Case No. 19-35394

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STATE OF WASHINGTON, et al., Plaintiffs-Appellees, v. ALEX M. AZAR II et al., Defendants-Appellants	:	On Appeal from the United States District Court Eastern District of Washington

NATIONAL FAMILY PLANNING & REPRODUCTIVE HEALTH ASSOCIATION, et al., Plaintiffs-Appellees, v. ALEX M. AZAR II et al., Defendants-Appellants	:	On Appeal from the United States District Court Eastern District of Washington

BRIEF OF *AMICI CURIAE* OHIO AND 12 OTHER STATES IN SUPPORT OF DEFENDANTS-APELLANTS AND REVERSAL

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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.

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 affiliate 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*, 917 F.3d 908, 910 (6th Cir. 2019) (en banc). Many other States have similar laws designed to ensure that public funds never make their way to abortion providers.

Title X is supposed to work in much the same way as these state laws. It prohibits its funds from being "used in programs where abortion is a method of family planning." 42 U.S.C. §300a-6. In the past, however, Health and Human Services has failed to meaningfully enforce this prohibition. The new rules will change that: they will ensure that Title X funds are not used to fund or promote abortion, even indirectly. That comports with Congress's command in §300a-6. It is also consistent with many citizens' concerns regarding government-funded abor-

tion. That is why the *amici* States are, as authorized by Rule 29(a)(2), filing this brief in support of the United States in all of the related challenges to the Secretary's new Title X rules in this Circuit: *California v. Azar, et al.*, No. 19-15974 (9th Cir.); *Essential Access Health, Inc., et al., v. Azar, et al.*, No. 19-15979 (9th Cir); *Oregon, et al. v. Azar, et al.* and *National Family Planning & Reproductive Health Ass'n, et al., v. Azar, et al.*, No. 19-35386 (9th Cir.); *Washington, et al., v. Azar, et al.* and *National Family Planning & Reproductive Health Ass'n, et al., v. Azar, et al.*, No. 19-35394 (9th Cir.). The *amici* States are filing identical briefs in each appeal.

ARGUMENT

This brief will not address every one of the challengers' arguments or the lower courts' errors. It will instead address the Secretary's statutory duty to implement Title X so as to keep its funds from being used in connection with abortion, *see below* 4–11, before addressing important-yet-underappreciated considerations that support the new rules, *see below* 11–24.

All that comes in Part I below. Part II addresses a distinct issue. Specifically, it takes up the inappropriateness—indeed, the unconstitutionality—of "universal" injunctions; that is, injunctions that forbid a law's application even to non-parties. Two of the district courts in the related cases awarded universal injunctions. *See Oregon v. Azar*, No. 19-cv-317, 2019 U.S. Dist. LEXIS 71518, *59 (D. Or. April 28,

2019); *Washington v. Azar*, No. 19-cv-3040, 2019 U.S. Dist. LEXIS 72903, *27 (E.D. Wash. April 25, 2019). Even if the new rules run afoul of Title X, these courts erred by awarding such overbroad relief.

I. The new regulations better promote Title X's mission.

Americans disagree about abortion. Passionately. But they can all agree that abortion has long been among the country's most divisive issues. These opposing views make public expenditure in support of abortion highly controversial. As a result, the federal government and most State governments avoid funding the practice. *See Rust v. Sullivan*, 500 U.S. 173, 201–02 (1991); *Harris v. McRae*, 448 U.S. 297, 315–17 (1980); *Maher v. Roe*, 432 U.S. 464, 474 (1977). To be sure, some States provide such funding. And many advocates would like to see more public funding. But the broader national consensus against funding elective abortion remains. *See* Pub. L. No. 115-31, §§613–14, 131 Stat. 135, 372 (2017) (barring certain federal funds from being used for elective abortion).

Title X reflects this consensus. So do the new rules, and the Secretary lawfully exercised his Title X authority by promulgating them.

A. Title X forbids using its funds to support programs relating to abortion, and charges the Secretary with administering this prohibition.

1. Title X says that its funds may not be used to support abortion, even indirectly: "None 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.

To understand why this language is there, consider the historical context. Congress passed Title X in 1970, a few years before *Roe v. Wade*. So, while many States had loosened their abortion restrictions, many others still forbade the practice in at least some circumstances. These States (and their citizens) would not have supported Title X if it funded, or evinced government approval of, what they still considered a crime. So Title X's principal sponsor, Congressman John D. Dingell, introduced what would become §300a-6 to assuage these concerns:

> Mr. Speaker, I support the legislation before this body. I set forth in my extended remarks the reasons why I offered to the amendment which prohibited abortion as a method of family planning . . . . With the "prohibition of abortion" the committee members clearly intended that abortion is not to be 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 (1970) (emphasis added); *see also* 53 Fed. Reg. 2922, 2922–23 (Feb. 2, 1988) (noting Congressman Dingell's statement on the house floor).

