No. 20-454

In the Supreme Court of the United States

ALEX M. AZAR II, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL., PETITIONERS

v.

MAYOR AND CITY COUNCIL OF BALTIMORE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

This is an Administrative Procedure Act (APA) challenge to an HHS rule entitled *Compliance With Statutory Program Integrity Requirements*, 84 Fed. Reg. 7714 (Mar. 4, 2019). The rule regulates health care providers in the Title X family planning program, compelling them, when counseling pregnant patients, to make prenatal care referrals and to refuse to make abortion referrals, in an effort to steer patients toward childbirth and away from abortion. The questions presented are as follows:

1. Whether the rule is contrary to law because, among other things, it "interferes with communications regarding a full range of treatment options between the patient and the provider." 42 U.S.C § 18114(3) (the "Non-Interference Mandate").

2. Whether the rule is contrary to law because it violates an appropriations rider that has appeared in every annual HHS appropriations bill since 1996 that mandates that "all pregnancy counseling [in the Title X program] shall be nondirective." Further Consolidated Appropriations Act, 2020, Pub. L. No. 116-94, § 117, 133 Stat. 2558 (the "Nondirective Mandate").

3. Whether the rule is arbitrary and capricious because HHS's conclusion that the rule is "not inconsistent" with medical ethics is either inadequately explained or objectively unreasonable given the absence of record support for that conclusion and the unanimous contrary view of professional medical organizations in the record.

4. Whether the rule is arbitrary and capricious because HHS quantified the rule's compliance cost using numerical estimates even though the only evidence in the record that supports a numerical estimation of cost shows that the cost of compliance is orders-of-magnitude higher than HHS's estimates.

PARTIES TO THE PROCEEDING

Respondent agrees with petitioners' complete and correct listing of the parties. *See* Pet. II.

RELATED PROCEEDINGS

Respondent is unaware of any related proceedings other than those identified in the Petition. *See* Pet. II.

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INTRODUCTION

A doctor diagnoses her patient as pregnant and asks if she would like counseling about her options. The patient says that she would, and the doctor engages in nondirective counseling wherein the doctor presents the full range of options to the patient in a neutral manner. The doctor explains that the patient may pursue prenatal care, adoption, or abortion, among other options. In accordance with the principles of nondirective counseling, the patient directs the course of the counseling, asking questions about each course of action, which the doctor answers. The doctor does not present one option as superior to any other. As the counseling unfolds, it becomes clear that the patient would like to pursue abortion as an option and asks her doctor where she can go to receive one.

For nearly the entire history of the Title X program, 42 U.S.C. §§ 300 *et seq.*—for nearly 50 years—physicians in the program were free to give that advice. But in 2019 HHS finalized a rule that changed that. *See* 84 Fed. Reg. 7,714 (Mar. 4, 2019) (hereinafter "the Rule"). Now, doctors and other advanced practice providers in the program cannot provide an abortion referral even if a patient explicitly requests one. *See id.* at 7789 (§ 59.14(d)(5)). There is no conscience exception; a doctor must withhold this information from a patient even if withholding it violates the doctor's conscience. In fact, the doctor not only cannot provide an abortion referral even if she is asked explicitly for one and feels that she cannot in good conscience withhold one, now she *must* make a referral for prenatal care no matter what else happens during the counseling session, even if the patient says during that session that she does not want a prenatal care referral. *Id.* (§ 59.14(b)).

The Rule's counseling restrictions alone would mark a radical departure from how the Title X program has

worked for half a century. But the Rule goes further still. A provider cannot even make an abortion referral using the provider's own non-Title X funds if the referral is made in a facility with the same entrance or by an individual that also provides Title X services because the Rule now imposes a stringent physical and financial "Separation Requirement" mandating that participants in the program physically separate Title X services from any other services touching abortion that they provide. *Id.* (§ 59.15). The Separation Requirement requires providers to maintain separate treatment, consultation, examination and waiting rooms, office entrances and exits, phone numbers, email addresses, educational services, and websites for their Title X services and "prohibited activities." *See id.* (§ 59.15(b)). As a consequence, Title X providers that cannot afford to build separate facilities and hire more doctors cannot make abortion referrals with their own money and still participate in the Title X program—even if such referrals were only ever made upon request.

