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15 **IN THE UNITED STATES DISTRICT COURT**  
**FOR THE NORTHERN DISTRICT OF CALIFORNIA**  
 16

17 **STATE OF CALIFORNIA, by and**  
**through ATTORNEY GENERAL**  
 18 **XAVIER BECERRA,**  
 19 Plaintiff,  
 20 v.  
 21 **ALEX AZAR, in his OFFICIAL**  
 22 **CAPACITY as SECRETARY of the U.S.**  
 23 **DEPARTMENT of HEALTH &**  
**HUMAN SERVICES; U.S.**  
 24 **DEPARTMENT of HEALTH &**  
**HUMAN SERVICES,**  
 25 Defendants.  
 26  
 27  
 28

3:19-cv-01184-EMC

***AMICI CURIAE* BRIEF OF THE STATES  
 OF OHIO, ALABAMA, ARKANSAS,  
 INDIANA, KENTUCKY (by and through  
 its Governor), LOUISIANA,  
 OKLAHOMA, SOUTH CAROLINA,  
 SOUTH DAKOTA, and TEXAS  
 OPPOSING INJUNCTION**

Administrative Procedure Act Case

Date: April 18, 2019  
 Time: 12:30 p.m.  
 Dept: Courtroom 5, 17<sup>th</sup> Floor  
 Judge: Hon. Edward M. Chen  
 Trial Date: Not set  
 Action Filed: March 4, 2019

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## INTRODUCTION AND STATEMENT OF AMICI INTEREST

Ohio and other *amici* states participate in Title X programs, partnering with the federal government to provide family-planning services and related healthcare to their residents. These States fully support Title X’s mission. The States therefore support administrative regulations that fulfill that mission by following Congress’s mandates.

At the same time, the *amici* states share many of their citizens’ growing concerns about providing government support to entities with links to abortion. That is why Ohio law, for example, makes entities that provide abortions, or that are affiliated with entities that do, ineligible for funding under certain public-health programs—programs that are outside of, but similar to, Medicaid and Title X. *Planned Parenthood of Greater Ohio v. Hodges*, No. 16-4027, 2019 U.S. App. LEXIS 7200 (6th Cir. 2019) (en banc) (per Sutton, J.). Many other States have similar laws designed to ensure that public funds never make their way to abortion providers. These various laws are comparable to Title X itself, which likewise prohibits the use of its funds “in programs where abortion is a method of family planning.” 42 U.S.C. § 300a-6.

The new Title X regulations support Title X’s mission—including its express command not to use Title X funds in furtherance of abortion. And the new rules accomplish this while continuing to honor the desire of many citizens in the *amici* States (and in California, for that matter) to avoid any involvement with abortion. That is why the *amici* States are filing this brief in support of the United States. This brief will not address all the statutory arguments supporting the new regulations; the federal government will ably handle that. Instead, this brief focuses on two important-yet-underappreciated considerations supporting HHS’s “reasoned explanation” for the rule change. *See F.C.C. v. Fox Television Stations*, 556 U.S. 502, 515 (2009). *First*, the new rules help preserve broad support for Title X by keeping a healthy distance between the consensus supporting family-planning services and the controversy over abortion. Without the new rules, public confusion regarding Title X’s link to abortion will erode support for the law’s uncontroversial and statutorily permissible applications. *Second*, because the new rules ensure that

1 funds will be spent only on programs for which there is consensus support, they promote the intrinsic,  
2 democratic interest in governing in a manner that the largest number of people can get behind.

3 The *amici* States address one other point, too—the appropriate remedy if this Court holds that  
4 the new rules are invalid. California asks for a national injunction. So do the California-based private  
5 plaintiffs in the related case. But neither California nor the private plaintiffs offer a sound reason to enjoin  
6 the new rules in Ohio or in other States that welcome the updated regulations. Courts are beginning to  
7 express “uncertainty about the propriety of universal injunctions.” *E. Bay Sanctuary Covenant v. Trump*,  
8 909 F.3d 1219, 1255 (9th Cir. 2018); *see also Trump v. Hawaii*, 138 S. Ct. 2392, 2424–29 (2018) (Thomas,  
9 J., concurring); Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 Harv. L. Rev.  
10 417, 425 (2017). But even assuming national injunctions are ever appropriate, such relief is not appropri-  
11 ate here. What business does California or any of the California-based private plaintiffs have suing to  
12 block the new regulations thousands of miles away? Surely they cannot show that *they* will be irreparably  
13 harmed by the application of the new rules in the *amici* States. What is more, to the extent other States  
14 or private groups and individuals share California’s view of the new rules’ validity, they can sue in their  
15 home venues to make the new rules inapplicable there. There is no good reason why one court should  
16 decide the issue for an entire nation.

