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

1. STATE OF OKLAHOMA *Plaintiff*, v. 1. UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; 2. XAVIER BECERRA, in his official capacity as the Secretary of the U.S. Department of Health and Human Services; 3. JESSICA S. MARCELLA, in her official capacity as Deputy Assistant Secretary for Population Affairs; and 4. OFFICE OF POPULATION AFFAIRS *Defendants*.	Case No. 23-CV-01052-HE

PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION AND OPENING BRIEF IN SUPPORT

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INTRODUCTION

In 1970, Congress enacted Title X to provide federal funding for family planning services. Ever since, the United States has been funneling millions of dollars to states through Title X, including to high quality programs run by Plaintiff, the State of Oklahoma, through the Oklahoma State Department of Health ("Oklahoma," "Health Department," "OSDH," or "State'). These programs have improved the lives of countless Oklahomans.

From the beginning, Title X has expressly prohibited Title X funds from "be[ing] used in programs where abortion is a method of family planning." 42 U.S.C. § 300a-6 (Title X, § 1008). And beginning in 2004, the Weldon Amendment precluded any state from receiving Title X funds if they discriminate against health care entities who refuse to refer women for abortions. Nevertheless, in 2021, Defendants issued a new final rule that *requires* Title X programs to "[o]ffer pregnant clients the opportunity to be provided information and counseling regarding ... pregnancy termination." 42 C.F.R. § 59.5(a)(5)(i)(C). Soon after, *Dobbs v. Jackson Women's Health Organization* restored the authority of the people and their elected state representatives to regulate abortion. Several Oklahoma laws then took effect, making it a crime to advise or procure an abortion for any woman, except to preserve her life, and instructing that no Oklahoma person or health care facility can be required to participate in any abortion unless the mother's life is at stake.

Defendants have now terminated Oklahoma's Title X funding solely because Oklahoma will not provide counseling or referrals for abortion. This decision violated Title X, the Weldon Amendment, the Administrative Procedures Act, the Spending Clause, and more. As such, it should be enjoined immediately to protect Oklahoma and Oklahomans.

BACKGROUND

I. Oklahoma Has Successfully Managed Title X Funding for Decades.

Oklahoma has participated in Title X's voluntary family planning projects for over fifty years, offering the State's most vulnerable citizens "a broad range of acceptable and effective family planning methods" that includes natural family planning, infertility, and services for adolescents. At no point since Oklahoma began participation in the federal program in 1971 has Oklahoma's funding received adverse treatment. Declaration of Tina Johnson, attached as Exhibit 1, at ¶ 8. Until now, that is.

The Health Department uses the Title X grant to disperse funds through 68 county health departments ("County Partners"), who provide critical public health services to rural and urban Oklahoma communities. *Id.* at ¶ 12. These County Partners are a part of the front-line of women's health in Oklahoma, and aim to provide comprehensive, connected care to all patients they serve. *Id.* at ¶ 12, 15. The Health Department has also contracted with the Oklahoma City-County Health Department and the Tulsa County Health Department ("City-County Partners") to ensure family planning services are available in Oklahoma's most heavily populated counties. *Id.* at ¶ 13.

The impact of depriving those communities and populations of Title X services cannot be understated. In many instances, particularly in rural Oklahoma communities, the Health Department and County Partners may be one of the only access points for critical preventative services for tens or even hundreds of miles. *Id.* at ¶ 18. Some of these same rural communities may not have a grocery store, let alone the presence of a full-time health

provider or women's health provider. *Id*. Many patients the Health Department sees already have difficulty accessing the health care they need because of location, work schedules, and/or transportation issues. *Id.* at ¶ 18. Language can also create difficulties in providing services. *Id.* at ¶ 17. Thus, Oklahoma's Title X program has access to 30+ different translators to assist with barriers to care.

In May 2016, HHS reviewed Oklahoma's Title X program in person, concluding that it "supports excellent projects and activities." *Id.* at ¶ 10. Indeed, HHS "applaud[ed]" Oklahoma's "efforts to increase services and qualities throughout the system," and its reviewers were "impressed with the dedication and commitment to family planning in both the central office staff as well as in the field." 2016 Review, attached as Exhibit 2, p. 1. After complying with several recommended changes, Oklahoma's program was approved, and HHS would not schedule a return visit until 2024. Exh. 1, ¶ 11. In March 2022, HHS awarded Oklahoma a Title X grant (FPHPA 006507), as it had done virtually every grant cycle since 1971. Notice of Award, attached as Exhibit 3.