The text of §300a-6 does what Congressman Dingell intended: it forbids Title X funds from being used by "programs where abortion is a method of family planning." §300a–6.

While §300a-6's meaning is clear enough, the statute says little about the precise means of keeping Title X funds from being used to promote abortion. The responsibility for developing those means falls to the Secretary of Health and Humans Services. The Secretary must develop rules governing Title X grants and contracts. In light of §300a-6, those rules must set forth grant and contract terms to ensure that Title X funds are not used to promote abortion, even indirectly. *Rust v. Sullivan*, 500 U.S. 173, 178–80 (1991).

As is true of any statute that tells the Executive to do something without saying how exactly to do it, Title X leaves the Secretary with some discretion. With that discretion comes a degree of deference. The Secretary may implement Title X in any manner consistent with the law. *Id.* at 184. The upshot is this: since Title X requires the strict segregation of Title X funds and abortion, regulations that preserve that strict segregation must be upheld, as long as they comport with all statutory commands. *Id.*

2. Congress has never amended §300a-6. Nonetheless, the district courts in the related proceedings identified two provisions that, according to them, fundamentally altered the Secretary's power to regulate Title X grants. Neither does.

The first provision is a budget rider that Congress has included in every Title X appropriations bill since 1996. The provision appropriates funds "[f]or carrying out the program under title X," and then states that

> amounts provided to said projects under such title shall not be expended for abortions, that all pregnancy counseling shall be nondirective, and that such amounts shall not be expended for any activity (including the publication or distribution of literature) that in any way tends to promote public support or opposition to any legislative proposal or candidate for public office.

Pub. L. No. 115-245, 132 Stat. 2981 (2018).

This rider does not weaken the Secretary's duties under Title X. To the contrary, its command that funds "shall not be expended for abortions," *id.*, confirms what §300a-6 already says. The rider further promotes the aims of Title X by stating expressly "that all pregnancy counseling shall be nondirective." *Id.* Read in context, this forbids Title X grantees from giving affirmative advice regarding whether to abort a pregnancy. That was already implicit in §300a-6, since all programs in which doctors advise patients to abort are "programs where abortion is a method of family planning." 42 U.S.C. §300a-6. But the budget rider eliminates

any debate on this point, telling the Secretary to keep Title X grantees out of directive counseling altogether.

The second post-1970 provision that the district courts cited was a provision of the Affordable Care Act, which limits what HHS can do through Act-related regulations. It reads in full:

> Notwithstanding any other provision of this Act, the Secretary of Health and Human Services shall not promulgate any regulation that—
>
> (1) creates any unreasonable barriers to the ability of individuals to obtain appropriate medical care;
>
> (2) impedes timely access to health care services;
>
> (3) interferes with communications regarding a full range of treatment options between the patient and the provider;
>
> (4) restricts the ability of health care providers to provide full disclosure of all relevant information to patients making health care decisions;
>
> (5) violates the principles of informed consent and the ethical standards of health care professionals; or
>
> (6) limits the availability of health care treatment for the full duration of a patient's medical needs.

42 U.S.C. §18114.

None of this bears on Title X. The provision applies only to regulations promulgated under the Affordable Care Act. We know this because of the "notwithstanding" clause. "The ordinary meaning of 'notwithstanding' is 'in spite of,'

or 'without prevention or obstruction from or by.'" *NLRB v. SW Gen., Inc.*, 137 S. Ct. 929, 939 (2017) (citations omitted). "In statutes, the word 'shows which provision prevails in the event of a clash.'" *Id.* (quoting Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* 126–27 (2012)). Applying those principles here, this statute announces six principles and declares that they prevail in the event of clash with "any other provision of *this Act*"—that is, any other provision of *the Affordable Care Act*. 42 U.S.C. §18114 (emphasis added).

The district courts interpreted this provision as applying to *all* HHS regulations, including rules promulgated under Title X. *See California v. Azar*, No. 19-cv-01184-EMC, 2019 U.S. Dist. LEXIS 71171 at *75 (N.D. Cal. Apr. 26, 2019); *Oregon*, 2019 U.S. Dist. LEXIS 71518 at *44–45; *Washington*, 2019 U.S. Dist. LEXIS 72903 at *21.

