2020) (rejecting an agency's argument relying "on snippets from the regulation's preamble"); *Peabody Twentymile Mining, LLC v. Sec'y of Lab.*, 931 F.3d 992, 998 (10th Cir. 2019) ("[T]he limitations that appear in the preamble do not appear in the language of the regulation, and we refuse to engraft those limitations onto the language.").[17]

HHS interprets its requirements to allow a Title X project to issue its own grants to objecting health-care entities as long as the project otherwise provides nondirective counseling and referrals. This interpretation is supported by the regulatory language and HHS's guidance. With that support, the district court didn't err by tentatively concluding that HHS's interpretation of its requirements hadn't been arbitrary or capricious.

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17 At oral argument, Oklahoma agreed, conceding that preamble language isn't binding.

4.3 The District Court Didn't Err By Tentatively Concluding That HHS Had Considered All Important Aspects of the Problem

Finally, Oklahoma alleges various errors and omissions, suggesting that HHS ignored two important aspects of the problem.[18]

First, Oklahoma alleges that HHS ignored federalism concerns, including the importance of the Supreme Court's 2022 opinion in *Dobbs v. Jackson Women's Health Organization*, 597 U.S. 215 (2022). But HHS issued extensive guidance about the effect of *Dobbs* on the requirements regarding counseling and referrals. Given that guidance, the district court didn't err by tentatively concluding that HHS had adequately considered *Dobbs*. Though *Dobbs* had addressed the constitutional right to an abortion, the opinion had not expressly addressed the power of the federal government to set conditions on federal grants. *See id.* at 231.

Even if the Supreme Court's opinion had addressed this power, the district court could tentatively conclude that HHS's requirements wouldn't prevent Oklahoma from regulating abortions. "The recipient is in no way compelled to operate a Title X project; to avoid the

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[18] In its appellate briefs, Oklahoma cites various other state laws, suggesting that they show a broad policy against abortions. But Oklahoma concedes that it didn't refer to these laws in district court. So we decline to address Oklahoma's new suggestion of a broad policy reflected in these laws. *See Bass v. Potter*, 522 F.3d 1098, 1107 n.9 (10th Cir. 2008) ("Because 'the theory in question was not presented . . . to the district court,' the issue 'is not properly before us' and we need not comment further.").

force of the regulations, it can simply decline the subsidy." *Rust v. Sullivan*, 500 U.S. 173, 199 n.5 (1991).

Second, Oklahoma argues that HHS failed to consider how termination of Oklahoma's grant would affect the state. But HHS considered the impact on Oklahoma patients, funding other providers who could fill the gap.

* * *

The district court didn't err in tentatively concluding that HHS had (1) correctly interpreted Title X and the regulations and (2) considered all important aspects of the problem.

Conclusion

The district court acted within its discretion by concluding that Oklahoma hadn't shown a likelihood of succeeding on its claims involving constraints under the spending power, violation of the Weldon Amendment, or arbitrariness and caprice in HHS's application of its regulations and Title X. So we affirm the denial of a preliminary injunction.[19]

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[19] Given Oklahoma's failure to show a likelihood of success, we need not consider the other elements of a preliminary injunction. *Warner v. Gross*, 776 F.3d 721, 736 (10th Cir. 2015); *see* Discussion–Part 1, above.

DISSENTING OPINION OF JUDGE FEDERICO

FEDERICO, Circuit Judge, dissenting.

For more than 50 years, the Oklahoma State Department of Health ("OSDH") received federal grant money under Title X of the Public Health Service Act, 42 U.S.C. § 300 *et seq.*, to provide family planning health care for Oklahomans. This money was primarily used to ensure that low-income and rural patients had access to reproductive and family planning care. Congress appropriated the federal grant money, which was dispersed through a regulatory scheme developed by the United States Department of Health and Human Services ("HHS").

Since Title X's inception in 1970, Congress has been explicit 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. Beginning in 2004 and every year thereafter, Congress included the so-called "Weldon Amendment" as an annual appropriations rider to every HHS appropriations bill. *See* Further Consolidated Appropriations Act, 2024, Pub. L. No. 118-47, div. D, tit. V, § 507, 138 Stat. 460, 703. Relevant here, the Weldon Amendment prohibits disbursement of grant money to government agencies that discriminate against any health care entity that "does not provide, pay for, provide coverage of, or refer for abortions." Pub. L. No. 118-47, div. D, tit. V, § 507(d)(1), 138 Stat. 460, 703.

As the majority explains, this appeal arises from HHS's regulatory requirement that all Title X grantees, such as OSDH, provide referrals to patients who

desire information on their full range of pregnancy options, including pregnancy termination ("referral requirement"). 42 C.F.R. § 59.5(a)(5). The Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization*, 597 U.S. 215 (2022), triggered an abortion ban under Oklahoma law, *see* Okla. Stat. Ann. tit. 21, § 861, and Oklahoma determined that OSDH providers and grantees cannot comply with the referral requirement without categorically running afoul of Oklahoma state law and policy. Because HHS disagreed with OSDH's assessment, it terminated OSDH's Title X grant.

On its face, the Weldon Amendment covers the more common situation in which funding cannot be denied to individual providers who raise conscience objections to the referral requirement. This case, however, presents a wholesale objection by a grantee who, under my reading of the Weldon Amendment, also qualifies as a health care entity as an institutional provider.

To determine whether the Weldon Amendment's discrimination prohibition applies to this case, we must define its use of the phrase "refer for abortions." Applying the natural reading of the Amendment's language to the facts of this case, Oklahoma has shown a likelihood of success in proving that HHS's termination of the Title X grant to OSDH was unlawful discrimination against its providers who cannot and will not comply with the referral requirement. I would therefore reverse the district court with instructions to grant the preliminary injunction, and thus, I respectfully dissent.

I

A

To contextualize the motion for preliminary injunction that was before the district court, we must consider HHS's historical implementation of Title X and OSDH's history as a program grantee. In 1970, Congress enacted Title X, which authorizes HHS to "make grants to and enter into contracts with public or nonprofit private entities to assist in the establishment and operation of voluntary family planning projects which . . . offer a broad range of acceptable and effective family planning methods and services." 42 U.S.C. § 300(a). Title X grants "shall be made in accordance with such regulations as the [HHS] Secretary may promulgate," *id.* § 300a-4(a), and "shall be payable . . . subject to such conditions as the Secretary may determine to be appropriate to assure that such grants will be effectively utilized for the purposes for which made," *id.* § 300a-4(b).

HHS has discretion under its regulations to determine the allocation of Title X grant funds among the applicants. *See* 42 C.F.R. § 59.7(a) (stating that "the Secretary may award grants" (emphasis added)). Title X funds must be spent in accordance with applicable regulations, *see id.* § 59.9, and HHS may terminate a grant if a recipient fails to comply with the terms and conditions, including any incorporated regulatory requirements, *see* 45 C.F.R. §§ 75.371(c), 75.372(a)(1).

For much of the Title X program's existence, HHS has required – as it does now – that Title X projects offer pregnant patients the choice to be provided information and "nondirective 'options counseling'" about

"prenatal care," "adoption and foster care," and "pregnancy termination (abortion)," "followed by referral for [any of] these services if [the patient] so requests." 53 Fed. Reg. 2922, 2923 (Feb. 2, 1988) (describing regulatory history); *see* 42 C.F.R. § 59.5(a)(5)(i)(C), (a)(5)(ii) (describing current project requirements, including "offer[ing] pregnant clients the opportunity to be provided information and counseling regarding . . . [p]regnancy termination," and "[i]f requested" to "provide neutral, factual information and nondirective counseling," as well as "referral upon request"). HHS requires that patients receive "complete factual information about all medical options and the accompanying risks and benefits." 65 Fed. Reg. 41281, 41281 (July 3, 2000).

Notably, § 1008 of Title X states that "[n]one of the funds appropriated . . . shall be used in programs where abortion is a method of family planning." 42 U.S.C. § 300a-6. Consistent with § 1008, HHS has explained that a Title X project may not "promote[] abortion or encourage[] persons to obtain [an] abortion." 65 Fed. Reg. at 41281. Any referral for an abortion may consist of "relevant factual information" such as a provider's "name, address, [and] telephone number," but Title X projects may not take "further affirmative action (such as negotiating a fee reduction, making an appointment, [or] providing transportation) to secure abortion services for the patient." *Id.*

On two occasions, HHS has promulgated rules requiring the inverse of the current rule, by placing strict restrictions on the type of counseling and referrals that Title X grantees may provide. First, in 1988, HHS issued a rule that prohibited grantees from discussing or referring for abortions. *See* 86 Fed. Reg.

19812, 19813 (Apr. 15, 2021) (describing 1988 rule). In *Rust v. Sullivan*, 500 U.S. 173, 184-90 (1991), the Supreme Court upheld the 1988 rule as a "permissible construction" of the statute in light of the "broad directives provided by Congress in Title X," but the rule was "never implemented on a nationwide basis." 65 Fed. Reg. 41270, 41271 (July 3, 2000). HHS issued an interim rule in 1993 that suspended the 1988 prohibitive rule and returned to the pre-1988 standards. 58 Fed. Reg. 7462, 7462 (Feb. 5, 1993). It then issued a rule in 2000 that required nondirective options counseling and a referral for options the patient requested. *See* 65 Fed. Reg. at 41271. This rule remained in effect until 2019. *Id.*

In 2019, HHS "essentially revive[d]" the 1988 rule that restrained the ability of Title X projects to provide pregnancy options counseling and prohibited Title X projects from referring for abortion. *Mayor of Balt. v. Azar*, 973 F.3d 258, 271 (4th Cir. 2020) (en banc). The Ninth Circuit upheld the rule's restrictions, *California ex rel. Becerra v. Azar*, 950 F.3d 1067, 1101-04 (9th Cir. 2020) (en banc), while the Fourth Circuit enjoined its operation in Maryland, *Mayor of Balt.*, 973 F.3d at 276-81, 283-90, 296.

In October 2021, HHS promulgated a final rule, which remains in effect today, restoring the counseling and referral requirements that have governed grantees "for much of the program's history." 86 Fed. Reg. 56144, 56150 (Oct. 7, 2021). HHS determined that the 2019 rule's restrictions on counseling and referrals had "interfered with the patient-provider relationship," *id.* at 56146; had "compromised [the] ability to provide quality healthcare to all clients," *id.*; and had "shifted the Title X program away from its history of providing

client-centered quality family planning services," *id.* at 56148.

Following the 2021 rule's promulgation, Oklahoma and several other States sued and brought a facial challenge against it in federal court in the Southern District of Ohio, including the referral requirement. *See Ohio v. Becerra*, 87 F.4th 759, 767-68 (6th Cir. 2023). The district court in *Becerra* denied the States' request to enjoin the referral requirement, and the Sixth Circuit affirmed, reasoning that the requirement is based on a permissible construction of Title X and HHS adequately explained its decision to restore the requirement. *Id.* at 770-75.

B

OSDH has been a recipient of Title X grants for decades,[1] including during the years in which the HHS regulations required Title X projects to offer nondirective options counseling and referrals for abortion upon a patient's request. And in March 2022, HHS again awarded OSDH a Title X grant for the period of April 1, 2022, through March 31, 2023.

In June 2022, the Supreme Court issued its decision in *Dobbs*, which overturned precedent recognizing a constitutional right to abortion. 597 U.S. 215. Following that decision, HHS advised Title X grantees that the counseling and referral requirements remained in effect. Aplt. App'x III at 58-66; *see also id.* at 68 ("[A]ll Title X recipients continue to operate under the federal requirements of the 2021 Title X rule, including

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[1] There are 68 clinics and entities that receive Title X grant funds in Oklahoma. *See* Aplt. App'x II at 41 (Declaration of Tina Johnson, MPH, RN ¶ 12).

the requirement to provide nondirective pregnancy options counseling in the event of a positive pregnancy test and client-requested referrals." (emphasis removed)). HHS reiterated that Title X projects are required to offer pregnant patients nondirective options counseling and a referral upon the patient's request, including for abortion. HHS stated that projects may also make out-of-state referrals.

The same day that *Dobbs* was decided, Oklahoma's law outlawing abortion, § 861, took effect. *See* ACLU, *et al.* Am. Br. at 31 (discussing Letter from John O'Connor, Okla. Att'y Gen., to J. Kevin Stitt, Okla. Governor (June 24, 2022)). And in August 2022, OSDH sought to modify its counseling and referral policies because § 861 became state law.

HHS determined that Oklahoma's first proposed policy modification did not comply with federal regulatory requirements, but it offered Oklahoma the option of submitting an "alternate compliance proposal" with specific examples of acceptable arrangements, including by providing Title X patients the number for a national call-in hotline where operators would supply the requisite information. Aplt. App'x III at 71-72. Initially, Oklahoma agreed to comply with its counseling and referral obligations by providing nondirective counseling on all pregnancy options by its staff or through the hotline. And on March 14, 2023, Oklahoma submitted written assurance of its compliance with the 2021 rule and program materials showing that patients were being made aware of the hotline. Based on Oklahoma's assurances, HHS approved an award for April 1, 2023, through March 31, 2024.

Shortly after HHS awarded funding, on May 5, 2023, Oklahoma reversed course, notifying HHS that

it had made changes to its Title X project. Under the new policy, OSDH would "[p]rovide neutral, factual information and nondirective counseling on pregnancy options in Oklahoma by OSDH staff (except for options the client indicated she does not want more information on)," but would no longer provide counseling through a referral to the hotline. Aplt. App'x I at 90. In response, HHS informed Oklahoma that this policy "does not comply with the Title X regulatory requirements and, therefore," violates "the terms and conditions of [its] grant." *Id.* at 91.

HHS then suspended Oklahoma's award but allowed it 30 days to bring its program into compliance. Oklahoma, however, "indicated that it would not be able to comply with the Title X regulation[,] citing state law." *Id.* HHS was unmoved and terminated Oklahoma's grant. Because Oklahoma "had ample notification of what is required to maintain compliance with the Title X regulation," HHS concluded that termination was "in the best interest of the government" given Oklahoma's "material non-compliance with [grant] terms and conditions." *Id.* at 91-92. And in September 2023, HHS redirected Oklahoma's $4.5 million award to two entities in Missouri. Oklahoma appealed the termination action to an administrative review panel within HHS. Shortly before oral argument in this appeal, HHS denied Oklahoma's administrative appeal.

After filing a complaint against HHS, Xavier Becerra,[2] Jessica Marcella,[3] and the Office of Population Affairs ("Defendants") in the Western District of Oklahoma, Oklahoma moved for a preliminary injunction seeking to enjoin Defendants from redirecting the award to other entities. The district court held a hearing on the motion in March 2024, and, during the hearing, provided its reasoning orally for denying the motion. The district court determined that Oklahoma had not shown a likelihood of success on the merits, that it had shown irreparable injury, and that the merged remaining factors were neutral.

II

We review the district court's denial of a preliminary injunction for abuse of discretion. *Heideman v. S. Salt Lake City*, 348 F.3d 1182, 1188 (10th Cir. 2003). The district court's factual findings are reviewed for clear error and its legal determinations are reviewed de novo. *Id.* Though I agree with most of the majority's opinion,[4] I take issue with its interpretation of a federal statute (the Weldon Amendment), so my review is best framed as whether the district court abused its discretion by committing an error of law in interpreting and applying that statute. *Att'y Gen. of*

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[2] Becerra is the Secretary of HHS. Oklahoma sues him in his official capacity.

[3] Marcella is the Deputy Assistant Secretary for the Office of Population Affairs. Oklahoma sues her in her official capacity.

[4] I agree with the majority that the district court did not abuse its discretion by concluding that the 2021 HHS rule did not violate the Spending Clause or by concluding that HHS did not otherwise act arbitrarily and capriciously.

Okla. v. Tyson Foods, Inc., 565 F.3d 769, 775 (10th Cir. 2009). To this end, "it is well-established that 'committing a legal error . . . is necessarily an abuse of discretion.'" *Berdiev v. Garland*, 13 F.4th 1125, 1132 (10th Cir. 2021) (quoting *Elzour v. Ashcroft*, 378 F.3d 1143, 1150 n.9 (10th Cir. 2004)).

To obtain a preliminary injunction, Oklahoma must show:

> (1) [it] is substantially likely to succeed on the merits; (2) [it] will suffer irreparable injury if the injunction is denied; (3) [the] . . . threatened injury [to it] outweighs the injury the opposing party will suffer under the injunction; and (4) the injunction [is] not . . . adverse to the public interest.

Fish v. Kobach, 840 F.3d 710, 723 (10th Cir. 2016) (internal quotation marks omitted) (quoting *Beltronics USA, Inc. v. Midwest Inventory Distrib., LLC*, 562 F.3d 1067, 1070 (10th Cir. 2009)). When, as here, the government is the opposing party, factors three and four merge. *Nken v. Holder*, 556 U.S. 418, 435 (2009). Because it concludes that Oklahoma is not likely to succeed on the merits, the majority analyzes this first factor only.

Additionally, under the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.*, "[a] person[5] suffering a legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial

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5 "Person" includes "an individual, partnership, corporation, association, or public or private organization other than an agency." 5 U.S.C. § 551(2).

review thereof." 5 U.S.C. § 702. And relevant here, "final agency action for which there is no other adequate remedy in a court" is subject to our review. *Id.* § 704. An agency action is "final" for purposes of § 704 when the action marks the consummation of the agency's decision-making process, *Chic. & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 113 (1948), and is one by which the rights or obligations have been determined, or from which legal consequences will flow, *Port of Bos. Marine Terminal Ass'n v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 71 (1970). This case presents a final agency action subject to our review because HHS terminated OSDH's Title X grant and allocated it elsewhere, despite an ongoing administrative appeal.

The scope of our review of the agency action is determined by statute. 5 U.S.C. § 706. "Informal agency action must be set aside if it fails to meet statutory, procedural or constitutional requirements or if it was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560, 1575 (10th Cir. 1994) (internal quotations omitted) (quoting *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 413-14 (1971)); 5 U.S.C. § 706(2)(A)-(D).

III

Like the majority, I now consider whether the district court abused its discretion by denying the extraordinary remedy of a preliminary injunction. Unlike the majority, however, I respectfully conclude that it did. Further, not only do I conclude Oklahoma has demonstrated it is substantially likely to succeed on the merits of its claim that the agency action was

unlawful, but I also conclude that the other preliminary injunction factors weigh in Oklahoma's favor.

A

Oklahoma has demonstrated a substantial likelihood of success on the merits. HHS's decision and action to terminate OSDH's Title X grant was not lawful because that final agency action violated the Weldon Amendment. It did so because HHS discriminated against a health care entity that programmatically determined that it could not follow the referral requirement because doing so would violate state law and policy.

This case presents a question of first impression. Indeed, no conscience-based objections were made under the Weldon Amendment until 2017 – more than a decade after its creation. So, although we are not guided by a large body of case law to apply the statute to these facts and circumstances, my analysis is guided by what I believe to be the best reading of the statutory text.

1

When interpreting a statute, "we start with the statutory text." *Tanzin v. Tanvir*, 592 U.S. 43, 46 (2020). The Weldon Amendment states:

> (d)(1) None of the funds made available in this Act may be made available to a Federal agency or program, or to a State or local government, if such agency, program, or government subjects any institutional or individual health care entity to discrimination on the basis that the health care entity does

> not provide, pay for, provide coverage of, or refer for abortions.
>
> (2) In this subsection, the term "health care entity" includes an individual physician or other health care professional, a hospital, a provider-sponsored organization, a health maintenance organization, a health insurance plan, or any other kind of health care facility, organization, or plan.

Pub. L. No. 118-47, div. D, tit. V, § 507, 138 Stat. 460, 703. The only defined term in the Weldon Amendment is "health care entity." But like reading any statute, "we look first to its language, giving the words used their ordinary meaning." *Artis v. D.C.*, 583 U.S. 71, 83 (2018) (quoting *Moskal v. United States*, 498 U.S. 103, 108 (1990)); *Republic of Sudan v. Harrison*, 587 U.S. 1, 8 (2019) (noting that courts should strive to find "the most natural" reading of statutory text); *Maslenjak v. United States*, 582 U.S. 335, 336 (2017) (reviewing statutory text for "the most natural understanding" of its language).

As the majority explains, Oklahoma must prove two elements to show it will succeed on the merits: (1) OSDH is a "health care entity," and (2) HHS discriminated against OSDH for declining to refer pregnant patients for abortions. The majority skips the first element because it decides the issue on the second. However, the first element is worthy of

exploration because it is a prerequisite for, and properly frames the analysis of, the second element.[6]

2

I first consider whether OSDH is a "health care entity" within the definition of that term in the Weldon Amendment. All parties agree that OSDH is a Title X grantee, and I conclude that the Weldon Amendment's definition of a "health care entity" also covers OSDH because it is a "health care facility, organization, or plan." Pub. L. No. 118-47, div. D, tit. V, § 507(d)(2), 138 Stat. 460, 703. As fleshed out during oral argument, OSDH qualifies as such a "facility, organization, or plan" because it engages in direct patient care at OSDH clinics. Oral Argument at 3:40-3:55, 4:45-4:55, 5:00-7:20; *see also* Aplt. App'x II at 39 (Johnson Declaration ¶ 3, describing job positions at OSDH, including public nursing at county health clinics).[7]

During the back-and-forth discussions about compliance with the referral requirement, OSDH communicated to HHS that its staff provides direct patient care. In May 2023, OSDH stated its family planning policy would "[p]rovide neutral, factual information and nondirective counseling on pregnancy options in Oklahoma *by OSDH staff*." Aplt. App'x I at 90 (emphasis added). In other words, OSDH has facilities to see patients and administer health care, is

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[6] The district court briefly considered the first question without drawing any specific conclusions of law, but noted it is a "threshold matter." *See* Aplt. App'x III at 213-15.