II. HHS Has Promulgated Contradictory Regulations Throughout the Years.

From the beginning, Title X has expressly prohibited grant funds from "be[ing] used in programs where abortion is a method of family planning." 42 U.S.C. § 300a-6. Despite this Congressional mandate, HHS has historically implemented contradictory rules and regulations for Title X, depending on the presidential administration. From the mid-1970s to the late-1980s, HHS permitted—and then in 1981 adopted guidelines requiring—Title X recipients to offer pregnant women "nondirective options counseling on pregnancy

termination (abortion) . . . followed by referral for these services if she so requests." 53 Fed. Reg. 2922, 2923 (Feb. 2, 1988). *Id.*

In 1988, HHS changed course and issued a final rule prohibiting Title X providers from making referrals for or counseling women regarding abortion. *Id.* at 2945. HHS determined that these requirements were "more consistent with" the Title X provision prohibiting abortion funding. *Id.* at 2932. In *Rust v. Sullivan*, 500 U.S. 173 (1991), the Supreme Court upheld HHS's 1988 regulation. *Rust* held that HHS had permissibly justified its new rule on abortion referrals, which, the federal government had argued, was "more in keeping with the original intent of the statute[.]" 500 U.S. at 186-87.

But in 1993, HHS again reversed course and suspended the 1988 Rule. In 2000, HHS began requiring Title X recipients to make abortion referrals upon request from a patient. 65 Fed. Reg. 41,270. In 2004, however, Congress began including the so-called "Weldon Amendment" as an annual appropriations rider for every HHS appropriations bill. *See, e.g.,* Consolidated Appropriations Act, 2022, Pub. L. No. 117-103, div. H, title V, § 507(d)(1), 136 Stat. 49,496 (Mar. 15, 2022). Per the Weldon Amendment, no HHS funds, which includes Title X funds,

> 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.

Id.

In 2019, in line with the Weldon Amendment, HHS promulgated *Compliance with Statutory Program Integrity Requirements*, 84 Fed. Reg. 7714 (Mar. 4, 2019) ("2019

Rule"). The 2019 Rule adopted much of the 1988 Rule that was upheld in *Rust*, including the prohibition on Title X grantees "perform[ing], promot[ing], refer[ing] for, or support[ing] abortion as a method of family planning." *Id.* at 7788-90. HHS concluded that this approach 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. HHS determined that prior regulations "are inconsistent" with section 1008 "insofar as they require referral for abortion as a method of family planning." *Id.* at 7723.

Finally, in 2021, HHS reversed course yet again, promulgating a regulation that it now claims requires abortion referrals. *See* 86 Fed. Reg. 56,144 (Oct. 7, 2021). Although contrary to Title X's text and the Weldon Amendment, HHS's 2021 Rule remains in effect today, and, pursuant to HHS's interpretation, generally requires grantees like the Health Department to make abortion counseling and referrals available upon patients' requests.

III. HHS Terminates Oklahoma's Title X Funding Over Abortion Referrals.

In Oklahoma, advising or procuring an abortion for any woman is punishable as a felony. *See* 21 O.S. § 861. This statute came into effect immediately following the Supreme Court's decision in *Dobbs*, which reversed *Roe v. Wade* and held that authority to regulate abortion must be returned to the people and their elected representatives. *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 302 (2022). Exercising that right, the people's elected representatives in Oklahoma have prohibited abortion except to preserve a woman's life, and they have made it illegal to advise a woman to obtain an abortion. *See* 21 O.S. § 861. This law has been upheld by the Oklahoma Supreme Court. *See OCRJ v. Drummond*, 2023 OK 24, 526 P.3d 1123 (Okla. 2023).

Although 42 C.F.R. § 59.5(a)(5) holds that "[e]ach" Title X project should "[n]ot provide abortion as a method of family planning," the Biden Administration re-added in 2021 that each project must nevertheless "[o]ffer pregnant clients the opportunity to be provided information and counseling regarding … [p]regnancy termination." *Id.* § 59.5(a)(5)(i). Then, after *Dobbs*, HHS indicated that it would require compliance with 42 C.F.R. § 59.5(a)(5)'s requirement of abortion referrals, regardless of any state laws that conflict with this requirement.

For its part, the Health Department reasonably concluded that it could not comply with 42 C.F.R. § 59.5(a)(5)(i)(c) if it required abortion referrals, because Oklahoma law makes it a crime for any person to advise or procure an abortion for any woman. Health Department Appeal Letter, attached as Exhibit 6. Nevertheless, the Health Department took several actions to find an agreeable solution that would allow the Health Department to continue receiving Title X funds while complying with Oklahoma law prohibiting abortions. *Id.* On August 29, 2022, the Health Department sought to modify its programmatic procedures to ensure compliance with Oklahoma abortion law, a modification that was denied by HHS on November 9, 2022. *Id.* The Health Department sought reconsideration of this determination on November 22, 2022. *Id.* The Health Department undertook extensive internal processes to determine how to comply with this HHS regulation and Oklahoma law through early 2023, but it was unable to find a solution. Exh. 1, ¶ 21.