The Rule's consequences for the Title X program, and for the City, were swift and far-reaching. Roughly one in four Title X service sites withdrew from the Title X program in response to the Rule, cutting the Title X program's patient capacity in half. Pet.App.30a n.9. That loss jeopardized care for 1.6 million female patients nationwide. *Id.* The State of Maryland withdrew from the program in response to the Rule, forcing the City—which had participated in the Title X program since its inception—out as well. JA225 (4th Cir. Dkt. No. 19-1614, Dkt. 17). The City lost $1,430,000 in annual Title X subgrants from the Maryland Department of Health. JA229. Tens of thousands of people living below the poverty line in the City lost access to Title X. JA226.

The Rule's dramatic changes to a longstanding and successful program—one that has, among other things, massively increased access to contraception and

decreased the number of abortions in the United States—demanded careful consideration of the limits Congress has placed on HHS's statutory authority to regulate interactions between patients and doctors in the program over the last 30 years, especially given the sanctity of the doctor-patient relationship and the ways the Rule impinges on it. Such dramatic changes also called for careful consideration of the moral, ethical, financial, and public health implications of the Rule for providers and patients.

HHS failed to give those issues the consideration they required. The Fourth Circuit thus held the Rule unlawful for four reasons, any one of which would warrant the Rule's invalidation. Pet.App.23a-58a. The Fourth Circuit did not err with respect to any of those conclusions, let alone all four. This Court sits "to correct wrong judgments, not to revise opinions," *Herb v. Pitcairn*, 324 U.S. 117, 126 (1945), and the judgment below is correct for more reasons than the court below even discussed. Finally, this case will soon disappear from this Court's docket. The President-elect has pledged to reverse the Rule in the early days of his administration, long before the parties can brief it or the Court can hear or decide it. Some wolves come in sheep's clothing. Some wolves come as themselves. This wolf comes as a dog.

The Court should deny the petition. At minimum, the Court should wait until February to decide whether to grant the petition to determine whether this case can reach the merits in this Court.

STATEMENT

A. Statutory and Regulatory Background

For almost fifty years, the Title X program has provided free or reduced-cost family planning care to needy patients across the country. *See* Pub. L. No. 91-572, 84 Stat. 1504 (1970). The program has been governed by largely unchanged rules, and it has been one of this

country's most successful public health programs: reducing rates of abortion and unintended pregnancy by facilitating contraceptive access; providing testing and treatment for sexually transmitted infections; screening for breast and cervical cancer; and conducting pregnancy testing and counseling. Section 1008 of Title X provides that no Title X funds "shall be used in programs where abortion is a method of family planning," 42 U.S.C. § 300a-6, and indeed, no funds ever have.

Title X gives the Secretary authority to promulgate grant-making regulations, 42 U.S.C. § 300a-4(a). In 1971, the Department issued its first regulations implementing Title X. It required each grantee of Title X funds to provide assurances that, among other things, priority will be given to low-income individuals, services will be provided "solely on a voluntary basis" and "in such a manner as to protect the dignity of the individual," and the "project will not provide abortions as a method of family planning." 36 Fed. Reg. 18,465, 18,466 (Sept. 15, 1971), *codified at* 42 C.F.R. § 59.5(9) (1972). Each program was to provide "medical services related to family planning including physician's consultation, examination, prescription, continuing supervision, laboratory examination, contraceptive supplies, and necessary referral to other medical facilities when medically indicated" and include "[p]rovision for the effective usage of contraceptive devices and practices." These policies and interpretations "have been used by the program for virtually its entire history." 65 Fed. Reg. 41270, 41271 (July 3, 2000).

The 1988 "Gag Rule"

In 1988, HHS prohibited Title X projects from providing pregnancy counseling about abortion. *Statutory Prohibition on Use of Appropriated Funds in Programs Where Abortion is a Method of Family Planning*, 53 Fed. Reg. 2,922, 2,945 (1988). The 1988 regulations also required that Title X programs be physically separated

from abortion services. *Id.* at 2,923–24. This Court upheld the 1988 regulations in *Rust v. Sullivan*, concluding that § 1008 was ambiguous and could be interpreted to allow HHS to prohibit abortion counseling and require physical separation and that the rule was not arbitrary and capricious. 500 U.S. 173, 184, 187-89 (1991). The regulations never went fully into effect because HHS changed its policy amid ongoing litigation. *See National Family Planning & Reproductive Health Ass'n, Inc. v. Sullivan*, 979 F.2d 227, 241 (D.C. Cir. 1992).

