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

REPLY BRIEF FOR THE PETITIONERS

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Baltimore acknowledges (Br. in Opp. 20) that the en banc Fourth Circuit created a square circuit split with the en banc Ninth Circuit and that the challengers in the Ninth Circuit have filed their own petitions for writs of certiorari, which the government agrees should be granted alongside the one here. And the City itself emphasizes that the challenged rule is a significant one, characterizing the consequences as "dramatic" and "far-reaching." *Id.* at 2. The City thus all but concedes that this is a paradigm case for this Court's review. Yet Baltimore nevertheless opposes certiorari, relying on speculation that the rule will be "immediately rescind[ed]" by new agency leadership and on the assertion that the merits are not even "close." *Id.* at 11. Neither argument withstands scrutiny.

I. BALTIMORE'S SPECULATION ABOUT THE RULE'S FUTURE IS NO REASON FOR DENYING REVIEW NOW

Relying on past statements by the Biden campaign, Baltimore urges this Court to deny review on the theory that the rule will be rescinded before this Court can address its validity. Br. in Opp. 10-11. But this Court recently granted a writ of certiorari to consider agency approval of Medicaid work requirements, notwithstanding the similar possibility of a future policy change. See *Azar* v. *Gresham*, No. 20-37 (Dec. 4, 2020). It should do the same here.

Any decision whether to rescind the rule ultimately must be made by the Department of Health and Human Services (HHS), which would have to comply with any applicable requirements of the Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.*, 701 *et seq.* Substantively, the APA requires agency action rescinding or modifying a rule to engage in "reasoned decisionmaking." *Department of Homeland Sec.* v. *Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1905 (2020) (*Regents*) (citation omitted). And because that requirement demands that HHS consider, among other things, "the 'alternatives' that are 'within the ambit of the existing policy'" and "potential reliance interests" engendered by the current rule, *id.* at 1913 (brackets and citation omitted), the City's confident assertion that the agency will scuttle the rule in light of campaign statements rests on either unfounded speculation about the rulemaking process or an assumption of improper pre-commitment. Procedurally, the APA requires notice-and-comment rulemaking to rescind rules, subject to certain exceptions. 5 U.S.C. 553(a) and (b). And that further calls into question whether any rescission of the rule would

be in effect before this Court otherwise decided the validity of the current rule by the end of this Term.

Relatedly, it is quite likely any such rescission would be met with litigation, including requests for preliminary injunctive relief. Cf. *Regents*, 140 S. Ct. at 1903-1905; *Little Sisters of the Poor Saints Peter & Paul Home* v. *Pennsylvania*, 140 S. Ct. 2367, 2378-2379 (2020). Indeed, after the current rule was enjoined, other plaintiffs brought suits challenging the lawfulness of the rule's predecessor, which purported to require Title X providers to refer for abortion. See *Vita Nuova, Inc.* v. *Azar*, 458 F. Supp. 3d 546 (N.D. Tex. 2020) (dismissing some, but not all, claims under Article III); Notice, *Obria Grp., Inc.* v. *HHS*, No. 19-cv-905 (C.D. Cal. June 13, 2019) (voluntarily dismissing challenge). To be clear, the point is not that any such challenge would necessarily or even likely prevail. Rather, it is that rescission of the rule would require not only proper administrative evaluation but also potentially prolonged and uncertain litigation, during which the validity of the current rule would remain important. Those considerations underscore why the decision whether to grant certiorari should not turn on speculation over the rule's future. And in contrast, granting further review and resolving whether the rule is lawful by June 2021 would benefit the government and Title X providers *regardless* of the rule's ultimate fate. This Court's decision would either (1) provide clarity about HHS's authority in this area while the agency considers whether and how to replace the rule, or (2) obviate the need for any rescission and further litigation.