On May 25, 2023, HHS sent a letter to the Health Department claiming the Department was in violation of Title X and out of compliance with the terms and conditions

of award FPHPA 006507, the "Oklahoma State Department of Health Family Planning Services Project" (the "Award"). HHS Suspension Letter, attached as Exhibit 4. The Award totals approximately $4.5 million in funding—money that is relied on by the Health Department to provide critical health care services to Oklahoma citizens. Exh. 1, ¶ 9. Specifically, HHS determined that the Health Department was in violation of Section 59.5(a)(5)(i)(c) because the Health Department would not offer pregnant clients the opportunity to be provided information and counseling about abortion.

During its 2016 review of Oklahoma's program, HHS specifically noted that "Title X grantees and sub-recipients must be in full compliance with Section 1008 of the Title X statute and 42 C.F.R. § 59.5(a)(5), which prohibit abortion as a method of family planning. Systems must be in place to assure adequate separation of any non-Title X activities from Title X project." *Id*. HHS determined that this requirement was met by the Health Department's Title X program. *Id*. HHS further noted that, "Oklahoma State Department of Health Maternal and Child Health policies and procedures, including the sub-recipient contract reviewed contain provisions prohibiting abortion as a method of family planning." *Id*. at p.20, ¶ 8.2. The Health Department received notice that the Award would be terminated on June 27, 2023. HHS Termination Notice, attached as Exhibit 5. On July 27, 2023, the Health Department appealed that ruling, administratively. Exh. 6.

On or about September 22, 2023, while the Health Department administrative appeal was still pending, HHS announced supplemental funding, supposedly to support the provision of Title X services in Oklahoma. Funds that would previously have been directed to the Health Department were instead apparently reallocated to Community Health

Connection, Inc. and Missouri Family Health Council, Inc., a Missouri entity. Community Health Connection, Inc. was awarded $216,000 in newly authorized federal funds, while Missouri Family Health Council, Inc. was awarded $3,250,000 in supplemental funds. [HHS Grant Award Announcements, available at https://opa.hhs.gov/about/news/grant-award-announcements/hhs-issues-11-million-supplemental-funding-support-provision, last accessed January 24, 2024]

IV. Oklahoma Brings an As-Applied Challenge to the Title X Termination.

On November 23, 2023, Oklahoma filed this as-applied challenge to HHS's termination of Oklahoma's Title X funding based on HHS's 2021 Rule. *See Scherer v. U.S. Forest Serv.*, 653 F.3d 1241, 1243 (10th Cir. 2011). Oklahoma anticipates that HHS may attempt to rely on the Sixth Circuit's recent decision in *Ohio v. Becerra*, 87 F.4th 759 (6th Cir. 2023), to argue that these issues have already been decided. But *Ohio*, where Oklahoma was a plaintiff, was a *facial* challenge to the 2021 rule that did not consider the facts and circumstances of the decision at issue here. This as-applied challenge raises factual and legal issues that were not present in *Ohio*, such as the effect of *Dobbs*, the Spending Clause, and the Weldon Amendment. *Ohio* does not foreclose relief.

ARGUMENTS AND AUTHORITIES

To obtain a preliminary injunction, Oklahoma must show that: (1) it is likely to succeed on the merits; (2) it will suffer irreparable injury if the injunction is denied; (3) the threatened injury outweighs any injury to the opposing party; and (4) the injunction is not against the public interest. *Awad v. Ziriax*, 670 F.3d 1111, 1125 (10th Cir. 2012). Oklahoma meets all four requirements, and this Court should issue a temporary injunction.

Alternatively, this Court should postpone effectiveness of Defendants' action to terminate Oklahoma's Title X award pursuant to 5 U.S.C. § 705.

I. OKLAHOMA IS LIKELY TO SUCCEED ON THE MERITS.

Defendants' decision to terminate Oklahoma's Title X funding is unlawful. Under the Administrative Procedures Act ("APA"), courts are entitled to "decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action." 5 U.S.C. § 706. Courts may compel an agency action "unlawfully withheld" and "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; contrary to constitutional right, power, privilege, or immunity; in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; [or] without observance of procedure required by law." *Id.* Here, Oklahoma seeks to set aside Defendants' termination decision and restore Oklahoma's Title X funding.

A. Defendants' Decision to Terminate Oklahoma's Title X Funding is Reviewable.

Defendants' decision to terminate Oklahoma's Title X funding is a final agency action subject to review by this Court. *Sackett v. EPA*, 566 U.S. 120, 127 (2012). While Oklahoma pursued an agency appeal prior to filing this action, and allowed HHS ample time to resolve that appeal, that appeal was not mandatory. *See Darby v. Cisneros*, 509 U.S. 137, 147 (1993); *State of Mo. v. Bowen*, 813 F.2d 864, 871 (8th Cir. 1987).