There are a variety of problems with that reading. Begin with the interpretive problems. First, if Congress wanted to alter something as critical to Title X as §300a-6, it would have been much clearer. Congress, after all, "does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001). Section 18114 is certainly vague, forbidding regulations that create "any unreasonable barriers to the ability of individuals to ob-

tain appropriate medical care," or that "interfere[] with communications regarding a full range of treatment options between the patient and the provider." And as the discussion above of §300a-6's text and purpose indicates, the Secretary's power to keep Title X funds from promoting abortion indirectly is a critical part of Title X itself. It follows from the elephants-in-mouseholes canon that, if Congress had wanted to limit the Secretary's ability to enforce §300a-6, it would have been a good deal clearer.

The Northern District of California rejected this canon's applicability, reasoning that because §18114 "was entirely consistent with the prevailing Title X regulatory scheme" at the time of its enactment, it did not alter the fundamental details of that scheme. *See California*, 2019 U.S. Dist. LEXIS 71171 at *77. But that is beside the point. Reading §18114 as limiting the range of options available to enforce §300a-6 would fundamentally alter Title X *itself*, even if it had no effect on then-applicable regulations.

The second interpretive problem relates to the first: because §18114 does not *expressly* limit the Secretary's discretion regarding the implementation of §300a-6, reading such a limitation into the statute would run afoul of the strong presumption against implied partial repeals. *See Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 664 (2007). If §18114's broad proscriptions apply to

the Secretary's actions under Title X, then they implicitly strip the Secretary of quite a bit of discretion that he previously possessed. In other words, they implicitly repeal part of Title X. This Court, however, will find "an implied partial repeal ... only in the face of an irreconcilable conflict or clear repugnancy" between two statutes. *Paredes-Urrestarazu v. United States INS*, 36 F.3d 801, 813 (9th Cir. 1994) (internal citations and quotation marks omitted). Since §18114 can be read as leaving Title X unaffected, no irreconcilable conflict or clear repugnancy permits this Court to find an implied partial repeal.

Then there is the historical problem that, "for those … inclined to entertain" an argument based on "legislative history," ought to be nearly dispositive. *Murphy v. Smith*, 138 S. Ct. 784, 790 n.2 (2018). If the Affordable Care Act had been understood as limiting the Secretary's discretion to keep Title X funds from abortion providers, it would not have passed. To obtain the necessary support of pro-life representatives and senators, "Congress attached abortion coverage restrictions introduced by Senator Ben Nelson." Magda Shaler-Haynes, et al., *Abortion Coverage and Health Reform: Restrictions and Options for Exchange-Based Insurance Markets*, 15 U. Pa. J.L. & Soc. Change 323, 326 (2012). These restrictions included limits on federal funding for abortion. *See, e.g.*, 42 U.S.C. §18023. It is hard to take seriously the suggestion that the same Act that had to include such re-

strictions in order to win passage simultaneously *weakened* the Secretary's ability to enforce Title X's pre-existing restrictions on abortion-related funding.

B. The new rules reflect a proper exercise of the Secretary's discretion regarding the implementation of §300a-6.

Because Title X tasks the Secretary with implementing Title X, the question in this case boils down to whether he has permissibly carried out that duty in promulgating the new rules. He has, for all the reasons in the federal government's briefs. The *amici* States write separately, however, to emphasize some additional considerations supporting the new rules.

1. The new rules largely restore the system of Title X implementation that the Supreme Court upheld in *Rust v. Sullivan*.

In 1988, HHS issued regulations similar to the new rules. The agency took this step because it determined that the pre-1988 regulations had failed to "preserve the distinction between Title X programs and abortion as a method of family planning." 53 Fed. Reg. 2922, 2923–24 (Feb. 2, 1988). To better promote that distinction, the new rules (among other things) barred recipients from making abortion referrals, and required recipients to maintain strict financial and physical segregation between their non-abortion services and their abortion services (if they provided any).

The Supreme Court upheld these regulations as a proper exercise of the Secretary's discretion to implement Title X. *Rust*, 500 U.S. at 191. In the process, it rejected free-speech and due-process arguments, too. *Id.* at 192–200, 201–13.

The regulations did not last. In 1993, just two weeks into a new administration, the agency rescinded the just-upheld regulations after determining that they would "inappropriately restrict grantees." 58 Fed. Reg. 7462, 7462 (Feb. 5, 1993). The agency settled on a new tack, promulgated through interim rules. Once finalized in 2000, those rules required grantees to provide "information and counseling regarding" abortion, and required grantees to provide this information in "nondirective" terms. Grantees even had to provide abortion "referral upon request." 42 C.F.R. §59.5(a)(5) (July 3, 2000). Thus, HHS replaced the ban on abortion referrals with its opposite. HHS claimed that the *Rust*-approved rules had not been shown to work (even though they were in effect for just a short time), and that grantees preferred looser restrictions. Specifically, HHS said the looser rules were "generally acceptable to the grantee community, in contrast to" the rules that *Rust* upheld. 65 Fed. Reg. 41,270, 41,271 (Jul. 3, 2000).