Two days after his inauguration in 1993, President Clinton ordered HHS immediately to rescind the rule. Mem., *The Title X "Gag Rule,"* 58 Fed. Reg. 7455 (Jan. 22, 1993). HHS then issued an interim final rule rescinding the rule, with immediate effect, sixteen days after his inauguration, on February 5, 1993. 58 Fed. Reg. 7462 (Feb. 5, 1993); *see also Standards of Compliance for Abortion-Related Services in Family Planning Service Projects*, 58 Fed. Reg. 7,462 (Feb. 5, 1993). HHS finalized a new rule in 2000, memorializing the same regulatory approaches that had governed since Title X's inception, and were in place until last year. 65 Fed. Reg. 41,270 (July 3, 2000).

The Nondirective Mandate

Relevant to this case, starting in 1996 Congress began enacting the Nondirective Mandate—requiring as part of its annual Title X appropriations that "all pregnancy counseling shall be nondirective." *See, e.g.*, *Continuing Appropriations Act, 2019*, P.L. 115-245, Div. B, Title II, 132 Stat. 2981, 3070-71 (2018); *Consolidated Appropriations Act, 2018*, P.L. 115-141, Div. H, Title II, 132 Stat. 348, 716-17 (2018); *Consolidated Appropriations Act, 2017*, P.L. 115-31, Div. H, Title II, 131 Stat. 521 (2017). The Nondirective Mandate appears under the heading "FAMILY PLANNING" in the Appropriations Act and the relevant paragraph states in its entirety:

> For carrying out the program under title X of the PHS Act to provide for voluntary family planning projects, $286,479,000: *Provided*, 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. Law. No. 115-245, Title II, 132 Stat. 2981, 3070-71 (Sept. 28, 2018) (emphasis added). The Nondirective Mandate was the end of a years-long legislative effort to cement a nondirective counseling requirement into the law governing the Title X program to ensure that pregnant patients were not steered toward abortion (or away from it) during pregnancy counseling. *See* 141 Cong. Rec. 21634 (1995) (statement of author Rep. Greenwood); *id.* at 21638 (statement of Rep. Porter); *id.* at 21637 (statement of Rep. Smith).

The Non-Interference Mandate

In 2010, as part of the Affordable Care Act (ACA), Congress included a provision emphasizing the importance of nondirective counseling and uninhibited patient access to all information that health care professionals determine is ethically and medically necessary for informed consent. Section 1554 ("Access to Therapies") of the ACA, reaffirmed the core principles underlying the existing regulations and statutory requirement for nondirective counseling, and provides that the Secretary of HHS "shall not promulgate any regulation" that:

> (l) 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; [or]
>
> (5) violates the principles of informed consent and the ethical standards of health care professionals.

42 U.S.C. § 18114 ("Non-Interference Mandate"). The Non-Interference Mandate "restricts the Secretary in a number of important ways from creating rules that potentially restrict access to certain benefits or settings of care." 156 Cong. Rec. 4198 (2010) (statement of Rep. Pascrell). The Mandate is "designed to permit providers to fully discuss treatment options with patients and their families and permit the patient to render an informed choice as to their course of rehabilitation or other treatment." *Id.* The Non-Interference Mandate was squarely understood to protect patients from government regulations that would restrict their access to information from their health care providers from which they could make "informed choices as to their course of rehabilitation or other treatment." *Id.*

The 2019 Rule

On June 1, 2018, HHS issued a proposed rule that proposed to overhaul the longstanding Title X regulations in numerous respects. 83 Fed. Reg. 25,502 (Jun. 1, 2018) (the "Proposed Rule"). HHS received over 500,000 public comments opposing the Proposed Rule—including extensive comments from major medical associations, major Title X providers and policy and research organizations, nearly 200 members of Congress, and several states.