## 17 ARGUMENT

### 18 I. The new regulations better promote Title X’s mission by separating the controversy over 19 abortion from the consensus support for funding family-planning services.

20 Americans disagree passionately about abortion. But they can all agree that abortion has long been  
21 among the country’s most divisive issues. These opposing views make public expenditure in support of  
22 abortion highly controversial. And as a result, the federal and most state governments avoid funding the  
23 practice. *See Rust v. Sullivan*, 500 U.S. 173, 201–02 (1991); *Harris v. McRae*, 448 U.S. 297, 315–17 (1980);  
24 *Maher v. Roe*, 432 U.S. 464, 474 (1977). To be sure, some States (including California) provide such  
25 funding. And many advocates would like to see more public funding. But the broader national consensus  
26



1 against funding elective abortion remains. *See* Pub. L. No. 115-31, §§ 613–14, 131 Stat. 135, 372 (2017)  
2 (barring certain federal funds from elective abortion).

3 Title X reflects this consensus. Since its 1970 enactment, the law has funded *non-abortion* family  
4 planning. All the while, it has banned the use of Title X funds “in programs where abortion is a method  
5 of family planning.” 42 U.S.C. § 300a-6. Needless to say, HHS’s regulations must adhere to this con-  
6 gressional mandate.

7 Here, HHS explained that it updated the rules to better satisfy Congress’s mandate—and con-  
8 cerned citizens’ expectations. 84 Fed. Reg. 7714 (Mar. 4, 2019). It thus offered “reasoned explanations”  
9 for the policy change, and the change is therefore not “arbitrary and capricious” in violation of the Ad-  
10 ministrative Procedure Act. *F.C.C. v. Fox Television Stations*, 556 U.S. 502, 515 (2009). California is  
11 mistaken to insist otherwise. *See* California PI Mot. at 15–16; 5 U.S.C. § 706(2)(A).

12 Strict separation of Title X funding and abortion serves two important purposes that are of par-  
13 ticular interest to the *amici* States, and thus a focus of this brief. *First*, strict separation preserves public  
14 support for Title X by preventing it from becoming associated with abortion. *Second*, strict separation  
15 advances the federal government’s interest in adopting policies that large numbers can support. The new  
16 rules better promote these two interests because they better promote Title X’s mandate to segregate  
17 abortion services and Title X programs. Part B elaborates on that point. But first, Part A puts the new  
18 rules in historical context. That context illustrates that the rules function in much the same way as earlier  
19 regulations that the Supreme Court already upheld.

20 **A. The new regulations largely restore the regulatory scheme that the Supreme Court upheld**  
21 **as a valid implementation of Title X in *Rust v. Sullivan*.**

22 Title X bans recipients from using its funds “in programs where abortion is a method of family  
23 planning.” 42 U.S.C. § 300a-6. It always has. *See* Family Planning Services and Population Research  
24 Act of 1970, Pub. L. 91-572 § 6(c), 84 Stat. 1504, 1508 (1970). Over the years, HHS has repeatedly  
25 changed its regulatory approach to enforcing this congressional mandate.

1           Begin in 1988, when HHS issued regulations similar to those now at issue. It took this step be-  
2 cause it determined that the pre-1988 regulations had failed to “preserve the distinction between Title X  
3 programs and abortion as a method of family planning.” 53 Fed. Reg. 2922, 2923–24 (Feb. 2, 1988). To  
4 better promote that distinction, the agency adopted new rules that, among other things, barred recipients  
5 from making abortion referrals and *required* recipients to maintain a strict financial and physical separa-  
6 tion between their non-abortion services and their abortion services (if indeed they provided any).

7           The Supreme Court, in *Rust v. Sullivan*, determined that these regulations properly enforced Ti-  
8 tle X, and thus upheld them against regulatory challenges. 500 U.S. 173, 191 (1991). It upheld them  
9 against constitutional challenges too, rejecting free-speech and Due Process Clause arguments. *Id.* at  
10 192–200, 201–13.