The agency's new rules will displace the rules from 2000 once they are allowed to go into effect. These new rules—which largely mirror the 1988 rules that *Rust* upheld—differ from the previous rules both in the procedure by which they

were adopted and their substance. Consider first the procedural difference. In 1993, just days after the new administration entered office, HHS rescinded the rules that *Rust* had upheld. Here, in contrast, HHS worked on the issue for many months, announcing its proposed rules only on June 1, 2018. 83 Fed. Reg. 25,502 (June 1, 2018). HHS followed notice-and-comment procedures before any immediate action, and has now issued the updated regulations, explaining its reasons for the changes. 84 Fed. Reg. 7714 (Mar. 4, 2019).

The substantive differences between the current rules and the new ones are more relevant to this case. HHS sought to comply with Title X's text, and with the expectations of citizen taxpayers, by clearly segregating abortion services and Title X funds. *Id.* at 7715. In the agency's own words, the new rules "will ensure compliance with, and enhance implementation of, the statutory requirement that none of the funds appropriated for Title X may be used in programs where abortion is a method of family planning and related statutory requirements." *Id.*. How? For one thing, by eliminating the requirement that Title X recipients make abortion referrals, and replacing it with a rule that permits (without requiring) non-directive counseling about the availability of abortion. *Id.* at 7716–17. For another, by requiring Title X recipients to maintain stricter physical and financial segregation between abortion services and programs that spend Title X money. *Id.* at 7763–67; 42

C.F.R. §59.15. The new rules say that, "to be physically and financially separate, a Title X project must have an objective integrity and independence from prohibited activities. Mere bookkeeping segregation of Title X funds from other monies is not sufficient." 42 C.F.R. §59.15.

Together, the new rules' requirements "protect against the unintentional co-mingling of Title X resources with non-Title X resources." 84 Fed. Reg. at 7715. Preventing such comingling is necessary to give effect to Congress's prohibition on using Title X funds "in programs where abortion is a method of family planning." 42 U.S.C. §300a-6. And by addressing "the potential for ambiguity between approved Title X activities and non-Title X activities and services," the new rules eliminate what would otherwise be the "significant risk" of "public confusion over the scope of Title X services, including whether Title X funds are allocated for, or spent on, non-Title X services, including abortion-related purposes." 84 Fed. Reg. at 7715.

The Secretary additionally supported the financial-and-physical-segregation rule by citing numerous sources illustrating the failure of the pre-existing rules to support Congress's mandate. Those sources showed that, "under the current arrangement, it is often difficult for patients, or the public, to know when or where Title X services end and non-Title X services involving abortion begin." 84 Fed.

Reg. at 7764. "Even with the strictest accounting ... , a shared facility greatly increases the risk of confusion." *Id.* The agency noted that this concern sharpened over the years because abortion was increasingly being performed in "nonspecialized clinics"—in other words, clinics that do more than provide abortions. *Id.* at 7765. HHS noted that "[a]ccording to the Guttmacher Institute, nonspecialized clinics accounted for 24% of all abortions in 2008, 31% in 2011, and 36% in 2014." *Id.* (citations omitted). That increased the likelihood of confusion about whether Title X supported abortion services.

2. 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.

a. 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. After all, 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 of Greater Ohio v. Hodges,* 917 F.3d 908, 910 (6th Cir. 2019) (en banc).

The fungibility and public-imprimatur concerns led many citizens to call for laws putting a greater distance between public funding and abortion-performing entities. Their representatives listened, and passed laws doing just that. Ohio, for example, enacted a law barring public funds under several non-Title X programs from going to entities affiliated with abortion providers. This law is designed to "promote childbirth over abortion, to avoid 'muddl[ing]' that message by using abortion providers as the face of state healthcare programs, and to avoid entangling program funding and abortion funding." *Id.* (citing Ohio's brief at 39–41). In upholding the law, the *en banc* Sixth Circuit, in an opinion by Judge Sutton, recognized the validity of Ohio's interest: "Governments generally may do what they wish with public funds," so they may "subsidize some organizations but not others." *Id.* at 911 (citing *Rust*, 500 U.S. at 192–94). Thus, when a State's citizens do not wish to

promote abortion, that State may choose not to spend its citizens' money doing so. *See id.*

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

Campaign to Undermine Reproductive Health and Rights, available at https://tinyurl.com/y6n2co24.