[7] The OSDH clinics can be located by county on the OSDH website.

an organization that provides health care, and is an institutional plan with individual medical professionals who provide health care. The district court also noted the Weldon Amendment "means the provider of the services." Aplt. App'x III at 213. I agree and conclude that such language describes OSDH.[8]

There is nothing in the statutory text of the Weldon Amendment that prohibits a grantee from also being a protected "health care entity." Indeed, HHS itself recognizes that grantees and health care entities may be one and the same in the context of making objections to the referral requirement, having noted that "objecting individuals and grantees will not be required to counsel or refer for abortions in the Title X program." 86 Fed. Reg. at 56153. Thus, because OSDH is an institutional health care entity protected by the Weldon Amendment, it cannot be discriminated against on the basis that it does not refer patients for abortions.

3

I now turn to the second inquiry: whether HHS violated the Weldon Amendment by discriminating against OSDH for declining to refer pregnant patients for abortions. The key statutory phrase at issue is the meaning of "refer for abortions." That is, HHS cannot discriminate by denying funding against any health care entity (such as OSDH) that does not refer its

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[8] In *Becerra*, the Sixth Circuit noted it was "somewhat puzzled about the interaction between the [2021] Rule's referral requirement and . . . the Weldon Amendment[] as applied to State grantees." 87 F.4th 759, 774 n.8. But it did not have to resolve this point because the States did not pursue it on appeal or before the district court. *Id.*

patients for abortions. This phrase is not defined in the Weldon Amendment, so as stated above, we must consider the ordinary or most natural understanding of this language.

The majority's primary focus on this issue is the preposition "for" in the phrase "refer for abortions" within the Weldon Amendment, using dictionary definitions to conclude the language means to refer a pregnant patient for the particular purpose of getting an abortion. In my view, to best understand the phrase "refer for abortions" in this context, we must consider the provider-patient interaction where the Oklahoma patient requests a referral from OSDH or other individual provider to discuss all pregnancy options. There is only one option that is unlawful in Oklahoma – abortion. If the patient desires information about options that are not abortion, there would be no need for a referral to a national hotline. On the other hand, if a patient requests a referral, an Oklahoma provider would reasonably assume it is solely to explore the option of pregnancy termination, which OSDH concluded would run afoul of Oklahoma law and policy.

From OSDH's perspective, if only one patient in Oklahoma called the "All-Options Talkline" proposed by HHS to comply with the referral requirement, and ultimately decided to obtain an abortion, this would be a referral for the purpose of obtaining an abortion under the majority's reading of the Weldon Amendment. It would require OSDH providers to anticipate whether a referral would result in an abortion, potentially violating Oklahoma law and policy. And not only would such a reading possibly violate

Oklahoma law and policy, but it may also violate conscience-based objectors' rights.

The majority calls this speculative and unsupported by the record. However, when discussing the referral requirement for the Title X grant, OSDH communicated to HHS that it would "[p]rovide neutral, factual information and nondirective counseling on pregnancy options in Oklahoma by OSDH staff (except for options the client indicated she does not want more information on)," but would no longer provide counseling through a referral to the hotline. Aplt. App'x I at 90. Thus, OSDH was saying explicitly to HHS that it could not comply for the reason explained above – because the only pregnancy option not available in Oklahoma is abortion.

Also, the majority finds fault in this reasoning by saying it disregards the statutory focus on the referring entity's purpose rather than the pregnant patient's reason or purpose for a request for a referral. The statute says nothing, not even a hint, about the referring entity's purpose. Rather, the statute is a command to government agencies or programs that they cannot discriminate against health care entities. The statute's focus is on the agency that controls the funds, not the entity that is applying to receive them.

Although one point of contention in this litigation is whether the referral requirement violates state law, no authority has been uncovered that would require Oklahoma to prove its legal position is correct to be protected from discrimination by the Weldon Amendment. During oral argument before the district court, Oklahoma informed the court that its Attorney General had deemed the referral requirement to be unlawful in Oklahoma. Aplt. App'x III at 159-60. In

this context only, why isn't that enough? The Weldon Amendment is silent as to whether a health care entity must state its basis for objecting, or why it does not refer for abortions. Rather, as an objector, the Amendment plainly protects OSDH from discrimination through funding termination.

And though "[w]hen construing statutes, we begin with the plain language of the text itself," "[p]roper interpretation of a word 'depends upon reading the whole statutory text, considering the purpose and context of the statute.'" *United States v. Ko*, 739 F.3d 558, 560 (10th Cir. 2014) (quoting *Dolan v. U.S. Postal Service*, 546 U.S. 481, 486 (2006)). Here, the text and purpose of the Weldon Amendment align to put the focus on agency discrimination, not a detailed probe as to why an entity does not refer for abortions. The record supports that OSDH raised a sincere objection to compliance with the referral requirement, which HHS disregarded by terminating the grant.

The majority relies upon HHS's regulation that requires Title X projects to offer pregnant patients "the opportunity to be provided information and counseling regarding . . . [p]regnacy termination." 42 C.F.R. § 59.5(a)(5)(i)(C). But Oklahoma's claim here is a violation of the Weldon Amendment, not an agency regulation, so the agency regulation is of little consequence. With the passage of the Weldon Amendment, Congress did not delegate to HHS or any other agency the authority to clarify its meaning. Rather, the text of the Amendment stands on its own, making it the statutory duty of the courts to determine its meaning when conducting a review of agency action. *See* 5 U.S.C. § 706; *see also Sherley v. Sebelius*, 689 F.3d

776, 786 (D.C. Cir. 2012) (Henderson, J., concurring) (The Weldon Amendment "reveals no express delegation of authority—implicit or explicit—to any agency to administer its provisions—which is unsurprising given that the [amendment] itself confers no substantive authority on any agency to do anything; it simply—and plainly—prohibits the Departments of Labor, Health and Human Services and Education, as well as [r]elated [a]gencies, from using the appropriated funds for the specifically enumerated purposes." (internal quotation marks omitted)).

In reviewing the district court's interpretation and application of the Weldon Amendment, I do not find it to be the best reading of the statute. Rather, I read the statute to conclude that HHS's termination action violated it. Indeed, in sum, I conclude the best reading of the Weldon Amendment is: (1) OSDH is a health care entity; and (2) HHS discriminated against OSDH on the basis that it does not provide, pay for, provide coverage of, or refer for abortions. OSDH's non-compliance with the referral requirement was raised as a legitimate objection to not run afoul of state law and policy. There is nothing in the Weldon Amendment, the record of this case, or the parties' arguments that requires more to trigger the anti-discrimination prohibition.

Finally, to support its conclusions, the majority gives weight to the Weldon Amendment's legislative history. But I see the legislative history as a mixed bag. Representative ("Rep.") Weldon stated the following regarding the Weldon Amendment:

> The reason I sought to include this provision in the bill is my experience as a physician, and I still see patients, is that the majority

> of nurses, technicians and doctors who claim to be pro-choice who claim to support *Roe v. Wade* always say to me that they would never want to participate in an abortion, perform an abortion, or be affiliated with doing an abortion. This provision is meant to protect health care entities from discrimination because they choose not to provide abortion services.
>
> * * *
>
> This provision is intended to protect the decisions of physicians, nurses, clinics, hospitals, medical centers, and even health insurance providers from being forced by the government to provide, refer, or pay for abortions.

150 Cong. Rec. 25044-45 (2004).

> Rep. Weldon also stated the following:
>
> This provision is intended to protect the decisions of physicians, nurses, clinics, hospitals, medical centers, and even health insurance providers from being forced by the government to provide, refer, or pay for abortions.
>
> * * *
>
> This provision only applies to health care entities that refuse to provide abortion services. Furthermore, the provision only affects instances when a government requires that a health care entity provide abortion services. Therefore, contrary to what has been said, this provision will not affect access

> to abortion, the provision of abortion-related information or services by willing providers or the ability of States to fulfill Federal Medicaid legislation.

Id.

First, this legislative history was made eighteen years before *Dobbs* extinguished the constitutional right to abortion, which had for decades been ensconced by *Roe*. Second, as pointed out in *City and County of San Francisco v. Azar*, "Representative Weldon used the term 'refer for' as separate from the provision of information, and further explicitly clarified that the Amendment was not meant to apply to the provision of abortion-related information." 411 F. Supp. 3d 1001, 1021 (N.D. Cal. 2019). But "the provision of any information by a 'health care entity' that could reasonably lead to a patient obtaining the procedure at issue would be considered a 'referral.'" *Id.* In other words, the statements of the legislator who sponsored and whose name appears on this Amendment, even if given substantial weight, do not clearly resolve what was intended with the words "refer for abortions" because he drew a distinction between referrals and the provision of abortion-related information that is not in the statutory text. The legislative history should not be used here to muddy the meaning of the statutory text, especially given the muddiness of the history itself. *See Food Mktg. Inst. v. Argus Leader Media*, 588 U.S. 427, 436 (2019) (noting that legislative history may "muddy" the meaning of clear statutory language).

B

Having determined that Oklahoma is substantially likely to succeed on the merits of its claim regarding the Weldon Amendment, I turn now to the second preliminary injunction factor – irreparable harm. Oklahoma asserts that the district court properly found that Oklahoma faces irreparable harm because it will lose $4.5 million in Title X funding absent an injunction.

To constitute irreparable harm, an injury must be certain, great, actual "and not theoretical." *Heideman*, 348 F.3d at 1189 (quoting *Wis. Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985)). Irreparable harm is more than "merely serious or substantial" harm. *Prairie Band of Potawatomi Indians*, 253 F.3d at 1250.

To make this showing, Oklahoma must establish "a significant risk that [it] will experience harm that cannot be compensated after the fact by monetary damages." *Greater Yellowstone Coal. v. Flowers*, 321 F.3d 1250, 1258 (10th Cir. 2003) (quoting *Adams v. Freedom Forge Corp.*, 204 F.3d 475, 484-85 (3d Cir. 2000)). And "[w]hile not an easy burden to fulfill," "a plaintiff who can show a significant risk of irreparable harm has demonstrated that the harm is not speculative." *Id.* Finally, to be irreparable, "the injury must be 'likely to occur before the district court rules on the merits.'" *New Mexico Dep't of Game & Fish v. U.S. Dep't of the Interior*, 854 F.3d 1236, 1250 (10th Cir. 2017) (quoting *Yellowstone Coal*, 321 F.3d at 1260).

Oklahoma argues it "will not likely be able to recoup the funds as monetary damages due to sovereign

immunity." Aplt. Br. at 60. And, indeed, Oklahoma's argument succeeded in *Becerra*, 87 F.4th at 782-83. There, the Sixth Circuit held that economic injuries caused by agency action are unrecoverable because the APA does not waive the federal government's sovereign immunity in this context. *Id.* I agree with the Sixth Circuit's take on the issue. The termination of the financial grant is actual, irreparable harm that will occur before the district court rules on the merits of the case, warranting relief.[9]

C

Merging the third and fourth factors that are necessary to merit a preliminary injunction, I also find they favor Oklahoma. On HHS's side of the scale, the public has an interest in Title X grantees complying with agency regulations to receive public funds. The funds, however, are already appropriated by Congress in this context, so whether they go to a grantee in Oklahoma or are redirected to Missouri as occurred here, the net result monetarily is a neutral transaction.

Weighing against HHS's interest is the reality that the termination of the grant to OSDH reduces access to health care for those who need it most: patients who visit OSDH clinics for health care because, by virtue of resources or geography, that is the only option available to them. Additionally, both

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[9] The parties filed a motion for expedited review of this appeal because a decision is needed to obligate funds for the next fiscal year, should an injunction be granted. The need to expedite this appeal further demonstrates irreparable harm, as what is at stake is the funding of OSDH clinics to provide health care to low-income and rural patients.

the Weldon Amendment and Oklahoma state law § 861 were enacted by elected representatives in the respective legislatures, federal and state, so compliance and respect for the law is an interest that commands significant weight. Oklahoma prevails on this factor as well.

D

Finally, and for the same reasons stated above, I would grant Oklahoma a stay under 5 U.S.C. § 705. Section 705 provides:

> When an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review. On such conditions as may be required and to the extent necessary to prevent irreparable injury, the reviewing court, including the court to which a case may be taken on appeal from or on application for certiorari or other writ to a reviewing court, may issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings.

Id. (emphases added).

Oklahoma has satisfied § 705's requirements. Not only has it demonstrated a substantial likelihood of success on the merits, but it also has demonstrated that it would suffer irreparable harm absent an injunction.

IV

This case presents circumstances that ripened only after *Dobbs* was decided and Oklahoma's abortion ban took effect. These two events gave rise to a change in OSDH's longstanding policy, as it concluded it could no longer follow the referral requirement set forth in 42 C.F.R. § 59.5(a)(5) without running afoul of state law and policy. But rather than complying with its statutory obligations, HHS terminated OSDH's grant in violation of the Weldon Amendment. Because I conclude that Oklahoma has met its burden, I would reverse the district court and remand with instruction to grant the preliminary injunction motion. Accordingly, I respectfully dissent.

ORDER, U.S. DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA (MARCH 26, 2024)

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA,

Plaintiff

v.

UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, ET AL.,

Defendants.

No. CIV-23-1052-HE

Before: Joe HEATON,
United States District Judge.

ORDER

For the reasons stated on the record at the hearing on March 26, 2024, plaintiff's Motion for Preliminary Injunction [Doc. #23] is **DENIED**.

IT IS SO ORDERED.

Dated this 26th day of March, 2024.

/s/ Joe Heaton
United States District Judge

BENCH RULING AND HEARING ON MOTION FOR PRELIMINARY INJUNCTION (MARCH 26, 2024)

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA,

Plaintiff,

v.

UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, ET AL.,

Defendants.

Case No. CIV-23-1052-HE

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE JOE HEATON
UNITED STATES DISTRICT JUDGE
MARCH 26, 2024
AT 1:30 P.M.
MOTION FOR PRELIMINARY INJUNCTION

APPEARANCES

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* * * * *

(Proceedings held on March 26, 2024.)

THE COURT: I seem to have some imbalance of counsel here. Do you guys want to spread out?

Well, good afternoon, everyone. We're here on Oklahoma vs. U.S. Department of Health and Human Services.

Let me have appearances by counsel, please.

MR. HILLIS: Tom Hillis for the State of Oklahoma, and with me is Barry Reynolds, my partner Miles McFadden, my partner A.J. Ferate, and Audrey Weaver with the attorney general's office.

I would also like to introduce Ellen Carr, intern with the A.G.'s office, Your Honor.

THE COURT: Let's have her just present this, why don't we?

MR. HILLIS: She would do better than me, Judge.

THE COURT: All right. Mr. Hillis, are you going to be the lead counsel here on this?

MR. HILLIS: Yes, Your Honor.

THE COURT: All right. And who's here on behalf of the defendant?

MR. CLENDENEN: Good afternoon, Your Honor. Michael Clendenen from the Department of Justice.

THE COURT: It's Clendenen?

MR. CLENDENEN: Yes. Yes, Your Honor.

THE COURT: All right. This is in connection with the State's request for preliminary injunction. Let me ask just as a threshold matter: I think I had mentioned in the order setting the hearing that I wanted everyone to let me know if there was going to be evidence to be offered, and as I understand it from I think the State's submission, the plan is no testimonial evidence, but essentially the various exhibits that have been presented are coming in by agreement; is that essentially what the agreement is?

MR. HILLIS: Yes, Your Honor.

MR. CLENDENEN: Yes, Your Honor.

THE COURT: All right. Okay. Then we'll proceed with the case here just as—on the basis that it's essentially oral argument.

I have spent a fair amount of time in the briefs in this case. It's got some thorny, many-facetted issues to it, but it did seem to me that it was involved enough and involving enough substantial theories that don't come before me in your average employment discrimination case or felon in possession case that it would be helpful to have some argument from counsel to assist me in making a determination.

So Mr. Hillis, why don't you step to the podium and let's hear from you first and we can start working through this.

I guess at the very outset, I just—to be very clear on it, in terms of the specific injunction that the State's asking for here, as I understand it, the circumstances are there was a grant made, and then based on later developments, the grant was terminated.

So is the State's request essentially a mandatory injunction asking me to restore a funding flow or what?

MR. HILLIS: It's not necessarily restore—I'm sorry, maybe a little loud.

But what we have, Your Honor, we have yearly grants that are made under Title X. And it's my understanding that those grants are documented

on April 1st of every year, with the funds flowing in, I believe, July or August of each year.

So that's the need for the preliminary injunction, is to prohibit the HHS from denying Oklahoma a grant solely on the basis that Oklahoma will not require referrals for abortion under Title X.

THE COURT: Maybe I'm splitting hairs here, and it may not make any difference, but I gather, though, that the—based on the termination letter from the federal department, that the grant has been terminated, so in effect, this would be a declaration or something to reinstate the grant?

MR. HILLIS: To reinstate the grant and to allow us to apply this fiscal year without requiring us to have the program require abortion referrals.

THE COURT: Now, the—some of the submissions here, I don't recall whose they were, talked in terms of a five-year funding cycle that happens on this Title X program.

I assume we're—based on what you're saying, that we're now, what, one year into that five-year cycle, but it's just a question of making the further request for the—

MR. HILLIS: Yeah. And it's a little odd. I don't know if it's for accounting reasons, but the grants are for a five-year period, but then there are yearly renewals of that grant.

And so they've taken away the four and a half million already, but what we're here today is to say that the federal government cannot deny us a future grant solely on the basis that we will not refer for abortions.

So in this April—it's my understanding the grants are announced on April 1. And what we're saying is that the federal government cannot deny Oklahoma a grant solely on the basis that Oklahoma will not refer for abortions.

THE COURT: But the urgency of the April 1 deadline is the State's view that if you're not on the list that's announced April 1, you can't ever get it back later?

MR. HILLIS: That's my understanding, Your Honor. I'm not here as a government grants expert, but we have had detailed communications with the Department of Justice, and that's the understanding that I have, Your Honor.

So the critical deadline is April 1st to be awarded a grant that will be funded in July or August of this year.

THE COURT: Well, in that connection, let me ask, I think there's—there was an indication in the—in your papers that after the termination letter was received from the feds—I frankly have debated about how to refer to the parties here. You know, we've got enough HHSs on both ends that it gets—so I may refer to the State and the feds. That may seem less respectful than might be the case otherwise, but—

MR. HILLIS: And in my mind, I do State and then HHS, I'm meaning—

THE COURT: All right. State and HHS is probably a better way to do it.

But at any rate, the suggestion was that after HHS sent the termination letter, there was an appeal—

MR. HILLIS: Yes.

THE COURT: —that was filed by the State that I gather is still pending.

MR. HILLIS: My understanding, Your Honor, yes.

THE COURT: Does that preserve something in terms of potential entitlement to being funded, if the decision here should ultimately be in the State's favor?

MR. HILLIS: I don't know that we can recoup the funds that have been paid to the Missouri outfit, but that's not what we're seeking now.

What we're seeking now is just a declaration to HHS that says you cannot mandate that Oklahoma have an abortion referral in its Title VII—or Title X, I'm sorry—Title X application. And that would put us in line to get another grant on the next grant cycle.

THE COURT: All right. All right. Go ahead.

MR. HILLIS: Okay.

May it please the Court. Appreciate the Court's attention to this very serious matter for the people of the state of Oklahoma.

I do want to commend the Department of Justice for their collegiality in this case. With the cooperation of the Department of Justice, we have a very finite issue for Your Honor.

And literally, that finite issue is: Is it lawful for health and human services to require Title X grantees to refer patients who request to abortion providers. That's the issue in front of Your Honor.

And that's a crystallized issue that we think is very clearly decided in Oklahoma's favor.

You'll see, just a brief history, Oklahoma has been a Title X grantee for at least four decades. With that, the State of Oklahoma funds very vital family planning services through a network established through the Oklahoma Department of Health.

The State of Oklahoma funds 68 separate county health departments to provide crucial and necessary funding for the people of the state of Oklahoma.

THE COURT: What are the ones that don't—that aren't in the 68? Is it like the city-county health departments in the major metro areas that are not part of the mix?

MR. HILLIS: My guess is some of the health departments cover multiple counties, because we've got 68 of the 77 counties, so—but I can't say that I'm conversational on that. But there are 68 separate health departments that are funded with Title X funds.

With that, Oklahoma is able to provide very valuable family planning services to people largely who would not get access to that.

Oklahoma is largely a rural state. We have two major metropolitan areas: Tulsa and Oklahoma City, obviously. But then the rest of the state—

and I'm from Lawton, so that's not a major metropolitan area, but is a metropolitan area—but you have large swaths of Oklahoma that are rural without access to quality care.

While that—those gaps in those, particularly in the rural counties are funded by the State of Oklahoma Department of Health, and literally you have people with no access to medical care, but their county health department. So this issue is critical for the state of Oklahoma.

Oklahoma has adopted this program. It was last reviewed in 2016. We have that as—I believe our review is attached. Yeah, it's Exhibit 2 to our preliminary injunction.

You will see that Oklahoma was commended for its Title X program in Exhibit 2. Matter fact, it was so good, that review, that the next review was not even granted or was not even required until 2024.

So Oklahoma has a well-developed, long-standing Title X program that was very, very effective for the people of the state of Oklahoma.

Obviously, the tension in this case comes in 2022. And that's when the United States Supreme Court overruled decades of precedent in the *Dobb*s decision.

All of a sudden, *Dobbs* returned legislation with respect to abortion to the states, where for decades, it had been purely a federal issue. And so that triggered a whole series of events that gets us here today.

And that requirement, it goes back to vacillating HHS regulations on abortion referrals.

Title X is very clear in 1008 that Title X funds cannot be used in a program where abortion is a method of family planning. Crystal clear, no one's arguing that.

HHS has taken, again, a vacillating position, and I think both the U.S. Government and the state government agree on that vacillation.

HHS went from requiring referrals to prohibiting referrals to requiring referrals. Again, solely on the backdrop of 1008, which says that abortion can't—funds can't be used in a program where abortion is a method of family planning.

The issue in front of Your Honor was never ripe before *Dobbs*. Because prior to *Dobbs*, Oklahoma could not make illegal referrals for abortion. Again, that changed completely with the *Dobbs* decision.

With the *Dobbs* decision, all of a sudden Oklahoma could, in fact, regulate abortion. Oklahoma's elected leaders have elected—made the policy decision that not only we're going to outlaw abortion, we're going to outlaw counseling for abortion.