11           The regulations did not last. In 1993, just two weeks into a new administration, the agency re-  
12 scinded the just-upheld regulations after determining that they would “inappropriately restrict grant-  
13 ees.” 58 Fed. Reg. 7462 (Feb. 5, 1993). The agency settled on a new tack, which it promulgated through  
14 interim rules. Once finalized in 2000, those rules required grantees to provide “information and coun-  
15 seling regarding” abortion, and required grantees to provide this information in “nondirective” terms.  
16 42 C.F.R. § 59.5(a)(5)(i-ii) (July 3, 2000). In essence, the HHS replaced the ban on abortion referrals  
17 with its polar opposite. HHS justified this requirement by claiming that the *Rust*-approved rules had not  
18 been shown to work (even though they were in effect for just a short time), and that grantees preferred  
19 looser restrictions. Specifically, HHS said the looser rules were “generally acceptable to the grantee  
20 community, in contrast to” the rules that *Rust* upheld. Those standards, HHS said, “were generally  
21 unacceptable to the grantee community.” 65 Fed. Reg. 41,270, 41,271 (Jul. 3, 2000).

22           The regulations HHS promulgated in 2000 remain in effect. The agency’s new rules will soon  
23 displace them, however. These new rules—which largely mirror the 1988 rules that *Rust* upheld—differ  
24 from the current rules both in the procedure by which they were adopted and their substance. Begin with  
25 the procedural difference. In 1993, just days after the new administration entered office, HHS rescinded  
26

1 the rules that *Rust* had upheld. Here, in contrast, HHS worked on the issue for significantly longer, an-  
2 nouncing its proposed rules only on June 1, 2018. 83 Fed. Reg. 25502 (June 1, 2018). HHS followed  
3 notice and comment procedures before any immediate action, and has now issued the updated regula-  
4 tions, explaining its reasons for the changes. 84 Fed. Reg. 7714 (Mar. 4, 2019).

5 The substantive differences between the current rules and the new ones are more relevant to this  
6 case. HHS sought to better comply with Title X’s text, and with the expectation of citizen taxpayers, by  
7 clearly segregating abortion services and Title X funds. *Id.* at 7714–15. In its own words, the new rules  
8 “will ensure compliance with, and enhance implementation of, the statutory requirement that none of  
9 the funds appropriated for Title X may be used in programs where abortion is a method of family planning  
10 and related statutory requirements.” *Id.* at 7714. How? For one thing, by eliminating the requirement  
11 that Title X recipients make abortion referrals, and replacing it with a rule that permits (but does not  
12 require) non-directive consulting about the availability of abortion. *Id.* at 7716–17. For another, by re-  
13 quiring Title X recipients to maintain stricter physical and financial separation between abortion services  
14 and programs that spend Title X money. *Id.* at 7763–77; 42 C.F.R. § 59.15. The new rule says that “to  
15 be physically and financially separate, a Title X project must have an objective integrity and independence  
16 from prohibited activities. Mere bookkeeping separation of Title X funds from other monies is not suffi-  
17 cient.” 42 C.F.R. § 59.15.

18 HHS will review programs for “objective integrity” based on factors listed in the rule:

- 19 (a) The existence of separate, accurate accounting records;
- 20 (b) The degree of separation from facilities (*e.g.*, treatment, consultation, examination and waiting  
21 rooms, office entrances and exits, shared phone numbers, email addresses, educational ser-  
22 vices, and websites) in which prohibited activities occur and the extent of such prohibited ac-  
23 tivities;
- 24 (c) The existence of separate personnel, electronic or paper-based health care records, and work-  
25 stations; and
- 26

1 (d) The extent to which signs and other forms of identification of the Title X project are present,  
2 and signs and material referencing or promoting abortion are absent.

3 42 C.F.R. § 59.15.

4 Together, these requirements “protect against the unintentional commingling of Title X re-  
5 sources with non-Title X resources of programs.” 84 Fed. Reg. at 7715. Preventing such comingling is  
6 necessary to give effect to Congress’s prohibition on using Title X funds “in programs where abortion is  
7 a method of family planning.” 42 U.S.C. § 300a-6. And by addressing “the potential for ambiguity be-  
8 tween approved Title X activities and non-Title X activities and services,” the new rules eliminate what  
9 would otherwise be the “significant risk” of “public confusion over the scope of Title X services, includ-  
10 ing whether Title X funds are allocated for, or spent on, non-Title X services, including abortion.” 84  
11 Fed. Reg. at 7715.

12 The agency additionally supported its financial-and-physical-separation rule by citing numerous  
13 sources illustrating the failure of the current rule to support Congress’s mandate. Those sources showed  
14 that, “under the current arrangement, it is often difficult for patients, or the public, to know when or  
15 where Title X services end and non-Title X services involving abortion begin.” 84 Fed. Reg. at 7764.  
16 “Even with the strictest accounting . . . , a shared facility greatly increases the risk of confusion.” *Id.* The  
17 agency noted that this concern sharpened over the years because abortion was increasingly being per-  
18 formed in “nonspecialized clinics”—in other words, clinics that focus on non-abortion services (such as  
19 Title X contraception services) but that also provide abortions. *Id.* at 7765. HHS noted that “[a]ccording  
20 to the Guttmacher Institute, nonspecialized clinics accounted for 24% of all abortions in 2008, 31% in 2011,  
21 and 36% in 2014.” *Id.* (citations omitted). That increased the likelihood of confusion about whether Title  
22 X supported abortion services.