B. Defendants' Decision to Terminate Oklahoma's Title X Funding Violates the Spending Clause of the U.S. Constitution.

The Spending Clause provides that "Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to … provide for the … general Welfare of the United States. . . ." U.S. Const. art. I, § 8, cl. 1. The Supreme Court has recognized four restrictions on the ability of Congress to exercise power under the Spending Clause, the second of which is most prominent in this case: if Congress wants to place conditions on a state's receipt of federal funds, it must do so unambiguously, so that states know the consequences of their decision to participate. *See Arbogast v. Kansas, Dep't of Lab.*, 789 F.3d 1174, 1186 (10th Cir. 2015) (citing *South Dakota v. Dole*, 483 U.S. 203, 207 (1987)).

"The legitimacy of Spending Clause legislation," "depends on whether a state voluntarily and knowingly accepts the terms of such programs." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 522 (2012); *see also Deer Creek Water Corp. v. Oklahoma City*, 82 F.4th 972, 987–88 (10th Cir. 2023). Thus, while Congress may exert influence on states by conditioning funding on certain requirements, Congress must provide *clear notice* of the obligations imposed. *Arlington Cent. School Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296 (2006). "'[L]egislation enacted pursuant to the spending power is much in the nature of a contract,'" and therefore, to be bound by "'federally imposed conditions,'" recipients of federal funds must accept them "'*voluntarily* and *knowingly*.'" *Pennhurst State Sch. & Hospital v. Halderman,* 451 U.S. 1, 17 (1981) (emphasis added).

Ambiguity is critical in this context. "[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." *Colorado v. U.S. Dep't of Justice*, 455 F. Supp. 3d 1034, 1056 (D. Colo. 2020). And conditions imposed by an agency on grant funding cannot have been unambiguously authorized by Congress when the conditions were never statutorily authorized to begin with. *Id.* at 1056-57; *see also West Virginia ex rel. Morrisey v. U.S. Dep't of the Treasury*, 59 F.4th 1124, 1147 (11th Cir. 2023) (stating that "the ability to place conditions on federal grants ultimately comes from the Spending Clause, which empowers Congress, not the Executive, to spend for the general welfare"). "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).

Before terminating Oklahoma's funding, Defendants placed a condition on Oklahoma's receipt of Title X funding: the requirement to refer women for abortions. That condition was wholly absent from Congress's statutory regime. Importantly, the Supreme Court in *Rust* specifically found that the Title X statute is ambiguous on the point of abortion referrals. *Rust*, 500 U.S. at 184 (finding that the statutory language of § 1008 "does not speak directly to the issues of counseling, referral, advocacy, or program integrity" and is therefore ambiguous); *see also Ohio*, 874 F.4th at 771 (reiterating *Rust*'s finding that the statute is ambiguous). And that was before Congress enacted the Weldon Amendment, which, if anything, clarified the Title X ambiguity *in Oklahoma's favor*. *See infra* I(C).

Thus, Defendants wrongfully imposed their abortion referral requirement as a condition to Oklahoma's receipt of Title X funding.

Indeed, HHS itself has acknowledged that the Title X statute is silent and therefore *at best* ambiguous about abortion counseling and referrals. *See* 86 Fed. Reg. at 56,149. And since the statute is admittedly ambiguous (at most), Defendants' grant conditions cannot be constitutional under the Spending Clause. *See, e.g.*, *Colorado*, 455 F. Supp. 3d at 1056. Without that *clear notice* from Congress itself, Oklahoma could not *voluntarily* and *knowingly* agree to that requirement as a condition to accepting Title X funding.

In sum, binding precedent holds that Title X is at most ambiguous on the issue of abortion referrals, and therefore the Spending Clause prohibits Oklahoma from being punished for not complying with Defendants' regulatory gloss. The Sixth Circuit's recent decision in *Ohio* says nothing to the contrary, since it did not involve a Spending Clause argument. Rather, the Sixth Circuit claimed, as a critical part of its analysis, that Title X is ambiguous on abortion referrals. *Ohio*, 87 F.4th at 765 ("In *Rust v. Sullivan*, the Supreme Court held that § 1008 is ambiguous as to … referrals for abortion and that *Chevron* deference applies."). The ambiguity that the Sixth Circuit deemed as foreclosing the facial APA argument there counsels directly *toward* a Spending Clause violation here. Because HHS's decision to terminate Oklahoma's grant funding was based on a requirement that was not congressionally mandated and that Oklahoma never knowingly and voluntarily accepted, HHS's decision violates the Spending Clause. An injunction should therefore issue.