The nation's leading non-partisan medical associations, counting more than 90 percent of the nation's OB-GYNs among their members, submitted comments

opposing the changes contemplated by the Proposed Rule. The groups included the American Medical Association ("AMA"), the American College of Obstetricians and Gynecologists ("ACOG"), the American College of Physicians ("ACP"), the American Academy of Family Physicians ("AAFP"), the American Academy of Nursing ("AAN"), and the American Academy of Pediatrics ("AAP"), among others. *See* Pet.App.26a-28a.

On March 4, 2019, HHS published the final rule entitled *Compliance With Statutory Program Integrity Requirements*, 84 Fed. Reg. 7714 (Mar. 4, 2019) (codified at 42 C.F.R. pt. 59) ("Rule"). The Rule's referral restrictions and separation requirements were unchanged from the proposed rule.

The Rule imposes broad restrictions on what health care providers under the Title X program may inform pregnant patients. The Rule states that "[a] Title X project may not perform, promote, refer for, or support abortion as a method of family planning, nor take any other affirmative action to assist a patient to secure such an abortion." 84 Fed. Reg. 7,788 (codified at 42 C.F.R. §§ 59.5(a)(5), 59.14(a) (abortion-referral ban)). The Rule states that to meet this requirement Title X grantees may not provide any information about abortion providers, identified as such, to a patient.

Providers may not offer a patient an abortion referral except in an emergency. If a patient specifically asks for a referral for pregnancy termination during pregnancy counseling, providers are prohibited from offering the patient anything more than a list of "comprehensive primary health care providers"—most of whom must *not* provide any abortions. *Id.* at 7789. The list cannot identify which providers actually provide the abortion services she is requesting, and staff are prohibited from answering patient questions about which providers on the list actually provide abortions. *Id.* Because the list is limited to

"comprehensive primary health care providers," specialized reproductive healthcare providers are excluded.

Even as Title X providers are prohibited from referring for pregnancy termination (even if the patient asks for it) providers are required to refer all pregnant patients for prenatal care (even if the patient has expressly stated she does not want such a referral). 84 Fed. Reg. 7789 (codified at 42 C.F.R. §§ 59.14(b)(1)).

The Rule requires that Title X activities be "physically and financially separate" (defined as having an "objective integrity and independence") from prohibited activities. These "activities" include not just the provision of abortion services, but also any counseling that does not meet the counseling restrictions. 84 Fed. Reg. at 7789. Whether this criterion is met is to be determined through a "review of facts and circumstances," with relevant factors including but not limited to:

> (a) The existence of separate, accurate accounting records; (b) The degree of separation from facilities (e.g., treatment, consultation, examination and waiting rooms, office entrances and exits, shared phone numbers, email addresses, educational services, and websites) in which prohibited activities occur and the extent of such prohibited activities; (c) The existence of separate personnel, electronic or paper-based health care records, and workstations; and (d) The extent to which signs and other forms of identification of the Title X project are present, and signs and material referencing or promoting abortion are absent.

Id. The preamble notes that physical separation at a "free-standing clinic," like one of the City's clinics, "might require more circumstances to be taken into account in order to satisfy a clear separation between Title X services" and abortion referrals, because having the "same entrances, waiting rooms, signage, examination rooms, and the close proximity between Title X and

impermissible services" presents "greater opportunities for confusion" than at a hospital. *Id.* at 7767. The Rule does not specify which additional circumstances would be taken into account.

B. Procedural History

The City challenged the rule under the Administrative Procedure Act (APA), 5 U.S.C. §§ 551 *et seq.,* §§ 701 *et seq.* Pet.App.18a-21a. The district court granted a preliminary injunction and later granted summary judgment and issued a permanent injunction. The district court agreed with the City that the rule violated the APA for five reasons: (1) the Rule violates the Non-Interference Mandate; (2) the Rule violates the Nondirective Mandate; (3) HHS's reasoning about medical ethics was arbitrary and capricious; (4) HHS's estimate of the cost of compliance with the Rule's "Separation Requirement" was arbitrary and capricious, and (5) HHS's reasoning about the rule's likely impact on providers and patients in the program was arbitrary and capricious. Pet.8-9. The Fourth Circuit affirmed for the first four reasons and did not pass on any other claims or arguments. Pet.9-11. Petitioners timely sought this Court's review. Pet.2.

