No. 25-____

IN THE
Supreme Court of the United States

STATE OF TENNESSEE,

Petitioner,

v.

ROBERT F. KENNEDY, JR., in his official capacity as Secretary of the U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, ET AL.,

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

JONATHAN SKRMETTI
Attorney General

J. MATTHEW RICE
Solicitor General
Counsel of Record

HARRISON GRAY KILGORE
Senior Assistant Attorney General for Strategic Litigation

OFFICE OF TENNESSEE ATTORNEY GENERAL
P.O. Box 20207
Nashville, TN 37202
(615) 741-3491
Matt.Rice@ag.tn.gov

Counsel for Petitioner

QUESTIONS PRESENTED

In 2023, the U.S. Department of Health and Human Services stripped millions of dollars in funding from the States of Tennessee and Oklahoma because they refused to counsel or refer for abortions that are illegal under state law. Tennessee sued, alleging that HHS's funding decision exceeded statutory authority, violated the Administrative Procedure Act, and flunked the Spending Clause clear-statement rule. A district court denied Tennessee's request for preliminary relief. The Sixth Circuit affirmed. In doing so, the court created a circuit split on what the Spending Clause requires and drastically narrowed the prospective scope of *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024). After the Sixth Circuit's decision, HHS restored Tennessee's funding at approximately full amounts and thereby eliminated any live dispute between the parties. The questions presented are:

1. Whether, pursuant to *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950), this Court should vacate and remand with instructions to dismiss the appeal as moot.

2. Whether, in the alternative, this Court should vacate and remand for further consideration in light of *Medina v. Planned Parenthood South Atlantic*, 145 S. Ct. 2219 (2025).

PARTIES TO THE PROCEEDINGS BELOW

Petitioner, plaintiff-appellant below, is the State of Tennessee.

Respondents, defendants-appellees below, are Robert F. Kennedy, Jr., in his official capacity as Secretary of the United States Department of Health and Human Services; the United States Department of Health and Human Services; the Deputy Assistant Secretary for Population Affairs; and the Office of Population Affairs.*

* Pursuant to this Court's Rule 35.3, the following respondents have been automatically substituted as official-capacity parties: Robert F. Kennedy, Jr., *vice* Xavier Becerra; the Deputy Assistant Secretary for Population Affairs *vice* Jessica S. Marcella.

RELATED PROCEEDINGS

The following proceedings are directly related to this case within the meaning of Rule 14.1(b)(iii):

Tennessee v. Becerra, No. 24-5220 (6th Cir.) (initial opinion and judgment issued August 26, 2024; amended opinion and judgment issued March 10, 2025; petition for en banc review denied May 9, 2025).

Tennessee v. Becerra, No. 3:23-cv-384 (E.D. Tenn.) (order denying preliminary injunction motion issued March 11, 2024; final judgment not yet entered).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Constitutional Provisions

Statutes

Regulations

Other Authorities

INTRODUCTION

The decision below is a dream for the administrative state—but a nightmare for sovereign States. It carries forward agency deference for every statutory construction ever allowed under *Chevron*, negating this Court's instruction that courts must identify the "single, best meaning" of a statute when confronted with a new "agency action[]." *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 400, 412 (2024). The decision also guts the Spending Clause. According to the Sixth Circuit, the Spending Clause allows the Executive Branch to subject States to conditions on federal funding that are untethered from any statutory restriction. If Congress provides that States will be subject to "regulations" an agency "may promulgate" or "conditions" the agency "may determine to be appropriate," *see* 42 U.S.C. § 300a-4(a), (b), that's good enough for the Sixth Circuit. And this case shows just how supercharged that power is, because the Sixth Circuit allowed a regulatory funding condition that *this Court has already stated Title X does not address* to serve as the basis for stripping Tennessee of millions of dollars. That cannot be right.

If HHS had not mooted this appeal, it would have been ready-made for this Court's review. But HHS has now restored Tennessee's Title X funding and disavowed enforcing the abortion-related mandates it previously cited as grounds for rescindment. When the actions of a prevailing party below give rise to mootness, this Court's "established practice" is to "vacate the judgment below and remand with a direction to dismiss." *United States v. Munsingwear, Inc.*, 340

U.S. 36, 39 & n.2 (1950). The Court should follow that practice here.

And if this appeal is not moot, the Court should vacate the judgment and remand the case for further consideration in light of *Medina v. Planned Parenthood South Atlantic*, 145 S. Ct. 2219 (2025). The Sixth Circuit would likely reconsider its Spending Clause holding given *Medina*'s repeated instruction that the Constitution requires *Congress* to announce clear spending conditions *in statutes*. Indeed, this Court recognized as much by GVR'ing Oklahoma's near-identical Spending Clause challenge to HHS's decision to rescind its Title X funding. *Oklahoma v. U.S. Dep't of Health & Hum. Servs.*, No. 24-437, 2025 WL 1787685, at *1 (Mem.) (U.S. June 30, 2025). Absent *Munsingwear* vacatur, that same approach is warranted here.

The Court should grant the petition for certiorari, vacate the judgment below, and remand with instructions to dismiss as moot or, at minimum, for further consideration in light of *Medina*.

OPINIONS BELOW

The Sixth Circuit's initial opinion (Pet.App.49a-95a) is reported at 117 F.4th 348 (6th Cir. 2024). The Sixth Circuit's amended opinion (Pet.App.1a-48a) is reported at 131 F.4th 350 (6th Cir. 2025). The Sixth Circuit's order denying en banc rehearing (Pet.App.152a-153a) is unreported but available at 2025 WL 1409052 (6th Cir. May 9, 2025). The district court's opinion (Pet.App.96a-151a) is reported at 720 F. Supp. 3d 564 (E.D. Tenn. 2024).

JURISDICTIONAL STATEMENT

The Sixth Circuit initially entered judgment on August 26, 2024, but later issued an amended opinion and judgment on March 10, 2025. A petition for en banc rehearing was denied on May 9, 2025. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, § 8, cl. 1 of the United States Constitution is reproduced at Pet.App.154a. Subsection 300(a) of Title 42 of the United States Code is reproduced at Pet.App.155a. Pertinent portions of subsections 300a-4(a) and (b) of Title 42 of the United States Code are reproduced at Pet.App.156a. Section 300a-6 of Title 42 of the United States Code is reproduced at Pet.App.157a.

STATEMENT

A. Background

1. Exercising its Spending Clause power, Congress enacted Title X of the Public Health Service Act, 42 U.S.C. § 300, et seq., to provide federal funding for family planning services. Title X authorizes the Secretary of HHS "to make grants to and enter into contracts with public or nonprofit private entities to assist in the establishment and operation of voluntary family planning projects." 42 U.S.C. § 300(a). These grants and contracts are "made in accordance with such regulations as the Secretary may promulgate," *id.* § 300a-4(a), and may be used to "offer a broad

range of acceptable and effective family planning methods and services," *id.* § 300(a).

But Congress placed a guardrail on Title X: "None of the funds appropriated under" that program "shall be used in programs where abortion is a method of family planning." *Id.* § 300a-6. HHS has always read that provision (often referred to as Section 1008) to prevent Title X grantees from performing abortions. But HHS's view on its power to require grantees to *refer and counsel* for abortion procedures has "flipped back and forth" between irreconcilable formulations. *Ohio v. Becerra*, 87 F.4th 759, 765 (6th Cir. 2023). Sometimes HHS has understood Section 1008 to *permit* abortion counseling and referrals in Title X programs. Other times, HHS has invoked its Section 1008 authority to *require* abortion counseling and referrals. And still other times, HHS has interpreted Section 1008 to *prohibit* counseling and referring for abortion. Changes occurred in 1971 (no funding), the mid-1970s (directive counseling prohibited, nondirective counseling allowed), 1981 (requiring counseling and referrals), 1988 (barring both counseling and referrals), 2000 (requiring both counseling and referrals), and 2019 (permitting nondirective counseling but prohibiting referrals). *See id.* at 765-68; *California ex rel. Becerra v. Azar*, 950 F.3d 1067, 1075 (9th Cir. 2020) (en banc).

The *Chevron* doctrine provided legal cover for this flip-flopping. This Court, in *Rust v. Sullivan*, considered whether HHS's 1988 rule prohibiting abortion counseling and referrals fell within the agency's rulemaking authority as limited by Section 1008. 500 U.S.

173, 184-87 (1991). The Court held that Section 1008 is "ambiguous" because it "does not speak directly to the issues of counseling [or] referral[s]." *Id.* at 184. The "legislative history," according to the Court, was similarly "ambiguous" as to what Section 1008 requires. *Id.* at 186. The Court therefore evaluated the rule under the two-step framework from *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), and deferred to HHS's interpretation of Section 1008, *Rust*, 500 U.S. at 184-87.

This Court granted review in a suite of cases in early 2021 to provide clarity on the contours of Section 1008. *See Am. Med. Ass'n v. Becerra*, Nos. 20-429, 20-454, 20-539. But a change in administration and concomitant enforcement priorities robbed the Court of the opportunity. 141 S. Ct. 2619 (2021) (dismissing certiorari).

So the regulatory whiplash continued. HHS's latest take on Section 1008 came in October 2021. 86 Fed. Reg. 56144 (Oct. 7, 2021) ("2021 Rule"). Among other things, the 2021 Rule replaced a 2019 *ban* on abortion referrals by Title X grantees with a *mandate* that Title X projects provide abortion counseling and make abortion referrals upon request. *Id.* at 56179.

The State of Ohio led a coalition of States challenging the 2021 Rule as facially unlawful. *See Ohio*, 87 F.4th at 767-68. Bound by *Rust* and *Chevron*, the Sixth Circuit upheld the 2021 Rule. *Id.* at 770-75. The court recognized that this Court's decision in *Dobbs v. Jackson Women's Health Organization*, 597 U.S. 215

(2022), was unaccounted for "[w]hen HHS implemented the 2021 Rule" because it "had not yet happened." *Id.* at 774 n.7. But because "judicial review of agency action is limited to the grounds that the agency invoked when it took the action," the Court held that *Dobbs* did not affect Ohio's facial challenge to the 2021 Rule. *Id.* (quoting *DHS v. Regents of the Univ. of Cal.*, 591 U.S. 1, 20 (2020)). Even so, the court explained that "[t]he impact of *Dobbs* on the Title X program is undoubtedly an 'important aspect' of the question" for future *applications* of the rule to Title X participants, meaning that application of the 2021 Rule's referral mandate against States with post-*Dobbs* laws criminalizing abortion would require new and different scrutiny. *See id.* (quotation omitted).

2. Tennessee has developed "a leading" Title X program. D.Ct.Doc. 1-1 at 36.[1] The State received its first Title X grant in 1971, and for five decades, HHS renewed Tennessee's funding without fail. D.Ct.Doc. 1-5 at 131-32. Tennessee's Title X program provides services across all 95 counties in the State. D.Ct.Doc. 1-1 at 36. Its facilities provide an array of family planning and health services ranging from abstinence training, to natural family planning and fertility methods, to pregnancy testing and infertility services. *Id.*; D.Ct.Doc. 1-5 at 132. Tennessee's program "has also provided all options counseling, including counseling on" pregnancy termination as requested by the pregnant client. D.Ct.Doc. 1-5 at 132.

---

[1] All pincites to district court filings refer to the stamped Page ID numbers generated by the court's ECF filing system for the consolidated docket No. 3:23-cv-384-TRM (E.D. Tenn.).

Each year, Tennessee serves over 40,000 individuals through Title X, most of whom qualify as low income and depend on the State for vital services. *Id.*; D.Ct.Doc. 1-1 at 36. HHS has commended the State's "strong" performance. D.Ct.Doc. 1-2 at 96.

3. In March 2022, Tennessee received a new Title X grant that provided the State with approximately $7 million for family planning services each year through 2027. D.Ct.Doc. 1-7 at 170-86. When Tennessee received this 5-year grant, HHS had implemented the 2021 Rule's abortion-related mandates.

Months later, this Court's decision in *Dobbs* triggered a chain of events. At the federal level, *Dobbs* spurred HHS to issue guidance about the impact on Title X. D.Ct.Doc. 1-6 at 161-69. That guidance stated that Title X recipients are still required to provide counseling and referrals for abortion, but it did not address how providers in States that outlaw abortion could comply. *See id.* at 164-66. HHS instead advised that "[t]here are no geographic limits for Title X recipients making referrals," but "Title X recipients are required to provide for coordination and use of referrals and linkages with [providers] who are in close physical proximity to the Title X site, when feasible." *Id.* at 165 (emphasis omitted). HHS also recommended using telehealth for making "necessary referral[s] to other medical facilities." *Id.*

In Tennessee, *Dobbs* activated the Human Life Protection Act. That Act, which took effect 30 days after the *Dobbs* decision, makes it a felony to "perform[] or attempt[] to perform an abortion," except to

preserve the life or health of the pregnant woman. *See* 2019 Tenn. Pub. Acts, ch. 351, §§ 2-3.

With that change in state law, Tennessee's Department of Health updated its Title X protocol to clarify that it would comply with the 2021 Rule by "provid[ing] information and counseling regarding all options that are legal *in the State of Tennessee*." *See* D.Ct.Doc. 1-5 at 132-33, 135-37 (emphasis added).

Soon after, HHS began a pre-scheduled review of Tennessee's Title X program. *Id.* at 133. During that review, the State told HHS about its post-*Dobbs* policy. *Id.* And HHS determined that the State "met" the 2021 Rule's counseling-and-referral expectations, even though "[n]o referrals for abortion are made" under the post-*Dobbs* policy. D.Ct.Doc. 1-1 at 56. Indeed, HHS lauded Tennessee's Department of Health as "the only agency" in the State capable of "administer[ing] Title X funds with integrity." *Id.* at 36. An HHS official passing along Tennessee's report praised the State for "such a wonderful review and leading a strong Title X program." D.Ct.Doc. 1-2 at 96.

HHS later reversed course. In *Dobbs*'s wake, President Biden ordered agencies like HHS to assess "potential actions" in light of States' restored ability to regulate abortion—including under Title X. *See* Exec. Ord. No. 14076, 87 Fed. Reg. 42053 (July 8, 2022). In response, HHS initiated another audit of Tennessee's Title X program in January 2023. And this time HHS disapproved the State's program, deciding that Tennessee must counsel and refer for abortions prohibited by state law. *See* D.Ct.Doc. 1-9 at 189-90. Either that,

or Tennessee should refer illegal abortions "out of state." D.Ct.Doc. 1-11 at 195. When the State refused to accede to these ultimatums, HHS canceled the balance of Tennessee's Title X grant and reallocated the $7 million the State was to receive to Planned Parenthood and similar groups. *See* D.Ct.Doc. 1 at 18-19 (collecting cites).

B. Proceedings Below

Tennessee sued to invalidate the rescindment of its March 2022 Title X grant award. The State argued that HHS's rescindment was unlawful under Title X, the Administrative Procedure Act, and the Spending Clause. *Id.* at 22-30. And it sought a preliminary injunction to preserve its funding during litigation. D.Ct.Doc. 20. On March 11, 2024, the district court denied this request for an injunction. Pet.App.96a-151a.

Tennessee immediately appealed. After briefing had closed before the Sixth Circuit, this Court decided *Loper Bright*, interring *Chevron* deference. Tennessee requested a chance to brief *Loper Bright*'s effect on this case, but HHS insisted that further briefing on the matter was unnecessary. C.A.Doc. 45. Without the benefit of additional briefing, the Sixth Circuit panel affirmed the district court's decision, with Judge Kethledge dissenting in part and concurring in the judgment in part. Pet.App.49a-95a.

As relevant here, the panel majority held that Tennessee was unlikely to succeed in its challenge based on two crucial conclusions. First, the majority

held that *Rust* and *Ohio* govern HHS's authority under Section 1008 to impose abortion-related funding conditions even after *Loper Bright*. Pet.App.66a-73a. Second, the majority held that HHS passed the Spending Clause's clear-statement rule even though Title X "does not" itself "illuminate" HHS's abortion conditions. *See* Pet.App.56a-66a. Title X states that grants and contracts "made under this subchapter shall be made in accordance with such regulations as the Secretary may promulgate" and "shall be payable … subject to such conditions as the Secretary may determine to be appropriate." Pet.App.58a (ellipsis in original) (quoting 42 U.S.C. § 300a-4(a), (b)). These broad delegations, the majority held, were constitutionally sufficient under the Spending Clause clear-statement rule when "combin[ed]" with the regulations promulgated under them. Pet.App.60a. The majority dismissed any tension with Spending-Clause cases that stress the need to source funding conditions in congressional statutes, not agency rules. *See* Pet.App.61a-63a.

In dissent, Judge Kethledge explained that the majority's reliance on *Rust* and *Ohio*—"*Chevron* case[s] down to [their] bones"—misapplies *Loper Bright*. *See* Pet.App.84a. That's because *Loper Bright* only narrowly affords statutory stare decisis protection to *Chevron*-dependent "holdings … *that specific agency actions are lawful*." Pet.App.87a (emphasis in original) (quotation omitted). Rescinding Tennessee's Title X funding, Judge Kethledge recognized, is distinct from the "specific agency action[s]" that were at issue in *Rust* and *Ohio*. *See id.* *Rust*, for example, dealt with "the 1988 Rule, which has since been rescinded." *Id.* Thus, Judge Kethledge argued that the

court had "no occasion to defer to that holding," and instead needed to "determine for itself whether the 2021 Rule's abortion-referral requirement," applied against Tennessee, "is contrary to law." Pet.App.87a-88a. The majority's contrary approach, he warned, renders *Loper Bright* "of no moment whatever" and ensures "*Chevron* lives on in perpetuity as to any statute that the Supreme Court has ever deemed ambiguous under that doctrine." Pet.App.86a-87a.

Under the de novo review required by *Loper Bright*, Judge Kethledge determined that HHS's "abortion-referral requirement likely violates § 1008's proscription." Pet.App.90a. Given this impermissibility, Judge Kethledge did "not reach Tennessee's parallel challenge" to the referral requirement "under the Spending Clause." Pet.App.94a. Judge Kethledge otherwise concluded that statutory text and subsequent congressional appropriations likely supported enforcing the 2021 Rule's counseling mandate and therefore partially concurred in the judgment. Pet.App.94a-95a.

Tennessee sought en banc review. Five months later—with Tennessee's petition still pending—the court issued an amended opinion. That opinion left the majority's original Spending Clause analysis undisturbed and doubled down on the view that *Rust* and *Ohio* control notwithstanding *Loper Bright*. *See* Pet.App.1a-36a. In particular, the majority announced that "a 'specific agency action' attaches to an agency's particular construction of a statute." Pet.App.23a (quoting *Loper Bright*, 603 U.S. at 376).

From there, it rejected "Tennessee's attempt to distinguish HHS's *promulgation* of the 2021 Rule in *Ohio* from HHS's *rescindment of* Tennessee's Title X funding," reasoning instead that both involve the same "specific agency action." *Id.* (emphases in original). Judge Kethledge carried forward his separate opinion without any changes. Pet.App.37a-48a. And, at the invitation of the court, Tennessee filed a supplemental memorandum explaining why the amended opinion made en banc review even more necessary. C.A.Doc. 76.

Shortly thereafter, Tennessee received an unprompted notice from HHS reflecting a partial, forward-looking restoration of Title X funding under Tennessee's March 2022 grant award—the same grant HHS had previously canceled. *See* C.A.Doc. 77.

The court denied Tennessee's petition for en banc rehearing on May 9, 2025. Pet.App.152a-153a. Since then, HHS has clarified that it is "declining to enforce" the 2021 Rule's abortion-counseling-and-referral mandates against Tennessee, and the State can "rely" on that position going forward. Pet.App.160a; *see id.* at 158a-159a; Pet.App.162a-219a; *see also* Tenn. Att'y Gen. and Rep., *Tennessee Attorney General's Office Recovers $7 Million in Annual Healthcare Funding for Expectant Mothers* (July 29, 2025, at 10:39 CT), https://tinyurl.com/y9j4td8j. HHS has also notified Tennessee that the State's funding will be restored prospectively at approximately full funding (minus a small, unrelated reduction necessitated by congressional appropriations). *See* Pet.App.158-159a.

REASONS FOR GRANTING THE PETITION

The decision below neuters this Court's effort in *Loper Bright* to move past *Chevron* deference, perpetuates uncertainty around HHS's authority under Section 1008, and permits Congress to circumvent constitutional limits on its spending power by simply delegating to executive agencies broad authority to impose funding conditions. Each of these important legal errors would have independently warranted this Court's review. But before Tennessee could obtain further review, HHS mooted this appeal. Consistent with its ordinary practice in such circumstances, the Court should grant the petition for a writ of certiorari, vacate the judgment below, and remand with instructions to dismiss this appeal as moot. *See Munsingwear*, 340 U.S. at 39.

At bare minimum, the Court should vacate the judgment and remand for further consideration in light of *Medina*. The Spending Clause analysis in that recent decision will likely alter the Sixth Circuit's consideration of Tennessee's challenge. Indeed, this Court just GVR'd Oklahoma's near-identical Title X challenge in light of *Medina*. *Oklahoma*, 2025 WL 1787685, at *1. If *Medina* requires a fresh look at Oklahoma's case, the same is true here.