Moreover, as courts have recognized, "more is at stake when Congressional spending legislation threatens state sovereign interests . . . ." *Commonwealth of Kentucky v. Yellen*, 67 F.4th 322, 327 (6th Cir. 2023); *see also Planned Parenthood of Kansas & Mid-Missouri v. Moser*, 747 F.3d 814, 824 (10th Cir. 2014) (describing the "special nature of Spending Clause legislation" and explaining that "[i]n the federal-grant context, the State is more a partner than a subordinate of the federal government"), *abrogated in part on other grounds as recognized by Safe Streets All. v. Hickenlooper*, 859 F.3d 865, 905 n.16 (10th Cir. 2017). "In traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision." *United States v. Bass*, 404 U.S. 336, 349 (1971). In this instance, Oklahoma's sovereign interests in protecting unborn Oklahoma lives and in controlling criminal activities are directly impacted. First, under Oklahoma law, procuring an abortion for any woman is punishable as a felony. 21 O.S. § 861. This statute came into effect immediately following *Dobbs*, which held that the U.S. Constitution does not provide a right to abortion and that authority to regulate abortion must be returned to the people and their elected representatives. *See* 597 U.S. at 301-02 (holding that "respect for and preservation of prenatal life at all stages of development" is a legitimate state interest).

By terminating Oklahoma's grant funds on the basis of its abortion laws and refusal to countenance referrals, without clear congressional authorization, Defendants have intruded upon Oklahoma's sovereignty. Moreover, by awarding Oklahoma's funds to an entity in Missouri, Defendants have willfully encouraged an entity to disregard Oklahoma

law. By awarding the Missouri Family Health Council funds to provide services in Oklahoma, HHS presumably expects and anticipates that entity will provide services in Oklahoma. HHS will also presumably condition Missouri Family Health Council's receipt of such funds on compliance with all of HHS's regulations, including 42 C.F.R. § 59.5(a)(5)(i)(c). To the extent that Missouri Family Health Council provides services in Oklahoma and provides pregnancy termination referrals, Missouri Family Health Council risks violating Oklahoma law.

Therefore, Oklahoma's sovereign interests are directly in play, and the lack of *clear notice* by *Congress* of any requirement to offer abortion counseling and referrals renders HHS's termination of Oklahoma's Title X funding violative of the Spending Clause.

C. Defendants' Decision to Terminate Oklahoma's Title X Funding Violates Title X and the Weldon Amendment.

HHS's decision to interpret its regulation as requiring the termination of Oklahoma's Title X funding violates federal law—specifically, it violates Title X and the Weldon Amendment. Again, the Weldon Amendment expressly *prohibits* Title X funds from flowing to States that discriminate against a "health care entity" that refuses to refer women for abortions. *See supra* p.4. A "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. 117-103, div. H, title V, § 507(d)(2) (emphasis added).

The Weldon Amendment's requirements plainly apply to Oklahoma, as a state. The Health Department administers the Title X family planning program in Oklahoma by dispersing funds through 68 county health departments that provide critical public health services to rural and urban Oklahoma communities. Exh. 1, ¶ 12. These County Partners *easily* meet the broad definition of "health care entities" set forth above. The Health Department is also a health care entity because it partners with and funds county health departments. *See* 45 C.F.R. § 88.2 (stating that "[a]s applicable, components of State or local governments may be health care entities under the Weldon Amendment . . . ."). Thus, the Weldon Amendment applies here to prohibit Oklahoma from requiring these entities to provide referrals for abortions. Yet, that is exactly what Defendants are trying to coerce Oklahoma to do—require health care entities to refer for abortions, else risk losing millions in Title X funding. This is unlawful, whether it is construed as a violation of the Weldon Amendment itself or a violation of Title X as interpreted in light of the Weldon Amendment.

Incredibly, when enacting the 2021 Rule supposedly requiring abortion referrals, Defendants expressly *declined* to consider the impact of the Weldon Amendment. The relevant rulemaking stated as follows:

> While the [conscience] statutes may at times interact with the requirements of Title X, interpreting these laws is beyond the scope of this rule and the HHS Office for Civil Rights (OCR) has been delegated authority to receive complaints under these provisions. …
>
> Irrespective of the points made above … objecting individuals and grantees will not be required to counsel or refer for abortions in the Title X program in accordance with applicable federal law.

86 Fed. Reg. 56,153 (Oct. 7, 2021) (emphases added). So, despite having declined to analyze the Weldon Amendment, and despite indicating that "grantees will not be required to counsel or refer for abortions in the Title X program," *id.*, Defendants have now discontinued Oklahoma's funding because it declines to refer women for abortion. This is unlawful.

Put differently, under Title X Oklahoma must ensure that sub-grantees and recipients comply with all Title X regulations. *See* 86 Fed. Reg. at 56,152. Defendants' decision to suspend and terminate Oklahoma's Title X funding is based on Oklahoma's failure to comply with HHS's requirements in 42 C.F.R. § 59.5(a)(5). *See* Exh. 5 at 3. HHS contends that this regulation forbids Oklahoma from sub-granting to health care entities that will not refer for abortion. *Id.* at 5. This includes the County and City-County Partners that receive Oklahoma's Title X funding. But to comply with Defendants' regulation, Oklahoma is required to "discriminat[e] on the basis that the health care entity does not . . . refer for abortions," which is directly prohibited by the Weldon Amendment. 136 Stat. 49,496 § 507(d)(2). As such, Defendants' decision to suspend and terminate Oklahoma's Title X funding is based on HHS's requirement that Oklahoma comply with a regulation that violates federal law. Thus, Defendants' decision should be set aside under the APA for the separate and independent reason that HHS's action is premised on requiring a violation of federal law.