**B. Strictly segregating Title X funds and abortion is critical for preserving public support for the otherwise-popular program, and for reflecting the values and policy preferences of millions of Americans coast to coast.**

The new rules strictly segregate Title X funding and abortion services. These rules are valuable both instrumentally and intrinsically. Their instrumental value lies in preventing “public confusion” regarding Title X’s connection to abortion. If people begin to suspect that Title X is funding abortion even indirectly, the program will lose public support. The new rules stop that loss of support. The rules’ intrinsic value is that they can gain broad support in a pluralistic country made up of millions of individuals with radically different views. In a representative democracy like ours, a law that can gain wide support is, all else equal, better than one that cannot. Since nearly everyone can get behind Title X so long as it has no connection to abortion, the revised rules promote this democratic ideal.

California’s brief fails to appreciate either point—perhaps because it fails to appreciate the concerns of citizens who do not share its views of the issue. This brief aims to fill the gap.

1. Because many citizens oppose abortion, federal and state laws have long banned the public funding of abortion facilities and services. See *Harris*, 448 U.S. at 315-17; *Maher*, 432 U.S. at 474. For millions of Americans, these laws do not go far enough. For one thing, money is fungible. Thus, giving money to abortion providers for purposes unrelated to abortion is often no different from funding abortion itself; if the government doles out \$100 to spend on STD tests, an abortion provider can accept the money, buy the tests, and use \$100 that it would have spent on the same tests to support its abortion services. See *Holder v. Humanitarian Law Project*, 561 U.S. 1, 31 (2010). In addition to their concern with fungibility, many Americans believe that prohibitions on direct funding do too little to express a legitimate policy preference against government-endorsed elective abortion. These citizens believe that permitting abortion providers or advocates to participate in providing a government-funded service implies a public imprimatur on abortion—an imprimatur that citizens legitimately seek to withhold. See *Planned Parenthood*, 2019 U.S. App. LEXIS 7200 at \*4.

1           The fungibility and public-imprimatur concerns led many citizens to call for laws putting a greater  
2 distance between public funding and abortion-performing entities. Their representatives listened, and  
3 passed laws doing just that. Ohio, for example, enacted a law barring public funds under several non-  
4 Title X programs from going to entities affiliated with abortion providers. This law is designed to “pro-  
5 mote childbirth over abortion, to avoid ‘muddl[ing]’ that message by using abortion providers as the face  
6 of state healthcare programs, and to avoid entangling program funding and abortion funding.” *Id.* at \*4  
7 (citing Ohio’s brief at 39–41). In upholding the law, the en banc Sixth Circuit, in an opinion by Judge  
8 Sutton, recognized the validity of Ohio’s interest: “Governments generally may do what they wish with  
9 public funds,” so they may “subsidize some organizations but not others and [] condition receipt of public  
10 funds on compliance with certain obligations.” *Id.* at \*6 (citing *Rust*, 500 U.S. at 192–94). So when a  
11 State’s citizens do not wish to promote abortion, that State may choose not to spend its citizens’ money  
12 doing so. *See id.* The Sixth Circuit’s en banc ruling thus establishes the legitimacy of, and confirms the  
13 desire for, laws putting a greater distance between public funds and abortion.

14           Ohio is not alone. In 2011, Indiana enacted a law providing that state agencies “may not[] enter  
15 into a contract with, or make a grant to, any entity that performs abortions or maintains or operates a  
16 facility where abortions are performed,” other than hospitals and ambulatory surgical centers. The same  
17 law cancelled existing contracts with covered abortion providers. *Planned Parenthood of Ind., Inc. v.*  
18 *Comm’r of the Ind. State Dep’t of Health*, 699 F.3d 962, 969–70 (7th Cir. 2012). Arizona passed a similar  
19 law in 2012, barring state agencies and subdivisions from entering family-planning services contracts with,  
20 or awarding family-planning services grants to, any person performing “nonfederally qualified abortions”  
21 or maintaining or operating a facility in which those abortions were performed. *Planned Parenthood Ariz.,*  
22 *Inc. v. Betlach*, 727 F.3d 960, 964 (9th Cir. 2013). The pace of such laws is increasing: the Guttmacher  
23 Institute reports that, while State have sought for decades to bar family-planning funds from going to  
24 those who perform abortions or even referrals or counseling, at least eighteen States adopted new fungi-  
25 bility-based restrictions between 2011 and 2016. *See* “Fungibility”: The Argument at the Center of a 40-

1 Year Campaign to Undermine Reproductive Health and Rights at [www.guttmacher.org/gpr/2016/10/fungibility-argument-center-40-year-campaign-undermine-reproductive-health-and-rights](http://www.guttmacher.org/gpr/2016/10/fungibility-argument-center-40-year-campaign-undermine-reproductive-health-and-rights).