I. Vacatur under *Munsingwear* is warranted.

This case presented three questions of fundamental importance: First, to what extent did *Chevron* deference survive *Loper Bright*? Second, did Congress empower HHS to compel States to counsel and refer for abortions, especially those that are illegal under

state law after *Dobbs*? And third, can Congress circumvent the Spending Clause clear-statement rule simply by delegating to federal agencies broad authority to set spending conditions? But HHS's reinstatement of Tennessee's funding and disavowal of the 2021 Rule moots this case, prohibiting the State from seeking answers.

When that happens, this Court's "established practice" is to "vacate the judgment below and remand with a direction to dismiss." *Munsingwear*, 340 U.S. at 39 & n.2. This Court has followed that approach in "countless cases," *Great W. Sugar Co. v. Nelson*, 442 U.S. 92, 93 (1979) (per curiam), and it is the "normal" procedure in the event of mootness, *Camreta v. Greene*, 563 U.S. 692, 713 (2011). The rule serves important purposes: "A party who seeks review of the merits of an adverse ruling, but is frustrated by the vagaries of circumstance" or the "unilateral action of the party who prevailed below," "ought not in fairness be forced to acquiesce in the judgment." *U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 25 (1994). At the same time, "[v]acatur 'clears the path for future relitigation' by eliminating a judgment the loser was stopped from opposing on direct review." *Arizonans for Off. Eng. v. Arizona*, 520 U.S. 43, 71 (1997) (quotation omitted). The case for vacatur is especially strong here for three reasons.

A. HHS mooted this appeal.

The controversy in this appeal was resolved when HHS restored Tennessee's funding and disclaimed the 2021 Rule's abortion-related mandates.

The jurisdiction of the federal courts is limited to the resolution of actual "Cases" or "Controversies." U.S. Const. art. III, § 2, cl. 1. And "an 'actual controversy' must exist not only 'at the time the complaint is filed,' but through 'all stages' of the litigation." *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 90-91 (2013) (quotations omitted). Thus, a case or appeal becomes moot when the issues presented are no longer "live" or the parties lack a legally cognizable interest in the outcome—"[n]o matter how vehemently the parties continue to dispute the lawfulness of the conduct that precipitated the lawsuit." *Id.* at 91. A case generally presents no live controversy if "no court is now capable of granting the relief" sought by the plaintiff. *Kingdomware Techs., Inc. v. United States*, 579 U.S. 162, 169 (2016).

Under those principles, this appeal is moot. Tennessee brought this case to undo HHS's decision to rescind the State's March 2022 Title X grant award based on non-compliance with the 2021 Rule's abortion-related mandates, and Tennessee sought preliminary relief to prevent HHS from reallocating those annually dispersed funds during the pendency of this matter. *See* D.Ct.Doc. 1; D.Ct.Doc. 20. But Tennessee's 2024 Title X funding cannot be recovered, and HHS has committed to restoring Tennessee's 2025 funding and declining to enforce the 2021 Rule's abortion-related mandates against the State going forward. C.A.Doc. 80-1, at 2; Pet.App.159a-160a. Given these developments, this dispute no longer presents a live controversy because reversing the denial of Tennessee's motion for preliminary injunction would do

nothing to benefit the State, meaning it lacks any legally cognizable interest in the outcome of these proceedings.

HHS told the Sixth Circuit that "this case lacks prospective significance" given the restoration of Tennessee's funding, C.A.Doc. 80-1, at 3, so it presumably agrees.

B. The decision below would have warranted review.

Vacatur under *Munsingwear* is available even if a case becomes "moot before certiorari" when the decision below would have been worthy of further review absent mootness. *Azar v. Garza*, 584 U.S. 726, 729 (2018) (per curiam); *see Camreta*, 563 U.S. at 713-14. And further review of the decision below would have been warranted for at least three reasons:

1. The decision below risks undermining this Court's transformative *Loper Bright* decision and heightens the risk of growing "disuniformity" among the circuits over the meaning of the decision's stare decisis discussion. *See* Jonathan Remy Nash, Chevron Stare Decisis *in a Post*-Loper Bright *World*, 110 Iowa L. Rev. Online 180, 198-99 & n.86 (2025).

a. In *Loper Bright*, this Court overruled *Chevron* and revived courts' duty to determine statutes' "single, best meaning." 603 U.S. at 400. But the panel majority did not allow Tennessee to argue Title X's meaning de novo. Instead, it posited that *Rust* and *Ohio*—*Chevron* cases to their "bones"—require continued deference to any HHS action relating to Section 1008.

Pet.App.18a-26a; Pet.App.37a (Kethledge, J., dissenting). The broad, prospective effects of that erroneous decision about "an important question of federal law" would have warranted review. *See* Sup. Ct. R. 10(c).

Judge Kethledge stressed the stark upshot of the majority's reasoning: "*Chevron* lives on in perpetuity as to any statute that the Supreme Court"—or the circuit court—"has ever deemed ambiguous under that doctrine." Pet.App.40a. As Judge Kethledge explained, that cannot be right. *See id.*

First, the majority's view undercuts *Loper Bright* by tying stare decisis to statutory interpretations, not "specific agency actions." *Loper Bright*, 603 U.S. at 412. The term "agency action" refers to the particular agency rule or order subject to judicial review. *See* 5 U.S.C. § 551(13); *id.* §§ 702, 704. *Loper Bright* carefully instructed that it was not overruling prior *Chevron*-based "holdings" that "specific agency actions are lawful." *Loper Bright*, 603 U.S. at 412. Thus, the Court distinguished a case's "reliance on *Chevron*" from the "holding" that receives stare decisis effect. *Id.* In so doing, *Loper Bright* sets up a res-judicata-type rule to ensure long-extant "*specific* agency actions" are not exposed to de novo reopening. *United States v. Trumbull*, 114 F.4th 1114, 1125 (9th Cir. 2024) (Bea, J., concurring in the judgment) (emphasis in original and quotation omitted). But courts otherwise are to implement *Loper Bright*'s new "interpretive methodology." Pet.App.40a (Kethledge, J., dissenting) (quotation omitted).

The panel majority here missed that mark. Promulgation of "an agency rule" is one specific "agency action," while an agency "order, license, sanction, relief, or the equivalent" applying that rule is a separate specific "agency action." *See* 5 U.S.C. § 551(13). Hence the well-worn APA principle that regulated entities may "raise an as-applied challenge … in an enforcement proceeding." *See PDR Network, LLC v. Carlton & Harris Chiropractic, Inc.*, 588 U.S. 1, 15 (2019) (Kavanaugh, J., concurring in the judgment); *cf. Corner Post, Inc. v. Bd. of Governors of Fed. Rsrv. Sys.*, 603 U.S. 799, 813-23 (2024) (rejecting argument that "facial challenges to agency rules" accrue "when agency action is final rather than when the plaintiff can assert [a] claim" upon application of the rule against the plaintiff).

Yet the panel majority conflated the "specific agency action" at issue in prior decisions—the enactment of rules implementing Section 1008—from the distinct "specific agency action" Tennessee challenged here—the rescindment of its Title X grant. In the panel's view, a "'specific agency action' attaches to an agency's *particular construction of a statute*." Pet.App.23a (emphasis added). And because *Ohio* had upheld the 2021 Rule's construction of Section 1008, it was entitled to "statutory stare decisis." *Id.* (quotation omitted). That is not how the APA defines "agency action." *See* 5 U.S.C. § 551(13). Moreover, it would mean HHS rules reading Title X to bar abortion conditions comprise one "specific agency action," *see Rust*, 500 U.S. at 184-87, whereas all rules reading Title X to require abortion conditions are another "specific agency action," *see Ohio*, 87 F.4th at 770-72—with

both warranting simultaneous deference. That cannot be, and the majority made no effort to show otherwise.

Second, granting stare decisis effect to the statutory interpretations of circuit-level *Chevron* cases opens a Pandora's Box of analytical problems—none of which the panel majority addressed directly. Consider this case, which involves a Supreme Court precedent (*Rust*) and a circuit precedent (*Ohio*) approving opposite interpretations under *Chevron*. Which "holding[]" about the agency's "particular construction of a statute" controls as a matter of stare decisis and *Chevron*? Pet.App.23a. This Court's holding that Title X might *prohibit* abortion counseling and referrals, or *Ohio*'s contrary decision that Title X can be read to *mandate* abortion counseling and referrals? Does letting *Ohio* trump *Rust* violate vertical stare decisis?

And what are courts to do about conflicting circuit decisions approving opposite readings of a statute under *Chevron* deference? *Compare, e.g.*, *U.S. Telecom Ass'n v. FCC*, 825 F.3d 674, 701-04 (D.C. Cir. 2016), *with Mozilla Corp. v. FCC*, 940 F.3d 1, 22-23 (D.C. Cir. 2019) (per curiam). Are both available, meaning the agency always wins? Or do they cancel each other out, requiring de novo review? If *Loper Bright*'s discussion shields all "prior cases" relying on *Chevron*, *see* Pet.App.20a, why shouldn't other circuits' precedents approving prior agency constructions bind too? After all, the circuit-lottery statute funnels many rule challenges to a single circuit following a random draw. *See, e.g.*, Consolidation Order, Dkt. No. 1, *In re: MCP No. 185 Open Internet Rule (FCC 24-52)*, No. 24-7000 (6th Cir. June 13, 2024) (citing 28 U.S.C. § 2112(a)(3)).

Did *Loper Bright* intend to hinge parties' going-forward right to de novo review on such happenstance?

What is more, the decision to carry forward deference for all statutes previously interpreted under *Chevron* is a seismic doctrinal step. This Court has relied on *Chevron* some 70 times. *See* Br. for Resp'ts App. B 68a-72a, *Loper Bright Enters. v. Raimondo*, No. 22-451 (U.S. Sept. 15, 2023). And the decision below further expands the universe of statutes that will now be subject to perpetual agency deference. *See* Kent Barnett & Christopher J. Walker, Chevron *Step Two's Domain*, 93 NOTRE DAME L. REV. 1441, 1460, 1458, 1463 & n.173 (2018) (finding that the Sixth Circuit applied *Chevron* dozens of times between 2003 and 2013, upholding the agency's view more than 80 percent of the time). The panel majority, too, recognized that "thousands" of lower-court decisions apply *Chevron*, framing protection of those decisions as a plus to its approach. Pet.App.22a (quoting *Loper Bright*, 603 U.S. at 477 (Kagan, J., dissenting)). Preserving deference for all statutes previously run through *Chevron*'s framework would severely limit *Loper Bright*'s going-forward impact.

Further, it is an open question whether strong-form statutory stare decisis should apply to circuit-level precedents at all. That practice depends on Congress's presumed awareness of this Court's statutory decisions—a justification often inapplicable to circuit holdings. *See* Amy Coney Barrett, *Statutory Stare Decisis in the Courts of Appeals*, 73 Geo. Wash. L. Rev. 317, 318 (2005); *cf. BP PLC v. Mayor of Baltimore*, 593 U.S. 230, 244 (2021) (deeming it "most unlikely" that

"a smattering of lower court opinions could ever" warrant a presumption of congressional approval). Given that debate, it is dubious that, in an opinion critiquing and overruling *Chevron*, this Court meant to bestow a "superpowered form of *stare decisis*" on countless *Chevron* cases across circuits. *Kimble v. Marvel Ent., LLC*, 576 U.S. 446, 458 (2015).

b. The Sixth Circuit's sweeping approach to *Chevron* stare decisis also contributes to growing confusion among the circuits about the consequences of *Loper Bright*'s stare decisis discussion. *See* Nash, *supra* at 198-99 & n.86. The D.C. Circuit, for example, has held that *Loper Bright* requires courts to now "'exercise independent judgment' in construing" provisions previously held ambiguous under *Chevron*'s framework. *See Lake Region Healthcare Corp. v. Becerra*, 113 F.4th 1002, 1007 (D.C. Cir. 2024). The Seventh Circuit took a similar approach in *Bernardo-De La Cruz v. Garland*. *See* 114 F.4th 883, 890 (7th Cir. 2024). Meanwhile, the Fourth Circuit has noted "'though apparently in dicta, that '*Loper Bright* doesn't wipe away the results of our prior decisions deferring to'" agencies' "'reasonable interpretations' of [a statute].'" Nash, *supra* at 199 n.86 (quoting *Chavez v. Bondi*, 134 F.4th 207, 213 (4th Cir. 2025)). The Ninth Circuit has offered seemingly contradictory positions. In *Lopez v. Garland*, the Court held that a past *Chevron*-based circuit holding "remains precedential authority which binds us," 116 F.4th 1032, 1045 (9th Cir. 2024), but it has elsewhere explained that although the *holdings* of prior cases "in which *Chevron* deference was applied remain precedential until overruled," courts "are not compelled to use them as analytical building blocks in

every case" involving related statutory questions, *Murillo-Chavez v. Bondi*, 128 F.4th 1076, 1087 (9th Cir. 2025); *see also Trumbull*, 114 F.4th at 1125 (Bea, J., concurring in the judgment). "The Eleventh Circuit has also noted the issue but remain[s] unclear as to whether circuit *Chevron*-era precedent survives *Loper Bright*." Nash, *supra* at 199 n.86 (citing *Siqueira v. U.S. Att'y Gen.*, No. 23-13710, 2024 WL 4590031, at *2 (11th Cir. Oct. 28, 2024)). This Court could have cleared up the confusion among the lower courts with this case if HHS had not rendered it moot.

2. Proper resolution of the *Loper Bright* inquiry would also unlock de novo review of Section 1008's meaning for the first time, an issue of exceptional importance that would have independently warranted this Court's review. *See Cochran v. Mayor of Baltimore*, 141 S. Ct. 1369 (Mem.) (2021) (granting certiorari to review validity of prior HHS Title X rule), *cert dismissed by* 141 S. Ct. 2618 (2021).

This Court has only ever had the opportunity to consider the contours of HHS's Section 1008 authority under *Chevron*'s now-defunct framework. *See Rust*, 500 U.S. at 184-87. *Loper Bright* clears the way for de novo review of whether and how Title X limits or empowers HHS in setting abortion-related conditions. This subject has divided the circuits, including some that have taken the issue en banc, and not long ago this Court granted review of a similar question. *Compare California ex rel. Becerra*, 950 F.3d 1067, 1105 *with Mayor of Baltimore v. Azar*, 973 F.3d 258, 296 (4th Cir. 2020) (en banc), *cert. granted sub nom. Cochran v. Mayor of Baltimore*, 141 S. Ct. 1369 (Mem.)

(2021), *cert. dismissed*, 141 S. Ct. 2618 (2021). The opportunity to settle the scope of Title X's meaning thus makes this case more cert-worthy, especially given the acute sovereignty issues *Dobbs* now raises.

3. The Sixth Circuit's Spending Clause decision also would have warranted review. *Oklahoma*, 2025 WL 1787685, at *1; *see Oklahoma v. U.S. Dep't of Health & Hum. Servs.*, 145 S. Ct. 110 (2024) (JJ., Thomas, Alito, and Gorsuch, dissenting from denial of stay). As a Spending Clause statute, Title X implicates a special constitutional rule: Congress can set funding conditions only through "unambiguous[]" legislation States clearly understand. *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981). The panel majority agreed that HHS imposed abortion-related requirements that Title X itself lacks. *See* Pet.App.11a. But it deemed that no matter, since Title X generally allows HHS to place unspecified "conditions" on grants and the 2021 Rule clearly sets forth its abortion-related mandates. Pet.App.10a-13a. In other words, a general conferral of rulemaking authority—divorced from any statutory condition—can eliminate the States' ability to raise a Spending Clause challenge. That extraordinary proposition nullifies the Spending Clause clear-statement rule.

a. Funding via Congress's spending power functions "much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions." *Pennhurst*, 451 U.S. at 17. The very "legitimacy of Congress' power to enact Spending Clause legislation rests not on its sovereign authority to enact binding laws, but on whether the

[recipient] voluntarily and knowingly accepts the terms of th[at] contract." *Cummings v. Premier Rehab Keller, PLLC*, 596 U.S. 212, 219 (2022) (citation and quotation marks omitted). That means that "if Congress intends to impose a condition on the grant of federal moneys [under its Spending Clause authority], it must do so unambiguously." *Pennhurst*, 451 U.S. at 17. After all, recipients "cannot knowingly accept conditions of which they are 'unaware.'" *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296 (2006).

When "fix[ing] the terms" for dispersing "federal money to the States," Congress itself must speak with "a clear voice" via statute. *Pennhurst*, 451 U.S. at 17. Indeed, this Court *just* reaffirmed "these principles" in *Medina*. *See* 145 S. Ct. at 2230-34. By insisting that "*Congress* speak with a clear voice," the Spending Clause clear-statement rule alleviates "separation of powers and federalism concerns, *id.* at 2238 n.8 (emphasis in original) (quoting *Pennhurst*, 451 U.S. at 17), and "ensur[es] that Spending Clause legislation does not undermine … the States as independent sovereigns," *NFIB v. Sebelius*, 567 U.S. 519, 577 (2012) (opinion of Roberts, C.J.).

That poses a problem for HHS here. As *Rust* recognized, "[a]t no time did Congress directly address the issues of abortion counseling, referral, or advocacy." 500 U.S. at 185. So Congress itself imposed no statutory restriction that can support HHS's abortion-counseling-and-referral rule.

Yet despite conceding that Title X itself does not clearly condition States' funding on counseling and referring for abortions, the panel majority concluded that HHS may nonetheless permissibly impose that and many other conditions outside the statute. It is "sufficient for notice purposes under the Spending Clause," the majority stated, if a statute "unambiguously authorize[s]" an agency "to impose conditions for federal grants." Pet.App.12a (quoting *Oklahoma v. U.S. Dep't of Health & Hum. Servs.*, 107 F.4th 1209, 1219 (2024)). The agency then has power to "fashion conditions" however it "may determine to be appropriate." Pet.App.10a (quoting 42 U.S.C. § 300a-4(b)). These broad delegations, the majority held, satisfy the Spending Clause clear-statement rule when "combin[ed]" with the regulations promulgated under them. Pet.App.12a. So according to the Sixth Circuit, the Spending Clause requires nothing more than general rulemaking authority (even absent a statutory condition) and a regulation enacted thereunder.

This purse-sword merger explodes the "legitimacy" of spending conditions in a way no Supreme Court case permits. *Pennhurst*, 451 U.S. at 17. Contra the panel majority, Pet.App.11a-13a, the decision in *Bennett v. Kentucky Department of Education*, 470 U.S. 656 (1985), does not license blanket delegations of condition-setting authority to agencies. The Court instead found the "requisite clarity" *in the statute* and expressed "reluctan[ce] to conclude that the States guaranteed that their performance … would satisfy whatever interpretation" of the statute "might later be adopted by the Secretary." *Id.* at 666, 670. The majority's other citations, *see* Pet.App.11a-12a, also

sourced spending conditions in the statutes' text, so they are not on point either. *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 183 (2005); *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 640, 643 (1999).

This is not to say that agencies lack "authority to fill in gaps that may exist in a spending condition" by defining statutory terms or explaining how broad concepts (like "discrimination") might apply to particular facts. *See W. Va. ex rel. Morrisey v. U.S. Dep't of Treasury*, 59 F.4th 1124, 1148 (11th Cir. 2023). The discussion and cited cases in *South Dakota v. Dole*, 483 U.S. 203, 206-07 (1987), illustrate that limited prerogative. But this Court has never held that a mere conferral of general rulemaking authority somehow suffices for purposes of the Spending Clause's clear-statement requirement. Nor is it clear how reliance on general rulemaking authority, unbounded by any statutory restriction, could satisfy even the lax "intelligible principle" test. *See FCC v. Consumers' Rsch.*, 145 S. Ct. 2482, 2497-98 (2025).

b. The decision below splits with four other circuits.

In *Virginia Department of Education v. Riley*, the en banc Fourth Circuit held that, because of the Spending Clause, the "United States Department of Education was without authority" to impose an extra-statutory condition on Virginia through regulation. 106 F.3d 559, 561 (4th Cir. 1997) (en banc) (per curiam). Rather, "for Congress to condition a state's receipt of federal funds, *Congress* must do so clearly and unambiguously." *Id.* (emphasis added). "[F]orbidden

regulation in the guise of Spending Clause condition," the court explained, is not permissible. *Id.*; *see also id.* at 569 (Luttig, J., dissenting).[2] The Fourth Circuit therefore refused to "defer" to the executive agency's construction of the Spending Clause statute, since "[i]t is axiomatic that statutory ambiguity defeats *altogether* a claim by the Federal Government that Congress has unambiguously conditioned the State's receipt of federal monies in the manner asserted." *Id.* at 567 (Luttig, J., dissenting) (emphasis added). Rather, for a condition under the Spending Clause, Congress must speak with "clarity" *and* "specificity." *Id.*

In *City and County of San Francisco v. Trump*, the Ninth Circuit enjoined an executive order withholding funds from sanctuary cities. 897 F.3d 1225 (9th Cir. 2018). The Spending Clause, the Ninth Circuit explained, "vests *exclusive* power to Congress to impose conditions on federal grants"—"not the President." *Id.* at 1231 (emphasis added). Thus, without a "show[ing] that Congress authorized" withdrawing "federal grant moneys from jurisdictions that do not agree with the current Administration's immigration strategies," the executive-imposed spending condition violated the Constitution. *Id.* at 1234.