These laws do not even count the executive actions terminating funding. Between 2015 and 2016, officials in Arkansas, Kansas, and Utah all sought to terminate funding for non-abortion services to Planned Parenthood affiliates. *See Doe v. Gillespie*, 867 F.3d 1034, 1037–38 (8th Cir. 2017) (Arkansas); *Planned Parenthood of Kan. & Mid-Mo. v. Anderson*, 882 F.3d 1205, 1212–14 (10th Cir. 2018) (Kansas); *Planned Parenthood Ass'n of Utah v. Herbert*, 828 F.3d 1245, 1250 (10th Cir. 2016) (Utah). And in 2015, Louisiana's Department of Health and Hospitals terminated Planned Parenthood of Gulf Coast's Medicaid provider agreements, apparently in response to concerns related to particular aspects of Planned Parenthood's abortion practices. It canceled these agreements even though Planned Parenthood claimed also to be providing various public-health services ranging from pregnancy testing to STD treatment and beyond. *Planned Parenthood of Gulf Coast, Inc. v. Gee*, 862 F.3d 445, 450–52 (5th Cir. 2017).

These laws and executive acts have no direct bearing on Title X. Each involves a change to a program receiving no Title X funds. They are nonetheless significant because they reflect a common, concrete reality: many Americans do not want their tax dollars going to fund public-health initiatives linked to abortion.

Even the *impression* that a law steers money to abortions can stir intense voter passion. In 2010, an advocacy group in Ohio "issued a press release announcing its plan to 'educat[e] voters that their representative voted for a health care bill that includes taxpayer-funded abortion.'" *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 153 (2014) (citations omitted). The same group "sought to display a billboard in [a representative's] district condemning that vote." *Id.* at 154.. The public's concerns may arise from money's fungibility. They may rest on a desire to withhold the government's "stamp of approval" for organizations connected to abortion. But whatever motivates these concerns, they are undoubtedly deeply held and here to stay.

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

The updated rules, once implemented, will assure concerned citizens that their tax dollars are not being "used in programs where abortion is a method of family planning." §300a-6. The enhanced financial-segregation requirement addresses concerns about money's fungibility. Higher figurative walls between any entity's Title X funds and abortion-related funds protects against indirect subsidi-

zation. The physical-separation requirement addresses the "imprimatur" or approval concern, as it assures citizens that their Title X dollars are not indirectly supporting abortions by attracting patients to facilities that performs abortions. These assurances ultimately help to preserve and promote public support for Title X itself. Keeping Title X funds far away from abortion ensures that the consensus support for Title X is not eroded by any connection to the controversial practice of abortion.

The agency recognized all this. As explained above, explained how the previous administrative regime did not adequately reassure citizens of the separation they expect, and that Congress's mandate requires. The new rules do.

In addition to preserving public support for the program, the new rules promote the intrinsic democratic interest in adopting rules that majorities can get behind. Most people, whether they are pro-life or pro-choice or neither, support funding family-planning services *unrelated to* abortion. The new rules assure the public that Title X will continue providing that support, but that it will do so without indirectly supporting abortion. For example, the new rules bar recipients from making abortion referrals, in contrast to the old rules, which *required* referral. The rules will no longer require "nondirective pregnancy counseling" (though they will permit it). The rules will also encourage family participation in family-planning de-

cisionmaking, and will require training regarding compliance with State and local sexual-abuse reporting requirements. 84 Fed. Reg. at 7715–18. These and other changes reflect (in addition to Congress's mandate) the consensus position that public funding for services unrelated to abortion is appropriate, all while keeping the government from funding abortion even indirectly.

The new rules are hardly unique in funding priorities that can achieve greater consensus. Indeed, funding limits of this sort are quite common. Voters may, through their representatives, sometimes fund "all comers" in a certain category. But they may do the opposite too, even in areas that touch on constitutional rights. Thus, for example, the federal government may issue grants to promote art projects that are consistent with the "general standards of decency and respect for the diverse beliefs and values of the American public." 20 U.S.C. §954(d)(1); *see also Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 580 (1998). In a pluralistic society, it is fully appropriate for a government to spend its taxpayers' money on art that many will deem worthy of funding—and not, for example, a photograph of a crucifix submerged in urine. *See Finley*, 524 U.S. at 574. Supreme Court precedent further establishes that when a government chooses to fund education, it may choose not to fund religious studies if many of its citizens object to the public funding of religious training. *Locke v. Davey*, 540 U.S. 712, 720–22 (2004). The fact of

the matter is that funding decisions require policy choices. In a constitutional democracy, one reasonable way to make such choices is to fund the projects that can gain—and retain—broad support.

c. Critically, the new rules will serve the foregoing interests without posing any threat to the vitality of Title X programs. We know this because many States administer their own public-health programs without funding abortion providers. This confirms that there is no necessary connection between the success of Title X's family-planning mission and the comingling of abortion and Title X funds.