THE COURT: What are you basing that on?

MR. HILLIS: The statute, 861 is the—21 O.S. 861, Your Honor.

THE COURT: Well, all right. Go ahead.

MR. HILLIS: Okay. So that creates a tension that didn't exist in this case. So the State Department

of Health then looked at the regulations that now have ping-ponged back to having abortion referrals being mandated.

And the State looked at the regulation, which is 42 CFR 59.5, and I'm in A, that requires a Title X program to refer for abortion, if requested.

But what 59(b)(6) provides, contradictory to that mandate, 59(b)(6) provides that "Provide that family planning medical services will be performed under the direction of a clinical service provider, with services offered within their scope and practice and allowable under state law."

So in Oklahoma's mind, those are contradictory. That there's a thou shalt require abortion referrals, but then there's also a carve out that the services have to be allowable under state law.

So Oklahoma, in their—they've already been approved for the grant, but now they're doing their yearly approval, they then modify that Oklahoma will comply with the abortion referral, if it's allowable under state law.

THE COURT: Let me ask just I guess partly as a matter of being clear on the timeline, but I think it relates potentially to maybe help focus on where the conflict ultimately came from.

This version of the rule, this 42 CFR 59.5 was adopted in October of 2021—

MR. HILLIS: Yes, sir.

THE COURT: —right? And then the grant from—or the application from the State of Oklahoma under Title X got approved in March of 2022?

MR. HILLIS: Yes.

THE COURT: And then I'm saying this based on what was, I think, in some of the letters back and forth and that were describing the history, but at least it said that in August of 2022, this would be after the award had been approved, that Oklahoma proposed changes in how the nondirective options counseling was to be provided and wanted to shift to just providing clients with a link to the HHS website.

And, apparently, HHS rejected that, which triggered some kind of an appeal, but at any rate, they rejected that and asked for maybe an alternative proposal.

I mean, is all that accurate as you understand it up to that point?

MR. HILLIS: Well, I think Oklahoma vacillated a little bit here because we initially thought we could lawfully do the link—

THE COURT: Well, that's what I'm getting to.

MR. HILLIS: Yeah.

THE COURT: The—they talk about wanting some alternative proposals which, apparently, in February of 2023, Oklahoma did make an alternative proposal that proposed that counseling on all pregnancy options, which I assume would include abortion, could come either through the department of health staff or from this All Options Talk Line. That was Oklahoma's proposal.

MR. HILLIS: Tertiary proposal, yes.

THE COURT: I thought tertiary had to do with oil wells.

MR. HILLIS: Well, the first one. I shouldn't use 75-cent words. I'm sorry.

THE COURT: Anyway, but apparently, then, as I understand it, HHS concluded that that was okay, that that—

MR. HILLIS: Initially.

THE COURT: That that alternative proposal would meet the requirements for the grant.

And then there's an indication that it's—that in May of 2023, Oklahoma advised that it had a change required in our family planning program policy effective late afternoon of 4-27-23.

MR. HILLIS: Yes, you have the chronology correct, Your Honor.

THE COURT: So I guess my question is what happened on the afternoon of 4-27-23?

MR. HILLIS: I'm reading tea leaves here, but what happened, I think, is that *Dobbs* was a complete sea change for the State of Oklahoma. Well, all 50 states. And so it just took some time to work through that.

And so the 4-27 is the ultimate position of the State that we believe it's unlawful to refer for abortion. So I think that was—

THE COURT: I guess the thing that strikes me as odd about that is, I'm quoting this directly when it says that this thing happened late afternoon of 4-27-23. I mean, maybe that's when the lightbulb went off, I don't know.

But it would seem to me like there must have been something more specific than that that was being alluded to with that level of specificity.

MR. HILLIS: I think that that is, you know, decisions are events, but they're preceded by processes. And I think the 4-27 was the culmination of a process that the State went through in deciding the impact of the *Dobbs* decision, looking at the extant state law and that that was the culmination, that we don't think that referrals for abortions are lawful under the State of Oklahoma law.

THE COURT: And that's based on the 21 O.S. 861 you're talking about?

MR. HILLIS: Yes, Your Honor.

THE COURT: Well, let me ask you about that.

That's what I was looking for previously when I was trying to get it, but the language of that statute makes it criminal to advise a woman to take medication or employ some other means to terminate a pregnancy or to procure the abortion, obviously, but I guess the thing that—or at least the question that comes to my mind is when it says—or what is criminalized is advising the woman to go do something.

MR. HILLIS: Right. Or counsel, I believe is in—I don't have the statute.

THE COURT: There isn't any reference to counseling, but I guess that's my point. It doesn't say you can't bring up the subject. It just says you can't advise them to take a particular course of action.

So I guess my question would be, as I understand it in terms of what this referral requirement is, it keeps talking in terms of—what is it—a nondirective provision of basic information, that if it's nondirective, why would you interpret—if the nondirective provision of information is what they're talking about, that's what's a referral, then I'm having trouble seeing how that violates the statute.

I mean, statute seems to contemplate somebody advising the woman to do something.

MR. HILLIS: Right. And that's the position of the attorney general of the State of Oklahoma, that the referral would run afoul of 21 O.S., Section 861.

THE COURT: Well, you mean—is it the attorney general's position that, let's just say you've got a pregnant woman sitting in the—you know, the local health department office in Lawton and she says, "I'm pregnant, what are my options?" If the health department personnel-if the health department person sitting there says, "Well, abortion's not legal in Oklahoma unless your life's in danger, but you can call this number to get some other information."

MR. HILLIS: I believe the attorney general takes the position that that's unlawful.

THE COURT: Seriously?

MR. HILLIS: Yes, Your Honor.

THE COURT: Really?

MR. HILLIS: Yes.

THE COURT: Well, okay.

MR. HILLIS: So . . .

THE COURT: Does he think it's unlawful to mention the word "abortion"?

MR. HILLIS: I don't think mention, but I think that goes into would that be considered advising or counseling an abortion.

THE COURT: You think—would it be a crime for someone to say abortion's legal in Colorado? Is that a crime?

MR. HILLIS: I'm not a criminal lawyer, but no, I would not think that would be—run afoul of 861, to make a factual—if that's a factual statement.

THE COURT: So if that's not a crime, why would it be a crime to refer somebody to a phone number that might tell them that it was legal in Colorado?

MR. HILLIS: Because that's the purpose, is to promote abortions. And that's what the State of Oklahoma, through its elected legislatures, don't want to do.

THE COURT: But it's Oklahoma's position that anything that mentions the possibility of abortion is thereby promoting it?

MR. HILLIS: I don't think it goes that far, but to give someone abortion providers would at least potentially run afoul of advising someone to get an abortion. And that's the part that is problematic for the State of Oklahoma.

THE COURT: But as I understand it, the referral requirement only applies if the client or the

patient, whatever the right word would be, requests it.

MR. HILLIS: That's the way the reg is written. You're right.

THE COURT: And that would suggest that the impetus for the idea of thinking about it is not coming from HHS, it's coming from the client.

MR. HILLIS: The initial one, but then the genesis could always be beyond the person advising it.

The genesis doesn't matter. It's the fact of saying, "Here are abortion providers that you can lawfully get an abortion from." That's the problem that potentially runs afoul of 861.

THE COURT: It would seem to me the question is whether at what point you're advising somebody to do something.

MR. HILLIS: Right. If you're a state official or in a state program and you're handing out something that says, you know, Dr. Smith in Grand Island, Colorado, performs abortion, to me, I can see why the State of Oklahoma, with its policy against abortion, would not want people using state-directed funds to do that. I think that's a legitimate regulatory ask post *Dobbs*.

THE COURT: Well, may well be a legitimate regulatory ask. I'm not sure that's the same thing as saying it's criminal.

MR. HILLIS: But there's at least litigious uncertainty over that. And that's the part where, you know, we're entitled to construe our state statutes and

to direct our county officials on what's lawful and what's not lawful.

And at least there's litigious uncertainty, and, you know, I can't cite you, you know, State v. Smith, the Court of Criminal Appeals said yea or nay, but there's at least litigious uncertainty over there. And discretion being the better a part of valor, I can understand why the department of health said, no, we can't comply with that.

Particularly, in light of—if you read the rest of the regulation, Your Honor, I think it becomes clear, because as the government noted in their brief, one part of the regulation says—and this is on page 12 of their brief. This is 59—42 CFR 59.5(a)(5), "Objecting providers or Title X grantees are not required to counsel or refer for abortions." That's their own regulation. That's their own quote right out of their statute or right out of their brief.

THE COURT: Is that the regulation they say's been vacated?

MR. HILLIS: I don't believe so.

THE COURT: Somewhere in a brief there's a footnote—

MR. HILLIS: There was one. I don't believe it's 59.5(a), because that's the one they're trying to tie us up with.

And so I'm fast forwarding. My argument would have proceeded differently, but here, their regulation first of all says, thou shall refer for abortion referrals. But then that same regulation says, "Objecting providers or Title X grantees are

not required to counsel or refer for abortions." And I'm quoting right now out of their own brief.

And so those are conflicting right there. And that obviates one of their arguments about the necessary clarity that is needed for a funding requirement.

So the real issue here is: Is the requirement that Title X grantees—and Oklahoma is a Title X grantee. The grant that we submitted in our paper denominates the State of Oklahoma as a grantee.

Can Title X grantees be denied funding based on a funding condition that is not in the statute? That's the issue in front of Your Honor.

THE COURT: Well, if that's the statute, that sounds like a facial challenge to the regulation to me.

MR. HILLIS: Well, right now what we have is not a facial challenge to the regulation. We've had $4.5 million yanked away from us.

THE COURT: I understand it has actual consequences, but it does seem to me that if—to the extent that you're just saying, you know, they didn't have the authority to promulgate the regulation they came up with, that's already been resolved, hadn't it?

MR. HILLIS: No.

THE COURT: What significance—

MR. HILLIS: If you're referring to the *State of Ohio*.

THE COURT: Yes, I am.

MR. HILLIS: Okay. And the *State of Ohio* case, Sixth Circuit—

THE COURT: Right.

MR. HILLIS: That was a facial challenge to the regulation. We're a vastly different area right now because we are—

THE COURT: Well, I assume you would agree, though, that to the extent anything you're doing now is a facial challenge, it's barred by the *Ohio* decision.

MR. HILLIS: It's contrary to the *Ohio* decision. The government has not taken the position that that's collateral estoppel in this case.

THE COURT: Why doesn't that obviously flow here?

MR. HILLIS: Because it was an as-applied or it was a facial challenge and this is an as-applied challenge. Because—

THE COURT: No, but my question is to the extent that it is a facial challenge in substance, isn't it precluded by the *Ohio* decision?

MR. HILLIS: It's contrary to the *Ohio* decision. I have not been faced with the government arguing that the *Ohio* court or the Sixth Circuit is binding on Your Honor or binding on the State of Oklahoma.

But you are right, the State of Oklahoma was a party in the Sixth Circuit litigation.

THE COURT: Well, I mean, it does seem to me that, you know, ordinarily if I was having to consider a Sixth Circuit case, I would give it whatever weight I thought it deserved based on how persuasive it was. I mean, it doesn't bind me like something out of the Tenth Circuit would.

MR. HILLIS: Out of Denver, right.

THE COURT: But it does seem to me that it's a pertinent distinction here that Oklahoma was a party to that case.

MR. HILLIS: Yes. I agree. I have to distinguish *Ohio*. I will agree with that.

But we can readily distinguish *Ohio*, because *Ohio*, again, as you noted, was a facial challenge. There's a vast difference between a facial challenge and an as-applied challenge in this case.

Because the as-applied challenge, the government, the federal government does not get the benefit of *Chevron* deference. That's crucial in this case.

Because if you read the *Ohio* opinion, its premise is *Chevron* deference. If you took away *Chevron* deference, I'll submit the *Ohio* justices would have reached a different decision, and they should have.

Because in this case, we've had four and a half million dollars taken away from the State of Oklahoma. So we have an as-applied challenge.

As-applied challenges—

THE COURT: Well, what is the difference in terms of—well, go ahead and finish your sentence.

MR. HILLIS: In a facial challenge, the skin—the cat hadn't been skinned. In applied challenges, the cat's been skinned. The money is gone from the State of Oklahoma. So we can challenge: Is that funding condition, is it statutorily based?

You have to apply the law without giving deference to the government in this case.

That is absolutely crucial, because if you look at *Pennhurst, Pennhurst* is a Judge—Justice Rehnquist opinion that sets up what Your Honor should do when facing a funding decision by the government.

And *Pennhurst* is absolutely clear that funding conditions must come from the text of the statute.

THE COURT: This is your Spending Clause argument?

MR. HILLIS: Spending Clause. Article I, Section 8. *Pennhurst* is crystal clear that that clarity must come from the statute. That differentiates the *Ohio* case entirely, because the *Ohio* case, if you'll read it, they spend a lot of pages, a lot of ink and paper on the *Chevron* deference.

But here, the answer, I think, for Your Honor is decided in an as-applied challenge by the *Rust* decision. Because *Rust* clearly holds on all fours that Title X does not either maintain or proscribe abortion referrals. It's just completely agnostic, so there's nothing in that regulation.

THE COURT: Well, it says as a matter of *Chevron* deference that you have to, at least as to that statute, accord deference to the agency's interpretation, which can change over the years. And it has changed.

MR. HILLIS: In an as-applied challenge under *Rust*. But remember, the holding of *Rust* is impactful.

The holding of *Rust* is that the Secretary could, because of the language of 1008, prohibit abortion referrals. That is very consistent with the language of 1008 that says that projects cannot use abortion as a method of family planning.

And so that's just a logical outreach in a facial challenge that the Secretary was okay to ban entirely abortion referrals. That's consistent with the text of 1008.

Rust did apply *Chevron* deference to get to that point, but what *Rust* does not stand for is that if a statute is silent as to a funding requirement, can the agency make it up.

THE COURT: Well, but what do you do in a situation like we've got here where the statutes that are part of Title X explicitly says the Secretary can prescribe conditions.

MR. HILLIS: Right. And so you look at that and see, does that give the Secretary carte blanche to come up with whatever rules or regulations that they want.

And if you look at the case law, and this—we've got to get down into the weeds here, and I apologize for that. But if you look at the case law, the case law is clear—

THE COURT: Well, you don't have to look—

MR. HILLIS: —that that general delegation does not give the Secretary carte blanche to come up with funding conditions that are not in the statute.

And very clearly, abortion referrals are not in the statute. That's crystal clear—

THE COURT: So you're saying you think the law is that we don't even have to get to the point of worrying about the presence or absence of *Chevron* deference, because it doesn't count anyway?

MR. HILLIS: Yeah, you don't get there because the Secretary was not empowered to exercise legislative function when Congress chose not to do it.

Cases are clear, they can't fill in that legislative gap. And I can walk you through the cases to get you there.

THE COURT: Well, they've been filling in that gap for 30 years.

MR. HILLIS: Well, but remember, for 30 years, there was no tension. The tension shows up in 2022 with the *Dobbs* decision.

THE COURT: The *Dobbs* decision didn't invent the Spending Clause at that point. The Spending Clause—

MR. HILLIS: Right. But there were no challenges to it because it was lawful in every state. Now we at least have serious concern that abortion referrals are unlawful in the State of Oklahoma.

THE COURT: But if that was the case, wouldn't that have come up in the *Ohio* decision?

MR. HILLIS: Not in a facial challenge, because you have *Chevron* deference. The crucial part of—and I hope you—I'm making myself clear.

The *Ohio* case was entirely dependent on *Chevron* deference. We don't have *Chevron* deference in an as-applied challenge.

THE COURT: My point is the *Ohio* case said, based on what they viewed as having been determined in *Rust* and the nature of—what is it—1008, that *Chevron* deference did apply and that that

included not only the result in *Rust* where they said it's within the permissible zone of regulatory regulation-making to ban referrals, but it's also within the permissible zone to require them.

MR. HILLIS: Right.

THE COURT: So if that's all the case, I mean—

MR. HILLIS: But that's not all the case, because it only gets to that point based on *Chevron* deference.

You take that *Chevron* deference away and apply the as-applied Article I, Section 8 challenge cases, that's when you see the Secretary does not have the authority to exercise legislative functions. That's crystal clear under every case, and I'm going to unfortunately have to walk you through a relatively tedious exposé, because it is necessary.

The cases that we rely on crystal clear*, Pennhurst* says that the funding conditions must be unmistakably clear. If you look at the *Morrisey* case out of—

THE COURT: Well, let me ask you about one that I was looking at, because I think it's maybe cited in your brief or somebody's brief, but it's the *Arlington Central School District* case that was talking about an attorney's fee statute, as I remember.

MR. HILLIS: Yes. That was in my hit list here.

THE COURT: And the statute, whatever the federal statute was, said you could recover attorney's fees. And—

MR. HILLIS: Expert fees weren't costs, yeah.

THE COURT: And it wasn't a situation, though, of where, you know, there were suddenly new regulations that came out. It didn't involve regulations. So I guess I'm having trouble seeing how this whole argument fits.

If there is statutory authority for the Secretary to do something and they've done something, I mean, you know, these cases that you've cited on the Spending Clause thing are, basically, it seems to me, saying, you know, you can't enter into what amounts to a contract with the State and then later come in and superimpose requirements on them after the fact. Isn't that the essence of it?

MR. HILLIS: That's part of it.

But I don't know if you're referring to the *Bennett* case, but if you look at each of these cases, and the government cited four principal cases for what I call a general delegation to the administrator. Can—under a general delegation, can the agency head exercise legislative functions. And the cases are all crystal clear: You absolutely cannot.

The first case they cite is the *Bennett v. Kentucky Department of Education* case, which is a Justice O'Connor opinion under I believe it was Title I of the Elementary Education Act.

And in that case, the federal government provided educational funds to developmentally disabled individuals.

The agency head then came up with a regulation that prohibited, it's called "supplanting," that the State couldn't use the federal funds and then just yank away the extant State funds that were

spent for developmentally disabled, so they had to spend their money and then the federal money was an add-on.

But in *Bennett*, what happened, Congress amended Title I to adopt the supplanting language.

And Justice O'Connor said, "In order to assure that federal funds would be used to support additional services that would not otherwise be available, the Title I program from the outset prohibited the use of federal grants to replace state funds. This prohibition initially was contained in regulations and explained in the program. Congress responded by amending Title I in 1970 to add a provision that specifically prohibited supplanting."

So Congress came in and adopted that as the law of the land. That's what made that appropriate.

And if you look at the text of Justice O'Connor's opinion, she says at page—I believe it's 47 U.S. 666, "The requisite clarity in this case is provided by Title I." Not the regulation. Title I.

So in that case, Justice O'Connor did not look at the general delegation, she looked at the text of the statute.

If you look at the federal government cites *Biden v. Missouri*, a case wholly not on point. It was a delegation doctrine case using COVID funds.

The final two cases they rely on are *Gruver* and *Mississippi Commission*. Those two cases are coercion cases. They're not requirements cases. So they're not on point.

So none of the cases stand for the proposition the government cites them for you, that a general delegation to the agency allows it to exercise funds.

The fallacy of their argument should be readily apparent because the only case law that's out there that a general delegation is sufficient to allow the agency to exercise legislative functions is the Tennessee case, Justice McDonough, about ten days ago.

But the important thing—so you have to look at the—what undergirds Justice—Judge McDonough's opinion to see if it's worth following or not.

He cites three primary cases; none of the cases that the government cited here. So Judge McDonough didn't even think they were authoritative. He first of all cites to *Jackson v. Board of Education*. Again, a Justice O'Connor opinion.

In that case, we were dealing with Title IX of funding and whether you could imply a cause of action based on the statute's language.

The language Justice O'Connor uses is—and this is, I believe, at page 179 or 178. "We reach this result based on the statute's text. In step with Sandoval, we hold that Title IX's private right of action encompasses suits for retaliation because retaliation falls within the statutes prohibited prohibition of intentional discrimination on the basis of sex."

So Justice O'Connor is saying the authority does not come from the regulator, it comes directly from the statute.

And what the ultimate opinion was, that Congress prohibited discrimination. The Court's construed discrimination to include unlawful retaliation. So that's just putting meaning to the words that Congress used.

THE COURT: But when we're dealing with a situation like what we have here, where Congress has essentially enacted a grant program—

MR. HILLIS: Yes.

THE COURT: —and it's for the purpose of promoting family planning projects or whatever, is it your position that any requirement that might relate to that simply is unenforceable, unless it's in the statute?

MR. HILLIS: There has to be a statutory—a nongeneral delegation to the regulator. And that's what the cases say.

THE COURT: Well, I assume you've looked at 59.5 that has a whole bunch of requirements that these plans or projects have to have. You're saying they're all invalid?

MR. HILLIS: The only one we're here on is the abortion referral. I've not studied the other ones, Judge.

THE COURT: But isn't that the logical consequence of what you're saying, since none of them are in the statute?

MR. HILLIS: No, the one that's crystal clear is that *Rust* tells us abortion referrals are not in Title X. That's binding on every court. And *Rust* says it's not in Title X, and so that's what's binding. And

if it's not in Title X, HHS cannot maintain it. And if you look at the cases, that's what it says.

The other case that they rely on is *Davis v. Monroe*. Again, a Justice O'Connor opinion.

She says, "The language of Title IX itself, particularly when viewed in conjunction with the requirement-prohibition of Title IX's prohibition to be liable in damages, also cabins the range of misconduct."

So throughout *Jackson* and *Monroe*, Justice O'Connor is citing not to regulations, she's citing to the text of Title IX.

They also cite to, curiously—or Justice McDonough curiously cites the case of—it was a Judge Alito case, I'm sorry. I've lost it here in my book. *Arlington Central v. Murphy*, where Justice Alito doesn't discuss regulations at all in the majority opinion.

But what's telling is the dissent, Justice Breyer's dissent. And he tells us why, when you're looking at implication of private rights of action, that that does not have the same scrutiny as funding conditions under *Pennhurst*. Justice Breyer says, "To the contrary, we have held that *Pennhurst* requirement that Congress unambiguously set out a condition on the grant of federal money does not necessarily apply to legislating setting forth the remedies available against a noncomplying state."