DISCUSSION

I. Granting the petition would be imprudent because the case is unlikely to be fully briefed and argued

Given the change in Administrations that will occur on January 20, 2021, this case almost certainly will be resolved before it can be briefed, argued, or decided on the merits. Two days after his inauguration in 1993, President Clinton ordered HHS immediately to rescind the 1988 rule on which the rule at issue in this case is modeled. Mem., The Title X "Gag Rule," 58 Fed. Reg. 7455 (Jan. 22, 1993). In response, HHS rescinded that earlier rule, with immediate effect, sixteen days after the President's inauguration, on February 5, 1993. 58 Fed. Reg. 7462 (Feb. 5,

1993). President-elect Biden has pledged to "reverse the Trump Administration's rule preventing [Planned Parenthood and other former Title X providers] from obtaining Title X funds." *The Biden Agenda for Women*, https://archive.is/TPl8M (referencing 84 Fed. Reg. 7,714 (Mar. 4, 2019)). A spokesperson for Mr. Biden's campaign told the New York Times last year that he would "use executive action to on his first day in office [to] withdraw … Donald Trump's Title X restrictions." Maggie Astor, *How the 2020 Democrats Responded to an Abortion Survey*, N.Y. Times, Nov. 25, 2019, https://archive.is/seSjM. In light of the overwhelming likelihood that President-elect Biden will immediately rescind the Rule following his inauguration, the Court should wait a couple of weeks to decide whether to grant the petition to determine whether this case can actually reach the merits in this Court.

Waiting to act on this petition will not prejudice the petitioners. The permanent injunction in this case has been in place for ten months (since February 14, 2020). Petitioners did not seek a stay of that permanent injunction in this Court. And petitioners have continued to administer the program effectively notwithstanding the permanent injunction which is narrow, limited to Maryland.

II. The Court should deny the petition because the decision below is correct

1. The Rule violates the Non-Interference Mandate. This is not a close issue. Pet.App.50a-54a. The Non-Interference Mandate, enacted in 2010, provides that "Notwithstanding any other provision of … [the Affordable Care Act], the Secretary of Health and Human Services shall not promulgate any regulation that" among other things "interferes with communications regarding a full range of treatment options between the patient and the provider" or "restricts the ability of health care providers to provide full disclosure of all relevant information to patients making health care decisions." 42 U.S.C. § 18114.

The Rule bars abortion referrals. By doing so, it interferes with communications regarding "a full range of treatment options" between the patient and the provider" and "restricts the ability of health care providers to provide full disclosure of all relevant information to patients." *Id.*[1]

That is the end of this case. This Court "has explained many times over many years that, when the meaning of the statute's terms is plain, [the Court's] job is at an end. The people are entitled to rely on the law as written, without fearing that courts might disregard its plain terms based on some extratextual consideration." *Bostock v. Clayton County*, 140 S. Ct. 1731, 1749 (2020); *Lamie v. United States Trustee*, 540 U.S. 526, 534 (2004) ("It is well established that 'when the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms."). "When the express terms of a statute give us one answer and extratextual considerations suggest another, it's no contest. Only the written word is the law, and all persons are entitled to its benefit." *Bostock*, 140 S. Ct. at 1737; *see also Carr v. United States*, 560 U.S. 438, 458 (2010); *Conn. Nat'l. Bank v. Germain*, 503 U.S. 249, 253–54 (1992) ("When the words of a statute are unambiguous … judicial inquiry is complete.").

The threat to expel a doctor from the Title X program for providing forbidden information to patients certainly "interferes with" and "restricts" her provision of that information. *Contra* Pet.16-18. The ordinary meaning of the word interfere is "to interpose in a way that hinders or impedes." *Merriam-Webster's Collegiate Dictionary* 652 (11th ed. 2004); *Merriam-Webster Online Dictionary*,

[1] The Rule violates other provisions of the Non-Interference Mandate as well, Pet.App.50a-52a, but its violation of these provisions is especially clear and sufficient to support the judgment below.

https://archive.is/lrf8g (same). And the ordinary meaning of the word restrict is "to confine or keep within limits, as of space, action, choice, intensity, or quantity," *Random House Unabridged Dictionary* 1642 (2d ed. 1993); *see also Merriam-Webster Online Dictionary*, https://archive.is/uLFG6 (similar). No English speaker would disagree that requiring a doctor in the Title X program to withhold information as a condition of continued participation in the program "interferes" with the provision of that information, or disagree that such a requirement "restricts" her ability to provide it.