In *Texas Education Agency v. United States Department of Education*, the Fifth Circuit considered "whether the clarity required for waiver of sovereign immunity … can be met by regulations clarifying an ambiguous" Spending Clause "statute." 992 F.3d 350,

---

[2] Judge Luttig's dissenting panel opinion was adopted in relevant part by a majority of the en banc Fourth Circuit. *See Va. Dep't of Educ.*, 106 F.3d at 561.

361 (5th Cir. 2021). The court explained that the "needed clarity cannot be so provided—it must come directly from the statute." *Id.* That's because the Spending Clause "empowers Congress, not the Executive, to spend for the general welfare," and "[r]elying on regulations to present the clear condition … is an acknowledgment that Congress's condition was not unambiguous" like the Spending Clause requires. *Id.* at 361-62. The Fifth Circuit reaffirmed this position in invalidating the off-set provision of the American Rescue Plan Act ("ARPA") under the Spending Clause. *Texas v. Yellen*, 105 F.4th 755, 774 (5th Cir. 2024).

The Eleventh Circuit adopted the same approach in *Morrisey*. After determining that ARPA's off-set provision "does not provide 'clear notice' … about how to comply with it," the court explained that the Treasury Secretary's clarifying regulations could not "defeat[] the States' constitutional arguments." *Morrisey*, 59 F.4th at 1146 (citation omitted). An "agency cannot exercise legislative power or otherwise 'operate independently of the statute that authorized it,'" and to allow otherwise, the court explained, "would be inconsistent with the Constitution's meticulous separation of powers." *Id.* at 1147 (citations omitted). Thus, "[j]ust as an agency cannot choose its own intelligible principle, it cannot provide the content that makes a funding condition ascertainable." *Id.* at 1148. For that point, the Eleventh Circuit relied on *United States v. Butler*, where this Court found "an obvious difference between a statute stating the conditions upon which moneys shall be expended and one effective only upon assumption of a contractual obligation to submit to a regulation." 297 U.S. 1, 73 (1936). This

means that "the 'needed clarity' under the Spending Clause 'must come directly from the statute.'" *Morrisey*, 59 F.4th at 1147 (citation omitted). And whatever authority agencies have "to fill in gaps that may exist in a spending condition," the "condition itself must still be ascertainable on the face of the statute." *Id.* at 1148.

The abortion-related funding conditions here are not ascertainable on the face of the statute. That is the precise holding of *Rust*: "At no time did Congress directly address the issues of abortion counseling, referral, or advocacy." 500 U.S. at 185. Moreover, the only statutory indication of congressional intent in Title X runs in Tennessee's favor. *See* 42 U.S.C. § 300a-6 ("None of the funds appropriated under this subchapter shall be used in programs where abortion is a method of family planning"). Yet the panel majority embraced the now-vacated opinion of the Tenth Circuit that Congress's broad delegation of condition setting authority, "*in combination* with HHS's 2021 counseling and referral regulation, are sufficient for notice purposes under the Spending Clause." Pet.App.12a (emphasis added). Indeed, the majority admitted that the generic rulemaking authority in Title X that HHS relied upon "does not illuminate the nature of any such conditions on the grant," but held that the Spending Clause is satisfied "by looking to both statutes *and* an agency's authorized regulations." Pet.App.11a (emphasis in original). The 2021 Rule's abortion-related mandates, the majority held, are "minutia" that HHS can clarify "even in the face of statutory ambiguity." *See* Pet.App.12a. With such a robust split, this issue would have been ripe for review.

c. The sweeping implications of the Spending Clause holding below would have warranted review. *See* Sup. Ct. R. 10(c). The Title X provisions that the majority found constitutionally sufficient place no limit on HHS's power to adopt new conditions. *See* 42 U.S.C. § 300a-4(a)-(b). And the majority does not suggest that Section 1008—or any other provision of Title X—checks those delegations. It is anyone's guess what controversial condition HHS might next impose on States' Title X programs. This will leave States without assurances needed to invest the requisite time and resources to build up programs in reliance on the federal funding they receive.

And the majority's reasoning risks further empowering agencies to unilaterally wield spending legislation against States more broadly—an alarming proposition given the recognized "separation of powers and federalism concerns" animating the Spending Clause clear-statement rule. *Medina*, 145 S. Ct. at 2238 n.8. Consider recent history: Through rules stretching Spending Clause statutes, the prior administration sought to condition States' Medicaid funding on their covering gender-transition procedures, *see Tennessee v. Becerra*, 739 F. Supp. 3d 467, 480-82 (S.D. Miss. 2024), and to override States' laws requiring parental consent for abortions, *see Deanda v. Becerra*, 96 F.4th 750, 762 (5th Cir. 2024). The prior administration's Department of Education sought to condition billions in States' education funding on following gender-identity mandates. *See Tennessee v. Cardona*, No. 24-5588, 2024 WL 3453880, at *1 (6th Cir. July 17, 2024). And the prior administration's Department of Justice, for its part, argued that spending legislation can even

"obligate" States "to violate state criminal law." *See Moyle v. United States*, 144 S. Ct. 2015, 2022 (2024) (Barrett, J., concurring). Given the issue's patent effects on state sovereignty and our constitutional structure, resolving agencies' power to conjure new spending conditions would have warranted review.

d. Oklahoma raised these same arguments in its twin Title X challenge. *See* Petition for a Writ of Certiorari 11-23, *Oklahoma v. HHS*, No. 24-437 (U.S. Oct. 15, 2024); Application for Stay 13-23, *Oklahoma v. HHS*, No. 24A146 (U.S. Aug. 5, 2024). This Court's recent GVR in *Oklahoma* proves the importance of these Spending Clause issues. 2025 WL 1787685, at *1. There the Court vacated the Tenth Circuit's judgment upholding HHS's rescission of Oklahoma's Title X funding and remanded the case so the circuit court could reconsider its decision with the benefit of *Medina*'s explication of the principles underlying the Spending Clause. *Id.*

C. The equities favor vacatur.

The determination whether to vacate the judgment when a case becomes moot while pending review ultimately "is an equitable one." *U.S. Bancorp*, 513 U.S. at 29. It requires the disposition that would be "most consonant to justice" in light of the circumstances. *Id.* at 24 (citation omitted). Here, the equities favor vacatur.

Under *Munsingwear*, the "principal condition" to which the Court has "looked is whether the party seeking relief from the judgment below caused the mootness by voluntary action." *Id.* When the party that

prevailed in the lower court caused the mootness through its own "unilateral action," vacatur is clearly "in order." *Azar*, 584 U.S. at 729. That is this case: HHS unilaterally restored Tennessee's Title X funding. HHS's March notice stated that Tennessee's award was being restored "pursuant to a settlement agreement with the recipient," but HHS has since confirmed that no such settlement agreement ever existed. C.A.Doc. 80-1, at 3 n.1 (citation omitted). So Tennessee had no role in making the Sixth Circuit's judgment unreviewable. Having blocked this Court's review, HHS should not "retain the benefit" of the agency-empowering judgment below. *See Azar*, 584 U.S. at 729.

Vacatur is also warranted because the decision below could "spawn[]" several "legal consequences" if left in place. *Munsingwear*, 340 U.S. at 41. As the foregoing discussion makes clear, the precedential value of the decision below will "have a significant future effect." *Camreta*, 563 U.S. at 704. The decision crystalizes *Chevron* deference "as to any statute that the Supreme Court"—or the Sixth Circuit—"has ever deemed ambiguous under that doctrine." Pet.App.40a (Kethledge, J., dissenting). For example, the Social Security Administration will now receive perpetual deference on questions about the role of work activity on individuals' entitlement to disability benefits. *See Valent v. Comm'r of Social Sec.*, 918 F.3d 516, 520 (6th Cir. 2019) (holding that 42 U.S.C. § 421(m) is ambiguous). Moreover, *Loper Bright*'s impact is a live issue in several in-circuit district court actions. *See, e.g.*, Order, *Sec'y of Labor v. Macy's, Inc.*, No. 1:17-cv-541, Dkt. No. 76 (S.D. Ohio Aug. 28, 2024). Addressing the

import of "prior judicial precedents based on *Chevron*" will bear critically on *Loper Bright*'s reach. Christoper J. Walker, *What* Loper Bright Enterprises v. Raimondo *Means for the Future of* Chevron *Deference*, Notice & Comment—Yale J. on Regulation (June 28, 2024), https://tinyurl.com/3kk7uusw.

Moreover, the decision below subjects States to the condition-setting whims of executive agencies, potentially requiring regular overhauls of multi-billion-dollar programs. Indeed, in "arguing that *statutory* ambiguity can be vitiated by *regulatory* enactments in the context of the Spending Clause, the federal defendants claim a remarkably broad power for federal administrative agencies." *Yellen*, 105 F.4th at 773 (emphases in original). After all, many important spending programs—like Title IX and the Affordable Care Act—that offer States billions of dollars come from statutes that also allow federal-agency rulemaking. *See, e.g.*, 20 U.S.C. § 1682; 42 U.S.C. § 18116. And the federal government has shown a willingness to wield its regulatory powers to impose extra-statutory conditions on States under such programs. *Supra* 30-31. Under the decision below, States would be put to deciding whether to abide these unforeseeable conditions or forego billions of dollars, exactly counterpose to the purposes of the Spending Clause clear-statement rule. *See Medina*, 145 S. Ct. at 2331-34.

Given that Tennessee regularly challenges federal rulemakings and participants in a raft of federal spending programs, *see, e.g.*, *Tennessee v. Cardona*, No. 3:24-cv-00073-DCR (E.D. Ky.) (Tennessee-led challenge to Biden Administration's Title IX rule to

preserve billions in federal funding), the decision below may have a significant impact on future litigation brought by the State—as well as every other State or regulated entity within the Sixth Circuit. Vacatur would rightly "strip[] the decision below of its binding effect" so that it may not be used against Tennessee in future litigation. *Camreta*, 563 U.S. at 713 (quoting *Deakins v. Monaghan*, 484 U.S. 193, 200 (1988)).

II. Alternatively, the Court should remand for reconsideration in light of *Medina*.

If the Court does not follow the well-worn *Munsingwear* path, it should vacate and remand for further consideration in light of *Medina*. When intervening developments "reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and when it appears that such a redetermination may determine the ultimate outcome of the litigation, a GVR order" is often appropriate. *Lawrence v. Chater*, 516 U.S. 163, 167 (1996). That approach is appropriate here, as this Court recognized when it GVR'd Oklahoma's parallel litigation. *Oklahoma*, 2025 WL 1787685, at *1.

Medina would materially affect the Sixth Circuit's consideration of the Spending Clause issue here. Although acknowledging that Title X itself does not condition funding on counseling and referring for abortions, the decision below stated that it is "sufficient for notice purposes under the Spending Clause" if a statute "unambiguously authorize[s]" an agency "to impose conditions for federal grants." Pet.App.12a (quo-

tation omitted). The agency then has power to "fashion conditions" however it may determine to be appropriate. Pet.App.10a. In other words, the decision below approves executive-branch regulations providing clear spending conditions that are absent from the statute itself.

But *Medina* confirms that "as a rule, '*Congress* alone has the power to enforce' the conditions *it attaches* to its grants." 145 S. Ct. at 2231 (emphases added) (quoting *Emigrant Co. v. Cty. of Adams*, 100 U.S. 61, 69 (1879)). This Court thoroughly explained that under the Spending Clause "*Congress* must clearly and unambiguously alert States to conditions associated with federal funding." *Id.* at 2232 n.4 (emphasis added). So nothing "less than clear *statutory language* can supply States with the unambiguous notice required." *Id.* at 2238 n.8 (emphasis added). These rules vindicate "separation of powers and federalism concerns" that would arise if the requisite clarity came from elsewhere. *Id.* For these reasons, it is likely that the Sixth Circuit would reach a different result if it were to reconsider this case under *Medina*.

The "equities of the case" also support vacatur and remand. *Lawrence*, 516 U.S. at 168. A "GVR order conserves the scarce resources of this Court that might otherwise be expended on plenary consideration," *id.* at 167—an especially important consideration here, given the split among the courts of appeals, *see, e.g.*, *supra* 26-30. A GVR would also alleviate the potential for unequal treatment and "assist[] this Court by procuring the benefit of the lower court's insight before [it] rule[s] on the merits." *Lawrence*, 516 U.S. at 167.

Last, "the intervening development" was not "part of an unfair or manipulative litigation strategy," and no unwarranted "delay" is threatened by a GVR. *Id.* at 168.

This Court has already vacated and remanded a decision involving identical Spending Clause issues (and nearly identical facts) for reconsideration in light of *Medina*. *Oklahoma*, 2025 WL 1787685, at *1. Vacating and remanding this case in light of *Medina* is similarly warranted.

CONCLUSION

The Court should grant the petition for certiorari, vacate the judgment of the court of appeals, and remand with instructions to dismiss the case as moot under *Munsingwear*. In the alternative, consistent with *Oklahoma*, 2025 WL 1787685, at *1, the Court should grant the petition for certiorari and remand for further consideration in light of *Medina*.

Respectfully submitted,

JONATHAN SKRMETTI
Attorney General

J. MATTHEW RICE
Solicitor General
Counsel of Record

HARRISON GRAY KILGORE
Senior Assistant Attorney General for Strategic Litigation

OFFICE OF TENNESSEE ATTORNEY GENERAL
P.O. Box 20207
Nashville, TN 37202
(615) 741-3491
Matt.Rice@ag.tn.gov

Counsel for Petitioner

AUGUST 7, 2025

APPENDIX

TABLE OF CONTENTS

Page

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 24-5220

STATE OF TENNESSEE,

Plaintiff-Appellant,

v.

XAVIER BECERRA, IN HIS OFFICIAL CAPACITY AS SECRETARY OF HEALTH AND HUMAN SERVICES; UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; JESSICA S. MARCELLA, IN HER OFFICIAL CAPACITY AS DEPUTY ASSISTANT SECRETARY FOR POPULATION AFFAIRS; OFFICE OF POPULATION AFFAIRS,

Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Tennessee at Knoxville.
No. 3:23-cv-00384—Travis Randall McDonough,
District Judge.

Argued: July 18, 2024

Decided and Filed: March 10, 2025

Before: GIBBONS, KETHLEDGE, and DAVIS,
Circuit Judges.

DAVIS, J., delivered the opinion of the court in which GIBBONS, J., joined in full. KETHLEDGE, J. (pp. 24–31), delivered a separate opinion dissenting in part and concurring in the judgment in part.

AMENDED OPINION

DAVIS, Circuit Judge. In 2021, the United States Department of Health and Human Services ("HHS") promulgated a rule requiring Title X grant recipients to provide neutral, nondirective counseling and referrals for abortions to patients who request it. Tennessee, which has been a Title X recipient for over 50 years, recently outlawed most abortions in the state. After doing so, Tennessee would commit only to conducting counseling and referrals for options deemed legal in the state. HHS considered Tennessee's commitment to be out of compliance with its regulatory requirements. So it opted to discontinue the grant. Tennessee filed suit to challenge HHS's action and enjoin it from closing the grant. The district court denied Tennessee's request for preliminary injunction because it held that Tennessee does not have a strong likelihood of succeeding on the merits of its claim and that the balance of the remaining preliminary injunction factors weigh in HHS's favor. For the reasons set forth below, we affirm.

I.

A.

Factual Background. In 1970, Congress enacted Title X of the Public Health Service Act (alternatively, the

"Act") to authorize HHS to award discretionary grants to fund family-planning projects. *See* 42 U.S.C. §§ 300(a), 300a-4(a)–(b); Family Planning Services and Population Research Act, Pub. L. No. 91-572, 84 Stat. 1504, 1508 (1970). Title X authorizes HHS to "enter into contracts with public or nonprofit private entities" to establish and operate these family-planning projects, 42 U.S.C. § 300(a), and these grants are to be "made in accordance with such regulations as the Secretary may promulgate," *id.* § 300a-4(a). Nevertheless, Section 1008 of the Act provides that "[n]one of the funds appropriated . . . shall be used in programs where abortion is a method of family planning." *Id.* § 300a-6. HHS has varied in its interpretation of the limit that § 1008 imposes on its regulatory authority. As a result, it has vacillated from regulations requiring funded projects to provide nondirective counseling and referrals for abortion (2000–2019), to forbidding such activity (2019–2021), to requiring nondirective counseling and abortion referrals if requested by the patient (2021–present). *See Ohio v. Becerra*, 87 F.4th 759, 765–67 (6th Cir. 2023) (summarizing the history of the Counseling and Referral rule). Generally, HHS grants are awarded for a one-year period and any subsequent continuation awards are similarly determined one year at a time. 42 C.F.R. § 59.8(a)–(b). When "non-Federal" entities fail to comply with the "[f]ederal statutes, regulations, or the terms and conditions" of an award, HHS is empowered to terminate the grant. 45 C.F.R. §§ 75.371(c), 75.372(a)(1).

In October 2021, HHS promulgated a rule requiring Title X programs to offer pregnant clients the opportunity to receive "neutral factual information and nondirective

counseling" regarding prenatal care and delivery, infant care, foster care, adoption, and abortion.[1] Ensuring Access to Equitable, Affordable, Client-Centered, Quality Family Planning Services, 86 Fed. Reg. 56144 (Oct. 7, 2021); *see also* 42 C.F.R. § 59.1 *et seq*; 42 C.F.R. § 59.5(a)(5)(i)–(ii). The 2021 Rule also required Title X programs to provide referrals for any of these options in response to a patient request. 42 C.F.R. § 59.5(a)(5)(ii). To comply with § 1008's prohibition of funding for programs where abortion is a method of family planning, the 2021 Rule emphasized that a referral for abortion services "may include providing a patient with the name, address, telephone number, and other relevant factual information" about a medical provider, but that a Title X project "may not take further affirmative action (such as negotiating a fee reduction, making an appointment, providing transportation) to secure abortion services for the patient." *Ensuring Access*, 86 Fed. Reg. at 56150.

In March 2022, HHS awarded the Tennessee Department of Health a Title X grant for the period from April 1, 2022, through March 31, 2023. The notice of award stated that the amount requested represented the one-year "budget period," (as opposed to the project's five-year period), and that it was "not obligated to make additional Federal Funds available." (R. 1-7, PageID 172).

In June 2022, the Supreme Court handed down its decision in *Dobbs v. Jackson Women's Health*

1. Through this rule, HHS readopted the regulations in place from 2000 to 2019. 86 Fed. Reg. 56144, 56144 (Oct. 7, 2021).

Organization, 597 U.S. 215, 142 S. Ct. 2228, 213 L. Ed. 2d 545 (2022), in which it held that there is no individual right under the Constitution to obtain an abortion. Following *Dobbs*, several states—Tennessee included—implemented laws that criminalized abortion in all but a few circumstances. Reasoning that *Dobbs* did not affect the Title X grant regime, in January 2023, HHS notified grantees it would be auditing their compliance with its counseling and referral regulations. HHS requested that grantees submit copies of their policies for providing neutral, nondirective options counseling and referrals for abortion services and a signed statement confirming compliance with those regulations.

Tennessee responded by submitting a letter confirming its compliance with the regulation and attaching its policy. The policy stated, in pertinent part, that Title X "[p]atients with positive pregnancy test[s] must be offered the opportunity to be provided information and counseling regarding all options that are legal in the State of Tennessee." (R. 1-3, PageID 99). The letter did not clarify which options the state deemed "legal in the State of Tennessee," but seemed to be alluding to a new law that had recently taken effect restricting abortion in the State. *See* Tenn. Code Ann. § 39-15-213. HHS notified Tennessee that its response appeared to place it out of compliance and offered Tennessee the option of submitting an "alternate compliance proposal" with specific examples of acceptable arrangements. (R. 1-9, PageID 190). For instance, HHS suggested the option of providing Title X patients with the number for a national call-in hotline where operators would supply referral information. Tennessee responded

by reiterating its compliance based on its understanding of its obligations under state law and federal regulations. (R. 1-10, PageID 192 (citing Tenn. Code Ann. § 39-15-213(a)(1))). HHS disagreed with Tennessee's assertion that it was in compliance. On March 20, 2023, the agency sent the state a letter explaining its decision to decline to issue a Title X continuation award to the Tennessee Department of Health.[2]

B.

Procedural History. In October 2023, Tennessee brought the instant action in the United States District Court for the Eastern District of Tennessee seeking: (1) a declaratory judgment under 28 U.S.C. § 2201 stating that HHS's termination of the state's Title X funding was unlawful; (2) dissolution of HHS's March 20, 2023, discontinuation decision; (3) a preliminary injunction enjoining HHS and others from enforcing or implementing the discontinuation decision; (4) to enjoin HHS from withholding Title X funds based on the counseling and referral clause; (5) reinstatement of Title X funds from the date of discontinuation; and (6) any and all other relief the court deemed proper.