So that makes sense when you look at the difference between Article I, Section 1 and Article I, Section 8.

Article I, Section 1 is the delegation doctrine. And you can have under an Article I, Section 1 delegation, you can have a general delegation of authority to the executive branch. That makes sense because the executive branch enforces the laws.

The analogy the Courts use is Article I, Section 1 is basically the sword. And the sword is utilized by the executive branch. Article I, Section 8 challenges, however, are the purse. And the purse is quintessentially exercised by the legislature. That's the problem that we have here.

And if you look at the cases that are on point, that being *Pennhurst*, *Morrisey* and the District Court of Colorado case that is slipping my mind right now, and you've got *Yellen*.

If you look at—particularly instructive is the *Morrisey* case. Because *Morrisey* dealt with specifically an as-applied funding condition challenge.

It says, "The Supreme Court's leading authority on the limits of Spending Clause is *Pennhurst*," obviously. And it says, "And Congress must speak unambiguously and with a clear voice when it imposes conditions on federal funds. We explain that Congress must spell out a condition clearly enough for the states to make an informed choice."

And here is the part that I think is instructive, and why a general delegation of authority—and that's all we have here, we have a general delegation. That general delegation cannot include legislative functions. And this is right out of the *Morrissey* case, second—"An agency cannot exercise

legislative power or otherwise operate independ ently of the statute that authorized it."

I'm going to skip a cite. "The Constitution gives Congress, not the executive branch, the power to tax and spend through the exercise of its legislative powers. It follows, therefore, that Congress, not an executive agency, must exercise that power constitutionally."

Congress cannot delegate under Article I, Section 8 its legislative powers to tax and spend. That's a killer for the government's argument in this case because it's clearly a funding condition that is sans the statute. Under *Rust*, that's crystal clear.

Morrissey goes on to state, "Allowing an executive agency to impose a condition that is not otherwise ascertainable in the law Congress enacted would be inconsistent with the Constitution's meticulous separation of powers, therefore, the needed clarity under the Spending Clause must come directly from the statute."

You don't get there with a general delegation of authority. The Colorado case, it's *Colorado v. Department of Justice*, exact same thing. And that's a District Court of Colorado case from 2020.

It says, "However, agency-imposed grant conditions, even if they, themselves, are unambiguous, cannot be constitutional under the Spending Clause unless the statute from which they originate is also unambiguous," citing *City of Philadelphia* case.

"Spending Clause ambiguity cases generally involve statutory construction, not interpretations of conditions imposed by the agency."

So the binding authority here, they have zero authority in this case, Your Honor, for the proposition that a general grant of regulatory functions can serve to allow them to exercise legislative functions. That's a violation of the separation of powers.

And here what you've got to look at, the government made it easy on you and on page 21 of their brief, they cite to a regulation, a delegation of authority, one which did not grant legislative authority and one that they claim does grant legislative authority. I'll read those to you because, there's no meaningful difference.

THE COURT: Well, we've been going for a little better than an hour here. Why don't you kind of wrap up your end of this in the next few minutes and I would like to hear from the government.

MR. HILLIS: Yeah, let me then transition.

The other thing that's impactful under why *Ohio* does not apply is *Ohio* expressly did not consider the Weldon Amendment.

THE COURT: They say your complaint doesn't, either. What's the consequence of that?

MR. HILLIS: It's none. We don't have to specifically mention the Weldon Amendment. The Weldon Amendment is law.

We said their actions are unlawful, but if the only thing we're doing is forcing me to amend my

petition and coming right back here, when they've been on notice the whole time, because it was in our appeal as well. So I didn't catch the government flatfooted. And so but I think that's—

THE COURT: I suspect you're right about that. Get to the merits.

MR. HILLIS: The Weldon Amendment, every dollar that has been spent, including the dollars that were taken away from us, pass through the Weldon Amendment.

And the Weldon Amendment is clear that you can't discriminate against grantees who refuse to refer for abortion. That's the congressional intent that you can look at under *Pennhurst* to see does that comply or does it not comply.

And I think the Weldon Amendment is specifically pertinent here in the application of the *Ohio* case, because *Ohio* specifically—the *Ohio* case, the Sixth Circuit said, We wonder why the Weldon Amendment wasn't raised? I do too.

But here, we have raised it. It's impactful. It tells you what the legislative intent was and it is very contrary to the abortion mandate.

And I do appreciate you letting me go long, Your Honor. I do have some arbitrary and capricious argument that I want to add, but I'm mindful of the Court's schedule.

THE COURT: Take a couple minutes and tell me. I've read the briefs.

MR. HILLIS: You have read the briefs. But here, what you have is the application—here is what we

consider the government is doing, it is looking at one regulation and ignoring two others. It is ignoring the regulation in the same regulation that says that Title X grantees don't have to refer for abortion.

How do you square that with they yanked our funding, so for the singular reason that we will not refer for abortion.

So that's arbitrary and capricious, because they're applying one regulation and they're ignoring another one.

It's also arbitrary and capricious because that same regulation likewise says that the services have to be allowable under state law.

The agency told you they did not consider the impact of *Dobbs* in the '21 rule or when they redid it.

We think there's litigious uncertainty, at a minimum, on if abortion referrals are lawful under state law. And if we're right, then they've run afoul of that regulation as well.

So we think the application is unlawful because they're applying one regulation that overrides all the other regulations, and they're ignoring—and they also ignored the Weldon Amendment.

So the Weldon Amendment is crucial, both for is *Ohio* impactful to Your Honor, and the Weldon Amendment's crucial in light of the as-applied to Oklahoma.

THE COURT: Insofar as you're saying essentially that their regulations are internally inconsistent, I

recall the briefs talking about some other kind of deference that, frankly, I hadn't heard referred to before. But as I understand it, it's essentially saying, look, if the question is how they're interpreting their own regulations, then there's deference entitled—that they're entitled to deference on that. I mean, after all, it's their regulations.

MR. HILLIS: But they can't just ignore one and they're ignoring one. Because we are a Title X grantee and we are being required to refer for abortion. That's contrary to their regulation.

And it's also contrary to services allowable under state law. You've got—you can't just ignore that. You can't put blinders on and say, We're going to do the bidding of the executive here, and the bidding of the executive wants to expand abortion. That's not an appropriate exercise of agency discretion, particularly in light of 1008, which at best, is hostile to abortion.

THE COURT: Well, doesn't it make some difference here, though, that we're dealing with a grant program? I mean, you know, it would seem to me that if the federal government came in and tried to, I don't know, impose some rule that said we're going to just flat require you, whether you like it or not, to go do an abortion referral. It seems to me that's different than saying if you don't want to do it, that's up to you, but if you want this grant, you have to do it.

MR. HILLIS: It may seem contradictory, but the most exacting review is when an agency spends money. That's the Article I, Section 8 review that the

requirements have to be unmistakably clear. That's the standard.

And if they're trying to say that the regulations can make that be unmistakably clear, well, they're not, because you've got two diametrically opposed regulations. They're not unmistakably clear.

Even if they could get across that huge gulf of them exercising legislative functions, which is just prohibited under *Morrissey*, *Kentucky v. Yellen*, every Supreme Court case that's out there, so . . .

I know I've been long-winded. I appreciate Your Honor's attention. This is a very crucial matter for the people of the state of Oklahoma. We desperately need these funds and it's just categorically unfair to withhold funds—

THE COURT: Let me ask you about that, just to be certain that I understand the circumstances.

I recall at some point in the briefs there were, you know, some kind of suggestion that if this grant doesn't come through, that all these 68 counties are going to be deprived of services and people are going to, you know, not get what they need.

I mean, as I understand it from the affidavit from your deputy director, the legislature has appropriated supplemental money to backstop this if you don't get the grant, right?

MR. HILLIS: They have, but, Your Honor, that goes right into—and I should have addressed this.

That goes right into irreparable harm. Because Oklahoma has a constitutional balance budget requirement.

So necessarily implicit or empirically, if we're spending four and a half million dollars that should come from the federal government, we're not spending that four and a half million dollars somewhere else. We're robbing Peter to pay Paul. That's irreparable harm.

The other thing is, you know, you need—

THE COURT: I don't understand what you just said about the balanced budget. I don't understand how that—

MR. HILLIS: Oklahoma can only spend as much money—Oklahoma has to balance its budget, unlike the federal government. We can't borrow money to fund obligations.

So if we're going to spend four and a half million dollars, we've got to take it from somewhere. So it may come from the highway fund that we can't—program that we can't fund—

THE COURT: Well, my point is the family planning services that are being delivered through the local departments of health are going to continue to be delivered, correct?

MR. HILLIS: For at least this year, but whether Oklahoma can afford to fund that going forward, we don't know.

THE COURT: And so the question, when we're—I mean, to the extent we're trying to balance harms here or whatever, the harm is not that there are

going to be services not provided, it's just a matter of the State not being able to be reimbursed for up to the extent of the grant.

MR. HILLIS: Right. But read all of *Ohio*. There's part of *Ohio* that you may not have read. *Ohio* was a facial challenge to the funding requirement. That's what we've talked about here.

It was also a challenge to—you've got to separate abortion clinics from Title X clinics.

THE COURT: The integrity part.

MR. HILLIS: Yeah.

THE COURT: I read that.

MR. HILLIS: Okay. And so they granted the injunction on that, but they granted the injunction because the State of Ohio lost $1.7 million. State of Ohio is much bigger than the state of Oklahoma.

But more importantly—and I don't mean to point at you. But more importantly, they still had 80 percent of their funding. And that was irreparable harm, according to the Sixth Circuit.

Well, if 10 percent or 20 percent, I'm sorry, of a state's funding that amounts to $1.7 million is irreparable harm, taking away all of Oklahoma's funding necessarily has to be irreparable harm. But I don't think that's—

THE COURT: And we're talking here about-what is it—four and a half million? Is that—

MR. HILLIS: Yeah, we lost four and a half million, Ohio lost 1.7 million. But Ohio still got—I can't do math in my head like that, but Ohio still got eight million or so, maybe seven.

But what the Sixth Circuit said is that that deprivation of 20 percent of your Title X funds is irreparable harm.

THE COURT: But I assume what makes it irreparable is that there isn't a mechanism as against sovereign immunity to recover it from the feds?

MR. HILLIS: Yes.

THE COURT: Is that it? All right.

MR. HILLIS: I do appreciate Your Honor. Thank you for your time.

THE COURT: All right. Mr. Clendenen.

MR. CLENDENEN: Good afternoon. May it please the Court. Michael Clendenen for the defendants.

For years, Oklahoma has accepted millions of dollars in federal grant funding to support its family planning project. These funds were expressly conditioned on the project's provision of abortion counseling and referrals upon a patient's request. And for years, Oklahoma willingly accepted and complied with this condition.

But starting in 2023, Oklahoma refused to satisfy the same condition. Oklahoma still wants the federal funds, it wants them free of the condition and wants this Court to order the federal agency to provide that funding, all despite the State's disavowal of its prior agreement with the agency.

This Court should deny that request, just as the Tennessee court denied a motion for preliminary injunction on similar claims earlier this month.

I would start with some of the threshold questions that Your Honor asked of the plaintiffs about

what sort of relief they're seeking, the State is seeking.

First, I would just note that I didn't see any proposed order anywhere. The plaintiffs haven't, you know, submitted—they basically haven't shown what they're asking for, just they say they want a preliminary injunction.

And it is their burden to, you know, submit a proposed injunction that makes sense for the Court to order, if it finds that they have met the requirements for a preliminary injunction.

But as far as what an order could look like, if the plaintiffs were successful, in the defendants' view, the only thing that would really make sense is an order that says the agency has to set aside funds for Oklahoma if they are—if they prevail on a final judgment.

This is just a preliminary injunction motion that we're dealing with, so it doesn't make sense to have a declaration that says the federal agency has to provide the funds now to Oklahoma.

I would also just clear up a couple things. There was questions about a five-year funding cycle. I think that's referring to the continuation grants.

So all of the Title X are for one year at a time. Funding is always given to all grantees one year at a time, but some grantees are given a continuation grant, which means basically that their application is approved for up to five years, assuming they—you know, they still meet the requirements of the program, they don't have to reapply each year for those five years. And that's

what Oklahoma had here, except for the termination.

THE COURT: So the five-year cycle means every five years, somebody comes in and does a big analysis of the details of everything and if that's okay, then each of the succeeding years is a more truncated procedure, I guess?

MR. CLENDENEN: No, Your Honor, I don't think that's quite correct. It's really a matter of when the grantee has to apply.

So in this case, Oklahoma applied I think in 2022, and HHS, the federal agency, approved their grant application for a continuation grant for five years, meaning that unless they did something that made them not in compliance, they would continue to get that grant funding for each of the next five years.

The funding still only goes out one year at a time, but they would not have to reapply until five years down the road.

Also, I do want to address the April 1st deadline.

I think plaintiffs are correct when they say just as a general matter that HHS usually obligates these funds on April 1st and that they go out generally in July or August, but by statute, the agency does have until the end of the fiscal year to provide the funding.

So the only statutory requirement is that the funding go out by September 30th. The April 1st deadline and the July-August time frame is not set in stone. It can be adjusted.

THE COURT: Well, does the pendency of the appeal have any impact on this? I mean, have they somehow preserved their rights to do something later?

MR. CLENDENEN: Your Honor, I'm not 100 percent sure, but I don't think that the agency interprets the pendency of an appeal to preserve funding, necessarily. The funding could still go out, notwithstanding the fact that there's an administrative appeal.

THE COURT: As I understand Mr. Hillis' argument, he says part of the urgency or the magic on April 1 is that it's not a matter of HHS potentially holding it, but it potentially turning around and giving the money out to other grantees.

MR. CLENDENEN: Yes, Your Honor. And as a general matter, that is usually the time frame that HHS would do that, but it's not required by statute. It's not required by any regulation either.

THE COURT: Are you telling me that HHS is committed not to do it here?

MR. CLENDENEN: Your Honor, no, HHS isn't committed to not—not doing anything on April 1st. But—

THE COURT: Well, you're not doing much to allay their panic, if you're not in a position to do that.

MR. CLENDENEN: Understood, Your Honor. I just wanted to make the point that it's not necessarily going to happen.

THE COURT: All right.

MR. CLENDENEN: So first I'll address their statutory claims.

The Court correctly adduced that—that their arguments, at least with respect to Section 1008, are just a rehash of their arguments from the *Ohio* case, to which Oklahoma was a plaintiff.

That was a facial challenge, but they haven't raised any sort of factual distinction that would take this case out of the ordinary case that *Ohio* dealt with.

So as a matter of legal analysis, there's nothing in their statutory arguments that wasn't addressed in *Ohio* or at least that they couldn't have raised in the *Ohio* case.

The only sort of twist that they had is the Weldon Amendment, which wasn't specifically raised in the *Ohio* case, but they could have raised it.

Weldon has been around since I believe 2004. It hasn't been changed, so there's no reason why Oklahoma couldn't have raised it in that case. It's just another facial challenge based on the statute. There's nothing about the as-applied facts here that make it particular to the Weldon Amendment arguments.

As the Court noted, they didn't raise it in their complaint. They raised it only in their preliminary injunction motion, which was filed after the *Ohio* decision came out. The complaint was filed before the *Ohio* decision.

One note on the Weldon Amendment: Oklahoma and the plaintiffs in the *Ohio* case did at one point in their briefing say that they didn't think that

states were covered by these conscientious statutes and that states couldn't be healthcare providers.

So the docket for the *Ohio* Sixth Circuit appeal is Case Number 21-4235. And on Document Number 47, which I believe is the brief of the appellants, they said that, "The district court in that case doubted this constituted any irreparable injury, noting that federal statutes protecting conscientious and/or civil rights may exempt some, quote/unquote, providers, from complying with the referral requirements," and they quote the order. And then they say, "But the states are not protected under any of those statutes. While individual doctors working for the states might be, no statute would free a government grantee from complying with the federal requirement." So that—they've already—

THE COURT: What about this regulation that Mr. Hillis has referred to that I gather does refer to grantees?

MR. CLENDENEN: So, Your Honor, that's a different regulation. That's part of the 2021 Rule. It's not part of the Weldon Amendment, if I'm understanding what you're referring to.

They talk about—

THE COURT: Well, I think he's talking about the part he says is inconsistent with the other provisions of the rule, but it's the—

MR. CLENDENEN: Yeah, where they say, "Objecting providers or Title X grantees are not required to

counsel or refer for abortions," is that the part that?

So that comes from the 2021 Rule, 86 Fed. Reg. at 56,153.

So that sentence is a reference to objecting providers and grantees, but as we just—I just said, states can't be objecting providers or grantees. They are not healthcare entities that are protected by the Weldon Amendment.

The healthcare M.D.s are basically, you know, institutions or individual providers. They can't be a government agency.

THE COURT: Let me ask: I was talking to—at the beginning of Mr. Hillis' presentation, I was walking him through a timeline to try to get a sense of exactly when the—you know, when the decision was made and what the decision was to—that became the basis for the termination.

And I guess it has to do with this—the hotline or whatever that was called, that at one point Oklahoma had said we'll do the hotline, and then changed its mind and wouldn't.

Is the—in terms of complying with the rule's requirement that there be a referral on request, does HHS view providing that link to the hotline as complying with that?

MR. CLENDENEN: Yes, Your Honor.

THE COURT: In other words, if you've done that, you've done the referral?

MR. CLENDENEN: Yes, Your Honor.

And I would just add that it's at least unclear that doing so, just providing the phone number, is a violation of Oklahoma law. So it's, at the very least, not clear that providers in the state couldn't comply with the requirements of the regulation and with Oklahoma state law.

THE COURT: All right.

MR. CLENDENEN: I do also want to address the argument about the regulation that the services be allowable under state law. We addressed this on Page 13 of our brief. It's also thoroughly discussed in the Tennessee opinion.

But the language of the part they're quoting under 42 CFR Section 59.5(b)(6) says that each Title X project must affirm that, "family planning medical services will be performed under the direction of a clinical services provider, comma, with services offered within their scope of practice and allowable under state law, comma, and with special training or experience in family planning."

So this is a change of language that also took place in the 2021 rule, the same rule that's being challenged here.

Where it says "clinical services provider," that had previously said "physician." And the change to add—to change it to "clinical services provider" and then add the phrase "allowable under state law" was meant to be an expansion to allow for providers to be a physician—sorry—a physician's assistant or a nurse practitioner or anyone along those lines, if they're allowed to practice medicine under state law.

It's not meant to be an expansion of the program that services always has to be allowed under state law. It just refers to whether or not the provider is, you know, basically medically certified to provide these services under state law.

And the Tennessee court addressed this and it found that the regulation unambiguously means what HHS is saying it means, but even if the Court thought it was ambiguous, it would be subject to a *Kisor* deference, which also referred to as *Auer* deference.

THE COURT: That's the deference—*Auer* deference, that's the one I had not at least seen it described that way before.

MR. CLENDENEN: Yes, Your Honor. *Auer* deference has been around for a few decades, I'm not sure exactly what year it was, and then in 2019, the Supreme Court reaffirmed it in *Kisor v. Wilkie*, which we cite in our brief.

Also for the Spending Clause analysis, I'm happy to answer any questions the Court has about that. But I do think the Tennessee court got it 100 percent correct in that case and it would be the exact same analysis here.

Again, it's just a facial challenge. Oklahoma could have raised it in the Sixth Circuit case in—or sorry, in *Ohio*. They didn't do so. It's a facial challenge. There's no difference between this argument and what Tennessee addressed.

But if there's any questions on that, I'm happy to.

And then just a couple of other points on that.

At one point the plaintiffs, I think they said there's no *Chevron* deference in an as-applied challenge. I didn't see that raised anywhere in a brief and I don't believe there's any citation to that argument. I don't believe that's correct. *Chevron* deference is the framework, whether it's an as-applied challenge or a facial challenge.

The *Ohio* decision already applies *Rust*, which is a *Chevron* case, and it would be the same here as it is in *Ohio*.

Also, it seemed as though the plaintiffs were trying to raise a nondelegation challenge, basically saying that a statute is unconstitutional if it delegates legislative power from Congress to an agency. That's not raised in the complaint or any of their briefing.

So if that's—the Court shouldn't entertain the claim, since it wasn't raised, but to the extent that the Court is interested in the merits, the Tennessee opinion does address this in a footnote also.

I'm happy to address any other points the Court has, but otherwise, I would rest my time.

THE COURT: Well, I do have, I guess, one further question, and that has to do with the hotline thing.

If somebody calls the hotline—

MR. CLENDENEN: Yes, Your Honor.

THE COURT: —who is on the other end of it and what do they learn?

MR. CLENDENEN: Your Honor, I'm not entirely sure who is answering the phone. I do know it's out of state. It's not located in Oklahoma.

They are given nondirective counseling on all options, which is exactly what the HHS regulation says.

So if a patient calls and says, I'm pregnant, what are my options? They will give nondirective counseling about prenatal care, adoption, foster care, that sort of option, and also pregnancy termination.

It's nondirective, meaning they're not pushing one option or another. They're just giving neutral, factual information.

If the patient is interested in, you know, abortion, any questions, the person on the phone would very likely say, Well, there's no providers in the state of Oklahoma because it's not legal there, but Kansas and Colorado have providers.

And then if the patient requests for a referral, then the person on the hotline would give a referral. Again, it's not directive. They're just basically providing address and phone number. They're not setting up transportation or anything like that. They're just giving the address and phone number for a provider that would give those services.

THE COURT: This is your chance.

MR. CLENDENEN: Your Honor, I think I covered everything.

Again, the Tennessee opinion goes through basically all the same arguments and there's no reason why the Court should reach a different result.

THE COURT: All right.

Anything else you want to add, Mr. Hillis?

MR. HILLIS: I do. That may not surprise you.

THE COURT: I'll give you 45 seconds to wrap it up.

MR. HILLIS: I'll confine myself to two points. I won't get it done in 45 seconds, though.

The issue in front of Your Honor is weighty and unique, because what you're being asked to do is to do something that only one court to date that we've been able to determine has done. And that is to hold that a general delegation to an agency includes legislative powers.