States vary in the degree to which they rely on private entities to implement Title X programs. Most Title X funds go to fund services at state agencies and county health departments. *See* Title X Family Planning Directory at https://www.hhs.gov/opa/sites/default/files/Title-X-Family-Planning-Directory-December2018.pdf (last visited June 5, 2019); *see also* Title X Family Planning Service Grants Award by State at https://www.hhs.gov/opa/grants-and-funding/recent-grant-awards/index.html (last visited June 5, 2019). Several States have laws that express a preference that Title X funds be prioritized for public entities, even if it is possible for leftover funds to be subgranted to private organizations. *See, e.g.*, Kan. Stat. Ann. §65-103b; Ky. Rev. Stat. Ann. §311.715; Wis. Stat. §253.07(5)(a). These public programs, of course, provide no abortion services.

They are nonetheless able to serve the public by providing precisely the services that Title X is designed to fund.

Other States do not subgrant federal Title X funds to private parties *at all*. Consider, for example, the State of Alabama. The State Department of Public Health is the sole Title X grantee in Alabama. See Title X Family Planning Directory at 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 than eighty health centers across the state, all of which are operated by state and local county health departments. *See id*. These local health centers provide contraceptive services, pelvic exams, screening for STDs, infertility services, and health education. The Department's 2019 grant award is over $5,000,000, which it will use to provide services to roughly one-hundred-thousand people. *See* Title X Family Planning Service Grants Award by State at https://www.hhs.gov/opa/grants-and-funding/recent-grant-awards/index.html (last visited April 4, 2019).

Finally, some States that subgrant Title X funding to private organizations already do so subject to state laws that mirror the challenged regulations. At least thirteen States—Arizona, Arkansas, Colorado, Indiana, Iowa, Louisiana, Michigan, Mississippi, Missouri, North Carolina, Ohio, Texas, and Wisconsin—have laws

that also prevent federal pass-through family planning funds from being used to pay for abortions. *See* Ariz. Rev. Stat. Ann. §35-196.02; Colo. Rev. Stat. Ann. §25.5-3-106; La. Rev. Stat. §40:1061.6; Iowa Code Ann. §217.41B; Miss. Code. Ann. §41-41-91; Mich. Comp. Laws Ann. §400.109a; Mo. Ann. Stat. §188.205; N.C. Gen. Stat. Ann. §143C-6-5.5; Ohio Rev. Code §5101.56; Tex. Health & Safety Code Ann. §32.005; Wis. Stat. Ann. §20.927. Several of these States have further restricted family-planning funds from any organizations that provide abortions, that contract with abortion providers, or that refer patients to get abortions. *See* Ark. Code Ann. §20-16-1602; La. Rev. Stat. §49:200.51; Ind. Code Ann. §5-22-17-5.5; Wis. Stat. Ann. §253.07(5).

The success of these various approaches confirms that the Secretary's new rules create no barrier to those genuinely interested in promoting Title X's mission, rather than using Title X as an indirect source of abortion funding.

II. Lower courts lack the power to award universal injunctions, and no such injunction is appropriate here anyway.

The plaintiffs in all of the related cases sought universal injunctions. In other words, they sought to enjoin the law's application as to everyone, not just as to the parties in each case. Two of the district courts gave them what they asked for. *See See Oregon*, 2019 U.S. Dist. LEXIS 71518 at *59; *Washington*, 2019 U.S. Dist. LEXIS 72903 at *27; *but see California*, 2019 U.S. Dist. LEXIS 71171 at *147. Those

courts erred: Article III courts have no power to award universal injunctions, and it would have been improper to award such relief here even if they did.

A. Courts lack the power to award universal injunctions, and they should, in any event, decline to award such relief.

District courts have no authority to award universal injunctions. True, this Circuit has upheld such awards, though it recently recognized the significant "uncertainty about the propriety of universal injunctions." *E. Bay Sanctuary Covenant v. Trump*, 909 F.3d 1219, 1255 (9th Cir. 2018). Still, it is worth beginning with first principles. The fact that courts have arrogated to themselves an extra-judicial power to award universal injunctions suggests that they should exercise that power with extreme caution.