Moreover, even if HHS were willing and able to rescind the rule as a legal and policy matter at some later date, that does not necessarily mean the agency in the

interim would stop seeking review of the judgment below. After all, that judgment imposes significant legal constraints on HHS's discretion going well beyond the specific context of the challenged rule. For example, under the en banc Fourth Circuit's holding that limitations within a federal spending program are subject to the restrictions in Section 1554 of the Patient Protection and Affordable Care Act (ACA), Pet. App. 50a-52a, HHS may soon face allegations that it cannot impose a wide range of traditional constraints on government healthcare spending, such as merely declining to provide Medicare coverage for a given procedure, see Pet. 18. And especially given that any notice-and-comment process would likely last beyond June 2021, HHS could continue to press for a decision this Term that would protect its long-term institutional interests, even if it chooses to rescind this particular rule sometime later.

Finally, this Court should decline Baltimore's invitation to delay consideration for "a couple of weeks" past the January 8, 2021 Conference. Br. in Opp. 11. This Court effectively denied that request already when it gave the City only a five-day extension to respond to the petition rather than the 58-day extension that had been requested. Declining further delay continues to make sense because otherwise the Court would be unable to decide this case until next Term (absent significant expedition at the merits stage). If HHS were to change course in a relevant manner a few weeks after certiorari were granted, the Court would retain the option of reconsidering; but if the Court waits to see what, if anything, HHS does, it will have lost the opportunity to resolve the case this Term even if the agency continues to desire that result.

Such delay would be especially harmful because the judgment below affirmed an injunction that is currently prohibiting HHS from enforcing the rule in Maryland. While Baltimore observes (Br. in Opp. 11) that the government did not seek a stay of that judgment after the Fourth Circuit denied one, the government's decision not to seek extraordinary stay relief should not be held against it in seeking timely review of a conflict between two en banc courts of appeals. The government's restraint does not mean it should be required to accept a further year's delay before the rule can be enforced in Maryland. Such a result would only incentivize parties to seek extraordinary relief in this Court.

II. THE RULE IS LAWFUL

Baltimore also urges this Court to deny review on the theory that the merits are not even "close," Br. in Opp. 11, 15—notwithstanding that its position was rejected by six Fourth Circuit judges and seven of eleven judges on the Ninth Circuit en banc panel. In any event, given the uncontested "circuit split" between two en banc courts of appeals, *id.* at 20, the City's merits contention is largely beside the point for certiorari purposes. The government addresses a few of Baltimore's more notable errors now to illustrate why its challenge to the rule rests on rhetoric rather than substance.

A. The Rule Falls Within HHS's Statutory Authority

As a threshold matter, Baltimore makes virtually no attempt to explain its position that subsidizing a family-planning program that refers clients for abortions complies with Section 1008's prohibition on funding programs "where abortion is a method of family planning." 42 U.S.C. 300a-6. Although the City emphasizes (Br. in Opp. 16) that *Rust* v. *Sullivan*, 500 U.S. 173 (1991), did

not hold that Section 1008 *unambiguously compelled* a prohibition on abortion referrals within the Title X program, that in no way undermines the point that the *best reading* of the statute's plain text is that such referrals are prohibited. Indeed, *Rust* itself credited HHS's determination in 1988 that prohibiting abortion referrals was "more in keeping with the original intent of the statute." *Id.* at 187. Baltimore is therefore left to rely on two post-*Rust* enactments, neither of which strips HHS of its statutory authority to prohibit abortion referrals, much less does so with the requisite clarity to accomplish an implied repeal.

1. The ban on abortion referrals does not violate an appropriations rider providing that "all pregnancy counseling shall be nondirective," Pet. 13 (citation omitted), because a Title X provider's *refusal to refer* a patient for an abortion neither involves "pregnancy counseling" nor "[]direct[s]" her to do anything. Pet. 13-16. Unable to refute that plain-text reading, Baltimore's only response is that "'[n]ondirective counseling' is a term of art" that requires both "counseling" and "referrals" that "do[] not steer a patient in one direction." Br. in Opp. 15. But the City never substantiates this *ipse dixit*, much less reconciles it with the rider's text or other legislation and regulations distinguishing between "counseling" and "referrals." Pet. 15-16. In any event, Baltimore does not explain how a refusal to provide an abortion referral "steers a patient" toward carrying her pregnancy to term. Br. in Opp. 16. Especially given that providers may explain to women seeking abortion referrals that such information is simply outside the scope of this limited federally funded program, Pet. 13, no reasonable patient could treat the refusal to

provide such information as an implicit direction not to seek an abortion outside of the auspices of Title X.