Approximately nine days ago, there were zero authority for that, and I'm guessing when Judge McDonough issued his opinion.

But before his, the government couldn't cite you a case that says that a general delegation suffices under the law to allow them to attach funding conditions that are clearly sans the statute.

So that's the issue that they're asking you is to follow Judge McDonough.

THE COURT: But how do you say here that it's clearly sans the statute, when the—

MR. HILLIS: *Rust*.

THE COURT: —when the statute that applies to Title X says we're going to do a grant program designed

to enhance family planning services, and you're saying unless every single element of what constitutes a family planning service is not spelled out in the statute, it's not valid?

MR. HILLIS: No. What I'm saying is when the Supreme Court has said explicitly that 1008 Title X does not have a referral mandate, that that is insufficient to allow an as-applied challenge under Article I, Section 8 of the United States Constitution.

And just so you'll know, on page 25 is the—one of these delegations was found by Morrisey to be not sufficient and then one is in Title X.

(Reading:) Providing that grants shall be subject to conditions as the Secretary may determine to be appropriate to assure that such grants will be effectively utilized for the purposes for which made, that's Title X.

And the one that was not found appropriate, (reading:) The Secretary shall have the authority to issue such regulations as may be necessary or appropriate to carry out this section.

There's no difference between those two. There's no—no. No material difference between those two.

And very clearly, the law before Tennessee was that a general delegation to the agency does not allow it to deny funding under Article I, Section 8 under the power of the purse because that is quintessentially a legislative function.

The other issue—so if you'll just look at those two and recognize that there's no published authority.

And I'm assuming Judge McDonough has not published his case, but if it is, he's the only one.

And that ought to give you great pause when the referral requirement—I don't want to demean it, so I'm trying to choose—is picayune compared to all the services that Oklahoma offers with Title X funds.

And literally, it is score keeping by the federal government. It's, State of Oklahoma, you're going to bow to our wishes. Not that that materially helps anybody, because anyone with Google and an iPhone can just Google abortion providers.

And so that's what we're talking about. They're denying $4.5 million in funding to Oklahoma just because we won't hand out a card to give the authority of the State to say, here's your abortion referral.

Doesn't matter all the other great things that we can do with this money to the people of the state of Oklahoma. That's the singular reason.

And so that's why you need to pay really attention—close attention and determine does the Secretary have the authority for that picayune of an issue to deny Oklahoma its Title X funds.

The other issue I want to hit just real quickly, and I know I'm going a little long, but I like Mike and he does a good job and I do want to say it's been a pleasure working with the DOJ. I had my fears, but they've been nothing but collegial and cooperative and I appreciate that.

But he made a comment that I think ought to be impactful to you—

THE COURT: He didn't say you had been nice to him.

MR. CLENDENEN: They have been nice, Your Honor, yes.

MR. HILLIS: It depends on your ruling, Judge.

THE COURT: He's not standing up, even now.

MR. HILLIS: There was a joke I'm glad I didn't tell. This table knows it.

When he candidly admits to say it's not clear that Oklahoma law prohibits referrals, that's telling. Because that impacts allowable under state law.

And surely, an agency should not be allowed to force a Title X requirement that even potentially is not allowable under state law. There's, at a minimum, litigious uncertainty whether a referral is authorized under Oklahoma law. And with that, the agency was duty-bound to exempt Oklahoma because of that litigious uncertainty.

THE COURT: Do you think the federal government is obliged to not impose any condition that might even relate to an area where there is litigious uncertainty?

MR. HILLIS: When their regulation that they're foisting on us says services have to be allowable under state law, that's the tension. It's not just a general Oklahoma is bigger than the feds, because we're clearly not.

But when their very regulation that they're trying to foist on Oklahoma says services must be allowable under state law, that if there's litigious uncertainty there, then they should say there's litigious uncertainty there, then you have to go

back to is the funding requirement unambiguously clear.

It's not unambiguously clear, because he said it was not clear whether referrals are prohibited by Oklahoma law.

So that right there, even if they had the legislative mantle that they could use the power of the purse, that uncertainty in and of itself mandates that they cannot require Oklahoma to refer for abortions lawfully.

And we would request the Court enter a preliminary injunction in this case that says that HHS is prohibited from using the abortion referral as a requirement that denies Oklahoma participation in Title X funding.

So I do appreciate the time and attention of the Court and thank you, Your Honor.

THE COURT: Well, this is certainly an involved set of issues that we're dealing with here, and offhand, I don't know of any set of public policy questions that's any more contentious probably than ones involving the abortion issue that's played out in multiple ways over the last, what, 30 or 40 years.

I saw in the paper that I think the Supreme Court was today entertaining oral argument on some other aspect of the same general topic, so it continues to be a very contentious matter. And it's been helpful to me to have the comments of the parties, in addition to the extensive written work product that you've submitted.

I debated whether to, you know, attempt to generate a lengthy written order or simply to tell

you what I'm inclined to do. I think I am in a position basically to tell you here what-the way I see the issue. I do that partly because we're getting up here very close to the end of March.

There does appear to be some urgency from the State's standpoint to have either a favorable determination from me or, presumably, an opportunity to seek relief from the appellate courts before the April 1st deadline runs.

And so I think it makes sense for me to go ahead and essentially rule now as to the pending motion.

The pending motion, of course, is one for preliminary injunction that requires Oklahoma to establish the elements that we are, I think, all familiar with in general.

One's the likelihood of success on the merits that there's irreparable injury if the injunction is not issued, a judgment, that the threatened injury to, and this state, the State, would outweigh any injury to the federal government if the injunction was not issued, and then finally, the requirement that it be not contrary to the public interest to issue the injunction.

There is, I think, some of the cases indicate that when we're dealing with a situation like this one where the injunction is sought against the federal government, the elements relating to balancing the injury and the public interest essentially merge. And I do think that ultimately what we're talking about here is the interest of both the federal government and the State in getting, you know, a proper application of the law.

So I don't know that the—either of those factors cut significantly in either direction, although I would say that were I evaluating or to the extent that I'm evaluating the threatened injury to the State of Oklahoma from nonissuance of the injunction, that among the things that jumps out at me is that the State's position here is ultimately premised on what it says Oklahoma law requires. That is, apparently, the basis for the change of position that Oklahoma took in the course of the grant administration process. And, frankly, it is my view that that is simply overblown.

I have an extraordinarily difficult time seeing how the implementation of the referral process as contemplated by the regulation here could translate into a violation of Oklahoma law.

Essentially, it seems to me what that says, if that is true, that means that it would violate the Oklahoma statute which bans, essentially, urging someone to get an abortion. For a department of health worker to say to the client sitting across the table, once they request information on abortion and they say, Well, it's not legal in Oklahoma, but if you want to look at other options, call this number. I cannot believe that any serious prosecutor would think that warranted prosecution under the statute.

And it seems to me the consequence of that is that this is not a situation where Oklahoma's position is driven by what the law compels it to do, but it's rather the policy basis for why Oklahoma would rather not do it.

And wanting to not do it is not to me quite the same thing as saying that it would be conduct that would violate the law if they did.

So I do think that it seems to me that the posture that Oklahoma finds itself in here is at least, in part, a matter of—it's a circumstance of its own choosing. Because it would appear to me that there is a path that was always available to Oklahoma whereby it could comply with the provisions of the grant process and do so without requiring anybody to violate Oklahoma law.

So as I say, that, I suppose, impacts my assessment of the relative harms here and to some degree it impacts, I suppose, some of the likelihood of success arguments.

But as I say, it does seem to me that to the extent it's premised on the assumption that the limited referral contemplated here by the regulations would violate Oklahoma law, let's just say that's less than obvious to me and that impacts some of the rest of this as well.

The element of the—whether irreparable injury has been shown or not, I think to the extent that is the basis for it, that I think Oklahoma's made a sufficient showing here of irreparable injury.

As Mr. Hillis points out, the *Ohio* case concluded that, involving less money than is involved here. And, frankly, I'm reluctant to accept the federal government's invitation to say that $4.5 million isn't substantial enough to worry about.

I'm reminded of the comment of some senator a few years ago, he said, you know, you start

talking about this budget stuff, you got a billion here and a billion there and pretty quick, you're talking about real money.

Well, you know, this isn't billions, but it seems to me, for purposes of sufficient showing of irreparable injury, that 4.5 million is enough.

But, of course, as is often the case in these sorts of circumstances, the challenge, it seems to me here, ultimately turns on or disposition of the motion turns on the question of the likelihood of success on the part of the State.

It strikes me that in making that determination, I mean, there's been reference made to things that are unique about this litigation. It seems to me that there are at least a couple of things that are unique about it that are not involved in your average, you know, fighting over who's got the authority to do what between units of government.

One is the fact that there has already been litigation between the parties on substantially the issues arising out of this same dispute. And, of course, I'm talking about the litigation that resulted in what we've referred to as the *Ohio* case, *Ohio v. Becerra*, the Sixth Circuit case.

Ordinarily, a Sixth Circuit opinion wouldn't be binding on me. It isn't binding here, I suppose, in the sense that a Tenth Circuit decision would be, but it seems to me that it does implicate, because Oklahoma was a party there, that it limits what they're in a position to come here in a second court and re-litigate.

Whether it's—you refer to it as res judicata or claim preclusion or whatever, it seems to me the rule rather clearly is that to the extent that the particular claim was litigated in a prior forum, that the State is precluded by the doctrine from re-litigating it here, which is to say that they're not in a position to either, you know, reargue the same argument that was made there or to raise other theories that might ultimately support the same claim.

So it seems to me that res judicata claim preclusion does preclude at least part of the arguments that the State is relying on here, particularly those where there are, you know, comments like the statute doesn't even authorize this kind of a regulation or something.

It seems to me that those are the kinds of arguments that are essentially precluded by the litigation that has already occurred between the parties.

Now, I do recognize that the *Ohio* case involved a facial challenge to the regulation. And that the focus there was on the 1008 language, but it does seem to me that in terms of how the doctrine of res judicata claim preclusion applies, that to the extent we're talking about a facial challenge to the regulation, that the *Ohio* decision would preclude re-litigation on any theory that was advanced or that might have been advanced, at least to the extent that it's the basis for a facial challenge.

And as I say, I think some of the arguments that have been made here today essentially are that. They're a facial challenge that's barred by the

litigation that has already occurred, like, for example, whether they have exceeded their authority by issuing this regulation at all or whether the counseling requirement's outside the scope of Title X.

I mean, those are, in my view, facial-type arguments and I don't think you can avoid the impact of just—just by saying, well, we're doing it as-applied.

You know, certainly, the application of any rule has consequences, but if it, at a fundamental level, is going to facial attack, then I think it's precluded for that reason.

The other thing that strikes me as being unique about the circumstances here is that we're not dealing with a regulation that just got thought up in 2021 or 2022, whenever the current version of the rule was adopted.

We're dealing with an area of the law that has obviously reflected the substantial pulling and hauling that's been going on for 30 years over this difficult issue of abortion. And the question of the kinds of requirements that are to be imposed in connection with this grant program have changed over time.

The *Ohio* court, of course, describes in some detail that history. I won't repeat it here, other than to acknowledge what I think we're all aware of. And that is that depending on which administration was in the power, the regulatory—or the regulations pursuant to Title X have varied in their treatment of the counseling requirement and the provision of information that would

potentially be the basis for referral. Sometimes it's been required, sometimes it's been prohibited.

And I think what is clear from *Rust* is that at least to the extent that we're tying it to the language of 1008, we're dealing with an ambiguous area where *Chevron* deference applies.

But I do think that the fact that we have this lengthy history of prior incarnations of substantially the same requirements, as are now at issue in this case, translates into making it a very difficult lift for the State to come in and show arbitrary and capricious regulations when it has that history.

I understand there are a couple of aspects that have been mentioned here this morning that maybe differ from it, but at least in terms of the fundamental underlying requirement for the—imposing a condition on the Title X grant that the grantee has to be providing this nondirective information and potentially referral information on request, that's not new. It's not something that is, it strikes me as being, you know, something new and exotic.

So I think, as I say, the fact that we have that history makes the whole lift that Oklahoma's attempting here a very difficult one.

But that said, I think ultimately evaluating the individual arguments that Oklahoma's offered here on balance, I simply am not persuaded that Oklahoma has a reasonable prospect of prevailing on these arguments.

The arguments about the Spending Clause that Mr. Hillis has referenced, I confess I am thoroughly unpersuaded by.

We're dealing here not with simply a matter of random delegation of legislative authority, but we're dealing with a grant program. We're dealing with a grant program in a particular context and for a particular purpose where Congress has specifically said that we expect the agency to promulgate rules to flesh it out.

I don't think, as I read the cases, that in those circumstances, that the—whether it's the Spending Clause or, frankly, I'm not sure we're talking about the same thing when we're talking about the Spending Clause versus a nondelegation doctrine. I suspect those may be different.

But, in any event, I'm unpersuaded by that argument. I mean, the cases that talk about the Spending Clause issues recognize that the notice to the—essentially they say, look, if they're going to be conditions imposed on a grant, or on federal spending, that the State is entitled to know what those conditions are. You can't mousetrap the State or another grantee by imposing them after the fact.

Here, it seems to me, there's no serious argument to be made that the State of Oklahoma didn't know what the conditions were that the HHS folks were going to insist on as a basis for participation in the grant program.

The State, of course, had, as I understand it, commented on the regulations. They had at some point got involved in the *Ohio* litigation to

challenge it. And the regulations themselves, in terms of the particular requirement that's at issue here, the counseling and referral part, was clearly in place at the point where the grant application process went forward.

The cases, as I read them, say that in terms of putting the State on notice of what the conditions are, those can come, not only from the statute, but from the regulations pursuant to the statute.

And so it seems to me that the—that this is simply not a circumstance where the State can plausibly say, Well, gee, we've been subjected to these conditions when we didn't know what the deal was.

What the deal was has been obvious, it seems to me. The State doesn't agree with those conditions, and certainly that's—they're certainly entitled to take a different view. But that, it seems to me, is something different than saying, Well, we were sufficiently mousetrapped by the conditions, that we ought to be relieved from them now, even though we don't comply with them.

So it seems to me that the Spending Clause argument doesn't hunt—and I frankly think that is probably one that we don't even need to get into the weeds on it, because to the extent that the argument is that regulations on these kinds of things go beyond the—what's permitted by the Spending Clause or what's permitted by the delegation—the nondelegation doctrine, it seems to me that's facial in nature. That goes to whether the regulations can properly approach it at all.

And as I said earlier, if it is essentially a facial challenge, it seems to me that's precluded by *Ohio* and the particular litigation context that we've got here.

I think to the extent that the State is relying here on an argument that it violates Title X itself, I assume that's essentially an argument about 1008 and that, of course, is exactly what *Ohio* addressed and resolved.

And I don't see anything about the circumstances here that in terms of it being—the fact that it's been applied here, if the underlying objection to it is facial in nature, I don't think you create an opportunity to re-litigate it based on that.

So at any rate, it seems to me that the *Ohio* litigation has already concluded that the particular regulation that we're dealing with here is within the scope of what's permissible as against the language of Title X itself.

With respect to the termination being based—or being contrary to the provision of the Weldon Amendment, that is maybe a closer question, just because some of this is not as clear, I think, as some of the other provisions. But I am frankly not persuaded that the State can establish that one, either.

The question I think is essentially one of whether or not the various provisions of—well, whether the language in the appropriation bill saying that there can't be discrimination against a healthcare entity that refuses to refer for abortion, I think the question there is a threshold matter as what constitutes a healthcare entity.

Mr. Clendenen says, well, that means the provider of the services. I frankly think that is probably the more plausible interpretation of that than to say that the State can object.

It strikes me as a very substantial step to say essentially that a state can get the benefit of what's essentially a conscience-protecting kind of amendment just because the particular regulatory requirement is contrary to state policy.

I—from what I have seen of the history of that regulation, it does appear to be focused essentially on assuring that providers are not required to perform some—either perform an abortion or refer—do something related to abortions contrary to their own conscience or religious beliefs or whatever.

And it does seem to me that that's something different than what we've got here, which is essentially the State saying, look, we see—we prefer a different policy and we don't want to follow it because it conflicts with state policy.

So I am skeptical whether the State can ultimately establish that as a basis for showing the Weldon Amendment is somehow eliminating the need for the State to comply with or making it improper for HHS to insist on compliance with the referral portion of that.

Again, with the Weldon Amendment, I can't help thinking that, frankly, at least in part, that's in the nature of a facial challenge, more than it is in substance an as-applied challenge.

But to the extent that it is as-applied, in the sense that the feds are applying requirement to require the State to at least give a potential—to give the pregnant woman information via a hotline, it seems to me that, if anything, that as-applied approach to the regulation is a more forgiving standard in terms of what it's requiring from the State than might arguably be required by the regulation.

I mean, to be sure the regulation itself says nondirective information, suggesting that it can't be, you know, somebody campaigning for an abortion or trying to urge somebody to do it. But it does seem to me that, you know, the feds might plausibly seek more than just giving out a phone number.

But, ultimately, it appears that the circumstances here are simply by supplying a phone number, the State could meet its referral obligations, as contemplated by the grant terms.

And so it seems to me that even to the extent that we try to apply the Weldon Amendment beyond that to in some as-applied circumstance, that you have a hard time translating that into a violation here.

That leaves, finally, the issue of whether or not this regulation is—and particularly its application to Oklahoma through the termination for failure to do referrals, is arbitrary and capricious under the APA.

It seems to me that, as I said at the outset, that in terms of the explanation for the particular requirement that the rule's explanation of it is

ample. It's more or less the same rationale that was in place for, what was it, '81 to '89 or whatever the time period was, where essentially the same rule was in place.

I certainly recognize that there are respectable different views as to what the best regulation should be or what a good regulation would be as it applies to this issue, and it's obviously changed over the years, but to suggest that the present regulation is arbitrary and capricious I think simply falls short.

The explanation has been given in the order continuing the rules as to the basis for it. It seems to me that is plainly within the scope of the agency's discretion to make that.

I don't think it—that to say, well, that there's litigious uncertainty about it; that's not the test for whether it's arbitrary and capricious. There's plenty of litigious uncertainty about everything.

It does not translate into a basis for concluding here that the particular regulation was arbitrary and capricious.

The Tennessee case that the parties have referred to, I think goes into more detail in terms of the history of the rule and so on and I'm—I am in substantial agreement with that case's treatment of the arbitrary and capricious issue.

To the extent that the State here is relying on the language in the rule that talks about the allowable under state law provision, it does seem to me that it most plausibly makes sense to understand that as relating to the professional

qualifications of the providers that are involved, simply because that's a construction of it or an interpretation of it that avoids the conflict that arguably would otherwise exist with the other provisions.

I think under the various deference standards that apply to particularly an agency's interpretations of its own regulations, as opposed to interpretation of a statute, *Chevron* is—*Chevron* is interpreting regulations based on a statutory command.

We're talking here about whether a—the HHS's interpretation of the regulations, of their own regulations is entitled to deference and it seems to me that it is. Which is to say that the language that appears in—that's been referred to about allowable under state law doesn't have the meaning that the State would prefer to attach to it here, so as to suggest some general requirement that state law is going to generally trump all other regulatory provisions that might apply.

So, in any event, it does seem to me that on multiple grounds, that the State is unlikely to be able to prevail here, and as a result, I'm going to deny the request for a preliminary injunction.

What I would ask is that—I don't know precisely how the parties will go forward in light of this determination. I assume the State will seek some kind of relief from the circuit. If you do, then, obviously, that will govern the direction in which the case goes forward, consistent with what the circuit decides.

If you decide not to do that or the circuit denies relief, then I would like the parties to think

through where that leaves us. If there is magic to this April 1st deadline and it isn't met, for whatever reason, does that make the case moot or not? I don't know. It simply potentially impacts how we go forward as a scheduling matter with the balance of the case.

So what I would ask is that the parties file something within the next let's say three weeks to give me your respective positions as to how we go forward, if at all here, in light of whatever you may seek from the circuit or whatever they may do in the meantime.

Questions from the parties or anything further that we need to address while we're here today?

MR. HILLIS: I take it there is going to be some sort of written order, but—

THE COURT: What I anticipate doing is simply an order that says it's denied for the reasons that I've said here today.

MR. HILLIS: Okay. Can I order the transcript then now or do I—

THE COURT: Now or when, I think you're entitled to a transcript, so we'll see that you get one.

MR. HILLIS: I do appreciate it.

THE COURT: Anything else?

MR. HILLIS: I think we can be can beat the three-week deadline, Your Honor.

THE COURT: All right.

Anything else? All right.

Court's in recess. (Adjourned.)

U.S. HHS PROGRAM REVIEW OF THE OKLAHOMA TITLE X FAMILY PLANNING PROJECT, RELEVANT EXCERPTS (MAY 2-5, 2016)

PROGRAM REVIEW TITLE X FAMILY PLANNING PROJECT OKLAHOMA STATE DEPARTMENT OF HEALTH

MAY 2-5, 2016

{ Internal Page References Omitted }

BACKGROUND INFORMATION

Grantee Name:

Oklahoma State Department of Health

Grantee Number: FPHPA066194

Project Address:

1000 NE 10th Street
Oklahoma City, Oklahoma 73117

Site Visit Dates:

May 2-5, 2016

Program Review Team Members:

Liese Sherwood-Fabre, PhD
Administrative/Community Outreach and Education Review Team Leader

Lawrence Peaco, MPA
Financial Services

Cristino Rodriguez, FNP-C
Clinical Services

Department of Health and Human Services (DHHS) Region VI Staff:

Liese Sherwood-Fabre, PhD

Department of Health and Human Services (DHHS) Region VI Staff:

May 2, 2016 Briefing

Oklahoma State Department of Health

[. . .]

OVERVIEW OF THE PROJECT

History and Development

The Oklahoma State Department of Health (OSDH) and State Board of Health were created with the passage of the Oklahoma Public Health Code on July 1, 1963. The State Department of Health was to consist of the Commissioner of Health and such divisions, sections, bureaus, office and positions as established by the Board of Health and by law. Currently state health services are organized under a Governor-appointed Secretary for Health. The current Commissioner of Health is also the Secretary of Health.