In November 2023, this court reviewed a similar Title X case and held that HHS's 2021 Rule was a permissible construction of the Title X statute. *See Ohio*, 87 F.4th at

2. HHS concluded that a continuation award was not "in the best interest of the government" based on its determination that Tennessee's Title X project was not in compliance with the Title X regulation. (*See* R. 1-12, PageID 198 (quoting 42 C.F.R. § 59.8(b))).

771–72. Based in large part on our decision in *Ohio*, the district court denied Tennessee's preliminary injunction, concluding that Tennessee was not likely to succeed on the merits and that the balance of the equities and the public interest did not favor relief. The district court further concluded that Tennessee had "no basis to force funding from HHS without meeting the obligations upon which the [Title X] funding [was] conditioned." (R. 30, PageID 857). Tennessee timely appealed.

II.

We review a district court's denial of a motion for a preliminary injunction for abuse of discretion. *Wonderland Shopping Ctr. Venture Ltd. P'ship v. CDC Mortg. Cap., Inc.*, 274 F.3d 1085, 1097 (6th Cir. 2001). We will find that a district court has abused its discretion when it has made "clearly erroneous findings of fact, improperly applied the governing law, or used an erroneous legal standard." *Id.* (quoting *Bonnell v. Lorenzo*, 241 F.3d 800, 809 (6th Cir.2001)). Though we review de novo the question of whether a movant is likely to succeed on the merits, a district court's ultimate determination as to whether the factors weigh in favor of granting or denying preliminary injunctive relief is subject to review for abuse of discretion. *Ohio*, 87 F.4th at 768 (citing *City of Pontiac Retired Emps. Ass'n v. Schimmel*, 751 F.3d 427, 430 (6th Cir. 2014) (en banc) (per curiam)). Thus, absent a legal or factual error, "the district court's weighing and balancing of the equities will be overruled 'only in the rarest of cases.'" *Am. Imaging Servs., Inc. v. Eagle-Picher Indus., Inc. (In re Eagle-Picher Indus., Inc.)*, 963 F.2d 855, 858 (6th Cir. 1992) (citations omitted).

Courts consider four factors when determining whether to grant a preliminary injunction: "(1) whether the movant has a strong likelihood of success on the merits; (2) whether the movant would suffer irreparable injury without the injunction; (3) whether issuance of the injunction would cause substantial harm to others; and (4) whether the public interest would be served by issuance of the injunction." *Ohio*, 87 F.4th at 768 (citing *City of Pontiac*, 751 F.3d at 430). "Where the federal government is the defendant, as here, the third and fourth factors merge." *Id.* (citing *Nken v. Holder*, 556 U.S. 418, 435, 129 S. Ct. 1749, 173 L. Ed. 2d 550 (2009)).

III.

Likelihood of Success on the Merits. Tennessee first argues that it has a strong likelihood of success on the merits because HHS's discontinuation of Title X funds usurped Congress's sole Spending Clause powers and disregarded the Administrative Procedure Act's ("APA") limits.

A.

The Spending Clause. Tennessee maintains that HHS's enforcement (through rescission of funding) of the 2021 Rule's counseling and referral requirements violated the Spending Clause of the United States Constitution. It argues that HHS's imposition of these requirements usurped Congress's exclusive authority to regulate Title X funding. The Spending Clause empowers Congress to "lay and collect Taxes . . . to pay the Debts and provide for

the common Defence and general Welfare of the United States." U.S. Const. art. I, § 8. It grants Congress the broad power to "set the terms" for when and to whom it will disburse federal funds. *Cummings v. Premier Rehab Keller, P.L.L.C.*, 596 U.S. 212, 216, 142 S. Ct. 1562, 212 L. Ed. 2d 552 (2022). As it regards funds disbursed to individual states, Congress's spending power operates like a contract; "in return for federal funds," states must agree to "comply with federally imposed conditions." *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17, 101 S. Ct. 1531, 67 L. Ed. 2d 694 (1981).

As a result, Congress's legitimacy to legislate under the spending power depends on (1) whether Congress's conditions on its grants of federal funds are unambiguous; and (2) "whether the State voluntarily and knowingly accepts the terms of the 'contract.'" *Id.* Because the district court reasonably concluded that Congress unambiguously authorized HHS to regulate Title X eligibility; the conditions of the grant were unambiguous; and Tennessee knowingly and voluntarily accepted the grant's terms, we find that the district court did not abuse its discretion in concluding that Tennessee is unlikely to succeed on the merits of its Spending Clause claim.

1.

Unambiguous Statutory Authorization. Tennessee argues that Congress did not unambiguously place counseling and referral requirements in Title X and did not grant HHS the authority to add these conditions. Therefore, these conditions violate the Spending

Clause. Tennessee's arguments here mirror the state of Oklahoma's challenge to HHS's counseling and referral requirements which it asserted in *Oklahoma v. United States Department of Health & Human Servs.*, 107 F.4th 1209, 1217 (10th Cir. 2024). Under similar facts, the state of Oklahoma also argued that Title X's ambiguity prevented HHS from imposing counseling and referral requirements on grant recipients. Like Tennessee, Oklahoma argued that because the Supreme Court, in *Rust v. Sullivan*, 500 U.S. 173, 111 S. Ct. 1759, 114 L. Ed. 2d 233 (1991), held that § 1008's language barring usage of federal funds "in programs where abortion is a method of family planning" is ambiguous, then "Congress's silence on counseling and referrals render[ed] Title X ambiguous for purposes of the spending power." *Oklahoma*, 107 F.4th at 1218 (quoting 42 U.S.C. § 300a-6). The *Oklahoma* court rejected these arguments because it found that Congress's instructions to HHS to determine eligibility for Title X grants likely did not violate the spending powers. *Id.* (citing 42 U.S.C. § 300a-4(a); § 300a-4(b)). We agree.

To begin, as the *Oklahoma* court recognized, Congress's charge to HHS to promulgate eligibility requirements for Title X funds is explicit; "Grants . . . made under this subchapter shall be made in accordance with such regulations as the Secretary may promulgate" and "shall be payable . . . subject to such conditions as the Secretary may determine to be appropriate" so they are "effectively utilized for the purposes for which made." 42 U.S.C. § 300a-4(a)–(b). In this way, Congress both imposed on the Secretary the responsibility to fashion conditions and alerted grant recipients to the existence

of conditions for funding. As to the former, the Supreme Court, in recognition of the fact that Congress is unable to "prospectively resolve every possible ambiguity concerning particular applications of requirements," has permitted such delegations. *Bennett v. Kentucky Dep't. of Educ.*, 470 U.S. 656, 669, 105 S. Ct. 1544, 84 L. Ed. 2d 590 (1985). True, the statutory language does not illuminate the nature of any such conditions on the grant. But these questions can be resolved by looking to both statutes *and* an agency's authorized regulations. In *Bennett* that meant looking to the statute's language indicating that Title I education funds could not be used to supplant state and local funds for public schools, along with the Department of Education's ("DOE") regulations specifying the measures that states and local grant recipients were required to take to assure compliance with the grant. When the DOE issued a final order, demanding that Kentucky repay funds that it purportedly used to supplant state educational funding "in violation of statutory and regulatory requirements," the state challenged the action as a violation of the Spending Clause. *Id.* at 663. Though the Court of Appeals had found that "the statute and regulations concerning supplanting were not unambiguous," *id.* (cleaned up), the Supreme Court upheld the agency action; Kentucky had agreed to but failed to comply with the conditions for the grant as set forth in the statute and regulations, so the DOE could pursue this statutory remedy. *See Jackson v. Birmingham Bd. of Ed.*, 544 U.S. 167, 183, 125 S. Ct. 1497, 161 L. Ed. 2d 361 (2005) (crediting Title IX's implementing regulations as well as circuit precedent interpreting the statute with placing grant recipients on notice of potential liability for retaliatory actions).

Here, Title X "unambiguously authorized HHS to impose conditions for federal grants" to ensure that the funds issued will be efficaciously put to use for their intended purpose. *Oklahoma*, 107 F.4th at 1219 (citing 42 U.S.C. § 300a-4(b); 86 Fed. Reg. 56144, 56154 (Oct. 7, 2021)). This clear delegation of authority to HHS, viewed in combination with HHS's 2021 counseling and referral regulation, are sufficient for notice purposes under the Spending Clause.

Resisting this conclusion, Tennessee argues that *Rust*'s holding that § 1008 is ambiguous as it relates to counseling and referrals for abortions, precluded HHS from requiring counseling and referrals and violated the Spending Clause. But as discussed, the Supreme Court has long recognized Congress's power to authorize agencies to issue grants and leave the minutia of its spending programs to be clarified through regulations and other guidelines—even in the face of statutory ambiguity. *Id.* at 1218 (citing *Bennett*, 470 U.S. at 670 ("We agree with the [agency] that the [state grantee] clearly violated *existing* statutory *and regulatory provisions*") (emphasis added) (collecting cases)[3] Again, Title X authorizes HHS

3. *See id.* (reviewing the spending power based on both the "the statutory provisions" *and* "the regulations . . . and other guidelines provided by the [the agency] at th[e] time" that funding had been accepted); *see also Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 643, 119 S. Ct. 1661, 143 L. Ed. 2d 839 (1999) (finding an agencies' unambiguous regulations satisfied the notice requirements under the spending power); *South Dakota v. Dole*, 483 U.S. 203, 206, 107 S. Ct. 2793, 97 L. Ed. 2d 171 (1987) ("Congress . . . has repeatedly employed the spending power 'to further broad policy objectives by conditioning receipt of federal

"to make grants to State health authorities to assist in planning, establishing, maintaining, coordinating, and evaluating family planning services." 42 U.S.C. § 300a(a). It directs that these grants "shall be made in accordance with such regulations as the Secretary may promulgate." *Id.* § 300a-4(a). And Congress made the disbursement of grant funds "subject to such conditions as the Secretary may determine to be appropriate to assure that such grants will be effectively utilized for the purposes for which made." *Id.* § 300a-4(b). These clauses, in addition to HHS's regulations explaining the importance of nondirective counseling and referrals for Title X services, foreclose Tennessee's arguments. *See Bennett*, 470 U.S. at 670. Congress made compliance with HHS's requirements a clear and unambiguous condition of receiving a Title X grant. *See* 86 Fed. Reg. 56144, 56154 (Oct. 7, 2021). Moreover, we agree with our concurring colleague that Congress's inclusion of a yearly appropriations rider which expressly contemplates nondirective pregnancy counseling lends further support for the notion that HHS acted within its authority in setting that condition for funding—a fact that has implications for both the Spending Clause and APA analysis. *See* Omnibus Consol. Rescissions and Appropriations Act of 2022, Pub. L. No. 117-103, 136 Stat. 49, 444 (Mar. 15, 2022).

Tennessee's reliance on *Kentucky v. Yellen*, 54 F.4th 325 (6th Cir. 2022) and *West Virginia ex rel. Morrisey v.*

---

moneys upon compliance by the recipient with federal statutory *and administrative directives*.'" (emphasis added) (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 474, 100 S. Ct. 2758, 65 L. Ed. 2d 902 (1980))).

U.S. Department of Treasury, 59 F.4th 1124 (11th Cir. 2023) does not increase its likelihood of success on the merits. It insists that these two cases support its proposition that, in the face of an ambiguous statute, regulations alone generally cannot establish conditions. Specifically, Tennessee argues that HHS was barred from resolving § 1008's ambiguity through its own interpretations. But *Yellen*, which grappled with a vague rather than an ambiguous statute, did not reach a holding on the broader question of whether Congress could condition funding on compliance with agency regulations. 54 F.4th at 353. Indeed, in *Yellen*, the Department of Treasury argued that statutory language alone sufficiently placed states on notice of its conditions for funding. *Id.* And in *Morrisey*,[4] the Eleventh Circuit found that grantees were subject to regulations and legal requirements in place when the grants were made. 59 F.4th at 1148 (acknowledging that Congress may require grantees to abide by "'the legal requirements in place when the grants were made' [and] [t]hese 'legal requirements' include existing regulations.") (quoting *Bennett*, 470 U.S. at 670). Thus, because § 1008

4. In addition to *Morrisey*'s nonbinding effect on our jurisprudence, the circumstances there differ from this case in two important ways. In an effort to resolve the ambiguity of a tax offset provision in a stimulus act which potentially implicated states' sovereign tax authority, the Treasury Department created an entirely new regulatory framework. The HHS did no such action. Second, the Treasury Department's regulatory framework changed the fundamental function of the relevant statute. HHS's counseling and referral requirements here do not have such a fundamental effect on the application of the grant program. *See Oklahoma*, 107 F.4th at 1219.

is situated among other provisions of Title X that clearly instruct HHS to determine the eligibility requirements, the district court did not err in concluding that Congress's delegation to HHS would not violate the Spending Clause.

2.

Voluntarily and Knowingly. The district court likely also did not err in determining that Tennessee voluntarily and knowingly agreed to HHS's requirement for nondirective counseling and referrals. Despite Congress's broad powers to set the unambiguous terms of its grants, it may not do so in a manner that "surprise[es] participating States with post acceptance or 'retroactive' conditions." *Pennhurst*, 451 U.S. at 25. As discussed above, this means that HHS's decision to discontinue Tennessee's grant based on the state's refusal to adhere to the counseling and referral conditions would violate the Spending Clause if it imposed new requirements *after* Tennessee's acceptance of the grant. *See Bennett*, 470 U.S. at 670 ("[L]iability is determined by[] the legal requirements in place when the grants were made."). But HHS issued the nondirective counseling and referral requirements in 2021, which then went into effect on November 8, 2021—several months before Tennessee accepted its Title X grant award in March 2022. *See* 86 Fed. Reg. 56144 *and* (R. 1-7, PageID 170). Moreover, as the district court aptly observed, the Counseling and Referral Rule has been in place in all but two of the last twenty-nine years. As a decades-long recipient of Title X funds, Tennessee was aware of this fact. So Tennessee was on clear notice of the 2021 Rule and voluntarily agreed to its requirements when it accepted

the grant. *See Miss. Comm'n on Env't Quality v. EPA*, 790 F.3d 138, 179, 416 U.S. App. D.C. 69 (D.C. Cir. 2015) ("[T]he fact that the State has long accepted billions of dollars notwithstanding the challenged conditions may be an additional relevant factor in the contract-like analysis the Court has in mind for assessing the constitutionality of Spending Clause legislation.").

Tennessee points out that HHS issued the 2021 Rule at a time when the law of the land stated that women had a constitutional right to obtain an abortion. Thus, there was no possibility that the state's adherence to the Rule might conflict with a law banning the procedure. But after the Supreme Court's decision in *Dobbs*, Tennessee criminalized the procedure in all but the narrowest of cases. It argues that this "supervening illegality" of abortions in the state demonstrated a clear and permissible public policy statement on an issue within the domain of its own sovereignty. This critical shift in circumstances, according to Tennessee, rendered inadequate any notice of the Rule it had received pre-criminalization because the 2021 Rule did not contemplate such a scenario. (ECF 20, Appellant's Br. 30). But to the extent that Tennessee argues that the 2021 Rule is "silent" regarding its obligations post-*Dobbs*, HHS provided detailed guidance on how its *nondirective* counseling and referral requirements remained unchanged and active. Consistent with § 1008, HHS reiterated that Title X projects "may not take further affirmative action . . . to secure abortion services for the patient." (R. 1-6, PageID 165 (citing 65 Fed. Reg. at 41281)). And after Tennessee raised compliance concerns following its criminalization of abortion, HHS offered Tennessee the

opportunity to submit an "alternate compliance proposal," which included the option to use a national call-in hotline where third-party operators would supply the requisite information. (R. 1-9, PageID 190). Thus, given that *Dobbs* did not address what, if any, effect the decision might have on Title X's underlying program requirements, the district court did not err in determining that Tennessee voluntarily and knowingly agreed to the conditions when accepting its grant award.

3.

Tennessee's Sovereignty. Tennessee also asserts that HHS's 2021 Rule violates the spending power because it infringes on Tennessee's state sovereignty. It suggests that the 2021 Rule's counseling and referral requirements compel Tennessee to undermine its own state criminal abortion laws. But like *Oklahoma*, Tennessee may not use its state criminal laws to "dictate eligibility requirements" for Title X grants. *Oklahoma*, 107 F.4th at 1220 (citing *Planned Parenthood Fed'n of Am., Inc. v. Heckler*, 712 F.2d 650, 663, 229 U.S. App. D.C. 336 (D.C. Cir. 1983) ("Although Congress is free to permit the states to establish eligibility requirements for recipients of Title X funds, Congress has not delegated that power to the states."')). The 2021 Rule makes no reference to incorporating state law and does not limit compliance with its requirements to the procedures available within a given state. And Tennessee was free to voluntarily relinquish the grants for any reason, especially if it determined that the requirements would violate its state laws. (R. 1-9, PageID 190); *see also Rust*, 500 U.S. at 199

n.5 ("The recipient is in no way compelled to operate a Title X project; to avoid the force of the regulations, it can simply decline the subsidy.")). Instead, Tennessee decided to accept the grant, subject to the 2021 Rule's counseling and referral requirements.

In addition, Tennessee's suggestion that the 2021 Rule violates the Spending Clause by impairing its general police powers to regulate "health and welfare" through "limits on the medical profession" is unsubstantiated. Thus, we find that the district court did not err in its conclusions that Title X and HHS's regulations did not violate the spending power and that Tennessee voluntarily and knowingly accepted its grant conditions. Tennessee is not likely to succeed on its Spending Clause claims.

B.

Tennessee's APA Challenge. Tennessee next argues that HHS's decision to discontinue funding its grant violated the APA. Specifically, Tennessee asserts that HHS's action to enforce the 2021 Rule: (1) exceeded HHS's regulatory authority under Title X; (2) is unreasonable; (3) is arbitrary and capricious; and (4) represents a new legislative rule which may only be promulgated via notice-and-comment rulemaking.

1.

Compliance with Title X. Tennessee maintains that HHS has misinterpreted § 1008's prohibition on the use of Title X funds for "programs where abortion is a method

of family planning." 42 U.S.C. § 300a-6. It argues that the best reading of that provision, according to its text and history, is that it bars HHS from conditioning Title X funding on grantees' counseling or referring for abortion services. This court must "hold unlawful and set aside agency action . . . found to be . . . in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. § 706(2).

Several states raised similar arguments before this court in *Ohio*, 87 F.4th at 770-75. In *Ohio*, we held that HHS's application of the 2021 Rule was within its statutory authority. *Id.* In deciding *Ohio*, we relied on the Supreme Court's conclusion in *Rust*, that § 1008 is indeed ambiguous with respect to nondirective counseling and referral options under *Chevron* step one; and under *Chevron* step two, HHS's "reasoned analysis" for proscribing such actions was a permissible construction of Title X. *Rust*, 500 U.S. at 187; *see also Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984). Thus, in reviewing HHS's 2021 Rule requiring nondirective counseling and referral in *Ohio*, we held that HHS's action also "must" have been permissible under *Chevron*'s step two analysis so long as HHS adequately explained its choice. *Ohio*, 87 F.4th at 772. In other words, because *Rust* held that a permissible construction of § 1008 permitted HHS to promulgate regulations banning counseling and referrals for abortion, we held that HHS's subsequent promulgation of a rule going the opposite way also "*must*" have been permissible so long as it adequately explained its choice. *Id.* at 772. We also concluded that HHS's reasoned analysis was sufficient to establish that

the 2021 Rule is not arbitrary and capricious—regardless of whether it represents the best reading of the statute.

Since our decision in *Ohio, Chevron* deference has fallen. *See Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 412, 144 S. Ct. 2244, 219 L. Ed. 2d 832 (2024). Consequently, given *Rust*'s and *Ohio*'s application of *Chevron* deference to HHS's actions relating to the provision of neutral, nondirective counseling[5] and referrals in those cases, Tennessee challenges their precedential effect. However, the extent to which *Loper Bright* undermines the validity of prior cases that were decided using *Chevron* deference depends on several factors not addressed by the parties in their briefing. In its guidance to lower courts, the Court broadly stated that it "do[es] not call into question prior cases that relied on the *Chevron* framework." *Id.* at 376. And it further explained that "[t]he holdings of those cases that specific agency actions are lawful . . . are still subject to statutory stare decisis despite [its] change in interpretive methodology." *Id.* (citing *CBOCS West, Inc. v. Humphries*, 553 U.S. 442, 457, 128 S. Ct. 1951, 170 L. Ed. 2d 864 (2008)). So, while *Loper Bright* opens the door to new challenges based on *new* agency actions interpreting statutes, specific agency actions already resolved via *Chevron* deference analysis will not automatically fall. *See id.* Unremarked upon was whether statutory stare decisis includes Circuit court precedent. *See id.*; *see also* Amy Coney Barrett, *Statutory Stare Decisis in the Court of Appeals*, 73 Geo. Wash. L. Rev. 317 (2005). For instance,

5. The states declined to challenge the counseling requirement included in the 2021 Rule in *Ohio v. Becerra*, 87 F.4th 759, 773 (6th Cir. 2023).

here, Tennessee's argument involves the same "specific agency action"[6] challenged in *Ohio*—HHS's enforcement of its 2021 Rule interpreting § 1008 to require nondirective counseling and referral options. In *Ohio*, we concluded that the 2021 Rule was lawful. Regardless of whether *Ohio* binds us,[7] like the *Oklahoma* court, we find its conclusion upholding the 2021 Rule—and by extension its enforcement against Tennessee here—persuasive. *Ohio* relied on *Rust* for its determination that HHS acted within statutory authority in treating referrals as falling outside of § 1008's restriction on using funds for programs in which abortion is a "method of family planning." We have held that we are bound by precedent "unless a Supreme Court decision 'mandates modification' of our precedent." *RLR Investments, LLC v. City of Pigeon Forge, Tenn.*, 4 F.4th 380, 390 (2021) (quoting *United States v. Moody*, 206 F.3d 609, 615 (6th Cir. 2000)). And the Supreme Court cautioned litigants hoping to rehash or relitigate previously settled issues decided based on *Chevron* that "[m]ere reliance on *Chevron* cannot constitute a special justification for

6. "'[A]gency action' includes the whole or a part of any agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." 5 U.S.C. § 551.