An alternative way of phrasing all this is to say that through the Weldon Amendment, Congress has made it clear that Title X is *not* ambiguous in regard to whether abortion referrals can be required of grantees. *Rust*, that is, cannot control an analysis of an

issue that did not yet exist when *Rust* was decided. Along these lines, it is important to observe that the Sixth Circuit in *Ohio* did not rule on any argument that the 2021 Rule violates the Weldon Amendment, because it was not raised by the parties in the briefing. *See* 87 F.4th at 774 n.8. The Sixth Circuit correctly observed, however, that "the 2021 Rule would seem to forbid states from subgranting to 'health care entities' who will not refer for abortion; that, in turn seems to force the States to 'discriminat[e] on the basis that the health care entity does not . . . refer for abortions,' the very thing the Weldon Amendment forbids." *Id.* The Sixth Circuit hinted, in other words, that the Weldon Amendment could change its precedent-based analysis of *Rust, Chevron*, and Title X. Therefore, this Court should find that HHS's decision to terminate Oklahoma's Title X funding violates federal law, specifically in light of the Weldon Amendment.

D. DEFENDANTS' DECISION TO TERMINATE OKLAHOMA'S TITLE X FUNDING EXCEEDS HHS'S STATUTORY AUTHORITY AND IS ARBITRARY AND CAPRICIOUS.

Here, Oklahoma challenges application of the 2021 Rule by HHS to terminate Oklahoma's Title X funding. Again, this is an as-applied challenge to the 2021 Rule.

1. Defendants' Termination of Oklahoma's Title X Funding Overstepped the Agency's Authority and is Not a Reasonable Interpretation.

Defendants' decision to terminate Oklahoma's Title X grant funding as a result of HHS's regulation purportedly requiring abortion counseling and referrals is not within the bounds of reasonable interpretation and is therefore in excess of the statutory authority granted by Congress. Agencies are required to follow governing statutes and regulations. In reviewing an agency's legal determinations, federal courts generally apply the analysis

set out in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), which consists of a two-step test. *Sinclair Wyo. Ref. Co. v. EPA*, 887 F.3d 986, 990 (10th Cir. 2017). At step one, courts consider "whether Congress has directly spoken to the precise question at issue." *Id.* (quotation omitted). At step two, if Congress has not directly spoken, courts ask whether an agency's interpretation is based on a permissible construction of the statute." *Id.* (citation omitted). The task is not to decide whether the agency's interpretation is the best interpretation, but whether it represents a reasonable one. *See Chevron*, 467 U.S. at 843-44.

Whether Title X funding provisions "include abortion as a method of family planning" was a point of debate while Congress considered Title X. 116 Cong. Rec. 37,375 (Nov. 16, 1970) (statement of Rep. Dingell). It was later clarified that "[n]one of the funds appropriated under this subchapter shall be used in programs where abortion is a method of family planning." 42 U.S.C. § 300a-6. Through this language, "committee members clearly intend[ed] that abortion is not to be *encouraged or promoted in any way* through" Title X. 116 Cong. Rec. 37375 (Nov. 16, 1970) (statement of Rep. Dingell) (emphasis added). "Programs which include abortion as a method of family planning are not eligible for funds allocated through this act." *Id.*

As described above, in *Rust* the Supreme Court held that HHS could permissibly prohibit abortion referrals, pursuant to a *Chevron* analysis. 500 U.S. at 186-87. The regulation considered by *Rust* was essentially the *opposite* of the regulation HHS has enforced against Oklahoma to strip Oklahoma's Title X funding here, though. Thus, while *Rust* recognizes that HHS can prohibit counseling and referrals for abortion services under

Title X, or could conceivably be agnostic or neutral with respect to requiring abortion counseling and referrals, HHS's application of 42 C.F.R. § 59.5(a) here goes too far—especially in light of the Weldon Amendment.

Although *Rust* recognized Title X was ambiguous on abortion referrals (under the first part of the *Chevron* analysis), Defendants may not resolve that ambiguity in the statute by *requiring* Title X grantees to make abortion counseling and referrals. The Weldon Amendment simply cannot be squared with such an approach. Using the current regulation to suspend and terminate Oklahoma's funding is inconsistent with federal law.[1]

Furthermore, Defendants' decision to terminate Oklahoma's Title X funding unreasonably interprets its own regulations. HHS's interpretation contradicts its other regulations requiring grantees to ensure that they will provide "family planning medical services" that are "allowable under *state* law." 42 C.F.R. § 59.5(b)(6) (emphasis added). HHS describes this as a requirement that must be met by a family planning project. *Id.* As set forth above, abortion counseling and referrals are not allowable under Oklahoma law. HHS cannot interpret its 2021 Rule to require Oklahoma to violate state law and then cancel Oklahoma's Title X funding when Oklahoma fails to do so.