Description of the Program

The Oklahoma State Department of Health Family Planning Program (OSDH FPP) is administered within the Perinatal and Reproductive Health Division of the Maternal & Child Health Service, a part of the Community & Family Health Services. The OSDH Family Planning (FP) Program is responsible for assuring compliance with Title X policy, procedure, and administration of funds. Day-to-day coordination of Title X project activities is the responsibility of the Administrative Program Manager of PRHD, who reports directly to the Director of MCH, who reports directly to the Deputy Commissioner of the CFHS. The Deputy Commissioner of the CFHS answers directly to the Commissioner of Health.

OSDH has administered the Title X family planning program for more than forty years.

The public health system in Oklahoma includes the OSDH with its statewide county health department

system and the two city county health departments in Oklahoma County and in Tulsa County, which are administratively separate from the OSDH system and have their own personnel systems. The county health departments are OSDH administrative units. Altogether, clinical and educational services are provided through 87 county health sites and 8 contract agency sites across the state, located in 70 of the 77 counties. The clinical services are provided through the Community Health Services' County District Administration, Nursing Service, Community Development Service, and Record Evaluation and Support. These entities provide service delivery and assist with program monitoring. The Medical Director is available by contract through OUHSC.

Oklahoma Health Care Authority (OHCA), the state Medicaid agency, changed their family planning services 1115B waiver to a State Plan Amendment (SPA) on September 1,2011 (now, SoonerPlan). The SPA includes hormonal contraceptive sub-dermal implant and the HPV vaccination, which were previously not included in the family planning waiver. Sterilization is not provided through the Title X FP project, although the SPA covers both male and female sterilizations.

The Title X Program Review Process

At the start of the process, the regional office and OSDH negotiated the dates for the review and the sites to be visited. Following these decisions, the regional office provided a list of documents to be compiled, including policies and protocols, board meeting minutes, and medical charts (at the clinic sites).

[. . .]

9.1 Low-Income Families

Priority for project services is to persons from low-income families (Section I 006(c)(1), PHS Act; 42 CFR 59.5(a)(6)).

Evidence that this requirement has been met includes more than 50% of clients are at or below 100% FPL as reported on the FPAR and service site locations are accessible to low-income individuals.

Observations:

The 2014 and 2015 OSDH FPAR percentages for those under 100% FPL was 73%. Both clinics visited were on a bus line and OSDH operates at least one clinic in all but seven very rural counties.

Finding:

This requirement was MET.

9.2 Dignity of the Individual

Services must be provided in a manner which protects the dignity of the individual (42 CFR 59.5 (a)(3)).

Evidence that this requirement has been met includes appropriate policies, direct observation of clinic operations that indicate protection of client privacy, and documentation which outlines clients rights and responsibilities.

Observations:

OSDH policies and procedures includes protecting client privacy, patient rights are posted, and all clients have a documented receipt of the HIPAA notification. In-take and financial interviews in one

site visited, however, were open to the waiting room and could be heard by occupants in that area.

Finding:

This requirement was **NOT MET**.

OSDH **must** ensure that client privacy is maintained when collecting personal data.

9.3 Non-Discrimination

Services must be provided without regard to religion, race, color, national origin, disability, age, sex, number of pregnancies, or marital status (42 CFR 59.5 (a)(4)).

Evidence that this requirement has been met includes written policies and procedures stating non-discrimination, documentation that staff have been informed of non-discrimination policies, and documentation of monitoring of sub-recipients for non-discrimination.

Observations:

OSDH has policies and procedures regarding non-discrimination and staff sign a reminder at least once a project period regarding this requirement.

[. . .]

Observations:

OSDH medical records reviewed indicates a robust referral network available to reproductive health clients with appropriate follow up.

Finding:

This requirement was MET.

9.6 Clinical Protocols

All grantees should assure services provided within their project operate within written clinical protocols that are in accordance with nationally recognized standards of care, approved by the grantee, and signed by the physician responsible for the service site.

Evidence that this requirement has been met includes written clinical policies and procedures that are aligned with nationally recognized standards of care and signed by a responsible physician, grantee monitoring of sub-recipients' policies for alignment with nationally recognized standards of care, and client records indicating services follow protocols.

Observations:

The OSDH Medical Director approved and signed all clinical protocols. Review of the protocols indicates they are based on nationally recognized standards promoted by ACOG and the USPTF.

Finding:

This requirement was MET.

9.7 Provision of Family Planning Related Medical Services

All projects must provide for medical services related to family planning and the effective usage of contraceptive devices and practices (including physician's consultation, examination, prescription, and

continuing supervision, laboratory examination, and contraceptive supplies) as well as necessary referrals to other medical facilities when medically indicated (42 CFR 59.5(b)(1)). This includes, but is not limited to, emergencies that require referral.

Evidence that this requirement has been met includes written policies and procedures requiring family planning-related medical services, provision of breast and cervical cancer screening onsite, and written agreements with relevant referral agencies exist.

Observations:

Review of documents and direct observation of interaction of clinic personnel with clients indicate that grantee is providing comprehensive family planning services including breast and cervical cancer screening as well as appropriate referrals.

Finding:

This requirement was MET.

[. . .]

U.S. HHS LETTER
RE: OPA DETERMINATION OF
NON-COMPLIANCE OF THE OSDH POLICY
(MAY 24, 2023)

DEPARTMENT OF HEALTH
AND HUMAN SERVICES
OFFICE OF THE ASSISTANT SECRETARY FOR HEALTH
OFFICE OF POPULATION AFFAIRS
WASHINGTON, D.C. 20201

Jill Nobles-Botkin, APRN-CNM, MSN
Administrative Programs Manager
Perinatal and Reproductive Health Division
Maternal & Child Health Services
Oklahoma State Department of Health
123 Robert S. Kerr Avenue 0308
Oklahoma City, OK 73102-6406

Dear Ms. Nobles-Botkin,

As you know, the Office of Population Affairs (OPA) has been corresponding with the Oklahoma State Department of Health (OSDH) since last summer with respect to its policy and procedure for providing nondirective options counseling and referral within its Title X project (FPHPA006507), in accordance with the 2021 Title X implementing regulations at 42 CFR § 59.5(a)(5). As a brief recap, on August 29, 2022, because of recent changes in Oklahoma state laws, OSDH submitted a proposal to change its policy and

procedure for providing nondirective options counseling by providing clients seeking counseling on pregnancy termination with a link to the HHS OPA website. On November 9, 2022, OPA informed OSDH that this proposal did not comply with the Title X regulatory requirements set out in 42 CFR § 59.5(a)(5)(ii) and, therefore, could not be approved. On November 22, 2022, OSDH submitted to OPA a request for reconsideration of OPA's November 9, 2022 decision. On January 25, 2023, OPA posted a letter to OSDH on GrantSolutions. That letter reiterated that the proposal to provide clients seeking counseling on pregnancy termination with a link to the HHS OPA website does not comply with the 2021 Title X implementing regulations at 42 CFR § 59.5(a)(5)(ii). The letter also informed OSDH that it could submit an alternate compliance proposal that included providing clients with a referral to another entity, such as the All-Options Talkline. OSDH informed OPA that it became aware of this letter on February 7, 2023, when contacted by email.

On February 16, 2023, OSDH responded to OPA's January 25, 2023, letter by submitting an alternative proposal for compliance, which included providing nondirective counseling on all pregnancy options by OSDH staff or through the All-Options Talk Line. On March 14, 2023, OSDH submitted a "Pregnancy Diagnosis and Counseling" policy (revised March 2023), which indicated that the protocol for counseling clients with a positive pregnancy test includes:

> b. Provide neutral, factual information and nondirective counseling on all pregnancy options by OSDH staff or through the All-

> Options Talk Line (1-888-493-0092) and website, https://www.all-options.org/find-support/talkline/ (except for options the client indicated she does not want more information on).

In addition, as a corollary to the counseling protocol, OSDH's "Pregnancy Diagnosis and Counseling" policy (revised March 2023) indicated that one of the options for referral was to the "All-Options Talk Line (1-888-493-0092)." As part of its March 14 submission, OSDH also sent a Pregnancy Choices brochure (dated March 2023), listing the All-Options Talk Line as one of the Oklahoma Family Planning Resources.

On March 21, 2023, OSDH submitted a written assurance of compliance with the options counseling and referral requirements in the 2021 Title X Final Rule. On March 23, 2023, OPA posted two documents on GrantSolutions (a letter dated March 1, 2023, and a printout of a Technical Review, Exported On: 03/20/2023). Those documents informed OSDH that OPA had determined that OSDH's policy complied with the Title X regulations.

Most recently, however, on May 5, 2023, OSDH notified OPA by email that it "had a change required in our family planning program policy effective late afternoon of 4/27/23." As documentation, OSDH submitted the same exact "Pregnancy Diagnosis and Counseling" policy (revised March 2023) as it originally submitted on March 14, 2023, but the new version no longer includes counseling through and referral to the All-Options Talk Line. Specifically, the policy submitted on May 5, 2023, replaced part b. quoted above with the following:

b. Provide neutral, factual information and nondirective counseling on pregnancy options in Oklahoma by OSDH staff (except for options the client indicated she does not want more information on).

In addition, the updated OSDH "Pregnancy Diagnosis and Counseling" policy (revised March 2023) no longer includes the All-Options Talk Line as an entity to which clients may be referred. And, as part of its May 5, 2023, submission, OSDH also included an updated Pregnancy Choices brochure, which no longer lists the All-Options Talk Line as a resource.

OSDH's reference to counseling on "pregnancy options in Oklahoma" in the "Pregnancy Diagnosis and Counseling" policy, rather than counseling on all pregnancy options, and the deletion of referral to the All-Options Talk Line in this policy without any other provision for abortion referrals, are not acceptable revisions, as Title X recipients must still follow all Federal regulatory requirements. The changes to OSDH's family planning program policy do not suffice or meet Federal requirements because Oklahoma law does not extend to all pregnancy options (*See* Okla. Stat. tit. 21, § 861), and we understand that, pursuant to OSDH's revised policy, information, counseling and referral will not be available for all alternative courses of action, but only for those options available under Oklahoma state law. This is inconsistent with Title X regulations at 42 CFR § 59.5(a)(5), which require Title X projects to provide information and nondirective counseling on a range of options, including prenatal care and delivery; infant care, foster care, or adoption; and pregnancy termination. Additionally, projects are required to provide referrals upon client request,

including referrals for abortion. In some circumstances, those referrals will need to be made out of state.

Thus, based upon the documentation provided, OPA has determined that OSDH's policy for providing nondirective options counseling and referral within your Title X project does not comply with the Title X regulatory requirements and, therefore, the terms and conditions of your grant. Given OSDH's failure to adhere to the Title X regulatory requirements for nondirective options counseling and referral, I have referred this matter to the HHS Office of the Assistant Secretary for Health's Grants and Acquisitions Management (GAM) Division as a violation of the terms and conditions of your grant. I have copied the Director of OASH GAM on this correspondence as notification of the compliance violation and will be in touch with a response.

Thanks,

/s/ Jessica Swafford Marcella

Deputy Assistant Secretary for Population Affairs
U.S. Department of Health and Human Services
Office of the Assistant Secretary for Health,
Office of Population Affairs

cc: Scott Moore
Director/Chief Grants Management Officer
U.S. Department of Health and Human Services
Office of the Assistant Secretary for Health, Grants and Acquisitions Management

U.S. HHS LETTER
RE: SUSPENSION OF AWARD
(MAY 25, 2023)

DEPARTMENT OF HEALTH
AND HUMAN SERVICES
OFFICE OF THE SECRETARY
OFFICE OF THE ASSISTANT SECRETARY FOR HEALTH
GRANTS & ACQUISITIONS MANAGEMENT ROCKVILLE,
MD 20852

To: Jill Nobles-Botkin (jill@health.ok.gov)
Project Director/Principal Investigator

Ms. Bethany J Ledel
(bethanyl@health.ok.gov) Authorized Official

Oklahoma State Health Department
123 Robert S Kerr Ave 0308
Oklahoma City, OK 73102-6406

Re: Suspension of Award FPHPA006507 "Oklahoma State Department of Health Family Planning Services Project"

The Office of Population Affairs (OPA) has provided notice in the attached letter that your award FPHPA006507 "Oklahoma State Department of Health Family Planning Services Project" is out of compliance with the Title X regulation (42 CFR Part 59, Subpart A) as of May 24, 2023.

As a condition of accepting the award (Notice of Award, Special Terms and Requirements 2), Oklahoma State Department of Health (OSDH) stipulated "that the award and any activities thereunder are subject to all provisions of 42 CFR Part 59, Subpart A." OSDH accepted the award per Standard Term 1 of the Notice of Award, "By drawing or otherwise obtaining funds for the award from the grant payment system or office, you accept the terms and conditions of the award and agree to perform in accordance with the requirements of the award."

OSDH accepted the award on May 24, 2022, by drawing down funds from the HHS Payment Management System (PMS). In doing so, OSDH agreed to comply with the Title X regulation as a condition of the award.

Therefore, I conclude that because OSDH is out of compliance with the Title X regulation, OSDH is also out of compliance with the terms and conditions of award FPHPA006507. As of April 27, 2023 (i.e., the effective date of the non-compliant OSDH policy), all costs are unallowable.

Consequently, I am suspending award FPHPA-006507 and all activities supported by it effective with the date of this letter. I will review this action in 30 days to reassess OSDH's compliance with the award terms and conditions. The suspension may be extended for an appropriate time or the award may be terminated pursuant to 45 CFR § 75.372(a)(1) for material noncompliance or unsatisfactory performance with the terms and conditions of the award. A termination under this section must be reported to the Office of Management and Budget-designated integrity and performance system, currently the Federal Awardee

Performance and Integrity Information System (FAPIIS). See 45 CFR § 75.372(b). Inclusion in FAPIIS may affect your ability to obtain future Federal funding.

As an alternative, you have the opportunity to voluntarily relinquish your grant and may do so by contacting the assigned Grants Management Specialist (Jessica Shields, Jessica.shields@hhs.gov), who can provide your additional information on the process. Note that as compared to termination, a decision to relinquish your award is not reported to FAPIIS.

Respectfully,

/s/ Scott J. Moore
2023.05.25 11:09:13 -04'00'

Scott J. Moore, Ph.D., J.D.
Director/Chief Grants
Management Officer
OASH Grants & Acquisitions
Management

CC Jessica Shields,
Grants Management Specialist
Cynda Hall, OPA Project Officer
Duane Barlow, OASH Grants Branch Chief
Amy Margolis, OPA Deputy Director
Jessica Marcella, Deputy Assistant Secretary
for Population Affairs

U.S. HHS LETTER
RE: NOTICE OF TERMINATION
FOR AWARD FPHPA006507
(JUNE 27, 2023)

DEPARTMENT OF HEALTH
AND HUMAN SERVICES
OFFICE OF THE SECRETARY
OFFICE OF THE ASSISTANT SECRETARY
FOR HEALTH GRANTS & ACQUISITIONS MANAGEMENT
ROCKVILLE, MD 20852

To: Jill Nobles-Botkin (jill@health.ok.gov)
Project Director/Principal Investigator

Ms. Bethany J Ledel
(bethanyl@health.ok.gov) Authorized Official

Oklahoma State Health Department
123 Robert S Kerr Ave 0308
Oklahoma City, OK 73102-6406

Re: Termination Notice for award FPHPA006507 "Oklahoma State Department of Health Family Planning Services Project"

This letter provides notice of my decision to terminate the above identified award under 45 C.F.R. § 75.372. Termination is not final until a Notice of Award has been issued with a revised project period end date indicating the effective date of the termination.

You must submit complete close out documentation within 120 days of the new project period end date.

Additional guidance is attached (Tab A). Failure to provide a timely and acceptable closeout package may result in a unilateral closeout and report to the Federal Awardee Performance and Integrity Information System (FAPIIS) as a material failure to comply with the terms and conditions of the award.

This termination is based on a failure to comply with the terms and conditions of the award as described below. The termination decision will be reported to the OMB-designated integrity and performance system accessible through SAM (currently FAPIIS). The information will be available in the OMB-designated integrity and performance system for a period of five years from the date of the termination, then archived. Agencies that consider making a Federal award to your organization during that five-year period must consider that information in judging whether organization is qualified to receive the Federal award, when the Federal share of the Federal award is expected to exceed the simplified acquisition threshold over the period of performance.

Your organization may comment on any information the OMB-designated integrity and performance system contains about the non-Federal entity for future consideration by awarding agencies. You may submit comments to the awardee integrity and performance portal accessible through SAM (currently CPARS). Awarding agencies will consider your comments when determining whether your organization is qualified for a future Federal award.

Appeal Procedure

You have an opportunity to object and provide information and documentation challenging the termination action, in accordance with 42 CFR part 50, subpart D. To receive a review of your challenge, you must submit a request for such review to the Assistant Secretary for Health (ASH) no later than 30 days after the written notification of the determination is received. An extension of time may be considered upon a demonstration of good cause for the extension. A request for review must identify the issue(s) in dispute. It must also contain a full statement of your position with respect to such issue(s) and the pertinent facts and reasons in support of your position. In addition to the required written statement, you must provide copies of any documents supporting your claim.

Upon receipt of your request, the ASH will follow the process set forth in 42 CFR part 50, subpart D. Any review committee appointed under § 50.405 will be provided with copies of all relevant background materials (including applications(s), award(s), summary statement(s), and correspondence) and any additional pertinent information available. You will be given an opportunity to provide the review committee with additional statements and documentation not provided in the request for review. This additional submission must be tabbed and organized chronologically and accompanied by an indexed list identifying each document. The additional submission should provide only material that is relevant to the review committee's deliberation of the issues raised. You may be asked by the committee, at its discretion, to discuss the pertinent issues with the committee and to submit such additional information as the committee deems appropriate.

Based on its review, the review committee will prepare a written decision to be signed by the chairperson and each of the other committee members. The review committee will then send the written decision with a transmittal letter to you. If the decision is adverse to your position, you will be advised as to your right to appeal to the Departmental Appeals Board under 45 CFR part 16.

Compliance Findings

Our findings with respect to non-compliance with the award terms and conditions.

1. By accepting the award (Tab A—Notice of Award (NOA), Special Terms and Requirements 2), Oklahoma State Department of Health (OSDH) stipulated "that the award and any activities thereunder are subject to all provisions of 42 CFR Part 59, Subpart A." OSDH accepted the award "By drawing or otherwise obtaining funds for the award from the grant payment system or office, you accept the terms and conditions of the award and agree to perform in accordance with the requirements of the award." (Tab A—NOA Standard Term 1).

2. OSDH accepted the award on May 24, 2022, by drawing down funds from the HHS Payment Management System (PMS). In doing so, OSDH agreed to comply with the 42 CFR Part 59, Subpart A as a condition of the award.

3. The Notice of Funding Opportunity (NOFO) PA-FPH-22-001 for the competition ultimately leading to the issuance of FPHPA006507 to OSDH stated the requirement that recipients must comply with the

final rule issued on October 4, 2021 (NOFO, Section B.2.a.2).

4. In the application submitted under PA-FPH-22-001, OSDH certified SF-424B "Assurance- Non-Construction Programs" which includes assurance "18. Will comply with all applicable requirements of all other Federal laws, executive orders, regulations, and policies governing this program." (Tab D)

OPA Determination of Non-Compliance with 42 CFR Part 59, Subpart A

5. On August 29, 2022, because of recent changes in Oklahoma state laws, OSDH submitted a proposal to change its policy and procedure for providing nondirective options counseling by providing clients seeking counseling on pregnancy termination with a link to the HHS OPA website.

6. On November 9, 2022, OPA informed OSDH that this proposal did not comply with the Title X regulatory requirements set out in 42 CFR § 59.5(a)(5)(ii) and, therefore, could not be approved.

7. On November 22, 2022, OSDH submitted to OPA a request for reconsideration of OPA's November 9, 2022 decision.

8. On January 25, 2023, OPA posted a letter to OSDH on GrantSolutions. That letter reiterated that the proposal to provide clients seeking counseling on pregnancy termination with a link to the HHS OPA website does not comply with the 2021 Title X implementing regulations at 42 CFR § 59.5(a)(5)(ii). The letter also informed OSDH that it could submit

an alternate compliance proposal that included providing clients with a referral to another entity, such as the All-Options Talkline.

9. OSDH informed OPA that it became aware of this letter on February 7, 2023, when contacted by email.

10. On February 16, 2023, OSDH responded to OPA's January 25, 2023, letter by submitting an alternative proposal for compliance, which included providing nondirective counseling on all pregnancy options by OSDH staff or through the All-Options Talk Line.

11. On March 14, 2023, OSDH submitted a "Pregnancy Diagnosis and Counseling" policy (revised March 2023), which indicated that the protocol for counseling clients with a positive pregnancy test includes:

> b. Provide neutral, factual information and nondirective counseling on all pregnancy options by OSDH staff or through the All-Options Talk Line (1-888-493-0092) and website, https://www.all-options.org/find-support/talkline/ (except for options the client indicated she does not want more information on).

12. In addition, as a corollary to the counseling protocol, OSDH's "Pregnancy Diagnosis and Counseling" policy (revised March 2023) indicated that one of the options for referral was to the "All-Options Talk Line (1-888-493-0092)." As part of its March 14 submission, OSDH also sent a Pregnancy Choices brochure (dated March 2023), listing the All-Options Talk Line as one of the Oklahoma Family Planning Resources.

13. On March 21, 2023, OSDH submitted a written assurance of compliance with the options counseling and referral requirements in the 2021 Title X Final Rule. On March 23, 2023, OPA posted two documents on GrantSolutions (a letter dated March 1, 2023, and a printout of a Technical Review, Exported On: 03/20/2023). Those documents informed OSDH that OPA had determined that OSDH's policy complied with the Title X regulations.