3        These laws do not even count the executive actions terminating funding. Between 2015 and 2016,  
4 officials in Arkansas, Kansas, and Utah all sought to terminate funding for non-abortion services to  
5 Planned Parenthood affiliates. *See Doe v. Gillespie*, 867 F.3d 1034, 1037–38 (8th Cir. 2017) (Arkansas);  
6 *Planned Parenthood of Kan. & Mid-Mo. v. Anderson*, 882 F.3d 1205, 1212–14 (10th Cir. 2018) (Kansas);  
7 *Planned Parenthood Ass’n of Utah v. Herbert*, 828 F.3d 1245 (10th Cir. 2016) (Utah). And in 2015, the  
8 Louisiana Department of Health and Hospitals terminated Planned Parenthood of Gulf Coast’s Medicaid  
9 provider agreements, apparently in response to concerns related to particular aspects of Planned  
10 Parenthood’s abortion practices. It canceled these agreements even though Planned Parenthood claimed  
11 also to be providing various public-health services, including pregnancy testing and counseling, contra-  
12 ception and contraceptive counseling, testing and treating specified sexually transmitted diseases, and  
13 more. *Planned Parenthood of Gulf Coast, Inc. v. Gee*, 862 F.3d 445, 450–52 (5th Cir. 2017), *cert. denied*, 139  
14 S. Ct. 408 (2018).

15        These laws and executive acts have no direct bearing on Title X; each involves a change to a pro-  
16 gram receiving no Title X funds. They are nonetheless significant because they reflect a common, con-  
17 crete reality: many Americans are concerned that public family-planning funding or other public-health  
18 funding is linked to abortion. Even the *impression* that a law steers money to abortions can stir intense  
19 voter passion. In 2010, an advocacy group in Ohio “issued a press release announcing its plan to ‘edu-  
20 cat[e] voters that their representative voted for a health care bill that includes taxpayer-funded abor-  
21 tion.’” The same group “sought to display a billboard in [a representative’s] district condemning that  
22 vote.” *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 153–54 & n.2 (2014). The public’s concerns may  
23 be based on the fungibility of funds. They may rest on a desire to withhold the government’s “stamp of  
24 approval” for organizations connected to abortion. But whatever motivates these concerns, there is no  
25 doubt they are deeply held and here to stay. The many laws and executive actions discussed above leave  
26 no doubt about that.

1           2. All of this matters to Title X. Many Americans—perhaps a hundred million or more —do not  
2 want their money going to fund abortions, directly or indirectly. If Title X provides such funding, or  
3 *appears to* provide such funding, support for the program will erode. HHS properly accounted for that.

4           The updated rules, once implemented, will assure concerned citizens that their tax money is fol-  
5 lowing Title X’s mandate and not being “used in programs where abortion is a method of family plan-  
6 ning.” 42 U.S.C. § 300a-6. They will also address distinct citizen concerns. The enhanced financial-  
7 separation requirement addresses concerns about fungibility of funds. Higher figurative walls between  
8 any entity’s Title X funds and abortion-related funds ensure that no indirect subsidy occurs. The physi-  
9 cal-separation requirement addresses the “imprimatur” or approval concern, as it assures citizens that  
10 their Title X dollars are not indirectly supporting abortions by attracting patients to a facility that per-  
11 forms abortions on the other side of a literal wall. These assurances ultimately help to preserve and pro-  
12 mote public support for Title X itself. That support might be threatened if the strong, continued senti-  
13 ment against abortion combines with a growing concern that Title X funds abortion indirectly. Keeping  
14 Title X funds far away from abortion ensures that the consensus support for Title X is not eroded by any  
15 connection to the controversial practice of abortion.

16           The agency recognized all this. As explained above, *see above* 6–7, HHS explained how the previ-  
17 ous administrative regime did not adequately reassure citizens of the separation they expect, and that  
18 Congress’s mandate requires. The new rules do.