On top of that, the same regulation requires grantees to:

> [p]rovide for coordination and use of referrals and linkages with primary healthcare providers, other providers of healthcare services, local health and

[1] Moreover, HHS's interpretation of the statute will be entitled to little or no deference if *Chevron* is overruled or significantly narrowed in the two cases currently pending before the Supreme Court where *Chevron*'s overruling is being considered. *See Loper Bright Enterprises, Inc. v. Raimondo*, Case No. 22-451, and *Relentless, Inc. v. Department of Commerce*, Case No. 22-1219. Defendants preserve their ability to argue for *Chevron*'s overruling, or for evaluating this case absent *Chevron* entirely.

> welfare departments, hospitals, voluntary agencies, and health services projects supported by other federal programs, *who are in close proximity to the Title X site*, when feasible, in order to promote access to services and provide a seamless continuum of care.

Id. § 59.5(b)(8) (emphasis added). Even if the Health Department could require subgrantees to make abortion referrals out of state under Oklahoma law, to do so would violate the requirement that referrals be given in close proximity to the Title X site. To be sure, the proximity requirement is only a requirement "when feasible." But it is not feasible to make referrals that are not permitted under Oklahoma law and that completely disregard the physical proximity requirement. Out of state travel is not something that is economically feasible for many recipients of Title X services, and the physical proximity requirement reflects this important reality. Simply disregarding the proximity requirement in all cases is not a viable option. As such, HHS's interpretation of its 2021 Rule to suspend and terminate Oklahoma's Title X funding exceeds HHS's statutory authority and ignores other requirements HHS placed on Oklahoma's Title X program.

2. Defendants' Termination Decision Was Arbitrary and Capricious.

Defendants' termination of Oklahoma's Title X funding was arbitrary and capricious. *See Olenhouse v. Commodity Credit Corp*., 42 F.3d 1560 (10th Cir. 1994). As part of this analysis, courts must "ascertain whether the agency examined the relevant data and articulated a rational connection between the facts found and the decision made" to determine "whether there [was] a clear error of judgment." *Id.* (citation omitted) "If the agency relied on factors which Congress has not intended for it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that

runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise" then an agency's action must be set aside. *Id*. (citation omitted).

Here, for reasons detailed above, Congress clearly intended its Title X funding *not* to go to promoting or performing abortions in any way, so Defendants' reliance on the lack of abortion referrals to strip Oklahoma of funding was arbitrary and capricious. Further, HHS failed to address important aspects of the problem since HHS did not consider the impact of requiring States where abortion is prohibited to comply with counseling and referral requirements. Defendants cannot point to any material in its administrative record where HHS has grappled with this important issue.

That is to say, HHS's application of its rule here was arbitrary and capricious because federalism concerns were overlooked. "[I]t is incumbent upon federal courts to be certain of Congress' intent before finding that a federal law overrides the usual constitutional balance of federal and state powers." *Bond v. U.S.*, 572 U.S. 844, 858 (2014) (citations omitted). Since the 2021 Rule was introduced, the Supreme Court has determined that abortion is not a constitutionally protected right and that issues concerning abortion must be returned to the people and their elected representatives. *Dobbs*, 597 U.S. at 231. While HHS may have found that there were no federalism implications at the time it implemented the 2021 Rule, *see* 86 Fed. Reg. 56,144, 56,168, there has been a paradigm shift on this issue. HHS's failure to consider this shift and the resultant federalism concerns at the time HHS suspended and terminated Oklahoma's Title X grant demonstrates that the decision was arbitrary and capricious. Oklahoma has exercised its sovereign right to ban

abortions and referrals for abortions. HHS either failed to think through these concerns prior to suspending and terminating Oklahoma's Title X grant, or it did think through them and capriciously decided to punish Oklahoma for its lawful exercise of sovereignty that is perfectly in accord with the language of Title X. *See* Complaint ¶¶ 34-35 (Defendant Becerra: Post-*Dobbs*, HHS will "double down and use every lever we have to protect access to abortion care.").

Defendants also failed to adequately consider the impact of its termination on patients and Oklahoma's ability to properly administer the Title X program in this State. HHS has consistently approved Oklahoma's Title X program. The Health Department's Title X program was last reviewed by HHS in 2016. At that time, HHS was "[o]verall. . . impressed with the dedication and commitment to family planning in both the central office staff as well as in the field." Exh. 2. The result of the Health Department's site visit by HHS was so positive that HHS did not schedule a return visit until January 2024—eight years later. Further, Oklahoma is heavily invested in providing services described in Title X, given Oklahoma's 40-year track record of administering the Title X program. And Oklahoma's citizens are heavily invested in receiving those services. *See supra*. HHS did not consider these important aspects before terminating Oklahoma's Title X funding.