Article III of the Constitution confers on courts "[t]he judicial Power." U.S. Const., art. III, §1. That power permits them to resolve only "Cases" and "Controversies." *Id.* at §2. "This language restricts the federal judicial power 'to the traditional role of the Anglo-American courts.'" *Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 132 (2011) (quoting *Summers v. Earth Island Institute*, 555 U.S. 488, 492 (2009)). That means, among other things, that courts can award relief only to parties who seek relief for a concrete injury. Thus, the Constitution empowers the judiciary "to provide relief to claimants, in individual or class actions, who have suffered, or will imminently suffer, actual harm." *Lewis v. Casey*, 518 U.S.

343, 349 (1996). But it *does not* permit parties to seek, or courts to award, relief outside the context of a discrete dispute between parties. For example, courts may not entertain suits by individuals purporting to represent injuries suffered by the public at large. *See Ariz. Christian Sch.*, 563 U.S. at 138; Woodlhandler & Nelson, *Does History Defeat Standing Doctrine*? 102 Mich. L. Rev. 689, 700-701 (2004).

Universal injunctions invert all of this. They permit parties to assert *non-parties*' interests and to obtain relief for those non-parties. That is exactly what Article III's limitation of the judicial power to "cases" and "controversies" is supposed to prevent. Perhaps because of this, universal injunctions did not exist historically. Indeed no court issued one until 1963, and they remained exceptionally rare until recent years. Bray, *Multiple Chancellors*, 131 Harv. L. Rev. 418, 437, 457–59 (2017). Often, "the most telling indication of" a "severe constitutional problem" is "the lack of historical precedent." *Free Enter. Fund v. PCAOB*, 561 U.S. 477, 505 (2010) (quoting *Free Enter. Fund v. PCAOB*, 537 F.3d 667, 699 (D.C. Cir. 2008) (Kavanaugh, J., dissenting)). So it is here.

In addition to ignoring the cases-and-controversies limitation in Article III, universal injunctions exceed the scope of the federal courts' equitable authority. The federal courts must wield their authority to issue equitable relief according to "the principles of the system of judicial remedies which had been devised and was

being administered by the English Court of Chancery at the time of" the American Revolution. *Grupo Mexicano De Desarrollo v. All. Bond Fund*, 527 U.S. 308, 318 (1999) (quoting *Atlas Life Ins. Co.* v. *W. I. Southern, Inc.,* 306 U.S. 563, 568 (1939)); *accord Boyle v. Zacharie*, 31 U.S. 648, 654 (1832) (per Story, J.). Those principles bar the award of relief to non-parties. *Trump v. Hawaii*, 138 S. Ct. 2392, 2424–29 (Thomas, J., concurring); *see also* Bray, *Multiple Chancellors*, 131 Harv. L. Rev. at 425. Again, "as a general rule, American courts of equity did not provide relief beyond the parties to the case" until the second half of the 20th century. *Trump*, 138 S. Ct. at 2427. And because this form of equitable relief was unavailable in the English Court of Chancery the 18th century, it is similarly unavailable in federal courts today.

2. The unconstitutionality of universal injunctions is reason enough to curtail their use. But there are other reasons, too. The first is that these suits create the potential for forum shopping. *See City of Chicago v. Sessions*, 888 F.3d 272, 288 (7th Cir.2018), *vacated by* 2018 U.S. App. LEXIS 21801 (7th Cir. 2018). If courts set a precedent of awarding nationwide injunctions, they will give advocates great incentive to structure their litigation strategies to pick out what they perceive to be the most favorable forums to obtain invalidation of whatever federal laws they dislike.

"The opportunity for forum shopping is extended by the asymmetric effect of decisions upholding and invalidating a statute, regulation, or order." Bray, *Multiple Chancelors*, 131 Harv. L. Rev. at 460. When a court "*upholds* the challenged law, that decision has no effect on other potential plaintiffs. But if one district judge *invalidates* it and issues a national injunction, the injunction controls the defendant's actions with respect to everyone." *Id.* The result? "Shop 'til the statute drops." *Id.* That is precisely what happened here. Litigants challenged the Title X rules in the Districts of Maine, Maryland, and Oregon, the Northern District of California, and the Eastern District of Washington. They could do this secure in the knowledge that a single universal injunction would bind the entire nation—even if the United States were to run the table in all other cases.

This shop-'til-the-statute-drops approach, in addition to putting the supporters of a government policy at a tremendous disadvantage, retards the development of law. Whereas an injunction tailored to the parties would encourage non-parties to continue litigating the issue, thus developing arguments and data that might prove useful down the line, universal injunctions decrease the incentive to file new suits, drawing the whole process to a halt.