19           3. The agency’s new rules are important for another reason: they reflect the virtues of govern-  
20 ment of the People, by the People, for the People. California speaks as though the federal government  
21 could please everyone by simply giving the States block grants through Title X and allowing them to send  
22 that money to whomever they wish. But as the above shows, that is wrong. Many American do not want  
23 to fund abortion, and the block-grant model would force them to do so.

24           Most people, whether they are pro-life or pro-choice or neither, support funding family-planning  
25 services *unrelated to* abortion. The new rules assure the public that Title X will continue providing that  
26 support, but that it will do so without indirectly supporting abortion. For example, the new rules bar  
27



1 recipients from making abortion referrals, in contrast to the old rules which *required* referral. The rules  
2 will no longer require “nondirective pregnancy counseling” (though they will permit it). The rules will  
3 also encourage family participation in family-planning decisionmaking, and will require training regarding  
4 compliance with State and local sexual-abuse reporting requirements. 84 Fed. Reg. at 7715–18. These  
5 and other changes reflect (in addition to Congress’s mandate) the consensus position that public funding  
6 for services unrelated to abortion is appropriate, while keeping the government from funding abortion  
7 even indirectly.

8         The new rules are hardly unique in funding priorities that can achieve greater consensus. Indeed,  
9 funding limits of this sort are quite common. Voters may, through their representatives, sometimes fund  
10 “all comers” in a certain category. But they may do the opposite too, even in areas that touch on consti-  
11 tutional rights. Thus, for example, the federal government may issue grants to promote art projects that  
12 are consistent with the “general standards of decency and respect for the diverse beliefs and values of the  
13 American public.” 20 U.S.C. § 954(d)(1); *see also Nat’l Endowment for the Arts v. Finley*, 524 U.S. 569,  
14 580 (1998). In a pluralistic society, it is fully appropriate for a government to spend its taxpayers’ money  
15 on art that many will deem worthy of funding—and not, for example, a photograph of a crucifix sub-  
16 merged in urine. *See Finley*, 524 U.S. at 574. Supreme Court precedent further establishes that when a  
17 government elects to fund education, it may elect not to fund religious studies if many of its citizens object  
18 to the public funding of religious training. *Locke v. Davey*, 540 U.S. 712, 720–22 (2004). The fact of the  
19 matter is that funding decisions require policy choices. In a constitutional democracy, one reasonable  
20 way to make such choices is to fund the projects that can gain broad support.

21         California’s brief seems to rest on an assumption that pro-life views, despite being shared by mil-  
22 lions in and outside of its borders, are illegitimate—and that the federal government may not accommo-  
23 date or advance such views. The Supreme Court disagrees. The very same case that created the modern  
24 abortion-rights framework acknowledged that States may pass legislation to “express profound respect  
25 for the life of the unborn.” *Planned Parenthood v. Casey*, 505 U.S. 833, 877 (1992) (plurality op.). The  
26 federal government may likewise “use its voice and its regulatory authority to show its profound respect

1 for the life within the woman.” *Gonzales v. Carhart*, 550 U.S. 124, 157 (2007). The federal ban on partial-  
2 birth abortion serves precisely that purpose: it bans a gruesome procedure, “‘disturbing’” in its “‘simi-  
3 larity to the killing of a newborn infant,’” because the procedure is “laden with the power to devalue  
4 human life” and “implicates additional ethical and moral concerns that justify a special prohibition.” *Id.*  
5 at 158 (citation omitted). If the federal government can pass laws to prevent the devaluation of human  
6 life, so can the States. They can do so by declining to fund elective abortions, *Harris*, 448 U.S. at 315-17  
7 and *Maher*, 432 U.S. at 474, or by ensuring that non-abortion funding is insulated from abortion activities,  
8 *Rust*, 500 U.S. at 201–02. Or they may do so by cutting abortion providers off from state funds altogether.  
9 *See Planned Parenthood*, 2019 U.S. App. LEXIS 7200 at \*3, 20–21.

10 If the People can ban entire procedures in order to express their preference for life, surely they  
11 can also take the much smaller step of ensuring that abortions do not happen on their dime, or with seem-  
12 ing public approval.

13 4. Critically, the new rules will serve these instrumental and intrinsic purposes without posing  
14 any threat to the vitality of Title X programs. We know this because many States administer their own  
15 public-health programs without funding abortion providers. *See above* 8–10. And we also know this be-  
16 cause many States administer Title X programs themselves, they do so effectively, and they do so without  
17 providing abortions. This confirms that there is no necessary connection between the success of Title  
18 X’s family-planning mission and the comingling of abortion and Title X funds.