7. In *Metropolitan Hospital v. U.S. Department of Health and Human Services*, we concluded that statutory stare decisis attaches to our own cases interpreting statutes in relation to their application under the APA only when such prior decisions were based on a finding that the terms of the statute were unambiguous and therefore left no room for agency discretion. 712 F.3d 248, 255–56 (6th Cir. 2013) (citing *Nat'l Cable and Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982, 125 S. Ct. 2688, 162 L. Ed. 2d 820 (2005)).

overruling such a holding." *Loper Bright*, 603 U.S. at 376 (quoting *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 266, 134 S. Ct. 2398, 189 L. Ed. 2d 339 (2014) (cleaned up)).

Here, Tennessee argues that *Loper Bright* abrogated the precedential effect of *Rust* and *Ohio* because they relied on *Chevron*. But *Loper Bright* declined to "call into question prior cases that relied on the *Chevron* framework." *Id.* This approach makes sense considering, "there are thousands of such decisions, many settled for decades." *Id.* at 477 (Kagan, J. dissenting). And, even if the "specific agency action" in *Rust* was HHS's 1988 Rule *prohibiting* counseling and referral requirements pursuant to § 1008, our own circuit precedent addressed the inverse specific agency action and notably affirmed HHS's authority under Title X to *require* nondirective counseling and referral options. *See Ohio*, 87 F.4th at 772. Thus, as we consider, on a tentative basis, whether the district court improperly relied on *Rust* and *Ohio* to support its analysis, we cannot say that *Loper Bright* requires us to find that it did. *See In re Baker*, 791 F.3d 677, 682 (6th Cir. 2015) (recognizing lower courts' obligation to follow Supreme Court dicta).

Alternatively, Tennessee argues *Ohio* and *Rust* are distinguishable because they only involved *facial challenges* to § 1008. Tennessee asserts that its claim is an *as-applied* challenge because the challenge hinges on HHS's decision to discontinue its Title X funding—a purportedly different agency action in the wake of Tennessee's changed circumstances post-*Dobbs*. But

Tennessee's attempt to distinguish HHS's *promulgation* of the 2021 Rule in *Ohio* from HHS's *rescindment of* Tennessee's Title X funding is unavailing because a "specific agency action" attaches to an agency's particular construction of a statute. *See Loper Bright*, 546 U.S. at 376 (connecting "specific agency action" to the "holdings of those cases that specific agency actions are lawful"). In *Ohio*, this court had already held that HHS's 2021 Rule is lawful because it is a permissible construction of § 1008. 87 F.4th at 772.[8] Therefore, *Ohio*'s holding that the 2021 Rule is lawful is "still subject to statutory stare decisis despite our change in interpretive methodology." *Loper Bright*, 603 U.S. at 412; *see also Lopez v. Garland*, 116 F.4th 1032, 1045 (9th Cir. 2024) (declining to call into question prior *Chevron* precedent because an administrative body did not promulgate a new interpretation of a statute). And the district court's decision is consistent with this approach.

Tennessee further asserts that its as-applied challenge now requires the court to determine § 1008's single, best meaning, especially in the wake of Tennessee's changed circumstances post-*Dobbs*. But this as-applied distinction is less meaningful where, as discussed, *Dobbs* did not address its effect, if any, on Title X's underlying

8. Unlike in *In re MCP No. 185*, 124 F.4th 993, 1002 (6th Cir. 2025), in which the Federal Communications Commission ("FCC") changed its previous construction of whether Broadband Internet Service Providers offer a "telecommunication service" subject to common-carrier regulations under Title II of the Communications Act of 1934, 47 U.S.C. § 153(51), here, HHS's particular construction of § 1008 is the same construction that this court approved in *Ohio*.

program requirements or HHS's enforcement of such requirements. *See Dobbs*, 597 U.S. at 231. In other words, despite the change in circumstances, Tennessee's claim still centers on its challenge of HHS's statutory authority as it relates to the 2021 Rule. *See* 42 U.S.C. § 300a-4(b). Notably, the counseling and referral requirements were unambiguously in place before Tennessee accepted its grant award and before it changed its own laws. As such, Tennessee's arguments boil down to whether the counseling and referral requirements were legal as per the limitation contained in § 1008. And this is the same issue addressed in *Ohio*. Nevertheless, while the district court must ultimately determine whether HHS's actions complied with Title X, we confine our inquiry to whether the district court erred in its tentative conclusion. *See Oklahoma*, 107 F.4th at 1226. And even if *Ohio* were no longer binding, we agree with the district court's conclusion that the 2021 Rule is a lawful construction of § 1008.

Moreover, the "single, best meaning" of § 1008 permits both neutral, non-directive counseling and referrals. *Loper Bright*, 603 U.S. at 400. As noted earlier, Congress's yearly spending rider presumes the provision of such counseling, specifically instructing—like the 2021 Rule—that all pregnancy counseling must be non-directive. Requiring grantees to follow up with additional information to those who request it, in the form of names, addresses, and phone numbers of health care providers, is a natural outgrowth of that counseling. And short of that, HHS has granted Tennessee the option of merely providing patients with a hotline number where they

can obtain such health care provider information. Under either scenario, the grant recipient's role is informational only. It neither recommends nor promotes any particular pregnancy care option, while, at the same time, it promotes HHS's stated intention to advance a patient-centered approach. In this light, it seems quite a stretch to say that merely supplying to patients health provider information or a means to obtain such information elevates a grantee's actions to the status of having abortion as a method of family planning. Even accepting the dissent's definition of the term "method," the provision of such information cannot be characterized as a deliberate or systematic action toward a particular end. Offering a list of phone numbers is simply too attenuated an act to characterize an entire program as one that conclusively offers abortion as a "method of family planning." For this reason, Tennessee is unlikely to succeed on its claim that the 2021 Rule violates the APA. The 2021 Rule's counseling and referral requirement is consistent with the meaning of § 1008.

Tennessee also relies on a series of other arguments to attack HHS's authority based on § 1008's ambiguity. For instance, it argues that because of § 1008's ambiguity, HHS's actions implicated the major-questions doctrine, which requires agencies to have "clear congressional authorization" before making major policy decisions. *W. Virginia v. EPA*, 597 U.S. 697, 722, 142 S. Ct. 2587, 213 L. Ed. 2d 896 (2022). But, given the limited scope of HHS's authority under Title X, the doctrine is likely not implicated. Title X describes HHS's authority to "make grants to and enter into contracts with public or nonprofit private entities to assist in establishment and operation

of voluntary family planning projects which shall offer a broad range of acceptable and effective family planning methods and services." 42 U.S.C. § 300(a). We agree with the district court's conclusion that this language sets forth a sufficiently intelligible principle supporting Congress's delegation. *See Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 474, 121 S. Ct. 903, 149 L. Ed. 2d 1 (2001). And as the district court accurately observed, HHS does not "exercise powers of vast economic and political significance." *Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs.*, 594 U.S. 758, 141 S. Ct. 2485, 2489, 210 L. Ed. 2d 856 (2021). It issued only eighty-six Title X grants in 2023 with an average award value of $ 3 million. Office of Population Affairs, *Fiscal Year 2023 Title X Service Grant Awards*, https://opa.hhs.gov/grant-programs/title-x-service-grants/current-title-x-servicegrantees/fy2023-title-X-service-grant-awards (last accessed Aug. 16, 2024). Given this relatively circumscribed grant-making authority, it is unlikely that HHS has run afoul of the non-delegation doctrine here and we see no reason to disturb the district court's conclusion on this point. *See, e.g.*, *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159–60, 120 S. Ct. 1291, 146 L. Ed. 2d 121 (2000) (finding nondelegation problem where "the FDA . . . asserted jurisdiction to regulate an industry constituting a significant portion of the American economy.").

2.

Compliance with HHS Regulations. Tennessee next argues that HHS's actions are inconsistent with its own regulations because program services must be

"allowable under state law" and referrals must be made to service providers "in close physical proximity." (ECF 20, Appellant's Br. 44 (citing 42 C.F.R. § 59.5(b)(6)); (*id.* at 45 (citing 42 C.F.R. § 59.5(b)(8))).

Allowable Under State Law. "[A] fundamental canon of statutory construction is that when interpreting statutes, the language of the statute is the starting point for interpretation, and it should also be the ending point if the plain meaning of that language is clear." *Saginaw Chippewa Indian Tribe of Mich. v. Blue Cross Blue Shield of Mich.*, 32 F.4th 548, 557 (6th Cir. 2022) (citations and quotations omitted). 42 C.F.R. § 59.5(b)(6) states that Title X projects must "[p]rovide that family planning medical services will be performed under the direction of a clinical services provider, with services offered within their scope of practice and *allowable under state law*, and with special training or experience in family planning." (emphasis added). Tennessee first argues that the plain meaning of § 59.5(b)(6) is that its Title X project may not encompass services relating to abortions because the procedure is not allowable under state law in Tennessee. But as the district court correctly concluded, Tennessee's interpretation does not reflect the plain meaning of the regulation. There is no indication that the *nondirective* options for counseling and the *neutral* information required by the Rule are not "allowable under state law" in Tennessee. Though Tennessee law prohibits a person from performing an abortion, the law "contains no language whatsoever related to counseling or referral[s]," and does not overlap with § 59.5(b)(6). (R. 30, PageID 840); *see* Tenn. Code Ann. § 39-15-213. Indeed, HHS's commentary

accompanying the 2021 Rule indicates HHS included the "allowable under state law" phrase to "more clearly reflect the role of a broader range of *healthcare providers* in providing Title X services." 86 Fed. Reg. at 56163–64 (emphasis added). Thus, this provision addresses "*who*" may qualify as a clinical services provider, not the types of *services* provided under Title X programs. In short, because Tennessee law does not prohibit mere abortion-related counseling or referrals, we find no conflict between § 59.5(b)(6) and Tennessee law. The district court did not err in this regard.

Close Physical Proximity. Tennessee next argues that 42 C.F.R. § 59.5(b)(8)'s mandate to provide services close to patients, conflicts with its need to refer patients to out-of-state providers due to its laws criminalizing abortions. Section 59.5(b)(8) requires Title X projects to "[p]rovide for coordination and use of referrals and linkages with [other health-care entities], *who are in close physical proximity to the Title X site, when feasible*, in order to promote access to services and provide a seamless continuum of care." (emphasis added). However, the phrase "when feasible" in this provision plainly modifies the requirement to refer to providers "in close physical proximity to the Title X site." *Id.* Thus, as the district court again correctly determined, the regulation only requires that Title X projects refer patients to nearby healthcare providers "when it is possible to do so." When such close-in-proximity referrals are not possible, it permits the referral to be made "to a provider farther away." (R. 30, PageID 837–39 (quoting 42 C.F.R. § 59.5(b)(8)); 86 Fed. Reg. at 56164 (explaining that "referrals are to be

to providers in close proximity to the Title X site when feasible"). This regulation does not require a referral to a provider within the state. The district court did not err.

3.

Finally, Tennessee contends that HHS's counseling and referral conditions are arbitrary and capricious because the agency failed to consider several "important aspect[s]" of its requirement. (ECF 20, Appellant's Br. 47 (citing *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 43, 103 S. Ct. 2856, 77 L. Ed. 2d 443 (1983))).

Federalism Concerns. First, Tennessee asserts that HHS ignored federalism concerns because its decision to discontinue Tennessee's grant award did not consider the effect of *Dobbs* on counseling and referral requirements. But as discussed above, HHS issued extensive guidance about the effect of *Dobbs* on the requirements regarding counseling and referrals. Though Tennessee is correct that the 2021 Rule did not contemplate *Dobbs*, that case did not address the power of the agency to set conditions on federal grants. 597 U.S. at 231. And as the Supreme Court has previously noted, "[t]he recipient is in no way compelled to operate a Title X project; to avoid the force of the regulations, it can simply decline the subsidy." *Rust*, U.S. at 199 n.5. The district court did not err here.

Unlawful Position Switch. Tennessee argues that the rescindment was an "unlawful position switch," because it came only months after HHS approved Tennessee's

Title X program with "full awareness the State's post-*Dobbs* policy that '[n]o referrals for abortion are made.'" (ECF 20, Appellant's Br. 50 (quoting (R. 1-1, PageID 56))). Tennessee points to HHS's July 2022 program review of its Title X project to support its argument that the agency unlawfully changed positions. However, the July 2022 program review indicated that there would be a follow-up if Tennessee changed its counseling and referral policies in response to the abortion restriction that was soon to take effect. And regardless, the counseling and referral requirements have been in place since 2021, before Tennessee applied for and received Title X funds.

Reliance Interests. Lastly, Tennessee argues that the rescindment overlooked Tennessee's legitimate reliance interests in the grant award because it has been receiving Title X funding for 50 years. And the rescindment was procedurally invalid because HHS was required to undertake notice-and-comment rulemaking procedures to impose "new requirements" on Tennessee's Title X project. (ECF 20, Appellant's Br. 53 (quoting *Nat'l Council for Adoption v. Blinken*, 4 F.4th 106, 114, 453 U.S. App. D.C. 199 (D.C. Cir. 2021) (citation omitted)). But Tennessee's notice-and-comment arguments fail because HHS did not impose any "new" requirements on grantees. Furthermore, Tennessee likely has no legally cognizable reliance interest in the receipt of a *discretionary* funding award on the conditions that it prefers. *Cf. Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 222, 136 S. Ct. 2117, 195 L. Ed. 2d 382 (2016). HHS's regulations make clear that Title X grants provide funding for one year with the option of issuing noncompetitive continuation grants

for additional years. 42 C.F.R. § 59.8(b). HHS was not obligated to award more. *Id.* § 59.8(c). The district court did not err in this regard.

IV.

Irreparable Harm. Tennessee argues that it will face irreparable harm without an injunction because the rescindment: (1) will cause Tennessee severe financial losses that it cannot later recover; (2) threatens the viability of Tennessee's Title X program; (3) causes irreparable reputational harm impacting its ability to secure future federal grants; and (4) interferes with its "sovereign interest" in setting its own abortion laws. *Maryland v. King*, 567 U.S. 1301, 1303, 133 S. Ct. 1, 183 L. Ed. 2d 667 (2012) (Roberts, C.J., in chambers).

"A plaintiff's harm from the denial of a preliminary injunction is irreparable if it is not fully compensable by monetary damages." *Overstreet v. Lexington-Fayette Urb. Cnty. Gov't*, 305 F.3d 566, 578 (6th Cir. 2002) (citing *Basicomputer Corp. v. Scott*, 973 F.2d 507, 511 (6th Cir. 1992)). Tennessee bears the burden of showing that its injuries are both "certain and immediate" and not "speculative or theoretical." *D.T. v. Sumner Cnty. Schs.*, 942 F.3d 324, 327 (6th Cir. 2019) (citation omitted). However, finding harm is not enough for Tennessee to satisfy its burden here. It is "the peculiarity and size of a harm" that "affects its weight in the equitable balance." *Kentucky v. Biden*, 57 F.4th 545, 556 (6th Cir. 2023). For instance, when the likelihood of success on the merits is low, plaintiffs must inversely show a higher degree of harm

to warrant an injunction. *See Friendship Materials, Inc. v. Mich. Brick, Inc.*, 679 F.2d 100, 105 (6th Cir. 1982) ("[I]n general, the likelihood of success that need be shown . . . will vary inversely with the degree of injury the plaintiff will suffer absent an injunction.") (citation omitted).

The district court satisfied itself that Tennessee's harm was insufficient to warrant a preliminary injunction because its claims failed to establish a high degree of harm. Tennessee says the court abused its discretion because Tennessee believes it will suffer severe financial, reputational, and sovereign harm. Specifically, it argues that its loss of $ 7 million in federal Title X funds will cause irreparable harm because the funds are unrecoverable, and this court in *Ohio* has similarly found lower amounts of lost federal funds sufficient to compel an injunction. 87 F.4th at 782–83. But there, the state of Ohio lost one-fifth of its Title X funding because of HHS's contested rule change. *Id.* Moreover, the court found that Ohio established that it was likely to succeed on the merits of one of its claims, further warranting an injunction. Tennessee's situation is different. Unlike Ohio, Tennessee lost its funding because it refused to comply with requirements established before it accepted the grant and declined to proceed with HHS's proffered alternative. There was no intervening rule change. We agree with the district court that Tennessee likely will not succeed on the merits. So, while Tennessee's complaints may demonstrate some degree of harm, the state was required to show a *higher degree* of harm than what was asserted here. *See Friendship Materials*, 679 F.2d at 105.

Second, there is no indication that Tennessee will lose its Title X program because of the lack of federal funding. Irreparable injury cannot be speculative. *See D.T.*, 942 F.3d at 327 (requiring that irreparable harm not be speculative); *see also Mich. Coal. of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 154 (6th Cir. 1991) ("[T]he harm alleged must be both certain and immediate, rather than speculative or theoretical."). As it currently stands, the Tennessee legislature has already provided the state's Title X project with the $ 7 million it would have otherwise received from HHS. (R. 21-1, PageID 335, ¶15). The Tennessee legislature earmarked the appropriations to fund its Title X project as "recurring." (R. 21-1, PageID 335, ¶15). Because this suggests that Tennessee's family planning program will continue to be funded—at least in the near-term—Tennessee's arguments that it will lose its program based on a lack of federal funding amount to speculation.

Tennessee's next claim, that it will suffer irreparable reputational harm, is similarly unpersuasive. Tennessee argues that because HHS is required to report its termination of Tennessee's grant to the federal grantee clearinghouse, the Federal Awardee Performance and Integrity Information System ("FAPIIS"), HHS's actions threaten Tennessee's "ability to obtain [any] future Federal funding." (*see* R. 1-9, PageID 190). Tennessee cites *ACT, Inc. v. Worldwide Interactive Network, Inc.*, 46 F.4th 489, 503–04 (6th Cir. 2022), for the proposition that its possible reported status is the type of reputational damage that "constitute[s] irreparable harm" because it is "likely to occur" and "difficult to quantify monetarily."

(ECF 20, Appellant's Br. 56). But Tennessee provided no evidence as to how being reported would "affect the grants it currently receives or will receive in the future." (R. 30, PageID 854 (citing *ACT, Inc.*, 46 F.4th at 503–04). True, the inclusion in FAPIIS "may" affect a grantee's ability to obtain future federal funding, (*see* R. 1-9, PageID 190). But Tennessee does not do its part to establish the evidence of how FAPIIS inclusion has hurt grantees "in the past" or that it "is likely to occur again." *State of Ohio ex rel. Celebrezze v. Nuclear Regul. Comm'n*, 812 F.2d 288, 290 (6th Cir. 1987). Thus, because Tennessee does not provide the "requisite facts and affidavits" supporting its theory of reputational harm, *Ohio*, 87 F.4th at 784, we agree with the district court that Tennessee's reputational-injury claim is too speculative.

Last, Tennessee claims that HHS's interference with its "sovereign interest" in setting its abortion laws constitutes a form of irreparable injury. (ECF 20, Appellant's Br. 56–57 (citing *Maryland*, 567 U.S. at 1303)). However, we have already concluded that there is no direct conflict between HHS's counseling and referrals requirement and Tennessee's recent abortion criminalization laws. Moreover, as discussed above, Tennessee was free to voluntarily relinquish the grants for any reason, especially if it determined the requirements would violate its state laws. (R. 1-9, PageID 190); *see also Rust*, 500 U.S. at 199 n.5. Thus, because the district court thoroughly addressed each of Tennessee's arguments regarding irreparable harm and correctly found them insufficient, we find that the district court did not abuse its discretion here.

V.

The Public Interest. Tennessee argues that declining to issue an injunction harms the public interest because it deprives Tennesseans of family planning services and generates new public-health risks. "[T]he public's true interest lies in the correct application of the law." *Kentucky v. Biden*, 23 F.4th 585, 612 (6th Cir. 2022) (citation omitted); *see also Priorities USA v. Nessel*, 860 F. App'x 419, 423 (6th Cir. 2021) ("[T]he public interest necessarily weighs against enjoining a duly enacted statute, and our assessment that the appellants will likely prevail on the merits tips the public-interest factor further in their favor.").

The district court found that this factor favored HHS because the court found HHS's actions lawful, and both parties had agreed that the public interest lies in the correct application of Title X and its regulations. Because we similarly find that HHS's actions were lawful, we find no abuse of discretion here.