On top of the fairness and development-of-the-law concerns, the potential for forum-shopping threatens the judiciary's reputation. The availability of universal

injunctions gives public and private actors alike the chance to accomplish in a single district court something they cannot accomplish politically. That is dangerous. "Few exercises of the judicial power are more likely to undermine public confidence in the neutrality and integrity of the Judiciary than one which casts the Court in the role of a Council of Revision, conferring on itself the power to invalidate laws at the behest of anyone who disagrees with them." *Ariz. Christian Sch.*,,563 U.S. at 145–46. That is precisely the role that courts assume when they issue universal injunctions instead of just resolving the cases before them.

Another problem with universal injunctions is that they effectively force third parties to assert legal rights even when they would rather not do so. In that respect, universal injunctions contradict the rest of Anglo-American jurisprudence, which typically leaves to the individual the question whether to press his rights or not. Criminal defendants, for example, may waive their right to a jury trial, opting instead for a bench trial or a guilty plea. Similarly, potential class members may opt out of a class if they object to the suit or would prefer to litigate individually. No one makes *those* parties press rights they would prefer not to exercise. *See generally* Williams, *Due Process, Class Action Opt Outs, and the Right not to Sue*, 115 Colum. L. Rev. 599, 605 (2015). Why, then, should non-parties in civil cases against the United States be compelled to have their legal rights asserted against their wishes?

This very case illustrates the problem with allowing plaintiffs to vindicate the rights of others. The *amici* States *support* the updated regulations; they do not want to assist in the funding of entities linked to abortion. They should not be forced to accept the "benefits" of an injunction they oppose.

B. None of the plaintiffs established any entitlement to a universal injunction here.

Even if universal injunctions were sometimes appropriate, none is appropriate here. Injunctive relief "must be tailored to remedy the specific harm alleged," *Lamb-Weston, Inc. v. McCain Foods, Ltd.*, 941 F.2d 970, 974 (9th Cir. 1991), and "no more burdensome to the defendant[s] than necessary to provide complete relief *to the plaintiffs*," *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979) (emphasis added). Because (almost by definition) universal injunctions are not "necessary to provide complete relief to the plaintiffs," no such injunction would be proper here.

The related cases involve two classes of plaintiffs: plaintiff States and private plaintiffs. The plaintiff States have no interest whatsoever in whether the new rules apply in other States. Below, they all alleged harms to *their* residents, and sought relief in furtherance of *their residents'* health interests. They also claimed harm to their own interests in preserving networks of Title X providers. Those interests do not justify enjoining the new rules anywhere except within the plaintiff States. So there is no plausible basis for concluding that an order enjoining the new

rules coast to coast is "necessary to provide complete relief to [the State] plaintiffs." *Califano*, 442 U.S. at 702.

The private plaintiffs fare no better. True, at least some of the private plaintiffs or their members operate outside of the plaintiff States, and thus seemingly have an interest in seeing the rules' application enjoined, *as to them*, nationwide. Still, a universal injunction—an injunction that binds even non-parties—remains decidedly unnecessary, since the private plaintiffs have no interest in making the rules inapplicable as to anyone but themselves and their members. Moreover, a universal injunction harms third parties. Specifically, it harms the many potential Title X subgrantees who would accept Title X funding *only under* the new rules—for example, those who would happily provide family-planning services if they could do so without having to make abortion referrals, as the 2000 rules require. *See* 84 Fed. Reg. at 7716. As of now, those entities cannot accept funding because a district court thousands of miles away has enjoined the new rules nationwide in order to protect the interests of other States and other subgrantees. Such overbroad relief is no necessary to further *the plaintiffs'* interests. It is therefore improper. *Califano*, 442 U.S. at 702.

CONCLUSION

The amici States urge reversal.

RESPECTFULLY SUBMITTED this 7th day of June, 2019 by:

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STATEMENT OF RELATED CASES

The following related cases are currently pending in this Court:

State of Oregon, et al., v. Azar, et al., and	Case No. 19-35386
National Family Planning & Reproductive Health Ass'n, et al., v. Azar, et al.	
State of California v. Azar, et al.,	Case No. 19-15974
Essential Access Health, Inc., et al., v. Azar, et al.	Case No. 19-15979

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CERTIFICATE OF COMPLIANCE FOR BRIEFS

9th Cir. Case Number(s) 19-35394

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I hereby certify that on June 7, 2019, the foregoing was filed electronically. Notice of this filing will be sent to all parties for whom counsel has entered an appearance by operation of the Court's electronic filing system. Parties may access this filing through the Court's system. I further certify that a copy of the foregoing has been served by e-mail or facsimile upon all parties for whom counsel has not yet entered an appearance and upon all counsel who have not entered their appearance via the electronic system.

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