Finally, in contradiction with the 2021 Rule's note—based on the Weldon Amendment—that "objecting . . . Title X grantees are not required to counsel or refer for abortions," 86 Fed. Reg. at 56,153, HHS shifted positions to require Oklahoma to refer for abortions and stripped our Title X funding when the Health Department could not do so.

This amounts to HHS "[s]hifting the regulatory goalposts without explanation," and is prohibited by the APA. *Fontem US, LLC v. FDA*, 82 F.4th 1207, 1222 (D.C. Cir. 2023).

3. *HHS Failed to Follow Proper Procedures*.

In deciding to suspend and terminate Oklahoma's Title X funding, HHS failed to follow proper procedures. Notice and comment requirements apply to substantive rules, or legislative rules, which are rules issued by agencies pursuant to statutory authority and which implement a statute, create new legal rights, and have the force and effect of law. *Sorenson Commc'n v. F.C.C.*, 567 F.3d 1215, 1222 (10th Cir. 2009); *New Mexico v. McAleenan*, 450 F. Supp. 3d 1130, 1180 (D.N.M. 2020). Thus, HHS's termination of Oklahoma's Title X funding amounts to a legislative rule that required notice and comment. HHS's failure to follow the correct procedural path also requires setting aside HHS's decision.

II. OKLAHOMA WILL SUFFER IRREPARABLE HARM IF AN INJUNCTION IS DENIED.

Oklahoma will suffer irreparable harm should an injunction not issue. Importantly, the grant funding for this next cycle, as far as Oklahoma is aware, will be sent or decided by April 1, 2024, making an injunction by that date critical.

Once this funding is distributed, Oklahoma will not likely be able to recoup the funds as monetary damages due to sovereign immunity. "An 'irreparable harm requirement is met if a plaintiff demonstrates a significant risk that he or she will experience harm that cannot be compensated after the fact by monetary damages.'" *Greater Yellowstone Coalition v. Flowers*, 321 F.3d 1250 (10thCir. 2003). Further, once

funding is distributed, there is no way for Oklahoma or the federal government to claw back distributions from entities that received funding. *See Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs*, 141 S. Ct. 2485, 2489 (2021) (indicating that risk of significant financial harm with no guarantee of eventual recovery constitutes irreparable harm). This loss of funding jeopardizes Oklahoma's ability to continue offering services through the Health Department and loss of its investment in translation and language services. Additional impacts include Oklahoma's ability to access the federal discount pharmacy program and potential loss to future grant funding that totals $541.2 million. *See* Exh. 1, ¶¶ 22-29. Each of these concerns favor issuance of a temporary injunction.

III. THE THREATENED INJURY TO OKLAHOMA EXCEEDS ANY POSSIBLE INJURY HHS COULD FACE.

The third element counseling in favor of issuing a temporary injunction is that the threatened injury to Oklahoma greatly exceeds any possible injury that HHS could face. Virtually no cognizable harm to HHS can be imagined, as an injunction would only preserve the status quo in effect before HHS terminated Oklahoma's funding in an arbitrary and capricious attack. And Defendants cannot rely on a lack of referrals for abortion as harm since, again, Title X expressly prohibits funding going to abortion. Further, no harm can result from issuing an injunction since HHS previously found that Oklahoma complied with program requirements and in good standing to receive and administer federal Title X funds during the current grant period. The very real injuries that Oklahoma has and will continue to sustain are greatly disproportionate to any harm that HHS might allege.

IV. THE REQUESTED INJUNCTION IS IN THE PUBLIC INTEREST.

Finally, a temporary injunction is appropriate since the requested injunction is in the public interest. Restoring Oklahoma's Title X funding *advances* the public interest by allowing the Health Department to continue to offer services as it historically has done. The public interest will also be advanced since, as recognized in *Dobbs*, regulation of "abortion must be returned to the people and their elected representatives." 597 U.S. at 215, 292. Oklahoma has exercised its right to determine policy on this issue. As such, the public interest will only be undercut by HHS's decision to suspend and terminate funding based on abortion concerns under a statute that expressly prohibits funding from going to programs promoting abortion.

CONCLUSION

For the foregoing reasons, this Court should grant Oklahoma's motion for a preliminary injunction and a stay under 5 U.S.C. § 705. Oklahoma respectfully requests this Court's resolution of the instant motion no later than April 1, 2024, to preserve Oklahoma's ability to benefit from a favorable decision or else seek appellate intervention prior to HHS's disbursement of Title X funds for 2024.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of January 2024, I electronically transmitted the foregoing document to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrant:

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