2. Baltimore is no more persuasive in contending that the prohibition on abortion referrals violates Section 1554 by "interfer[ing] with communications regarding a full range of treatment options between the patient and the provider" and "restrict[ing] 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(3)-(4); see Pet. 16-18. The City fails to explain why the Fourth Circuit's interpretation of Section 1554 would not strip HHS of independent regulatory authority to decline to fund abortions themselves (or any other medical procedures). Pet. 18. Baltimore characterizes this outcome as "a strawman," Br. in Opp. 14, but that is another *ipse dixit* without any basis for limiting the Fourth's Circuit rationale. The City fails to explain how the Fourth Circuit's reading of Section 1554 could be limited to those subsections dealing with "information that doctors provide to their patients." *Id.* at 15. And the City's reading of even just those subsections threatens to disable HHS from placing any limits on the types of referrals offered by Title X providers—whether to their preferred orthopedists, local medical-marijuana dispensaries, or other providers with whom they have financial relationships. See Pet. 23-24; cf. 42 U.S.C. 1395nn.

Baltimore contends that those startling consequences are dictated by the words "interferes with" and "restricts." Br. in Opp. 12 (citations omitted). But the First Amendment uses the similar verb "abridg[e]," U.S. Const. Amend. I, and it does not compel taxpayer "subsidization of abortion-related speech," *Rust*, 500 U.S. at 196. Barring abortion referrals within a limited

federally funded family-planning program does not "abridge," "restrict," or "interfere with" doctor-patient speech; it simply means that providers must "use private, non-Title X funds to finance [these] abortion-related activities," *id.* at 199 n.5.

Nor does the "general rule that the Government may choose not to subsidize speech," *Rust*, 500 U.S. at 200, render Section 1554 "superfluous," Br. in Opp. 14 (citation omitted). As the government explained below, HHS directly regulates health insurance under the ACA, and thus Section 1554 may limit its ability to promulgate health-insurance regulations. Gov't C.A. Reply Br. 15.

3. Even if the statutory-authority question were closer, the presumption against implied repeals would dispose of Baltimore's arguments. Pet. 18-19. The City does not contend that the post-*Rust* statutes it invokes are sufficiently clear to overcome the presumption; rather, it maintains that the presumption does not apply at all. Br. in Opp. 16. But *Rust*'s holding that the Title X statute implicitly delegated authority to HHS to prohibit abortion referrals "effectively bec[a]me part of the statutory scheme." *Kimble* v. *Marvel Entm't, LLC*, 576 U.S. 446, 456 (2015). Accordingly, any legislative decision to "limit" that "delegated lawmaking authority by enacting later specific prohibitions," Br. in Opp. 16-17, would plainly constitute a partial repeal of the statute. See Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 331 (2012) (explaining that the presumption applies when an "earlier ambiguous provision has already been construed by the jurisdiction's high court to have a meaning that does not fit as well with a later statute as another meaning").

B. The Rule Is The Product Of Reasoned Decisionmaking

In contending that the rule is arbitrary and capricious, Baltimore never addresses the threshold, and dispositive, flaw in its argument: commenters' objections based on medical ethics and compliance costs were irrelevant, given HHS's reasonable conclusions that the rule represented the best reading of Section 1008 and that statutory fidelity was more important than such concerns. Pet. 20-22. In any event, HHS's responses to those objections on their own terms were entirely reasonable, Pet. 22-31, and the City's criticisms amount only to a policy disagreement.