14. On May 5, 2023, OSDH notified OPA by email that it "had a change required in our family planning program policy effective late afternoon of 4/27/23." As documentation, OSDH submitted the same exact "Pregnancy Diagnosis and Counseling" policy (revised March 2023) as it originally submitted on March 14, 2023, but the new version no longer includes counseling through and referral to the All-Options Talk Line. Specifically, the policy submitted on May 5, 2023, replaced part b. with the following:

> b. Provide neutral, factual information and nondirective counseling on pregnancy options in Oklahoma by OSDH staff (except for options the client indicated she does not want more information on).

15. In addition, the updated OSDH "Pregnancy Diagnosis and Counseling" policy (revised March 2023) no longer includes the All-Options Talk Line as an entity to which clients may be referred. And, as part of its May 5, 2023, submission, OSDH also included an updated Pregnancy Choices brochure, which no longer lists the All-Options Talk Line as a resource.

16. OSDH's reference to counseling on "pregnancy options in Oklahoma" in the "Pregnancy Diagnosis and Counseling" policy, rather than counseling on all pregnancy options, and the deletion of referral to the All-Options Talk Line in this policy without any other provision for abortion referrals, are not acceptable revisions, as Title X recipients must still follow all Federal regulatory requirements. The changes to OSDH's family planning program policy do not suffice or meet Federal requirements because Oklahoma law does not extend to all pregnancy options (See Okla. Stat. tit. 21, § 861), and we understand that, pursuant to OSDH's revised policy, information, counseling and referral will not be available for all alternative courses of action, but only for those options available under Oklahoma state law. This is inconsistent with Title X regulations at 42 CFR § 59.5(a)(5), which require Title X projects to provide information and nondirective counseling on a range of options, including prenatal care and delivery; infant care, foster care, or adoption; and pregnancy termination. Additionally, projects are required to provide referrals upon client request, including referrals for abortion. In some circumstances, those referrals will need to be made out of state.

17. Thus, based upon the documentation provided, OPA determined that OSDH's policy for providing nondirective options counseling and referral the Title X project does not comply with the Title X regulatory requirements.

18. OPA communicated this determination of non-compliance to OSDH and the OASH Chief Grants Management Officer (CGMO) by letter dated May 24, 2023 (Tab C).

Determination of Non-Compliance with Award Terms and Award Suspension

19. On May 25, 2023, the CGMO concluded that because OSDH is out of compliance with the Title X regulation, OSDH is also out of compliance with the terms and conditions of award FPHPA006507. The CGMO provided notice of the suspension on that day to OSDH and informed OSDH that as of April 27, 2023 (i.e., the effective date of the non-compliant OSDH policy), all costs are unallowable (Tab B).

20. On June 22, 2023, during a call to assess the status of OSDH's efforts to come into compliance during the first 30 days of the suspension period, OSDH indicated that it would not be able to comply with the Title X regulation citing state law. OSDH stated it did not intend to relinquish the award.

Conclusion

After consideration of the above, I conclude that OSDH remains out of compliance with the Title X regulation. OSDH had ample notification of what is required to maintain compliance with the Title X regulation. OSDH took steps to achieve compliance in order to receive a continuation award and subsequently revised its policy to a non-complaint version.

Furthermore, I conclude that OSDH is unlikely to achieve compliance with the terms and conditions of the award during the current budget period. OSDH's material non-compliance with terms and conditions of the award place the federal interest at risk and it is in the best interest of the government to terminate award FPHPA006507 "Oklahoma State Department of Health Family Planning Services Project".

This decision to terminate will be final and effective with the project period end date on the NOA when it is issued.

Respectfully,

/s/ Scott J. Moore
2023.06.27 13:44:38 -04'00'

Scott J. Moore, Ph.D., J.D., C.F.E.
Director and Chief Grants Management Officer

CC Jessica Shields, Grants Management Specialist
Cynda Hall, OPA Project Officer
Duane Barlow, OASH Grants Branch Chief
Amy Margolis, OPA Deputy Director
Jessica Marcella, Deputy Assistant Secretary for Population Affairs

Attachments

A. Award Closeout Guidance
B. Notice(s) of Award (initial and all amendments)
C. OPA Determination of Non-Compliance with Title X Regulation 42 CFR Part 59, Subpart A
D. Award Suspension Letter
E. SF-424B Assurances - Non-Construction Programs

OKLAHOMA STATE DEPARTMENT OF HEALTH ADMINISTRATIVE APPEAL OF TERMINATION OF AWARD (JULY 27, 2023)

OKLAHOMA STATE DEPARTMENT OF HEALTH

Via U.S. Mail and email: ASH@hhs.gov
Rachel L. Levine, M.D.
Office of the Assistant Secretary for Health
200 Independence Avenue, SW
Room 716G
Washington, D.C. 20201

Re: Appeal of Termination of Award FPHPA006507 "Oklahoma State Department of Health Family Planning Services Project"

APPEAL OF TERMINATION OF AWARD FPHPA006507

Adverse Determination

On May 25, 2023, HHS sent a letter to the Oklahoma State Department of Health (OSDH) explaining HHS's position that OSDH was in violation of Title X and out of compliance with the terms and conditions of award FPHPA006507 "Oklahoma State Department of Health Family Planning Services Project" ("Award"). HHS explained OSDH was in violation of 42 C.F.R.

§ 59.5(a)(5)(i)(c) specifically, by no longer offering pregnant clients the opportunity to be provided information and counseling about pregnancy termination.

The Award was suspended as of the May 25, 2023, with a provision stating the action would be reviewed in thirty (30) days to "reassess OSDH's compliance with the award terms and conditions." Subsequently, on June 27, 2023, OSDH received notice the Award would be terminated. (See Exhibit A, Notice of Termination).

Governing Law

This appeal from FITIS's termination of award is governed by 42 C.F.R. §§ 50.401-50.406. The appeal provisions apply to the Office of Public Health and Science, which the OPA is a part of.[1] Termination of a grant for purported failure of grantee to operate in accordance with applicable law is specifically enumerated as a dispute covered by these procedures.[2] A complaint must he initiated within thirty (30) days of receipt of the written notification of the determination.[3] The request for review must: include a copy of the adverse determination; identify the issue in dispute; and contain a full statement of the grantee's position.[4]

Statement of the Issues

Since 1971, the Oklahoma State Department of Health (hereinafter "OSDH") has continuously received

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[1] 42 C.F.R.§ 50.402

[2] 42 C.F.R.§ 50.404(a)(1)

[3] 42 C.F.R. § 50.406(a)

[4] 42 C.F.R. § 50.406(b)

federal grant funds to provide family planning services across the State of Oklahoma. Through those funds as well as access to 340B priced pharmaceuticals and medical devices, OSDH has provided family planning services in 68 counties, while also contracting with Oklahoma City-County Health Department and Tulsa County Health Department, both independent of OSDH, to ensure family planning services are available in Oklahoma's two most populous counties. Because of both OSDH's statewide presence and receipt of the at-issue grant funds, OSDH has been able to provide safe and local access to family planning services for tens of thousands of Oklahomans. This is important to note, because the actions and conclusions of late are not exclusively ideological or political in nature, but carry life-altering consequences by limiting that historically successful and available access.

On June 24, 2022, the United States Supreme Court overruled *Roe v. Wade*, 410 U.S. 113, 93, S.Ct. 705 and *Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833, 112 S. Ct. 2791, (1992), holding that the Constitution does not confer a right to abortion. *Dobbs v. Jackson Women's Health Organization Et. Al.*[5] Up until that decision, 21 O.S. § 861 was unconstitutional only because of the United States Supreme Court decisions in *Roe* and *Casey*. On April 29, 2022, S.B. 1555 was signed into law by Oklahoma Governor, Kevin Stitt, allowing the Oklahoma Attorney General to certify that *Roe* and *Casey* have been overruled so that Oklahoma may enforce 21 O.S. § 861 and other legislation prohibiting abortion. The

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5 *Dobbs v. Jackson Women's Health Org.*, 213 L. Ed. 2d 545, 142 S. Ct. 2228 (2022)

Oklahoma Attorney general "appropriately" made this certification the same day as the *Dobbs* opinion-June 24, 2022. *Oklahoma Call For Reproductive Justice v. Drummond*, 2023 OK 24, P 14, 526 P.3d 1123. Title 21 O.S. 861 is currently good law in Oklahoma and provides:

> Every person who administers to any woman, or who prescribes for any woman, **or advises** or procures any woman to take any medicine, drug or substance, or uses or employs any instrument, or other means whatever, with intent thereby to procure the miscarriage of such woman, unless the same is necessary to preserve her life shall be guilty of a felony punishable by imprisonment in the State Penitentiary for not less than two (2) years nor more than five (5) years,

OSDH was found to be in noncompliance with 42 C.F.R. § 59.5(a)(5)(i)(c), which states a project must:

(i) Offer pregnant clients the opportunity to be provided information and counseling regarding each of the following options:

(A) Prenatal care and delivery;

(B) Infant care, foster care, or adoption; and

(C) Pregnancy termination.

The definition of counseling is "to give advice to someone."[6] As such, this rule is directly in conflict with the Oklahoma criminal statute 12 O.S. § 861 and prohibits OSDH from being in compliance with the

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6 *Merriam-Webster*. Available at: https://www.merriam-webster.com/dictionary/counsel (Accessed: 27 July 2023).

arbitrary HHS rule without risking criminal conduct Title 12 O.S. § 861 is not an unconstitutional law under guidance from the U.S. Supreme Court and a recent holding by the Oklahoma Supreme Court[7]. Therefore, Oklahoma and its citizens are being deprived of Title X funds for family planning service because of the condition HHS has placed into rule requiring counseling and/or advising on abortion.

Simply, this result was not the intent of 42 U.S.C. § 300 *et seq.,* and the condition requiring recipients to counsel on abortion services is contrary to law and exceeds statutory authority. Congress has passed specific legislation intended to prevent the denial or termination of awards based on the very type of conduct HHS is requiring Oklahoma to promote and engage in The rule requiring counseling on termination of pregnancy has changed three (3) times in the last five (5) years in a manner that appears based on the political party in power; providing more evidence this requirement is more politically relevant than aimed at meeting the purpose of the enabling law. Finally, terminating a grantee's Title X funding solely on the failure to counsel on abortion is a condition that is in violation of U.S. Supreme Court case law.

LEGAL ARGUMENT

It is "axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress." *Bowen v.*

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[7] In *Oklahoma Call For Reproductive Justice v. Drummond, the Oklahoma Supreme Court held that 21 O.S. § 861 does not violate* the Oklahoma Constitution as it allows the termination of a pregnancy in order to preserve the life of the pregnant woman. 2023 OK 24, P 14, 526 P.3d 1123

Georgetown Univ. Hosp., 488-U.S. 204, 208 (1988). When it comes to spending, Congress alone is given the "power of the purse," and the executive branch does not have unilateral authority to impose conditions on federal funding or to "decline to follow a statutory mandate or prohibition simply because of policy objections." *City & Cnty. of San Francisco v. Trump*, 897 F.3d 1225, 1232 (9th Cir. 2018). Further, it is "well settled that an agency may only act within the authority granted to it by statute." *Nat. Res. Def. Council v. Nat'l Highway Traffic Safety Admin.*, 894 F.3d 95, 108 (2d Cir. 2018). *See, Gundy v. United States*, 139 S.Ct. 2116, 2121 (2019) ("The nondelegation doctrine bars Congress from transferring its legislative power to another branch of Government.") Further, under the APA, agencies cannot make rules that are "arbitrary, capricious, an abuse of discretion, **or otherwise not in accordance with law**" and "in excess of statutory jurisdiction, 'authority, or limitation, or short of statutory right." *Id.; See also* 5 U.S.C. § 706(2).

Not only does the requirement at issue exceed statutory authority and violate the APA, but it also is an unlawful condition in violation of the U.S. Constitution and the limitations espoused by the United State Supreme Court in *South Dakota v. Dole*, 483 U.S. 203,107 S. Ct. 2793 (1987). In *Dole*, the Court outlined the limitations on what conditions Congress may attach to the receipt of federal funds: (1) "the exercise of spending must be in pursuit of 'the general welfare;" (2) if Congress wishes to condition the States' receipt of federal funds, it must do so unambiguously allowing "States to exercise their choice knowingly, cognizant of the consequence of their participation;" (3) conditions must be related "to the federal interest

in particular national projects or programs;" (4) conditions must not violate other provisions of the Constitution, such as the First Amendment or the Due Process or Takings Clauses of the Fifth Amendment. Finally, the *Dole* court expressed a fifth limitation, stating the condition cannot cross the line from enticement to impermissible coercion, such that states have no real choice but to accept the funding and enact or administer a federal regulatory program. *Dole*, 483 U.S. at 207-208, 107 S. Ct. at 2796.

A. HHS' Determination to Terminate Funding Based on Rule 42 C.F.R. § 59.5(a)(5)(i)(c) Exceeds Statutory Authority and Is Not Related to the Federal Interest Expressed in 42 U.S.C. §§ 300 et seq.

In 1970, Congress enacted Title X of the Public Health Service Act, codified in 42 U.S.C. §§ 300-300a-6A. Under 42 U.S.C. § 300, the Secretary is authorized to make grants and enter into contracts with public or non-profit private entities to assist in the establishment and operation of voluntary family planning projects which shall offer a broad range of acceptable and effective family planning methods and services (including natural family planning methods, infertility services, and services for adolescents). Further, the statute lists factors the Secretary shall take into account in making grants and contracts: "number of patients to be served, the extent to which family planning services are needed locally, the relative need of the applicant, and its capacity to make rapid and effective use of such assistance." 42 U.S.C. § 300(b). None of the factors require counseling on abortion services. In fact, Title X's governing statute, 42 U.S.C. §§ 300-300a-6, mentions "abortion" only once, "None

of the funds appropriated under this subchapter shall be used in programs where abortion is a method of family planning." The legislative history as to why this language was added is clear. The Conference report stated that section was specifically adopted into the Act "to ensure that Title X funds would 'be used only to support preventive family planning services, population research, infertility services, and other related medical, informational, and educational activities." H.R. Conf. Rep. No. 91-1667, 8 (Dec. 3, 1970), 42 U.S.C. 300a-6 (emphasis added).

Further, the author of Title X, Rep. John Dingell (D-MI) clarified the intent of the abortion prohibition:

> With the "prohibition of abortion" amendment—title X, section 1008—the committee members clearly intend that *abortion* ***is not to he encouraged or promoted in any way through this legislation***. Programs which include abortion as a method of family planning are not eligible for funds allocated through this act.
>
> 116 Cong. Rec. 37375 (Nov. 16, 1970) (emphasis added).

The governing regulation rightly acknowledges the statutory provision stating "[e]ach project supported under this part must . . . [n]ot provide abortion as a method of family planning."[8] Yet, in the same subpart, the regulation promulgated by HHS goes on to state "a project must [o]ffer pregnant clients the opportunity to be provided information and counseling regarding

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8 42 C.F.R. § 59.5(a)(5)

. . . pregnancy termination."[9] This inclusion is contrary to the expressed intent and spirit of the statute, evidenced by congressional disavowal of abortion as a means of family planning within the meaning of Title X, and is without statutory basis. The purpose of Title X is to provide funding for preventive family planning services, not abortion. Conditioning an award of Title X funding on counseling for abortion is outside of the scope and purpose of Title X.

In *Rust v. Sullivan*, the Court analyzed a challenge to HHS regulations prohibiting recipients of Title X funding from "counseling concerning the use of abortion as a method of family planning or provide referral for abortion as a method of family planning." *Rust v. Sullivan*, 500 U.S. 173, 193-96 (1991). The Court upheld the prohibition because "[t]he Title X program is designed not for prenatal care, but to encourage family planning. . . . This is not a case of the government 'suppressing a dangerous idea,' but of a prohibition on a project grantee or its employees from engaging in activities *outside of the project's scope*." *Rust v. Sullivan*, 500 U.S. 173, 193-194 (1991) (emphasis added). In other words, counseling on abortion is outside the scope of Title X. The Court understood Title X's primary intent was pre-pregnancy preventive services, stating "Indeed, if one thing is clear from the legislative history, it is that **Congress intended that Title X funds be kept separate and distinct from abortion-related activities. It is undisputed that Title X was intended to provide primarily pre-pregnancy preventive services**." *Id.* at 190 (emphasis added).

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[9] 42 C.F.R. § 59.5(a)(5)(i)(c)

However, the condition in rule now is a complete reversal to those requirements analyzed and upheld in *Rust*, as well as the requirements put in place in February 2019 by HHS. Nothing in, statute has changed relating to the purpose of the project's scope. The current rule no longer defines the limits of the programs, as they relate to the abortion prohibition in 42 U.S.C. § 300a-6, nor seeks to keep abortion and related activities separated from family planning services. Instead, the rule as applied by HHS now seeks to force recipients to counsel on abortion or lose their funding. The current condition is not related to Title X's expressed purpose and clear legislative history. Further, the condition clearly exceeds statutory authority because Title X's purpose is to provide family planning services. Abortion is unambiguously excluded from the scope of family planning services by 42 U.S.C. § 300a-6, stating no funds "shall be used in programs where abortion is a method of family planning." Such a condition requiring specific counseling as a form of family planning that is specifically excluded by statute, is both arbitrary and unreasonable.

Further, 42 C.F R. § 59.5(a)(5)(i)(c) not only exceeds HHS's statutory authority, but it is also in violation of the Weldon Amendment; further supporting that the requirement to counsel on abortion is wholly unrelated and antitheitcal to the expressed federal interest. The Weldon Amendment states:

> None of the funds made available in this Act may be made available to a Federal agency or program or to a State or local government, if such agency, program, or government subjects an institutional or individual health

> care entity to discrimination on the basis that the health care entity does not provide, pay for, or provide coverage of, or refer for abortions.[10]

This amendment sets forth clear Congressional intent, in plain language, that states healthcare entities are not penalized for refusing to, *inter alia,* refer for abortions. When Congress's intent is clear, "that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron, U.S.A., Inc. v. Natural Resources Defense council Inc.*, 467 U.S. 837, 842-843 (1984). Here, the unambiguous intent of Congress is to protect healthcare entities, including State entities such as OSDH, from having their funding denied or terminated for not referring patients for abortions. Referral is defined as "The act or an instance of sending **or directing to another for information, service, consideration, or decision**." Black's Law Dictionary 9th ed. (emphasis added).

HHS's termination of Award was due to OSDH's refusal to refer and/or counsel for abortions. This is clearly contrary to the terms of the Weldon Amendment. OSDH is a healthcare entity. The Weldon Amendment defines "health care entity" as "includ[ing] an individual physician or other health care professional, a hospital, a provider-sponsored organization, a health maintenance organization a health insurance plan, or any other kind of health care facility, organization, or plan." 45 C.F.R. § 88.2 The rule specifically recognizes State agencies, such as OSDH, may be health care

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[10] Consolidated Appropriations Act, 2023, Public Law 117-328, Div. H, sec. 507(d) (emphasis added)

entities: "As applicable, components of State or local governments may be health care entities under the Weldon Amendment and Patient Protection and Affordable Care Act section 1553."45 C.F.R. § 88.2. OSDH operates sixty-eight (68) county health departments that provide direct patient care to Oklahomans, including providing family planning services specifically intended under Title X. By its own terms the grant given recognizes OSDH is a healthcare entity. *See*, 42 C.F.R. § 59.1 ("The regulations of this subpart are applicable to the award of grants under section 1001 of the Public Health Service Act (42 U.S.C. 300) to assist in the establishment and operation of voluntary family planning projects. These projects shall consist of the educational, comprehensive medical, and social services necessary to aid individuals to, determine freely the number and spacing of children.") "Comprehensive medical services" by definition stem from "health care facility, organization, or plan."

In addition to being prohibited by statute, HHS's action is in violation of the APA because the condition is "arbitrary, capricious, an abuse of discretion, **or otherwise not in accordance with law**" and "in excess of statutory jurisdiction, authority, or limitation, or short of statutory right."[11] As previously mentioned, the agency action is "otherwise" contrary to law and expressly prohibited by federal conscience protection statutes. 42 C.F.R. § 59.5(a)(5)(i)(c), upon which the HHS based its action, is an unlawful regulation in that it is directly contrary to Title X's expressed purpose and the Weldon Amendment where the Rule purports to require referral for pregnancy termination

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11 *Id.* (emphasis added)

(*i.e.*, abortion), the Weldon Amendment seeks to protect entities who do not, *inter alia*, refer for abortions. Additionally, abortion is not a proper form of family planning methods under Title X. This is an irreconcilable conflict between administrative regulation and applicable statutory provisions. A "regulation that contravenes a statute is invalid." *United States v. Kahn*, 5 F4th 167, 175 (2d Cir. 2021). This conflict is obliquely recognized in the regulation itself, a footnote to the prohibition of providing abortion as a method of family planning states "[p]roviders may separately be covered by federal statutes protecting conscience and/or civil rights."[12]

It is clear Congress has not delegated power to supersede statutes to HHS, or any administrative agency for that matter. HHS acted in excess of its statutory jurisdiction by seeking to render a statute void. In fact, such a purported delegation would itself be unconstitutional. *See, Gundy v. United States*, 139 S.Ct. 2116, 2121 (2019) ("The nondelegation doctrine bars Congress from transferring its legislative power to another branch of Government."),

When an agency administers a statute, as HHS administers Title X, it is subjected to a two-level inquiry. First, the question is "whether Congress has directly spoken to the precise question at issue." *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984). Second, and only if Congress has been "silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843-

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12 42 C.F.R. § 59.5(a)(5) fn. 2

844. Further, when an "agency's interpretation involves an issue of 'deep 'economic and political significance,' it may not be entitled to deference. *City & Cnty. of San Francisco v. Trump*, 897 F.3d 1225, 1242 (9th Cir. 2018) *(citing King v. Burwell*, 135 S.Ct. 2480, 2489, 192 L.Ed.2d 483 (2015). Under the *Chevron* two-part inquiry, the rule in question fails both parts of the test. First, Congress has spoken directly on the subject clearly and extensively.[13] Abortion is not a valid form of family planning under Title X and, irrespective of that, providers arc not to be penalized for not referring patients for abortions. As discussed, the legislative history on this is also clear. Thus, any possible ambiguity on Congress's intent regarding Title X and referring for abortion is belied by the legislative history—Title X was not intended to "encourage or promote" abortion in any way. It cannot seriously be contended that requiring referral for abortion services is not a way of promoting or encouraging abortion.