Doctrines the Court uses to determine when the Government's refusal to fund an activity burdens a constitutional right are irrelevant to the interpretation of this statute. *Contra* Pet.17-18. Petitioners' effort to apply those doctrines here ignores the statute's text, which bars the Secretary from promulgating any regulation that "interferes with" or "restricts" the information doctors may provide their patients. The statute is not concerned with whether a doctor's "rights" are violated; or whether a patient's "rights" are violated; it is concerned only with whether "the ability" of health care providers to "provide full disclosure of all relevant information to patients" is "restrict[ed]" or whether "communications regarding "a full range of treatment options" are "interfer[ed] with." Petitioners' argument that the Rule "does not burden or interfere with a client's health care *at all*," Pet.18 (emphasis added), is false, akin to claiming that a rule barring a doctor in the program from telling a pregnant client she needs urgent medical care to save her pregnancy and her life would "not burden or interfere with a client's health care at all." But even if it were true the Rule still would violate the Mandate because what that the Mandate prohibits are regulations that "interfere[] with communications … between the patient and the provider" which the rule indisputably does.

Further bolstering the City's position: In the entire course of this litigation petitioners have not identified a circumstance where the Secretary has the regulatory authority to "interfere with" or "restrict" the speech of physicians directly through criminal or civil penalties rather than by regulating their participation in a government program. After all, HHS does not regulate doctors; state medical licensing boards do. That petitioner's interpretation would make the Non-Interference Mandate "inoperative or superfluous, void or insignificant," shows it is wrong. *Rubin v. Islamic Republic of Iran*, 138 S. Ct. 816, 824 (2018).

The "notwithstanding" clause does not limit the Mandate's reach. *Contra* Pet.19. "Thousands of statutory provisions use the phrase 'except as provided in ...' followed by a cross-reference in order to indicate that one rule should prevail over another in any circumstance in which the two conflict." *Atl. Richfield Co. v. Christian*, 140 S. Ct. 1335, 1351 (2020). "Such clauses explain what happens in the case of a clash, but they do not otherwise expand or contract the scope of either provision by implication." *Id.* (citing *NLRB v. SW General, Inc.*, 137 S.Ct. 929, 939-940 (2017) as standing for "the same principle for 'notwithstanding' clauses"). The Non-Interference Mandate's placement in the "Miscellaneous Provisions" subtitle of the ACA further shows that Congress intended it to have a sweep beyond the ACA. *Contra* Pet.18.

Finally, it makes eminent sense that Congress would restrict HHS's authority to manipulate communications between doctors and their patients given the sanctity of the doctor-patient relationship. In criticizing the Fourth Circuit's conclusion that the Rule violates other provisions of the Non-Interference Mandate, Pet.18, in the unique context of the Title X program involving low-income patients and the provision of time-sensitive healthcare services, *see* Pet.App.51a, the petitioners attack a strawman.

Petitioners nowhere disagree that Congress would reasonably wish to stop HHS from manipulating the information that doctors provide to their patients about appropriate medical treatments.

2. The Rule violates the Nondirective Mandate. This too is not a close issue. Pet.App.40a-50a. "Nondirective counseling" is a term of art in the medical community. HHS showed that its understanding of that term accords with the medical community's understanding in the Rule itself. *See* 84 Fed. Reg. at 7716; *see also id.* at 7746. In a nutshell, nondirective counseling is counseling that does not steer a patient in one direction or another. *See id.* at 7716; *see* Pet.App.40a-42a. Counseling where the physician withholds relevant information in an effort to steer the patient is not nondirective counseling. *See* 84 Fed. Reg. at 7716. Petitioners' argument that counseling maintains its "nondirective" character as long as the doctor "does not direct [a patient] to do anything," Pet.13, is not only inconsistent with the medical meaning of that concept, it is not even supported by HHS's own understanding of that concept in the Rule at issue in this very case. Counseling can be nondirective even if it does not treat every option presented exactly "the same," Pet.14, but it cannot steer the patient toward or away from one option or another and still be nondirective. *See* 84 Fed. Reg. at 7716, 7746. The ban on abortion referrals is unlawful because it steers patients away from abortion; no more or less unlawful than a ban on prenatal care or adoption referrals would be.