1. Baltimore does not dispute that HHS responded to comments alleging that the rule was inconsistent with medical ethics: among other things, the agency emphasized the limited nature of the Title X program, the existence of statutes allowing providers to refuse to refer for abortion, and this Court's decision in *Rust*. Pet. 22-28. Instead, the City faults the agency for not identifying a "professional medical organization" or "physician" who believes that the rule comports with medical ethics. Br. in Opp. 18. Even setting aside that one of the petitioners is *herself* a medical doctor (Dr. Diane M. Foley, the Deputy Assistant Secretary for Population Affairs), an expert agency needs no "special justification" for disagreeing with the purported expertise of various organizations in the field of medical ethics. Pet. 27 (quoting *Department of Commerce* v. *New York*, 139 S. Ct. 2551, 2571 (2019)). To the contrary, the government itself has a significant "interest in protecting the integrity and ethics of the medical profession"—especially when it comes to abortion and even when its judgment is not shared by doctors' guilds. *Gonzales* v. *Carhart*, 550 U.S. 124, 157 (2007) (citation omitted); see *id.* at 176

(Ginsburg, J., dissenting) (unsuccessfully objecting that partial-birth abortion was defended by "nine professional associations" and that no "comparable medical groups supported" the federal ban on the procedure).

2. Baltimore likewise does not dispute that HHS responded to comments alleging that the likely costs of initial compliance with the physical-separation requirement exceeded its initial estimate. Pet. 28-30. Nor does the City identify what HHS should have used to estimate compliance costs after it determined that the commenters' estimates rested on inaccurate assumptions. Pet. 30-31. Instead, Baltimore suggests that although HHS did not need to "quantif[y]" those costs at all, its attempt to do so should have been supported by a "study," "pilot program," or "expert opinion" outside the agency. Br. in Opp. 18-19. But the City offers no authority that an expert agency should be penalized for attempting to give a rough estimate of costs, especially when it ultimately concluded that "compliance with statutory program integrity provisions is of greater importance," 84 Fed. Reg. 7714, 7783 (Mar. 4, 2019).

Baltimore also contends that the physical-separation requirement "affected 100 percent of Title X sites" on the theory that, before the rule, every provider was offering abortion referrals as part of their Title X services. Br. in Opp. 19. But even if true, that was only because the rule's predecessor compelled them to do so. With the rule's elimination of the abortion-referral requirement, the only Title X sites affected by the physical-separation requirement were those that *chose* to provide abortion referrals as part of their *non*-Title X services. Baltimore offers neither evidence suggesting that *all* Title X providers fit the bill nor authority that HHS needed to assume as much. To the contrary, that

the majority of incumbent providers have chosen to remain in the program since the rule took effect, Pet. 27-28, suggests that for most Title X clinics, the costs of the physical-separation requirement were negligible, if not nonexistent.

Finally, Baltimore asserts that "HHS entirely failed to account for ongoing" costs of compliance with the physical-separation requirement, Br. in Opp. 18, while ignoring that the relevant discussion was limited to costs incurred "in the first year following" the rule's publication, 84 Fed. Reg. at 7782. HHS addressed ongoing compliance costs elsewhere: it explained that "[c]ommenters' insistence that requiring physical and financial separation would increase the cost for doing business only confirms the need for such separation," because that would mean that "the collocation of a Title X clinic with an abortion clinic permits the abortion clinic to achieve economies of scale." *Id.* at 7766. Baltimore does not and cannot contend that there was anything unreasonable about that conclusion.

* * * * *

For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be granted.[*]

Respectfully submitted.

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[*] Although the government agrees with Baltimore that this Court should also review the Ninth Circuit's decision, the government disagrees with Baltimore's proposal to replace the simple, neutral questions presented in the petition here with the lengthy, tendentious ones offered by the City. See Br. in Opp. II, 20. Rather than making this Court one of "first view," *id.* at 20, the petition's formulation of the questions presented would ensure that all parties and the Court could address a subsidiary argument addressed only by the Ninth Circuit—namely, whether the rule is arbitrary and capricious because HHS allegedly failed "to address adequately the [rule's] anticipated harms." Pet. at 29, *Oregon* v. *Azar*, No. 20-539 (Oct. 5, 2020). Of course, if the Court were disinclined to address that subsidiary issue, it would retain discretion not to do so. See *Caterpillar Inc.* v. *Lewis*, 519 U.S. 61, 75 n.13 (1996).