However, even if the record from Congress were to be found to be ambiguous, HHS's construction is not a reasonable one Title X provides HHS may "make grants to public or nonprofit private entities and to enter into contracts with public or private entities and individuals **to assist in developing and making available family planning and population growth information** (including educational materials) to all persons desiring such information (or materials)."[14] HHS is only empowered to promulgate regulations under Title X to implement making grants (or contracts)

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[13] *See e.g.,* Weldon Amendment and 42 U.S.C. § 300a-6

[14] 42 U.S.C. § 300a-3(a)

for this express purpose.[15] Thus the only reasonable scope of implementation is rules and regulations aimed at implementing family planning (from which abortion is statutorily prohibited), and population growth (which abortion is, by definition, excluded from). A rule requiring referral for abortion is therefore not a logical outgrowth, or reasonable interpretation, of Title X.

In practice, the arbitrary nature of this requirement becomes even more apparent. OSDH through community health departments provides family planning services, and the funds received under Title X were almost entirely expended in furtherance of those services. These funds have been and were intended, up to HHS's termination, to provide those family planning services to communities. The funds cannot be used for abortion related services even under the Act. None of the funds are intended to go to abortion, but the entire grant reward can be terminated for not counseling on abortion, subsequently depriving communities of the very funding and access needed to family planning services the Act is designed to ensure. Simply, terminating grant funds for failing to counsel on a service the recipient cannot provide by or be associated with by the Act is arbitrary and contrary to the purpose of the Act, depriving communities of funding for the very services the Act seeks to promote.

B. The Condition to Counsel for Abortion Is an Unconstitutional Condition

Courts have reasoned that a condition may be unconstitutional when the condition goes beyond just

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[15] *See*, 42 U.S.C. § 300a-4

defining the limits of a program, and instead, forces recipients to adopt "the Government's view on an issue of public concern. . . . " *Agency, for Int'l Dev. v. All.. for Open Soc'y Int'l, Inc.*, 570 U.S. 205, 220, 133 S. Ct. 2321, 2332, 186 L. Ed. 2d 398 (2013). This limitation is based on the following principle:

> For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to 'produce a result which (it) could not command directly.' Such interference with constitutional rights is impermissible.

Perry v. Sindermann, 408 U.S. 593, 597, 92 S. Ct. 2694, 2697, 33 L. Ed. 2d 570 (1972) (citing *Speiser v. Randall*, 357 U.S. 513, 526, 78 S.Ct. 1332, 1342, 2 L.Ed.2d 1460).

As argued above, the condition requiring counseling on abortion does exceed the limits of the Title X program. This rule usurps the entire intent of Title X by forcing recipients to counsel on abortion, which is a method of encouraging and promoting abortion[16]. In light of the *Dobbs* decision, the condition poses a significant problem, especially for recipients in the State of Oklahoma. Abortion, and advising on abortion, is now illegal in Oklahoma. The condition seeks to require recipients to "pledge allegiance" to HHS's policy of promoting abortion even if it means potential

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[16] With the "prohibition of abortion" amendment—title X, section 1008 the committee members clearly intend that abortion is not to be encouraged or promoted in any way through this legislation. 116 Cong. Rec. 37375 (Nov. 16, 1970) (emphasis added).

criminal liability for such conduct, which is a condition in violation of the Constitution, including the First Amendment. *Agency for Int'l Dev. v. All. for Open Soc'y Intl, Inc.*, 570 U.S. 205, 220, 133 S. Ct. 2321, 2332, 186 L. Ed. 2d 398 (2013).

The current requirement is not defining the limits of the programs or preventing conduct that undermines the program. In *Rust,* the Court upheld the HHS rule prohibiting a recipient from counseling on abortion because, in part, counseling on abortion was "*outside of the project's scope*." *Rust v. Sullivan*, 500 U.S. 173, 194 (1991). A requirement for recipients to now counsel on abortion is still outside Title X's scope and terminating a recipient's funds for not conducting activities outside the scope of a project is contrary to law.

Requiring recipients to counsel on abortion is an attempt to expand the purpose of the Title X program to include abortion as a family planning method in contradiction to the very terms of Title X. "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *Agency for Int'l Dev. v. All, for Open Soc'y Intl, Inc.*, 570 U.S. 205, 220-21, 133 S. Ct. 2321, 2332, 186 L. Ed. 2d 398 (2013) *(quoting Barnette*, 319 U.S., at 642, 63 S.Ct. 1178). Simply, a recipient should not be required to potentially violate criminal law to receive federal funding, especially for an issue outside the scope and purpose of Title X and within the State's lawful authority.

C. Congress Has Not Unambiguously Imposed the Condition That Recipients Must Counsel on Abortion to Receive Title X Funds

"If Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously." *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17, 101 S. Ct. 1531, 1540, 67 L. Ed. 2d 694 (1981). In enacting Title X, Congress specifically enumerated factors HHS should look at in awarding Title X funds: "number of patients to be served, the extent to which family planning services are needed locally, the relative need of the applicant, and its capacity to make rapid and effective use of such assistance." 42 U.S.C. § 300(b). There is no condition requiring recipients to counsel on abortion services provided in statute. In fact, the only condition related to abortion in statute is that a recipient must not use funds in a program where abortion is used as a family planning method. *See* 42 U.S.C. § 300a-6.

As argued above, the statutory language specifically prohibits the use of Title X funds for abortion service, and the legislative history reveals the Title X grant funds are intend to go towards pre-pregnancy services, not anything related to abortion. Such a requirement runs afoul of constitutional case law and is not unambiguously expressed by the statute. HHS has acted unilaterally outside the enabling law in promulgating this condition into rule, as well as implementing this condition to terminate Title X funding. The rule requiring counseling on termination of pregnancy has changed three (3) times in the last five years based on the political party in office. Further, as in discussed in *Rust*, there use to be a prohibition against counseling on abortion services. Therefore, it

cannot be stated that Congress has unambiguously imposed such a condition on Title X funds because the condition is solely imposed by HHS in excess of its authority and direct opposition of the expressed intent of Congress.

D. The Condition to Counsel on Termination of Pregnancy Does Not Promote the General Welfare

Title 42 U.S.C. §§ 300-300a-6 as codified does promote the general welfare by providing family planning services to citizens; however, the specific condition promulgated into rule by HHS, resulting in OSDH's grant to be terminated, does not promote the general welfare. In evaluating this limitation, the U.S. Supreme Court has stated "[t]he discretion belongs to Congress, unless the choice is clearly wrong, a display of arbitrary power, not an exercise of judgment. Nor is the concept of the general welfare static. Needs that were narrow or parochial a century ago may be interwoven in our day with the well-being of the nation. What is critical or urgent changes with the times." *Helvering v. Davis*, 301 U.S. 619, 641, 57 S. Ct. 904, 908-09, 81 L. Ed. 1307 (1937). Congress in its discretion chose to specifically prohibit Title X funds being used in any program that utilizes abortion as a family planning service. Requiring a recipient to counsel on abortion is not in the general welfare and exceeds the statutory authority and intent under which it is derived.

CONCLUSION

The action taken by HHS in terminating the Award to OSDH is contrary to law and in violation of federal conscience protection statutes. Conditioning

Title X funds on abortion counseling is outside the scope and expressed intent of Title X. Abortion is excluded as a family planning method under Title X, and Congress was clear the funds were never intended to be used to encourage or support abortion. The rule requires exactly what was prohibited by Title X-the promotion, encouragement and support of abortion. After *Dobbs,* abortion is now illegal in Oklahoma, and recipients should not be required to counsel on something not within the scope of the Title X program, especially if there is a potential for criminal conduct. Simply, the action taken exceeds the authority provided under Title X and violates constitutional protections put into place that prohibit the very type of condition required under 42 C.F.R. § 59.5(a)(5)(i)(c). The determination must be set aside, and the grant Award be reinstated.

OKLAHOMA STATE
DEPARTMENT OF HEALTH:

Lisa Martinez-Leeper
CHIEF ADMINSTRATIVE OFFICER

Prepared By:

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DECLARATION OF TINA JOHNSON, MPH, RN (JANUARY 26, 2024)

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA,

Plaintiff,

v.

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

Defendants.

Case No: 23-CV-1052-HE

DECLARATION OF TINA JOHNSON, MPH, RN

I, Tina Johnson, pursuant to 28 U.S.C. § 1747 declare and state as follows:

1. I am over the age of eighteen, of sound mind, and am competent to testify to the matters stated herein.

2. I am currently the Assistant Deputy Commissioner for Family Health Services for the Oklahoma

State Department of Health ("OSDH"), and I have served in this role since 2016.

3. I have been employed with OSDH for over thirty-five (35) years, and prior to my current position I served in various roles with OSDH including: Director of Nursing Service (2013-2016), Regional County Director for Pottawatomie, Seminole, Hughes, and Okfuskee Counties (2004-2013), Director of Nursing Education Nursing Service (2000-2004), District Nurse Manager for Pottawatomie, Seminole, Hughes, and Okfuskee Counties (1997-2000), and Public Health Nurse for Lincoln and Okfuskee County (1988-1997).

4. Prior to my employment with OSDH, I served as the Director of Nursing Service and as a Hospital RN Floor supervisor for Surgery and ER for the Prague Municipal Hospital in Prague, Oklahoma.

5. I obtained a Bachelor of Science in Nursing from Oklahoma Wesleyan University and a Masters of Public Health Administration and Policy from the University of Oklahoma College of Public Health.

6. I serve on the Board of Directors for the Public Health Institute of Oklahoma and volunteer with the Public Health Accreditation Board as a site visitor for accreditation reviews. I have previously served as the President of the Oklahoma Public Health Association.

7. In my role as Assistant Deputy Commissioner for Family Health Services, I have senior leadership oversight of family planning services as a component of OSDH's broader Family Health Services division, which encompasses Maternal and Child Health Services. The management of Title X grants falls within Maternal and Child Health Services.

8. The State of Oklahoma, through OSDH, has continuously received federal grant funds to provide family planning services across the state through Title X for more than forty years, or since 1971.

9. OSDH's Title X grant was approximately $4.5 million, annually, in the current grant cycle.

10. The U.S. Department of Health and Human Services ("HHS") conducted a comprehensive review of OSDH's Title X program in 2016, attached as Exhibit 1. That review process was designed to assess OSDH's compliance with federal regulations and guidelines governing Title X, and the quality of services and implementation of key aspects of the Title X program. That review process included meetings with key personnel, extensive document review, and on-site observational visits.

11. The result of HHS's comprehensive review of OSDH's Title X program was positive. HHS found that the OSDH met the requirements of Title X, and HHS reported that it was overall impressed with OSDH's program. Although HHS's review noted some deficiencies in OSDH's Title X program, none of those deficiencies resulted in the revocation of the Title X grant. Nor did HHS ever mention or threaten revocation of the Title X grant during that review process. In fact, the result of the on-site visits during this review were so positive that HHS did not schedule a return visit until January 2024.

12. Through the Title X program, OSDH provides funding to the State's 68 county health departments ("County Partners"), who provide critical family planning public health services to rural and urban Oklahoma communities. Those critical family planning

services include counseling of family planning options and related services, preventative women's health screenings and exams (including mammograms, pap-smears, anemia testing, depression screening, and the like), infectious disease testing, pre-conception care, immunizations, Medicaid applicability, and providing family planning prescriptions or medical devices. Moreover, County Partners provide referrals for mammograms, dysplasia follow-up as a result of an abnormal pap-smear, and follow-ups resulting from abnormal blood pressure, psychological/mental health concerns, and postpartum complications.

13. OSDH also contracts with the Oklahoma City-County Health Department and the Tulsa County Health Department ("City-County Partners"), who provide the same or similar family planning services previously described, in Oklahoma's most heavily populated counties.

14. Oklahoma's Title X program allows OSDH and its County and City-County Partners (collectively "Partners") to provide confidential services to adolescents, which account for approximately 12% of the patients served. This helps health care providers discuss sensitive or embarrassing topics and provide education, while still encouraging parental involvement and complying with all mandatory reporting laws.

15. The Title X program also allows OSDH and its Partners connect with patients who come in with other ancillary concerns, allowing the State to refer those patients to other health care providers or state resources to better serve a patients' overall health and well-being. For example, this has allowed the State to connect patients with the Oklahoma Women, Infants & Children supplemental food program, immunization

programs, and programs providing free infant car seats, including installation and safety checks. It also allows the State to screen for safety issues such as child abuse, domestic violence, or sex trafficking.

16. Because OSDH has continuously administered its Title X program for decades, OSDH and its Partners have built the infrastructure, capacity, personnel, and institutional knowledge to implement its Title X program across the entire state of Oklahoma effectively, efficiently, and with integrity. This has allowed OSDH and its Partners to provide critical health services to the public and those in need for decades. In recent years, over 25,000 patients on average annually have received services through Oklahoma's Title X program.

17. As one specific example of how this infrastructure and institutional knowledge has advanced public health, OSDH and its County Partners have built a network of translation services available across the state to accommodate the 30+ languages and dialects spoken in the state. Providing these translation services helps eliminate communication harriers that can have serious impact on a patient's care, for example when a patient may otherwise have to rely on an abusive partner or child to translate sensitive health information.

18. In many rural areas in Oklahoma, OSDH and its County Partners may be one of the only access points for critical preventative health services for many miles. Thus, many of the patients served by OSDH and its County Partners face barriers to accessing health care because of distance, work schedules, and transportation issues.

19. A substantial portion of patients served by OSDH and its Partners include lower income or uninsured individuals who cannot afford care elsewhere.

20. OSDH and its Partners have created significant goodwill throughout the state by providing crucial family planning, preventative, and screening services to citizens through its decades of administering the Title X program.

21. OSDH spent months working with HHS, seeking guidance as well as proposing solutions in an effort to remain in compliance with the grant requirements while not potentially running afoul of Oklahoma law. HHS was adamant in its "all or nothing" position that OSDH must include abortion-education resources as part of family planning client counseling. HHS was consistent in its position that OSDH must comply or face consequences despite repeat reminders of current Oklahoma law.

22. The continuing impact of HHS's decision to revoke the Title X grant awarded to OSDH—on OSDH, the County Partners, the City-County Partners, the Oklahomans served by the program, and the State at large—is extremely difficult to measure.

23. Without the Title X grant funds, OSDH required the Oklahoma Legislature to provide an emergency backstop to supplement the federal loss. The Oklahoma Legislature appropriated those funds for the 2023 fiscal year, but there is no guarantee that the Oklahoma Legislature continues to supplement those funds going forward. Without this continued funding, OSDH and its Partners will be unable to continue providing the critical family planning services offered

throughout the state, causing incalculable and devastating harm to the public health of the state and its citizens.

24. The revocation of the Title X grant has deprived OSDH of the federal discount pharmacy program for family planning prescriptions and medical devices ("340B"), which covers oral contraceptives, IUDs, and long-acting reversible contraceptives, among other things.

25. In order to ensure continuity of services in the aftermath of HHS's revocation, and to mitigate against forced disposal of these prescriptions and medical devices, OSDH has been forced to cobble together additional state dollars, approximately $678,000, to buy-back 340B acquired medications from HHS. This stopgap has also placed significant and unexpected strain on OSDH's Pharmacist and other personnel.

26. The delays and uncertainty caused by the abrupt deprivation of the 340B federal discount program has impacted rural county health departments as well as City-County Partners, who contract with OSDH to receive these critical prescriptions and medical devices. Meaning, public dollars used to purchase any prescriptions or medical devices do not stretch as far because OSDH and its Partners are forced to purchase at market rates. This impacts the number of services that can be provided, and ultimately reduces the number of Oklahomans served. It is also impacting the State's inventory and the availability of prescriptions and medical devices, which is crucial to provide real-time access to low income clients with low or no cost prescriptions or medical devices.

27. Without the 340B federal discounts, the cost of relevant prescriptions and medical devices may increase up to six times, leaving OSDH and its Partners unable to continue providing those benefits without significant financial impact, which will inevitably harm other critical health services offered by OSDH and its Partners.

28. In addition, HHS has repeatedly warned and threatened that OSDH's purported non-compliance under the Title X grant may be reported to the Federal Awardee Performance Integrity Information System ("FAPIIS"). In fact, it is likely HHS has already reported OSDH on the FAPIIS based on prior conversations between OSDH and HHS officials, where HHS officials expressed repeat warnings of intent to report OSDH. OSDH has been unable to confirm whether HHS has followed through with this intent. Being reported to the FAPIIS would have significant impact OSDH's ability to obtain or maintain other federal grant funds, including because federal law requires a contracting officer review the FAPIIS before awarding any federal grant over the simplified acquisition threshold. *See* FAR 9.104-6.

29. OSDH currently receives approximately $541.2 million in funding from over 90 other federal grant programs outside of Title X, ranging from HIV prevention, immunizations and public health infrastructure to workforce development, emergency preparedness, COVID-19 response and recovery (through the American Rescue Plan Act of 2021), and laboratory quality and readiness. Each of these grants could be jeopardized by HHS reporting OSDH to the FAPIIS.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on January 26th, 2024.

/s/ Tina R. Johnson

DEFENDANTS' OPPOSITION BRIEF TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION—RELEVANT EXCERPTS (FEBRUARY 23, 2024)

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA,

Plaintiff,

v.

UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, ET AL.,

Defendants.

No. 5:23-cv-01052-HE

DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

[. . .]

ARGUMENT

I. Oklahoma Is Not Likely to Succeed on the Merits

A. HHS's Decision Is Authorized by Title X

OPA's decision to terminate OSDH's Title X funding was based on the interpretation of § 1008 set forth in the 2021 Rule—i.e., that Title X programs must provide, if requested, counseling on and referral for abortion. Oklahoma contends that OPA's decision "violates Title X," PI Br. 14, because HHS's regulation "requiring abortion counseling and referrals is not within the bounds of reasonable interpretation" of § 1008 "and is therefore in excess of statutory authority granted by Congress," id. at 17; see id. at 18. From a statutory perspective, the only relevant consideration is whether the interpretation set forth in the 2021 Rule is permissible. And Rust establishes that it is, as recently explained by the Sixth Circuit in a case in which Oklahoma was a plaintiff.[3]

In Ohio, the Sixth Circuit held that Rust is controlling authority that § 1008 authorizes HHS to either forbid, permit, or require Title X programs to provide nondirective options counseling and, upon request, abortion counseling and referrals. Rust rejected arguments that "providing counseling and referral for abortion is either necessarily treating, or not treating, 'abortion as a method of family planning,'" and thus, the Ohio court held, it "must be . . .

[. . .]

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[3] The distinction between facial and as-applied challenges makes no difference in this situation. *See Brooklyn Legal Servs. Corp. v. Legal Servs. Corp.*, 462 F.3d 219, 228 (2d Cir. 2006) ("Facial and as-applied challenges differ in the extent to which the invalidity of a statute need be demonstrated (facial, in all applications; as-applied, in a personal application). Invariant, however, is the substantive rule of law to be used." (emphasis in original)).

D. HHS's Decision Is Neither Arbitrary Nor Capricious

Oklahoma's 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." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). 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). Oklahoma raises several arguments that OPA's termination decision was arbitrary and capricious. PI Br. 20-23. None of these arguments succeed.

Oklahoma first argues that the termination decision is arbitrary and capricious because "Congress clearly intended its Title X funding not to go to promoting or performing abortions in any way." *Id.* at 21. This argument is duplicative of Oklahoma's statutory arguments. *See supra* Part I.A-B. The abortion referral requirement of the 2021 Rule does not violate any statute, so OPA's termination decision relying on that rule is not arbitrary and capricious.

Oklahoma next argues that OPA discontinued OSDH's grant without considering "the impact of requiring States where abortion is prohibited to comply

with counseling and referral requirements." PI Br. 21; *see also id.* (arguing that "federalism concerns were overlooked"). Oklahoma is incorrect. As an initial matter, OPA's decision is a straightforward application of the valid requirements of the 2021 Rule. *See supra* Part I.A; *Ohio*, 87 F.4th at 772 (applying *Rust*). Because that rule requires grantees to provide abortion referrals upon request, OPA declined to continue funding OSDH's grant when OSDH would not certify that it would do so. An agency does not act in an arbitrary and capricious manner merely by applying a valid regulation. Oklahoma's argument is really a backdoor attempt at challenging the referral requirement of the 2021 Rule —a challenge that was already rejected in the *Ohio* case, to which Oklahoma was a party.

In any event, the agency has provided a valid explanation for its decision that takes into account the fact that certain states have limited access to abortion. In June 2022, HHS issued guidance that clarified the requirements of the Title X program post-*Dobbs*, including in states that limited access to abortion in the immediate wake of the *Dobbs* decision. *See* OPA Q&A, Ex. A. This document states that the abortion counseling and referral provisions of the 2021 Rule remain in effect, and that nondirective pregnancy options counseling (to include counseling on the option of abortion if requested), as well as abortion referrals upon request, is still required. *Id.* at 4-5. The document also notes that "[t]here are no geographic limits for Title X recipients making referrals for their clients," and that "Title X recipients have flexibility to refer clients for services across state lines if necessary." *Id.* at 5. HHS also clarified that counseling and referrals may be made in person or via

telehealth. *Id*. In deciding to terminate OSDH's funding, OPA further confirmed that Title X projects are required to "provide information and nondirective counseling on a range of options, including . . . referrals upon client request, including referrals for abortion," and that "in some circumstances, those referrals will need to be made out of state." ECF No. 23-4, at 4; *see also* May 24 OPA Letter at 1 (PI Br., Ex. 5 at 33-34, ECF No. 23-5) (noting that OPA "informed OSDH that it could submit an alternate compliance proposal that included providing clients with referral to another entity, such as the All-Options Talkline"). This explanation demonstrates that HHS considered the issue of state-law limitations on abortion access and nonetheless decided that . . .

[. . .]

CONCLUSION

For the foregoing reasons, the Court should deny Oklahoma's preliminary injunction motion.

Respectfully submitted,

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