Petitioners' effort to define away the problem with HHS's counseling restrictions—by claiming "referrals" are not "counseling," Pet.15-16—fails for the obvious reason that referrals are provided as part of counseling and what matters, at the end of the day, is whether the

counseling provided in the Title X program is nondirective.[2] *See* Pet.App.41a-45a. The character of the counseling depends on the information provided (or refused) therein. Referrals for abortion cannot be eliminated from counseling any more than discussion of abortion as an option could be eliminated (or discussion of prenatal care or adoption for that matter) without depriving the counseling of its nondirective character. Counseling that steers a patient by refusing to provide relevant information is not nondirective counseling.

Finally, petitioners' implied repeal argument, Pet.18-19, is fatally flawed because § 1008 can be given effect without violating the Non-Interference Mandate and the Nondirective Mandate. Section 1008 of Title X does not require HHS to bar physicians in the program from providing nondirective counseling that includes abortion as an option, as HHS recognized in this very rule, 84 Fed. Reg. at 7725. Indeed, if § 1008 mandated that, *Rust* would have been wrong to call § 1008 "ambiguous" and the 1988 rule merely "permissible," 500 U.S. at 184, and the regulations governing the program "for virtually its entire history," 65 Fed. Reg. at 41271, would be contrary to law. But if HHS can carry out § 1008 without violating the Non-Interference Mandate and the Nondirective Mandate—and it plainly can, by, for example, administering the program in the manner it was administered before the Rule took effect—then there is no conflict and no issue of implied repeal. *See Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 663 (2007); *Fed. Commc'n Comm'n v. NextWave Pers. Commc'ns Inc.*, 537 U.S. 293, 304 (2003). Petitioners are wrong that Congress cannot limit an agency's impliedly delegated lawmaking

[2] This argument also fails for the independent reason that it contradicts HHS's *own understanding in the Rule* that counseling includes referrals. *See* Pet.App.41a-42a.

authority by enacting later specific prohibitions. Pet.19. In fact, "courts frequently find Congress to have done this." *United States v. Fausto*, 484 U.S. 439, 453 (1988) (Scalia, J.); *see* Scalia & Garner, Reading Law 330 (2012) ("[A] later enactment … will often change the meaning that would otherwise be given to an earlier provision that is ambiguous.").

3. The rule is arbitrary and capricious because HHS did not adequately explain the basis for its conclusion that the rule is "not inconsistent" with medical ethics. 84 Fed. Reg. at 7748; *see* Pet.App.25a-33a. The only evidence concerning medical ethics in the record shows the opposite. Numerous major medical organizations including the AMA, ACOG, AAFP, ACP, AAP, AAN, and numerous additional organizations and individuals, all told HHS that the Rule would be inconsistent with medical ethics and place physicians in an ethically compromised situation. Pet.App.26a-28a. Four States and Planned Parenthood told HHS that the professional and ethical violations would be so profound they would be forced to exit the program if the proposed regulations were finalized (which they later did). *Id.* These statements were supported by citations to medical ethics codes, medical ethics opinions, and the organizations' own expertise in medical ethics. *See id.*

Against this compelling and voluminous evidence from the nation's leading medical organizations, collectively representing the overwhelming majority of the nation's board-certified OBGYNs, and rooted in longstanding principles of medical ethics and written medical ethics codes, HHS responded in a mere three paragraphs that cited no evidence of the requirements of medical ethics. *See* 84 Fed. Reg. at 7724, 7748. (A fact petitioners do not dispute, Pet.23-28). HHS did not identify any code of medical ethics under which the Rule's counseling restrictions would be considered ethical. Nor did HHS

identify any professional medical organization that takes the position that it is ethical. Nor did HHS state that its expertise in medical ethics drove its conclusion. Nor did HHS identify even a single physician who believes it is consistent with medical ethics for a physician to obstruct a patient's access to safe and legal medical treatment because the physician disagrees with the patient's decision to pursue that treatment. HHS's reasoning was insufficient.