19 To understand this, start with the fact that it is unusual for a State to rely heavily on private parties  
20 to provide Title X-funded services. Most Title X funds go to fund services at state agencies and county  
21 health departments. *See* Title X Family Planning Directory at [https://www.hhs.gov/opa/sites/default](https://www.hhs.gov/opa/sites/default/files/Title-X-Family-Planning-Directory-December2018.pdf)  
22 [/files/Title-X-Family-Planning-Directory-December2018.pdf](https://www.hhs.gov/opa/sites/default/files/Title-X-Family-Planning-Directory-December2018.pdf) (last visited April 4, 2019); *see also* Title X  
23 Family Planning Service Grants Award by State at [https://www.hhs.gov/opa/grants-and-funding/recent](https://www.hhs.gov/opa/grants-and-funding/recent-grant-awards/index.html)  
24 [-grant-awards/index.html](https://www.hhs.gov/opa/grants-and-funding/recent-grant-awards/index.html) (last visited April 4, 2019). Several States have laws that express a preference  
25 that Title X funds be prioritized for public entities, even if it is possible for leftover funds to be subgranted  
26 to private organizations. *See, e.g.*, Kan. Stat. Ann. § 65-103b; Ky. Rev. Stat. Ann. § 311.715; Wis. Stat.

1 § 253.07(5)(a). These public programs of course provide no abortion services. They are nonetheless able  
2 to serve the public by providing precisely the services that Title X is designed to fund.

3 Other States do not subgrant federal Title X funds to private parties *at all*. Consider, for example,  
4 the State of Alabama. The State Department of Public Health is the sole Title X grantee in Alabama. See  
5 Title X Family Planning Directory at [https://www.hhs.gov/opa/sites/default/files/Title-X-Family-](https://www.hhs.gov/opa/sites/default/files/Title-X-Family-Planning-Directory-December2018.pdf)  
6 [Planning-Directory-December2018.pdf](https://www.hhs.gov/opa/sites/default/files/Title-X-Family-Planning-Directory-December2018.pdf) (last visited April 4, 2019). It uses Title X funds to support more  
7 than 80 health centers across the state, all of which are operated by state and local county health depart-  
8 ments. *See id.* These local health centers provide contraceptive services, pelvic exams, screening for  
9 STDs, infertility services, and health education. The Department’s 2019 grant award is over \$5,000,000,  
10 which it will use to provide services to roughly one hundred thousand people. *See* Title X Family Planning  
11 Service Grants Award by State at [https://www.hhs.gov/opa/grants-and-funding/recent-grant-awards](https://www.hhs.gov/opa/grants-and-funding/recent-grant-awards/index.html)  
12 [/index.html](https://www.hhs.gov/opa/grants-and-funding/recent-grant-awards/index.html) (last visited April 4, 2019).

13 Finally, some States that subgrant Title X funding to private organizations already do so subject  
14 to state laws that mirror the challenged regulations. At least thirteen States—Arizona, Arkansas, Colo-  
15 rado, Indiana, Iowa, Louisiana, Michigan, Mississippi, Missouri, North Carolina, Ohio, Texas, and Wis-  
16 consin—have laws that also prevent federal pass-through family planning funds from being used to pay  
17 for abortions. *See* Ariz. Rev. Stat. Ann. § 35-196.02; Colo. Rev. Stat. Ann. § 25.5-3-106; La. Rev. Stat.  
18 § 40:1061.6; Iowa Code Ann. § 217.41B; Miss. Code. Ann. § 41-41-91; Mich. Comp. Laws Ann.  
19 § 400.109a; Mo. Ann. Stat. § 188.205; N.C. Gen. Stat. Ann. § 143C-6-5.5; Ohio Rev. Code § 5101.56;  
20 Tex. Health & Safety Code Ann. § 32.005; Wis. Stat. Ann. § 20.927. Several of these States have further  
21 restricted family-planning funds from any organizations that provide abortion, that contract with abortion  
22 providers, or that refer patients to get abortions. *See* Ark. Code Ann. § 20-16-1602; La. Rev. Stat.  
23 § 49:200.51; Ind. Code Ann. § 5-22-17-5.5; Wis. Stat. Ann. § 253.07(5). The upshot is that the challenged  
24 regulations will help—not hinder—these States administer Title X programs.

25 \* \* \*

1 In a country of more than 300 million people, no one gets his way all the time. Everyone has to  
2 compromise a bit. Title X reflects that compromise, by funding the services that large number of Amer-  
3 icans support while withholding that funding from services that large numbers oppose. The new federal  
4 rules promote that compromise, by helping to ensure that Title X provides no direct or indirect funding  
5 to abortion services. In so doing, the rules merely respect Congress’s promise from 1970, which perhaps  
6 will finally be met.