VI.

Tennessee cannot demonstrate how HHS's decision to discontinue its Title X grant due to the state's failure to comply with the 2021 Rule's requirements regarding counseling and referral for abortions, violated the Spending Clause or the APA. As a result, Tennessee is unable to prove the likelihood of its claims succeeding on the merits. The district court thoroughly assessed the balance of interests and found that they did not support

granting an injunction. The district court's handling of Tennessee's claims in denying the motion for a preliminary injunction was consistent with this court's precedent and did not constitute an abuse of discretion. Because the majority of the preliminary injunction factors do not favor Tennessee's position, we find that the balance of the equities weighs in favor of denying a preliminary injunction.

For the reasons above, we **AFFIRM** the judgment of the district court.

DISSENTING IN PART/CONCURRING IN THE JUDGMENT IN PART

KETHLEDGE, Circuit Judge, dissenting in part and concurring in the judgment in part. Tennessee should succeed on its claim under the Administrative Procedure Act, 5 U.S.C. § 706(2)(A), that HHS's abortion-referral requirement is contrary to law. The relevant law here is § 1008 of Title X, which provides that "[n]one of the funds appropriated under this title shall be used in programs where abortion is a method of family planning." 42 U.S.C. § 300a-6. Yet HHS's 2021 Rule specifies—as a condition of Title X funding—that recipients must, upon a patient's request, provide referrals to abortion providers. The question, then, is whether HHS's abortion-referral requirement makes Tennessee's program one in which "abortion is a method of family planning[,]" in violation of § 1008.

A threshold issue is whether authority definitively to interpret § 1008 lies with the courts or with HHS. In *Rust v. Sullivan*, 500 U.S. 173, 184, 111 S. Ct. 1759, 114 L. Ed. 2d 233 (1991), the Supreme Court said the agency had that authority, under the Court's decision seven years earlier in *Chevron, U.S.A. Inc. v. Nat'l Res. Defense Council, Inc.*, 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984). *Rust* was a *Chevron* case down to its bones: in the first sentence of its analysis, the Court said that "[w]e need not dwell on the plain language of" § 1008 because that "language is ambiguous." 500 U.S. at 184. The Court then described the question before it as "whether the agency's answer is based on a permissible construction of the statute."

Id. (quoting *Chevron*, 467 U.S. at 842-43). The agency's answer there was the opposite of its answer here: in its 1988 Rule, HHS stated that, under § 1008, a "Title X project may *not* provide counseling concerning the use of abortion as a method of family planning or provide referral for abortion as a method of family planning." *Id.* at 179 (quoting 42 C.F.R. § 59.8(a)(1) (1989)) (emphasis added). The Court then deferred to that interpretation and deemed the 1988 Rule lawful.

In the decades since, HHS has gone back and forth as to whether Title X programs may or even must provide abortion counseling and referrals. The 2021 Rule at issue here takes the "must provide" approach. Last year, our court acknowledged that *Chevron* and hence *Rust* remained binding precedent—even though the Supreme Court had recently granted certiorari to consider whether to overrule *Chevron*. *See Ohio v. Becerra*, 87 F.4th 759, 769 (6th Cir. 2023); *Loper Bright Enters. v. Raimondo*, 143 S. Ct. 2429, 216 L. Ed. 2d 414 (2023) (mem.). Accordingly, we held, "*Rust*'s holding requires us to reject the States' argument that the 2021 Rule's referral requirement is contrary to law." *Ohio*, 87 F.4th at 771.

During the pendency of this appeal, however, the Supreme Court overruled *Chevron*. *See Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 144 S. Ct. 2244, 2273, 219 L. Ed. 2d 832 (2024). In *Loper Bright*, the Court observed what the Court in *Chevron* had not: that § 706 of the Administrative Procedure Act "directs that, '[t]o the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of

law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action.'" *Id.* at 2302 (quoting 5 U.S.C. § 706). Hence, the Court observed, the APA "codifies for agency cases the unremarkable, yet elemental proposition reflected by judicial practice dating back to *Marbury v. Madison*, 5 U.S. 137, 1 Cranch 137, 177, 2 L. Ed. 60 (1803): that courts decide legal questions by applying their own judgment." *Loper Bright*, 144 S. Ct. at 2261. Thus—in agency cases as in any other case of statutory interpretation—the court must identify the statute's "single, best meaning" rather than merely a permissible one. *Id.* at 2266. And in agency cases specifically, "[c]ourts must exercise their independent judgment in deciding whether an agency has acted within its statutory authority, as the APA requires." *Id.* at 2273.

Whether HHS "has acted within its statutory authority" is precisely the question presented here. Yet the Department of Justice (as counsel for HHS) insists that, in answering that question, *Loper Bright* is of no moment whatever. Specifically, before argument, the Department opposed supplemental briefing as to the effect of *Loper Bright* upon our decision in this appeal. Instead, the Department merely asserted that, in *Rust*, the Court concluded that § 1008 "'does not speak' ["directly" is the next word in *Rust*] to 'counseling' or 'referral'"—as if, even after *Loper Bright*, the judicial task was therefore at an end. Dep't. of Justice 28(j) Letter of July 3, 2024 (citing *Rust*, 500 U.S. at 184). And at oral argument, the agency's counsel repeatedly refused to answer questions about what § 1008 means—instead asserting (again)

that we remain bound by *Rust*. Oral Arg. at 20:00-26:45, 33:30-36:20. In support, the Department emphasizes one sentence from *Loper Bright*—in which the Court said its decision did "not call into question prior cases that relied on the *Chevron* framework." 144 S. Ct. at 2273. So in the Department of Justice's view, apparently, *Chevron* lives on in perpetuity as to any statute that the Supreme Court has ever deemed ambiguous under that doctrine.

But the Department studiously overlooks the *extent* to which lower courts remain bound by the Court's "prior cases that relied on the *Chevron* framework." *Id.* And in the very next sentence of *Loper Bright*, the Chief Justice was surpassingly clear in defining that extent: "The holdings of those cases *that specific agency actions are lawful*—including the Clean Air Act holding of *Chevron* itself—are still subject to statutory *stare decisis* despite our change in interpretive methodology." *Id.* (emphasis added).

The "specific agency action" held lawful in *Rust* was the 1988 Rule, which has since been rescinded. Thus, in this appeal, we have no occasion to defer to that holding. Instead, we "must exercise [our] independent judgment in deciding whether [the] agency has acted within its statutory authority, as the APA requires." *Id.* We would therefore contravene *Loper Bright* if we deferred to the agency's interpretation of § 1008 in the 2021 Rule. (And to say the agency actually interpreted § 1008 is generous, since in the Rule the agency nowhere deigns to interpret it.)

So our court must determine for itself whether the 2021 Rule's abortion-referral requirement is contrary to law. Again, § 1008 provides: "None of the funds appropriated in this title shall be used in programs where abortion is a method of family planning." I have no quarrel with HHS's definition of "family planning"—under the prior administration's 2019 Rule and the 2021 Rule alike—as a process by which individuals can determine "the number and spacing" of their children. *See* 42 C.F.R. § 59.1 (2019); 42 C.F.R. § 59.1 (2021). And the word "where," as used in § 1008, pretty clearly means "in which[.]" *See* Bryan A. Garner, *Garner's Modern American Usage* 856 (3d ed. 2009); *Webster's Third New International Dictionary (Unabridged)* 2602 (1971). A "method," in turn, is not merely a means of obtaining a particular end, but a "regular, orderly," or "systematic" means of doing so. *See Webster's New Universal Unabridged Dictionary* 1134 (2d ed. 1983); *Webster's Third New International Dictionary* 2322. So a method is a deliberate or systematic means of obtaining a particular end.

Section 1008 thus denies funding to programs in which abortion is a regular or systematic means of enabling individuals to determine the number and spacing of their children. For achieving that end, of course, there are many means other than abortion: contraception, abstinence, in vitro fertilization, adoption. A program that has nothing to do with a particular means is not a program in which that means is a "method." For a program to be one in which a particular means "is a method of family planning," rather, the program must assist the patient in using or obtaining that means, and do so in a deliberate or systematic way.

Yet the program itself need not provide the ultimate service or product necessary for those means: the 2019 and 2021 Rules both expressly contemplate referrals to "actual providers of services," 42 C.F.R. § 59.5(b)(8), (9) (2019) and 42 C.F.R. § 59.5(b)(8), (9) (2021); and surely adoption and IVF, for example, are methods of family planning for programs that help patients obtain those services elsewhere. For a means to be attributable to a program as a "method," therefore, deliberate or systematic facilitation must be enough.

Facilitation means assistance toward a particular end. In this context, facilitation means assistance toward a patient's use of a particular means of family planning. Referral is such assistance, regardless of the means the patient seeks. For in family planning, as in life generally, knowledge of where to obtain a product or procedure is the first step toward actually obtaining it. Indeed, in the 2021 Rule, HHS itself acknowledged that referrals to abortion providers are "affirmative action" toward actually obtaining an abortion—when HHS stated that, apart from the referral itself, a Title X funds recipient "may not take *further* affirmative action (such as negotiating a fee reduction, making an appointment, providing transportation) to secure abortion services for the patient." 86 Fed. Reg. 56144, 56150 (Oct. 7, 2021) (emphasis added). For purposes of § 1008, however, HHS's distinction between referrals and these other affirmative actions is without a difference: all these actions provide assistance toward "secur[ing] abortion services for the patient." *Id.* And the referral requirement makes that assistance systematic, since by its terms every recipient of Title X funds must provide it.

Just as adoption or IVF are methods of family planning for programs that refer patients to providers for those services, therefore, so too is abortion a method of family planning for programs that refer patients to abortion providers. And the 2021 Rule mandates that every Title X program do exactly that. Thus, HHS's abortion-referral requirement makes every Title X program one "where abortion is a method of family planning."

HHS counters, in passing, that Tennessee could comply with the referral requirement "by providing Title X patients the number for a call-in hotline where operators would supply the requisite information." Br. at 10. But the "hotline" would supply the patient with the same information ("requisite" for obtaining an abortion) that handing her a printed list of abortion providers would. That indeed would transparently be the whole point of the exercise. Providing the patient with the hotline number would facilitate actually obtaining an abortion just as handing her the form would. That the hotline would contrive to add a step to that referral process (namely, that of dialing a phone number) should make zero difference to the analysis under § 1008. Courts enforce legal rules, rather than allow parties patently to circumvent them.

In sum, the abortion-referral requirement likely violates § 1008's proscription, and I would enjoin its enforcement.

* * *

A closer question is whether the 2021 Rule's requirement of nondirective counseling regarding abortion is likewise contrary to § 1008. The 2021 Rule provides in relevant part:

> A project must:
>
> (i) Offer pregnant clients the opportunity to be provided information and counseling regarding each of the following options:
>
> (A) Prenatal care and delivery;
>
> (B) Infant care, foster care, or adoption; and
>
> (C) Pregnancy termination.
>
> (ii) If requested to provide such information and counseling, provide neutral, factual information and nondirective counseling on each of the options, and, referral upon request, except with respect to any option(s) about which the pregnant client indicates they do not wish to receive such information and counseling.

42 C.F.R. § 59.5 (2021). Counseling on these topics must therefore be "neutral" and "nondirective[.]" The question, then, is whether the counseling requirement—to provide, upon request, nondirective counseling regarding abortion and various other topics—likewise makes a Title X program one in which abortion is a method of family planning.

An action is not a "method" just because it makes a particular outcome more likely. Rather, a method is deliberate or systematic action toward a particular end. And nondirective counseling by definition is not directed toward a particular outcome. (The same is not true of promotion or advocacy: persuading a person to choose a particular outcome is a deliberate step toward reaching it.) Nondirective counseling helps the patient choose her own means of family planning, but advances none of them. Hence nondirective counseling does not amount to deliberate or systematic facilitation of any of the pregnancy options the counseling might cover. Thus, the 2021 Rule's requirement of nondirective counseling likely does not violate § 1008.

An appropriations rider enacted every year since 1996 (including the years relevant here) all but confirms the point. By way of background, Congress "may amend substantive law in an appropriations statute, as long as it does so clearly." *Robertson v. Seattle Audubon Soc.*, 503 U.S. 429, 440, 112 S. Ct. 1407, 118 L. Ed. 2d 73 (1992). "Clearly" need not mean "expressly." In *Robertson*, for example, the Court held that an appropriations statute had implicitly (though clearly) "modified" provisions of the Migratory Bird Treaty Act, 16 U.S.C. § 703 *et seq.*, among two other Acts. 503 U.S. at 438-40.

Here, the appropriations rider provides in relevant part:

> For carrying out the program under Title X . . . to provide for voluntary family planning

> projects, $ 286,479.00: *Provided*, that amounts provided to said projects under such title shall not be expended for abortions, [and] that all pregnancy counseling shall be nondirective[.]

Omnibus Consol. Rescissions and Appropriations Act of 2022, Pub. L. No. 117-103, 136 Stat. 49, 444 (Mar. 15, 2022).

An ordinary reader would understand the phrase "all pregnancy counseling shall be nondirective" to mean that nondirective pregnancy counseling is permissible under Title X. In like fashion, for example, the phrases "all passenger vehicles must have seatbelts" and "all dogs shall be kept on a leash," proscribe neither manufacturing passenger vehicles nor taking dogs for a walk; instead, those phrases specify a condition for doing those things lawfully. Here, the specified condition is that counseling be "nondirective"; and the rider makes clear enough that pregnancy counseling is lawful under Title X so long as that condition is met.

Moreover, the rider's reference to "all" pregnancy counseling suggests that such counseling may concern various topics; and the relevant context—among other things, that the rider's preceding clause ends with the word "abortions"—suggests that abortion is one of them. Indeed, in light of § 1008, one can surmise that abortion, above all, was the topic Congress had in mind when it mandated that "pregnancy counseling" be nondirective. Thus—regardless of whether one thinks that § 1008,

construed within its four corners, would bar nondirective counseling regarding abortion—§ 1008 construed along with the appropriations rider, in the years in which the rider is enacted, very likely permits such counseling. The prior administration thought so, *see* 84 Fed. Reg. 7714, 7745-46 (Mar. 4, 2019); and I think they were likely right. Nor should it matter that the 2019 Rule permitted such counseling, whereas the 2021 Rule requires it: if nondirective counseling falls outside the proscription of § 1008, whether an agency permits or requires it is immaterial for purposes of that proscription. Thus, in my view, Tennessee is unlikely to prevail on its claim under the APA that the 2021 Rule's requirement of nondirective pregnancy counseling is contrary to law; and so I would not enjoin that requirement.

* * *

Given that (in my view) the abortion-referral requirement violates § 1008, I do not reach Tennessee's parallel challenge to that requirement on constitutional grounds (namely under the Spending Clause). *See Northwest Austin Mun. Utility Dist. No. One v. Holder*, 557 U.S. 193, 205, 129 S. Ct. 2504, 174 L. Ed. 2d 140 (2009). Tennessee does claim that the 2021 Rule's requirement of nondirective pregnancy counseling likewise "expressly violate[s] the Spending Clause by imposing unforeseen conditions far afield from Congress's Title X legislation." Complaint ¶112. But I think that claim will likely fail, since the rider plainly contemplates nondirective pregnancy

counseling and indeed prescribes a rule for its legality (namely that the counseling be nondirective). Nor do I think that Tennessee will likely show that the agency's actions with regard to the counseling requirement were arbitrary and capricious under the APA.

I respectfully dissent in part and concur in the judgment in part.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 24-5220

STATE OF TENNESSEE,

Plaintiff-Appellant,

v.

XAVIER BECERRA, IN HIS OFFICIAL CAPACITY AS SECRETARY OF HEALTH AND HUMAN SERVICES; UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; JESSICA S. MARCELLA, IN HER OFFICIAL CAPACITY AS DEPUTY ASSISTANT SECRETARY FOR POPULATION AFFAIRS; OFFICE OF POPULATION AFFAIRS,

Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Tennessee at Knoxville.
No. 3:23-cv-00384—Travis Randall McDonough,
District Judge.

Argued: July 18, 2024

Decided and Filed: August 26, 2024

Before: GIBBONS, KETHLEDGE, and DAVIS,
Circuit Judges.

DAVIS, J., delivered the opinion of the court in which GIBBONS, J., joined in full. KETHLEDGE, J. (pp. 24–31), delivered a separate opinion dissenting in part and concurring in the judgment in part.

OPINION

DAVIS, Circuit Judge. In 2021, the United States Department of Health and Human Services ("HHS") promulgated a rule requiring Title X grant recipients to provide neutral, nondirective counseling and referrals for abortions to patients who request it. Tennessee, which has been a Title X recipient for over 50 years, recently outlawed most abortions in the state. After doing so, Tennessee would commit only to conducting counseling and referrals for options deemed legal in the state. HHS considered Tennessee's commitment to be out of compliance with its regulatory requirements. So it opted to discontinue the grant. Tennessee filed suit to challenge HHS's action and enjoin it from closing the grant. The district court denied Tennessee's request for preliminary injunction because it held that Tennessee does not have a strong likelihood of succeeding on the merits of its claim and that the balance of the remaining preliminary injunction factors weigh in HHS's favor. For the reasons set forth below, we affirm.

I.

A.

Factual Background. In 1970, Congress enacted Title X of the Public Health Service Act (alternately "the

Act") to authorize HHS to award discretionary grants to fund family-planning projects. *See* 42 U.S.C. §§ 300(a), 300a-4(a)–(b); Family Planning Services and Population Research Act, Pub. L. No. 91-572, 84 Stat. 1504, 1508 (1970). Title X authorizes HHS to "enter into contracts with public or nonprofit private entities" to establish and operate these family-planning projects, 42 U.S.C. § 300(a), and these grants are to be "made in accordance with such regulations as the Secretary may promulgate," *id.* § 300a-4(a). Nevertheless, Section 1008 of the Act provides that "[n]one of the funds appropriated . . . shall be used in programs where abortion is a method of family planning." *Id.* § 300a-6. HHS has varied in its interpretation of the limit that § 1008 imposes on its regulatory authority. As a result, it has vacillated from regulations requiring funded projects to provide nondirective counseling and referrals for abortion (2000–2019), to forbidding such activity (2019–2021), to requiring nondirective counseling and abortion referrals if requested by the patient (2021–present). *See Ohio v. Becerra*, 87 F.4th 759, 765–67 (6th Cir. 2023) (summarizing the history of the Counseling and Referral rule). Generally, HHS grants are awarded for a one-year period and any subsequent continuation awards are similarly determined one year at a time. 42 C.F.R. § 59.8(a)–(b). When "non-Federal" entities fail to comply with the "[f]ederal statutes, regulations, or the terms and conditions" of an award, HHS is empowered to terminate the grant. 45 C.F.R. §§ 75.371(c), 75.372(a)(1).

In October 2021, HHS promulgated a rule requiring Title X programs to offer pregnant clients the opportunity to receive "neutral factual information and nondirective

counseling" regarding prenatal care and delivery, infant care, foster care, adoption, and abortion.[1] Ensuring Access to Equitable, Affordable, Client-Centered, Quality Family Planning Services, 86 Fed. Reg. 56144 (Oct. 7, 2021); *see also* 42 C.F.R. § 59.1 *et seq*; 42 C.F.R. § 59.5(a)(5)(i)–(ii). The 2021 Rule also required Title X programs to provide referrals for any of these options in response to a patient request. 42 C.F.R. § 59.5(a)(5)(ii). To comply with § 1008's prohibition of funding for programs where abortion is a method of family planning, the 2021 Rule emphasized that a referral for abortion services "may include providing a patient with the name, address, telephone number, and other relevant factual information" about a medical provider, but that a Title X project "may not take further affirmative action (such as negotiating a fee reduction, making an appointment, providing transportation) to secure abortion services for the patient." *Ensuring Access*, 86 Fed. Reg. at 56150.

In March 2022, HHS awarded the Tennessee Department of Health a Title X grant for the period from April 1, 2022, through March 31, 2023. The notice of award stated that the amount requested represented the one-year "budget period," (as opposed to the project's five-year period), and that it was "not obligated to make additional Federal Funds available." (R. 1-7, PageID 172).

In June 2022, the Supreme Court handed down its decision in *Dobbs v. Jackson Women's Health Organization*, 597 U.S. 215, 142 S. Ct. 2228, 213 L. Ed. 2d 545 (2022), in which it held that there is no individual

1. Through this rule, HHS readopted the regulations in place from 2000 to 2019. 86 Fed. Reg. 56144, 56144 (Oct. 7, 2021).

right under the Constitution to obtain an abortion. Following *Dobbs*, several states—Tennessee included—implemented laws that criminalized abortion in all but a few circumstances. Reasoning that *Dobbs* did not affect the Title X grant regime, in January 2023, HHS notified grantees it would be auditing their compliance with its counseling and referral regulations. HHS requested that grantees submit copies of their policies for providing neutral, nondirective options counseling and referrals for abortion services and a signed statement confirming compliance with those regulations.