4. The rule is arbitrary and capricious because HHS relied on numerical estimates of the cost of the Rule's separation requirement without adequately explaining the rationale for those estimates. Pet.App.35a-39a. HHS stated that affected grantees would incur average costs of $30,000, 84 Fed. Reg. 7782, but the $30,000 number is neither rooted in evidence nor reality. HHS has not identified any evidence in the record that supports this number—not one study, not one pilot program, not one expert opinion, not even one comment from the public. No one—including apparently HHS—has any idea where that $30,000 number came from or what expenses it is supposed to account for (i.e., whether it is costs for facilities, recordkeeping, salaries, or other expenses).

Instead, the evidence before the agency showed that this unfounded number is nowhere close to the actual cost of compliance. Pet.App.36a-37a. For one thing, HHS entirely failed to account for ongoing (not just one-time) costs, including those associated with required duplication of staff and contracts for goods and services—costs that can reach millions of dollars for some grantees. In contrast, Planned Parenthood, the largest Title X provider, carefully tallied the numbers and estimated average costs of nearly $625,000 per affected service site. *Id.* Other commenters pointed to costs of similar amounts. *Id.* Evidence provided by commenters showed that HHS's cost

estimates were not simply incorrect—but incorrect by orders of magnitude.

Petitioners' effort to rescue HHS's $30,000 number by calling it a "rough" estimate, Pet.28, fails. Estimates, even if "rough," must have some basis in fact. HHS's $30,000 number has no basis in fact. HHS's approach is like EPA setting an emissions limit by just making up a number—contrary to all of the evidence in the record—then claiming it was justified because it was a "rough" estimate while refusing to provide any further explanation or square its number with the evidence in the record. Agencies cannot make sweeping rules with the force of law affecting millions of people so cavalierly. *Contra* Pet.28-31. If the cost of compliance could not be quantified, it should not have been quantified. But as commenters' evidence made clear, in fact it could be quantified. HHS simply ignored what the evidence showed. No commenter demanded "false precision" from HHS. Pet.30-31. What commenters demanded, and what the APA requires, was fidelity to facts and evidence.

Even using HHS's incorrect $30,000 number, HHS demonstrably underestimated the financial cost of the Separation Requirement by over $200 million. HHS estimated that only 15 percent of sites would "not comply with physical separation requirements" because they provide abortions. 84 Fed. Reg. at 7781. HHS multiplied 15 percent of the total Title X sites by its $30,000 per site cost to arrive at a total estimated cost for the Separation Requirement of $36.08 million. 84 Fed. Reg. at 7782.

But the Separation Requirement affected 100 percent of Title X sites, because merely making abortion referrals as part of pregnancy counseling violates the separation requirement, *see id.* at 7717, and *every* Title X grantee made abortion referrals before the Rule took effect. Thus the estimated total cost—even using HHS's own per-site number—should have been $240 million, not

the $36 million the agency estimated. At minimum the estimate should have been higher because it entirely failed to account for providers, like the City, who are subject to the Separation Requirement and its attendant compliance costs but do not provide abortions. Here, again, HHS entirely failed to consider an important aspect of the problem and in doing so underestimated the cost of its Rule by roughly seven-fold—by over $200 million.

III. If the Court grants the petition, it should also grant the Ninth Circuit petitions, but should use the City's questions presented

If the Court does grant the petition, it should also grant the petitions filed by the challengers in the Ninth Circuit in Nos. 20-429 and 20-539, and consolidate the cases. It should use the counterstatement of the questions offered by the Mayor and City Council of Baltimore, or something similar, not the overbroad questions presented by the United States which ask the Court to pass on issues not addressed and resolved by either of the circuits involved in this circuit split. The Court cannot, consistent with Article III and its own practice, resolve questions presented that are framed as broadly as the United States has framed them without crossing from a court of review to first view. *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005); *see Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 201 (2012).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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