7 **II. Any potential injunction should be limited to California and should not be imposed on the**  
8 ***amici* States.**

9 If the Court does enjoin HHS’s new rules, it should limit its injunction to California. California  
10 seeks a nationwide injunction, but there is no good reason to award one here.

11 The first problem with California’s request is that it is doubtful district courts have any authority  
12 to award such relief. The Ninth Circuit recently recognized the “uncertainty” surrounding the propriety  
13 of nationwide injunctions. *E. Bay Sanctuary Covenant*, 909 F.3d at 1255. As Justice Thomas explained in  
14 a concurrence last year, such injunctions are a relatively recent development unrelated to traditional un-  
15 derstandings of jurisdiction and equity. *Trump*, 138 S. Ct. at 2424–29 (Thomas, J., concurring). Recent,  
16 widely read scholarship supports this skepticism. *See Bray, Multiple Chancellors: Reforming the National*  
17 *Injunction*, 131 Harv. L. Rev. at 425.

18 But assume that national injunctions can be appropriate in some cases. Even then, there is no  
19 reason to award such relief here. California wants relief for California and its citizens. That is why Cali-  
20 fornia supports its request for an injunction with evidence of alleged harms that *California and its citizens*  
21 will suffer if the law is not enjoined *with respect to California*. *See, e.g.*, Calif. Mot. at 2–3, 7 (discussing  
22 California providers). It has no cognizable interest in the new regulations’ application to Ohio or any  
23 other State. Certainly it will not suffer “irreparable harm” if the new regulations are allowed to go into  
24 effect halfway or all the way across the continent. Rule 65 requires injunctions to be tailored to address  
25 the situation at hand, and go no further than needed. California has not, and cannot, show that it needs a  
26 nationwide injunction to prevent itself or its citizens from being injured.

1 The California-only grantees in the related matter cannot show that *they* need a nationwide in-  
2 junction either. They speculate that HHS *might* redirect funds away from states where the new rules are  
3 enjoined. Assuming for the sake of argument that such speculation could support an injunction, this  
4 Court can prevent HHS from redirecting funds away from the plaintiffs in a California-specific injunction.  
5 So that concern does not justify imposing an injunction that applies throughout the entire country.

6 On top of this, the *amici* States *support* the updated regulations; they do not want to assist in the  
7 funding of entities linked to abortion. What interest does California have in forcing its values upon Ohio?  
8 To be sure, people and entities *in Ohio* may have an interest in enjoining the new regulations' operation  
9 in that State. But if they do, they can sue in Ohio to achieve that result. The same goes for the other  
10 *amici* States. For proof, look no further than Washington, Oregon, and Maine, where suits identical to  
11 this one are pending already. Indeed, to the extent that universal injunctions might be urged to avoid  
12 “multiplicity of suits,” *Trump*, 138 S. Ct. at 2427 (Thomas, J., concurring) (citing Bray, *Multiple Chan-*  
13 *cellors*, 131 Harv. L. Rev. at 426), that rationale cuts against that practice here. Multiple cases already  
14 exist, so a nationwide injunction here risks conflict with the outcomes in those cases.

15 Beyond that, the availability of nationwide injunctions in cases like this one, where there is no  
16 pressing need for national uniformity, creates the potential for forum shopping. This is not to say that  
17 any party to this case *is* forum shopping—certainly California has all the right in the world to sue in Cali-  
18 fornia. But if courts set a precedent of awarding nationwide injunctions, they will give advocates great  
19 incentive to structure their litigation strategies to pick out what they perceive to be the most favorable  
20 fora to obtain invalidation of whatever federal law they dislike. “Few exercises of the judicial power are  
21 more likely to undermine public confidence in the neutrality and integrity of the Judiciary than one which  
22 casts the Court in the role of a Council of Revision, conferring on itself the power to invalidate laws at the  
23 behest of anyone who disagrees with them.” *Arizona Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125,  
24 145–46 (2011). That is precisely the role that courts assume when they issue national injunctions in case  
25 where narrower relief will suffice.

**CONCLUSION**

For the above reasons, the amici States urge the Court to deny California’s request for a preliminary injunction, or alternatively, to limit any injunction to California.

**RESPECTFULLY SUBMITTED** this 8th day of April, 2019.

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**CERTIFICATE OF SERVICE**

I hereby certify that on April 8, 2019 I filed the foregoing document with the Clerk of the Court by CM/ECF, which automatically sends notice of the filing to all counsel of record.

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