Tennessee responded by submitting a letter confirming its compliance with the regulation and attaching its policy. The policy stated, in pertinent part, that Title X "[p]atients with positive pregnancy test[s] must be offered the opportunity to be provided information and counseling regarding all options that are legal in the State of Tennessee." (R. 1-3, PageID 99). The letter did not clarify which options the state deemed "legal in the State of Tennessee," but seemed to be alluding to a new law that had recently taken effect restricting abortion in the State. *See* Tenn. Code Ann. § 39-15-213. HHS notified Tennessee that its response appeared to place it out of compliance and offered Tennessee the option of submitting an "alternate compliance proposal" with specific examples of acceptable arrangements. (R. 1-9, PageID 190). For instance, HHS suggested the option of providing Title X patients with the number for a national call-in hotline where operators would supply referral information. Tennessee responded by reiterating its compliance based on its understanding of its obligations under state law and federal regulations. (R. 1-10, PageID 192 (citing Tenn. Code Ann. § 39-15-213(a)(1))). HHS disagreed with Tennessee's assertion

that it was in compliance. On March 20, 2023, the agency sent the state a letter explaining its decision to decline to issue a Title X continuation award to the Tennessee Department of Health.[2]

B.

Procedural History. In October 2023, Tennessee brought the instant action in the United States District Court for the Eastern District of Tennessee seeking: (1) a declaratory judgment under 28 U.S.C. § 2201 stating that HHS's termination of the state's Title X funding was unlawful; (2) dissolution of HHS's March 20, 2023, discontinuation decision; (3) a preliminary injunction enjoining HHS and others from enforcing or implementing the discontinuation decision; (4) to enjoin HHS from withholding Title X funds based on the counseling and referral clause; (5) reinstatement of Title X funds from the date of discontinuation; and (6) any and all other relief the court deemed proper.

In November 2023, this court reviewed a similar Title X case and held that HHS's 2021 Rule was a permissible construction of the Title X statute. *See Ohio*, 87 F.4th at 771–72. Based in large part on our decision in *Ohio*, the district court denied Tennessee's preliminary injunction, concluding that Tennessee was not likely to succeed on the merits and that the balance of the equities and the public interest did not favor relief. The district court further

2. HHS concluded that a continuation award was not "in the best interest of the government" based on its determination that Tennessee's Title X project was not in compliance with the Title X regulation. (*See* R. 1-12, PageID 198 (quoting 42 C.F.R. § 59.8(b))).

concluded that Tennessee had "no basis to force funding from HHS without meeting the obligations upon which the [Title X] funding [was] conditioned." (R. 30, PageID 857). Tennessee timely appealed.

II.

We review a district court's denial of a motion for a preliminary injunction for abuse of discretion. *Wonderland Shopping Ctr. Venture Ltd. P'ship v. CDC Mortg. Cap., Inc.*, 274 F.3d 1085, 1097 (6th Cir. 2001). We will find that a district court has abused its discretion when it has made "clearly erroneous findings of fact, improperly applied the governing law, or used an erroneous legal standard." *Id.* (quoting *Bonnell v. Lorenzo*, 241 F.3d 800, 809 (6th Cir.2001)). Though we review de novo the question of whether a movant is likely to succeed on the merits, a district court's ultimate determination as to whether the factors weigh in favor of granting or denying preliminary injunctive relief is subject to review for abuse of discretion. *Ohio*, 87 F.4th at 768 (citing *City of Pontiac Retired Emps. Ass'n v. Schimmel*, 751 F.3d 427, 430 (6th Cir. 2014) (en banc) (per curiam)). Thus, absent a legal or factual error, "the district court's weighing and balancing of the equities will be overruled 'only in the rarest of cases.'" *Am. Imaging Servs., Inc. v. Eagle-Picher Indus., Inc.* (*In re Eagle-Picher Indus., Inc.*), 963 F.2d 855, 858 (6th Cir. 1992) (citations omitted).

Courts consider four factors when determining whether to grant a preliminary injunction: "(1) whether the movant has a strong likelihood of success on the

merits; (2) whether the movant would suffer irreparable injury without the injunction; (3) whether issuance of the injunction would cause substantial harm to others; and (4) whether the public interest would be served by issuance of the injunction." *Ohio*, 87 F.4th at 768 (citing *City of Pontiac*, 751 F.3d at 430). "Where the federal government is the defendant, as here, the third and fourth factors merge." *Id.* (citing *Nken v. Holder*, 556 U.S. 418, 435, 129 S. Ct. 1749, 173 L. Ed. 2d 550 (2009)).

III.

Likelihood of Success on the Merits. Tennessee first argues that it has a strong likelihood of success on the merits because HHS's discontinuation of Title X funds usurped Congress's sole Spending Clause powers and disregarded the Administrative Procedure Act's ("APA") limits.

A.

The Spending Clause. Tennessee maintains that HHS's enforcement (through rescission of funding) of the 2021 Rule's counseling and referral requirements violated the Spending Clause of the United States Constitution. It argues that HHS's imposition of these requirements usurped Congress's exclusive authority to regulate Title X funding. The Spending Clause empowers Congress to "lay and collect Taxes . . . to pay the Debts and provide for the common Defence and general Welfare of the United States." U.S. Const. art. I, § 8. It grants Congress the broad power to "set the terms" for when and to whom it

will disburse federal funds. *Cummings v. Premier Rehab Keller, P.L.L.C.*, 596 U.S. 212, 216, 142 S. Ct. 1562, 212 L. Ed. 2d 552 (2022). As it regards funds disbursed to individual states, Congress's spending power operates like a contract; "in return for federal funds," states must agree to "comply with federally imposed conditions." *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17, 101 S. Ct. 1531, 67 L. Ed. 2d 694 (1981).

As a result, Congress's legitimacy to legislate under the spending power depends on (1) whether Congress's conditions on its grants of federal funds are unambiguous; and (2) "whether the State voluntarily and knowingly accepts the terms of the 'contract.'" *Id.* Because the district court reasonably concluded that Congress unambiguously authorized HHS to regulate Title X eligibility; the conditions of the grant were unambiguous; and Tennessee knowingly and voluntarily accepted the grant's terms, we find that the district court did not abuse its discretion in concluding that Tennessee is unlikely to succeed on the merits of its Spending Clause claim.

1.

Unambiguous Statutory Authorization. Tennessee argues that Congress did not unambiguously place counseling and referral requirements in Title X and did not grant HHS the authority to add these conditions. Therefore, these conditions violate the Spending Clause. Tennessee's arguments here mirror the state of Oklahoma's challenge to HHS's counseling and referral requirements which it asserted in *Oklahoma v. United*

States Department of Health & Human Servs., 107 F.4th 1209, 1217 (10th Cir. 2024). Under similar facts, the state of Oklahoma also argued that Title X's ambiguity prevented HHS from imposing counseling and referral requirements on grant recipients. Like Tennessee, Oklahoma argued that because the Supreme Court, in *Rust v. Sullivan*, 500 U.S. 173, 111 S. Ct. 1759, 114 L. Ed. 2d 233 (1991), held that § 1008's language barring usage of federal funds "in programs where abortion is a method of family planning" is ambiguous, then "Congress's silence on counseling and referrals render[ed] Title X ambiguous for purposes of the spending power." *Oklahoma*, 107 F.4th at 1218 (quoting 42 U.S.C. § 300a-6). The *Oklahoma* court rejected these arguments because it found that Congress's instructions to HHS to determine eligibility for Title X grants likely did not violate the spending powers. *Id.* (citing 42 U.S.C. § 300a-4(a); § 300a-4(b)). We agree.

To begin, as the *Oklahoma* court recognized, Congress's charge to HHS to promulgate eligibility requirements for Title X funds is explicit; "Grants . . . made under this subchapter shall be made in accordance with such regulations as the Secretary may promulgate" and "shall be payable . . . subject to such conditions as the Secretary may determine to be appropriate" so they are "effectively utilized for the purposes for which made." 42 U.S.C. § 300a-4(a)–(b). In this way, Congress both imposed on the Secretary the responsibility to fashion conditions and alerted grant recipients to the existence of conditions for funding. As to the former, the Supreme Court, in recognition of the fact that Congress is unable to "prospectively resolve every possible ambiguity

concerning particular applications of requirements," has permitted such delegations. *Bennett v. Kentucky Dep't. of Educ.*, 470 U.S. 656, 669, 105 S. Ct. 1544, 84 L. Ed. 2d 590 (1985). True, the statutory language does not illuminate the nature of any such conditions on the grant. But these questions can be resolved by looking to both statutes *and* an agency's authorized regulations. In *Bennett* that meant looking to the statute's language indicating that Title I education funds could not be used to supplant state and local funds for public schools, along with the Department of Education's ("DOE") regulations specifying the measures that states and local grant recipients were required to take to assure compliance with the grant. When the DOE issued a final order, demanding that Kentucky repay funds that it purportedly used to supplant state educational funding "in violation of statutory and regulatory requirements," the state challenged the action as a violation of the Spending Clause. *Id.* at 663. Though the Court of Appeals had found that "the statute and regulations concerning supplanting were not unambiguous," *id.* (cleaned up), the Supreme Court upheld the agency action; Kentucky had agreed to but failed to comply with the conditions for the grant as set forth in the statute and regulations, so the DOE could pursue this statutory remedy. *See Jackson v. Birmingham Bd. of Ed.*, 544 U.S. 167, 183, 125 S. Ct. 1497, 161 L. Ed. 2d 361 (2005) (crediting Title IX's implementing regulations as well as circuit precedent interpreting the statute with placing grant recipients on notice of potential liability for retaliatory actions).

Here, Title X "unambiguously authorized HHS to impose conditions for federal grants" to ensure that the

funds issued will be efficaciously put to use for their intended purpose. *Oklahoma*, 107 F.4th at 1219 (citing 42 U.S.C. § 300a-4(b); 86 Fed. Reg. 56144, 56154 (Oct. 7, 2021)). This clear delegation of authority to HHS, viewed in combination with HHS's 2021 counseling and referral regulation, are sufficient for notice purposes under the Spending Clause.

Resisting this conclusion, Tennessee argues that *Rust*'s holding that § 1008 is ambiguous as it relates to counseling and referrals for abortions, precluded HHS from requiring counseling and referrals and violated the Spending Clause. But as discussed, the Supreme Court has long recognized Congress's power to authorize agencies to issue grants and leave the minutia of its spending programs to be clarified through regulations and other guidelines—even in the face of statutory ambiguity. *Id.* at 1218 (citing *Bennett*, 470 U.S. at 670 ("We agree with the [agency] that the [state grantee] clearly violated *existing* statutory *and regulatory provisions*. . . .") (emphasis added) (collecting cases)[3]). Again, Title X authorizes HHS

3. *See id.* (reviewing the spending power based on both the "the statutory provisions" *and* "the regulations . . . and other guidelines provided by the [the agency] at th[e] time" that funding had been accepted); *see also Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 643, 119 S. Ct. 1661, 143 L. Ed. 2d 839 (1999) (finding an agencies' unambiguous regulations satisfied the notice requirements under the spending power); *South Dakota v. Dole*, 483 U.S. 203, 206, 107 S. Ct. 2793, 97 L. Ed. 2d 171 (1987) ("Congress . . . has repeatedly employed the spending power 'to further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory *and administrative directives*.'" (emphasis added) (quoting

"to make grants . . . to State health authorities to assist in planning, establishing, maintaining, coordinating, and evaluating family planning services." 42 U.S.C. § 300a(a). It directs that these grants "shall be made in accordance with such regulations as the Secretary may promulgate." *Id.* § 300a-4(a). And Congress made the disbursement of grant funds "subject to such conditions as the Secretary may determine to be appropriate to assure that such grants will be effectively utilized for the purposes for which made." *Id.* § 300a-4(b). These clauses, in addition to HHS's regulations explaining the importance of nondirective counseling and referrals for Title X services, foreclose Tennessee's arguments. *See Bennett*, 470 U.S. at 670. Congress made compliance with HHS's requirements a clear and unambiguous condition of receiving a Title X grant. *See* 86 Fed. Reg. 56144, 56154 (Oct. 7, 2021). Moreover, we agree with our concurring colleague that Congress's inclusion of a yearly appropriations rider which expressly contemplates nondirective pregnancy counseling lends further support for the notion that HHS acted within its authority in setting that condition for funding—a fact that has implications for both the Spending Clause and APA analysis. *See* Omnibus Consol. Rescissions and Appropriations Act of 2022, Pub. L. No. 117-103, 136 Stat. 49, 444 (Mar. 15, 2022).

Tennessee's reliance on *Kentucky v. Yellen*, 54 F.4th 325 (6th Cir. 2022) and *West Virginia ex rel. Morrisey v. U.S. Department of Treasury*, 59 F.4th 1124 (11th Cir. 2023)

Fullilove v. Klutznick, 448 U.S. 448, 474, 100 S. Ct. 2758, 65 L. Ed. 2d 902 (1980))).

does not increase its likelihood of success on the merits. It insists that these two cases support its proposition that, in the face of an ambiguous statute, regulations alone generally cannot establish conditions. Specifically, Tennessee argues that HHS was barred from resolving § 1008's ambiguity through its own interpretations. But *Yellen*, which grappled with a vague rather than an ambiguous statute, did not reach a holding on the broader question of whether Congress could condition funding on compliance with agency regulations. 54 F.4th at 353. Indeed, in *Yellen*, the Department of Treasury argued that statutory language alone sufficiently placed states on notice of its conditions for funding. *Id.* And in *Morrisey*,[4] the Eleventh Circuit found that grantees were subject to regulations and legal requirements in place when the grants were made. 59 F.4th at 1148 (acknowledging that Congress may require grantees to abide by "'the legal requirements in place when the grants were made' [and] [t]hese 'legal requirements' include existing regulations.") (quoting *Bennett*, 470 U.S. at 670). Thus, because § 1008 is situated among other provisions of Title X that clearly

4. In addition to *Morrisey*'s nonbinding effect on our jurisprudence, the circumstances there differ from this case in two important ways. In an effort to resolve the ambiguity of a tax offset provision in a stimulus act which potentially implicated states' sovereign tax authority, the Treasury Department created an entirely new regulatory framework. The HHS did no such action. Second, the Treasury Department's regulatory framework changed the fundamental function of the relevant statute. The HHS's counseling and referral requirements here do not have such a fundamental effect on the application of the grant program. *See Oklahoma*, 107 F.4th at 1219.

instruct HHS to determine the eligibility requirements, the district court did not err in concluding that Congress's delegation to HHS would not violate the Spending Clause.

2.

Voluntarily and Knowingly. The district court likely also did not err in determining that Tennessee voluntarily and knowingly agreed to HHS's requirement for nondirective counseling and referrals. Despite Congress's broad powers to set the unambiguous terms of its grants, it may not do so in a manner that "surprise[es] participating States with post acceptance or 'retroactive' conditions." *Pennhurst*, 451 U.S. at 25. As discussed above, this means that HHS's decision to discontinue Tennessee's grant based on the state's refusal to adhere to the counseling and referral conditions would violate the Spending Clause if it imposed new requirements *after* Tennessee's acceptance of the grant. *See Bennett*, 470 U.S. at 670 ("[L]iability is determined by[] the legal requirements in place when the grants were made."). But HHS issued the nondirective counseling and referral requirements in 2021, which then went into effect on November 8, 2021—several months before Tennessee accepted its Title X grant award in March 2022. *See* 86 Fed. Reg. 56144 *and* (R. 1-7, PageID 170). Moreover, as the district court aptly observed, the Counseling and Referral Rule has been in place in all but two of the last twenty-nine years. As a decades-long recipient of Title X funds, Tennessee was aware of this fact. So Tennessee was on clear notice of the 2021 Rule and voluntarily agreed to its requirements when it accepted the grant. *See Miss. Comm'n on Env't Quality v. EPA*,

790 F.3d 138, 179, 416 U.S. App. D.C. 69 (D.C. Cir. 2015) ("[T]he fact that the State has long accepted billions of dollars notwithstanding the challenged conditions may be an additional relevant factor in the contract-like analysis the Court has in mind for assessing the constitutionality of Spending Clause legislation.").

Tennessee points out that HHS issued the 2021 Rule at a time when the law of the land stated that women had a constitutional right to obtain an abortion. Thus, there was no possibility that the state's adherence to the Rule might conflict with a law banning the procedure. But after the Supreme Court's decision in *Dobbs*, Tennessee criminalized the procedure in all but the narrowest of cases. It argues that this "supervening illegality" of abortions in the state demonstrated a clear and permissible public policy statement on an issue within the domain of its own sovereignty. This critical shift in circumstances, according to Tennessee, rendered inadequate any notice of the Rule it had received pre-criminalization because the 2021 Rule did not contemplate such a scenario. (ECF 20, Appellant's Br. 30). But to the extent that Tennessee argues that the 2021 Rule is "silent" regarding its obligations post-*Dobbs*, HHS provided detailed guidance on how its *nondirective* counseling and referral requirements remained unchanged and active. Consistent with § 1008, HHS reiterated that Title X projects "may not take further affirmative action . . . to secure abortion services for the patient." (R. 1-6, PageID 165 (citing 65 Fed. Reg. at 41281)). And after Tennessee raised compliance concerns following its criminalization of abortion, HHS offered Tennessee the opportunity to submit an "alternate compliance proposal,"

which included the option to use a national call-in hotline where third-party operators would supply the requisite information. (R. 1-9, PageID 190). Thus, given that *Dobbs* did not address what, if any, effect the decision might have on Title X's underlying program requirements, the district court did not err in determining that Tennessee voluntarily and knowingly agreed to the conditions when accepting its grant award.

3.

Tennessee's Sovereignty. Tennessee also asserts that HHS's 2021 Rule violates the spending power because it infringes on Tennessee's state sovereignty. It suggests that the 2021 Rule's counseling and referral requirements compel Tennessee to undermine its own state criminal abortion laws. But like *Oklahoma*, Tennessee may not use its state criminal laws to "dictate eligibility requirements" for Title X grants. *Oklahoma*, 107 F.4th at 1220 (citing *Planned Parenthood Fed'n of Am., Inc. v. Heckler*, 712 F.2d 650, 663, 229 U.S. App. D.C. 336 (D.C. Cir. 1983) ("Although Congress is free to permit the states to establish eligibility requirements for recipients of Title X funds, Congress has not delegated that power to the states.")). The 2021 Rule makes no reference to incorporating state law and does not limit compliance with its requirements to the procedures available within a given state. And Tennessee was free to voluntarily relinquish the grants for any reason, especially if it determined that the requirements would violate its state laws. (R. 1-9, PageID 190); *see also Rust*, 500 U.S. at 199 n.5 ("The recipient is in no way compelled to operate a

Title X project; to avoid the force of the regulations, it can simply decline the subsidy."). Instead, Tennessee decided to accept the grant, subject to the 2021 Rule's counseling and referral requirements.

In addition, Tennessee's suggestion that the 2021 Rule violates the Spending Clause by impairing its general police powers to regulate "health and welfare" through "limits on the medical profession" is unsubstantiated. Thus, we find that the district court did not err in its conclusions that Title X and HHS's regulations did not violate the spending power and that Tennessee voluntarily and knowingly accepted its grant conditions. Tennessee is not likely to succeed on its Spending Clause claims.

B.

Tennessee's APA Challenge. Tennessee next argues that HHS's decision to discontinue funding its grant violated the APA. Specifically, Tennessee asserts that HHS's action to enforce the 2021 Rule: (1) exceeded HHS's regulatory authority under Title X; (2) is unreasonable; (3) is arbitrary and capricious; and (4) represents a new legislative rule which may only be promulgated via notice-and-comment rulemaking.

1.

Compliance with Title X. Tennessee maintains that HHS has misinterpreted § 1008's prohibition on the use of Title X funds for "programs where abortion is a method of family planning." 42 U.S.C. § 300a-6. It argues that

the best reading of that provision, according to its text and history, is that it bars HHS from conditioning Title X funding on grantees' counseling or referring for abortion services. This court must "hold unlawful and set aside agency action . . . found to be . . . in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. § 706(2).

Several states raised similar arguments before this court in *Ohio*, 87 F.4th at 770–75. In *Ohio*, we held that HHS's application of the 2021 Rule was within its statutory authority. *Id.* In deciding *Ohio*, we relied on the Supreme Court's conclusion in *Rust*, that § 1008 is indeed ambiguous with respect to nondirective counseling and referral options under *Chevron* step one and that given this ambiguity, under *Chevron* step two, HHS's "reasoned analysis" for proscribing such actions was a permissible construction of Title X. *Rust*, 500 U.S. at 187; *see also Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984). Thus, in reviewing HHS's 2021 Rule requiring nondirective counseling and referral in *Ohio*, we held that HHS's action also "must" have been permissible under *Chevron*'s step two analysis so long as HHS adequately explained its choice. *Ohio*, 87 F.4th at 772. In other words, because *Rust* held that a permissible construction of § 1008 permitted HHS to promulgate regulations banning counseling and referrals for abortion, we held that HHS's subsequent promulgation of a rule going the opposite way also "*must*" have been permissible so long as it adequately explained its choice. *Id.* at 772. We also concluded that HHS's reasoned analysis was sufficient to establish that

the 2021 Rule is not arbitrary and capricious—regardless of whether it represents the best reading of the statute.

Since our decision in *Ohio, Chevron* deference has fallen. *See Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 144 S. Ct. 2244, 2273, 219 L. Ed. 2d 832 (2024). Consequently, given *Rust*'s and *Ohio*'s application of *Chevron* deference to HHS's actions relating to the provisions of neutral, nondirective counseling[5] and referrals in those cases, Tennessee challenges their precedential effect. However, the extent to which *Loper Bright* undermines the validity of prior cases that were decided using *Chevron* deference depends on several factors not addressed by the parties in their briefing. In its guidance to lower courts, the Court broadly stated that it "do[es] not call into question prior cases that relied on the *Chevron* framework." *Id.* And it further explained that "[t]he holdings of those cases that specific agency actions are lawful . . . are still subject to statutory stare decisis despite [its] change in interpretive methodology." *Id.* (citing *CBOCS West, Inc. v. Humphries*, 553 U.S. 442, 457, 128 S. Ct. 1951, 170 L. Ed. 2d 864 (2008)). So, while *Loper Bright* opens the door to new challenges based on *new* agency actions interpreting statutes, it forecloses new challenges based on specific agency actions that were already resolved via *Chevron* deference analysis. *See id.* Unremarked upon was whether statutory stare decisis includes Circuit court precedent. *See id.; see also* Amy Coney Barrett, *Statutory Stare Decisis in the Court of*

5. The states declined to challenge the counseling requirement included in the 2021 Rule in *Ohio v. Becerra*, 87 F.4th 759, 773 (6th Cir. 2023).

Appeals, 73 Geo. Wash. L. Rev. 317 (2005). For instance, here, Tennessee's argument involves the same "specific agency action"[6] challenged in *Ohio*—the HHS's application of its 2021 Rule interpreting § 1008 to require nondirective counseling and referral options. In *Ohio*, we concluded that the 2021 Rule was lawful. Regardless of whether *Ohio* binds us,[7] like the *Oklahoma* court, we find its conclusion upholding the 2021 Rule—and by extension its enforcement against Tennessee here—persuasive. *Ohio* relied on *Rust* for its determination that HHS acted within statutory authority in treating referrals as falling outside of § 1008's restriction on using funds for programs in which abortion is a "method of family planning." We have held that we are bound by precedent "unless a Supreme Court decision 'mandates modification' of our precedent." *RLR Investments, LLC v. City of Pigeon Forge, Tenn.*, 4 F.4th 380, 390 (2021) (quoting *United States v. Moody*, 206 F.3d 609, 615 (6th Cir. 2000)). A fair reading of *Loper Bright* leads us to conclude that the district court did not improperly accede to the holdings in *Rust* and our earlier

6. "'[A]gency action' includes the whole or a part of any agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." 5 U.S.C. § 551.

7. In *Metropolitan Hospital v. U.S. Department of Health and Human Services*, we concluded that statutory stare decisis attaches to our own cases interpreting statutes in relation to their application under the APA only when such prior decisions were based on a finding that the terms of the statute were unambiguous and therefore left no room for agency discretion. 712 F.3d 248, 255–56 (6th Cir. 2013) (citing *Nat'l Cable and Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982, 125 S. Ct. 2688, 162 L. Ed. 2d 820 (2005)).

decision in *Ohio*. The Supreme Court cautioned litigants hoping to rehash or relitigate previously settled issues decided on *Chevron* that "[m]ere reliance on *Chevron* cannot constitute a special justification for overruling such a holding." *Loper Bright*, 144 S. Ct. at 2273 (quoting *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 266, 134 S. Ct. 2398, 189 L. Ed. 2d 339 (2014) (cleaned up)). To argue as much, the Court continued, would "at best," be "just an argument that the precedent was wrongly decided." *Id.* And this, as the majority concluded, is "not enough to justify overruling a statutory precedent." *Id.*

Here, Tennessee argues that *Loper Bright* abrogated the precedential effect of *Rust* and *Ohio* because they relied on *Chevron*. But this is exactly the conclusion that *Loper Bright* rejected; *Loper Bright* does not dictate abandonment of *Rust* or *Ohio* because it does not "call into question prior cases that relied on *Chevron*." *Id.* And, even if the "specific agency action" in *Rust* was HHS's 1988 Rule *prohibiting* counseling and referral requirements pursuant to § 1008, our own circuit precedent addressed the inverse specific agency action and specifically affirmed HHS's authority under Title X to *require* nondirective counseling and referral options. *See Ohio*, 87. F.4th at 772. In short, abandoning *Rust* and *Ohio* based on their reliance on *Chevron*, is unwarranted. Alternatively, Tennessee argues *Ohio* and *Rust* are distinguishable because they only involved facial challenges to § 1008. Tennessee asserts that its claim is an as-applied challenge because it disputes HHS's decision to discontinue its Title X funding based on the state's refusal to unqualifiedly confirm its commitment to give neutral nondirective counseling and

referrals after passing a law banning abortion post-*Dobbs*. But this as-applied distinction is less meaningful where, as discussed above, *Dobbs* did not address its effect on Title X's underlying program requirements or HHS's enforcement of such requirements. *See Dobbs*, 597 U.S. at 231. In other words, despite the change in circumstances, Tennessee's claim centers on its challenge of HHS's statutory authority to apply the 2021 Rule. *See* 42 U.S.C. § 300a-4(b). Notably, the counseling and referral requirements were unambiguously in place before Tennessee accepted its grant award and before it changed its own laws. As such, Tennessee's arguments amount to whether the counseling and referral requirements were legal as per the limitation contained in § 1008. Because this is the same issue addressed in *Rust* and *Ohio*, it has likely been foreclosed. Nevertheless, while the district court must ultimately determine whether HHS's actions complied with Title X, we confine our inquiry to whether the district court erred in its tentative conclusion. *See Oklahoma*, 107 F.4th at 1226. And even if we accept that *Ohio* is no longer binding, we agree with its conclusion that the 2021 Rule is lawful.

Applying *Loper Bright*, the best reading of § 1008 permits both neutral, non-directive counseling and referrals. As noted earlier, Congress's yearly spending rider presumes the provision of such counseling, specifically instructing—like the 2021 Rule—that all pregnancy counseling must be non-directive. Requiring grantees to follow up with additional information to those who request it, in the form of names, addresses, and phone numbers of health care providers, is a natural

outgrowth of that counseling. And short of that, HHS has granted Tennessee the option of merely providing patients with a hotline number where they can obtain such health care provider information. Under either scenario, the grant recipient's role is informational only. It neither recommends nor promotes any particular pregnancy care option, while, at the same time, it promotes HHS's stated intention to advance a patient-centered approach. In this light, it seems quite a stretch to say that merely supplying to patients health provider information or a means to obtain such information elevates a grantee's actions to the status of having abortion as a method of family planning. Even accepting the dissent's definition of the term "method," the provision of such information cannot be characterized as a deliberate or systematic action toward a particular end. Offering a list of phone numbers is simply too attenuated an act to characterize an entire program as one that conclusively offers abortion as a "method of family planning." For this reason, Tennessee is unlikely to succeed on its claim that the 2021 Rule violates the APA. The 2021 Rule's counseling and referral requirement is consistent with the meaning of § 1008.

Tennessee also relies on a series of other arguments to attack HHS's authority based on § 1008's ambiguity. For instance, it argues that because of § 1008's ambiguity, HHS's actions implicated the major-questions doctrine, which requires agencies to have "clear congressional authorization" before making major policy decisions. *W. Virginia v. EPA*, 597 U.S. 697, 722, 142 S. Ct. 2587, 213 L. Ed. 2d 896 (2022). But, given the limited scope of HHS's authority under Title X, the doctrine is likely not

implicated. Title X describes HHS's authority to "make grants to and enter into contracts with public or nonprofit private entities to assist in establishment and operation of voluntary family planning projects which shall offer a broad range of acceptable and effective family planning methods and services." 42 U.S.C. § 300(a). We agree with the district court's conclusion that this language sets forth a sufficiently intelligible principle supporting Congress's delegation. *See Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 474, 121 S. Ct. 903, 149 L. Ed. 2d 1 (2001). And as the district court accurately observed, HHS does not "exercise powers of vast economic and political significance." *Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs.*, 594 U.S. 758, 141 S. Ct. 2485, 2489, 210 L. Ed. 2d 856 (2021). It issued only eighty-six Title X grants in 2023 with an average award value of $3 million. Office of Population Affairs, *Fiscal Year 2023 Title X Service Grant Awards*, https://opa.hhs.gov/grant-programs/title-x-service-grants/current-title-x-servicegrantees/fy2023-title-X-service-grant-awards (last accessed Aug. 16, 2024). Given this relatively circumscribed grant-making authority, it is unlikely that HHS has run afoul of the non-delegation doctrine here and we see no reason to disturb the district court's conclusion on this point. *See, e.g., FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159–60, 120 S. Ct. 1291, 146 L. Ed. 2d 121 (2000) (finding nondelegation problem where "the FDA . . . asserted jurisdiction to regulate an industry constituting a significant portion of the American economy.").

2.

Compliance with HHS Regulations. Tennessee next argues that HHS's actions are inconsistent with its own regulations because program services must be "allowable under state law" and referrals must be made to service providers "in close physical proximity." (ECF 20, Appellant's Br. 44 (citing 42 C.F.R. § 59.5(b)(6)); (*id.* at 45 (citing 42 C.F.R. § 59.5(b)(8))).

Allowable Under State Law. "[A] fundamental canon of statutory construction is that when interpreting statutes, the language of the statute is the starting point for interpretation, and it should also be the ending point if the plain meaning of that language is clear." *Saginaw Chippewa Indian Tribe of Mich. v. Blue Cross Blue Shield of Mich.*, 32 F.4th 548, 557 (6th Cir. 2022) (citations and quotations omitted). 42 C.F.R. § 59.5(b)(6) states that Title X projects must "[p]rovide that family planning medical services will be performed under the direction of a clinical services provider, with services offered within their scope of practice and *allowable under state law*, and with special training or experience in family planning." (emphasis added). Tennessee first argues that the plain meaning of § 59.5(b)(6) is that its Title X project may not encompass services relating to abortions because the procedure is not allowable under state law in Tennessee. But as the district court correctly concluded, Tennessee's interpretation does not reflect the plain meaning of the regulation. There is no indication that the *nondirective* options for counseling and the *neutral* information required by the Rule are not "allowable under state law" in

Tennessee. Though Tennessee law prohibits a person from performing an abortion, the law "contains no language whatsoever related to counseling or referral[s]," and does not overlap with § 59.5(b)(6). (R. 30, PageID 840); *see* Tenn. Code Ann. § 39-15-213. Indeed, HHS's commentary accompanying the 2021 Rule indicates HHS included the "allowable under state law" phrase to "more clearly reflect the role of a broader range of *healthcare providers* in providing Title X services." 86 Fed. Reg. at 56163–64 (emphasis added). Thus, this provision addresses "*who*" may qualify as a clinical services provider, not the types of *services* provided under Title X programs. In short, because Tennessee law does not prohibit mere abortion-related counseling or referrals, we find no conflict between § 59.5(b)(6) and Tennessee law. The district court did not err in this regard.

Close Physical Proximity. Tennessee next argues that 42 C.F.R. § 59.5(b)(8)'s mandate to provide services close to patients, conflicts with its need to refer patients to out-of-state providers due to its laws criminalizing abortions. Section 59.5(b)(8) requires Title X projects to "[p]rovide for coordination and use of referrals and linkages with [other health-care entities], *who are in close physical proximity to the Title X site, when feasible*, in order to promote access to services and provide a seamless continuum of care." (emphasis added). However, the phrase "when feasible" in this provision plainly modifies the requirement to refer to providers "in close physical proximity to the Title X site." *Id.* Thus, as the district court again correctly determined, the regulation only requires that Title X projects refer patients to nearby healthcare

providers "when it is possible to do so." When such close-in-proximity referrals are not possible, it permits the referral to be made "to a provider farther away." (R. 30, PageID 837–39 (quoting 42 C.F.R. § 59.5(b)(8)); 86 Fed. Reg. at 56164 (explaining that "referrals are to be to providers in close proximity to the Title X site when feasible"). This regulation does not require a referral to a provider within the state. The district court did not err.

3.

Finally, Tennessee contends that HHS's counseling and referral conditions are arbitrary and capricious because the agency failed to consider several "important aspect[s]" of its requirement. (ECF 20, Appellant's Br. 47 (citing *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 43, 103 S. Ct. 2856, 77 L. Ed. 2d 443 (1983))).

Federalism Concerns. First, Tennessee asserts that HHS ignored federalism concerns because its decision to discontinue Tennessee's grant award did not consider the effect of *Dobbs* on counseling and referral requirements. But as discussed above, HHS issued extensive guidance about the effect of *Dobbs* on the requirements regarding counseling and referrals. Though Tennessee is correct that the 2021 Rule did not contemplate *Dobbs*, that case did not address the power of the agency to set conditions on federal grants. 597 U.S. at 231. And as the Supreme Court has previously noted, "[t]he recipient is in no way compelled to operate a Title X project; to avoid the force of the regulations, it can simply decline the subsidy." *Rust*, U.S. at 199 n.5. The district court did not err here.

Unlawful Position Switch. Tennessee argues that the rescindment was an "unlawful position switch," because it came only months after HHS approved Tennessee's Title X program with "full awareness the State's post-*Dobbs* policy that '[n]o referrals for abortion are made.'" (ECF 20, Appellant's Br. 50 (quoting (R. 1-1, PageID 56))). Tennessee points to HHS's July 2022 program review of its Title X project to support its argument that the agency unlawfully changed positions. However, the July 2022 program review indicated that there would be a follow-up if Tennessee changed its counseling and referral policies in response to the abortion restriction that was soon to take effect. And regardless, the counseling and referral requirements have been in place since 2021, before Tennessee applied for and received Title X funds.

Reliance Interests. Lastly, Tennessee argues that the rescindment overlooked Tennessee's legitimate reliance interests in the grant award because it has been receiving Title X funding for 50 years. And the rescindment was procedurally invalid because HHS was required to undertake notice-and-comment rulemaking procedures to impose "new requirements" on Tennessee's Title X project. (ECF 20, Appellant's Br. 53 (quoting *Nat'l Council for Adoption v. Blinken*, 4 F.4th 106, 114, 453 U.S. App. D.C. 199 (D.C. Cir. 2021) (citation omitted)). But Tennessee's notice-and-comment arguments fail because HHS did not impose any "new" requirements on grantees. Furthermore, Tennessee likely has no legally cognizable reliance interest in the receipt of a *discretionary* funding award on the conditions that it prefers. *Cf. Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 222, 136 S. Ct.

2117, 195 L. Ed. 2d 382 (2016). HHS's regulations make clear that Title X grants provide funding for one year with the option of issuing noncompetitive continuation grants for additional years. 42 C.F.R. § 59.8(b). HHS was not obligated to award more. *Id.* § 59.8(c). The district court did not err in this regard.

IV.

Irreparable Harm. Tennessee argues that it will face irreparable harm without an injunction because the rescindment: (1) will cause Tennessee severe financial losses that it cannot later recover; (2) threatens the viability of Tennessee's Title X program; (3) causes irreparable reputational harm impacting its ability to secure future federal grants; and (4) interferes with its "sovereign interest" in setting its own abortion laws. *Maryland v. King*, 567 U.S. 1301, 1303, 133 S. Ct. 1, 183 L. Ed. 2d 667 (2012) (Roberts, C.J., in chambers).

"A plaintiff's harm from the denial of a preliminary injunction is irreparable if it is not fully compensable by monetary damages." *Overstreet v. Lexington-Fayette Urb. Cnty. Gov't*, 305 F.3d 566, 578 (6th Cir. 2002) (citing *Basicomputer Corp. v. Scott*, 973 F.2d 507, 511 (6th Cir. 1992)). Tennessee bears the burden of showing that its injuries are both "certain and immediate" and not "speculative or theoretical." *D.T. v. Sumner Cnty. Schs.*, 942 F.3d 324, 327 (6th Cir. 2019) (citation omitted). However, finding harm is not enough for Tennessee to satisfy its burden here. It is "the peculiarity and size of a harm" that "affects its weight in the equitable balance."

Kentucky v. Biden, 57 F.4th 545, 556 (6th Cir. 2023). For instance, when the likelihood of success on the merits is low, plaintiffs must inversely show a higher degree of harm to warrant an injunction. *See Friendship Materials, Inc. v. Mich. Brick, Inc.*, 679 F.2d 100, 105 (6th Cir. 1982) ("[I]n general, the likelihood of success that need be shown . . . will vary inversely with the degree of injury the plaintiff will suffer absent an injunction.") (citation omitted).

The district court satisfied itself that Tennessee's harm was insufficient to warrant a preliminary injunction because its claims failed to establish a high degree of harm. Tennessee says the court abused its discretion because Tennessee believes it will suffer severe financial, reputational, and sovereign harm. Specifically, it argues that its loss of $7 million in federal Title X funds will cause irreparable harm because the funds are unrecoverable, and this court in *Ohio* has similarly found lower amounts of lost federal funds sufficient to compel an injunction. 87 F.4th at 782–83. But there, the state of Ohio lost one-fifth of its Title X funding because of HHS's contested rule change. *Id.* Moreover, the court found that Ohio established that it was likely to succeed on the merits of one of its claims, further warranting an injunction. Tennessee's situation is different. Unlike Ohio, Tennessee lost its funding because it refused to comply with requirements established before it accepted the grant and declined to proceed with HHS's proffered alternative. There was no intervening rule change. We agree with the district court that Tennessee likely will not succeed on the merits. So, while Tennessee's complaints may demonstrate some degree of harm, the state was required to show a *higher degree* of harm than

what was asserted here. *See Friendship Materials*, 679 F.2d at 105.

Second, there is no indication that Tennessee will lose its Title X program because of the lack of federal funding. Irreparable injury cannot be speculative. *See D.T.*, 942 F.3d at 327 (requiring that irreparable harm not be speculative); *see also Mich. Coal. of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 154 (6th Cir. 1991) ("[T]he harm alleged must be both certain and immediate, rather than speculative or theoretical."). As it currently stands, the Tennessee legislature has already provided the state's Title X project with the $7 million it would have otherwise received from HHS. (R. 21-1, PageID 335, ¶15). The Tennessee legislature earmarked the appropriations to fund its Title X project as "recurring." (R. 21-1, PageID 335, ¶15). Because this suggests that Tennessee's family planning program will continue to be funded—at least in the near-term—Tennessee's arguments that it will lose its program based on a lack of federal funding amount to speculation.

Tennessee's next claim, that it will suffer irreparable reputational harm, is similarly unpersuasive. Tennessee argues that because HHS is required to report its termination of Tennessee's grant to the federal grantee clearinghouse, the Federal Awardee Performance and Integrity Information System ("FAPIIS"), HHS's actions threaten Tennessee's "ability to obtain [any] future Federal funding." (*see* R. 1-9, PageID 190). Tennessee cites *ACT, Inc. v. Worldwide Interactive Network, Inc.*, 46 F.4th 489, 503–04 (6th Cir. 2022), for the proposition

that its possible reported status is the type of reputational damage that "constitute[s] irreparable harm" because it is "likely to occur" and "difficult to quantify monetarily." (ECF 20, Appellant's Br. 56). But Tennessee provided no evidence as to how being reported would "affect the grants it currently receives or will receive in the future." (R. 30, PageID 854 (citing *ACT, Inc.*, 46 F.4th at 503–04). True, the inclusion in FAPIIS "may" affect a grantee's ability to obtain future federal funding, (*see* R. 1-9, PageID 190). But Tennessee does not do its part to establish the evidence of how FAPIIS inclusion has hurt grantees "in the past" or that it "is likely to occur again." *State of Ohio ex rel. Celebrezze v. Nuclear Regul. Comm'n*, 812 F.2d 288, 290 (6th Cir. 1987). Thus, because Tennessee does not provide the "requisite facts and affidavits" supporting its theory of reputational harm, *Ohio*, 87 F.4th at 784, we agree with the district court that Tennessee's reputational-injury claim is too speculative.

Last, Tennessee claims that HHS's interference with its "sovereign interest" in setting its abortion laws constitutes a form of irreparable injury. (ECF 20, Appellant's Br. 56–57 (citing *Maryland*, 567 U.S. at 1303)). However, we have already concluded that there is no direct conflict between HHS's counseling and referrals requirement and Tennessee's recent abortion criminalization laws. Moreover, as discussed above, Tennessee was free to voluntarily relinquish the grants for any reason, especially if it determined the requirements would violate its state laws. (R. 1-9, PageID 190); *see also Rust*, 500 U.S. at 199 n.5. Thus, because the district court thoroughly addressed each of Tennessee's arguments

regarding irreparable harm and correctly found them insufficient, we find that the district court did not abuse its discretion here.

V.

The Public Interest. Tennessee argues that declining to issue an injunction harms the public interest because it deprives Tennesseans of family planning services and generates new public-health risks. "[T]he public's true interest lies in the correct application of the law." *Kentucky v. Biden*, 23 F.4th 585, 612 (6th Cir. 2022) (citation omitted); *see also Priorities USA v. Nessel*, 860 F. App'x 419, 423 (6th Cir. 2021) ("[T]he public interest necessarily weighs against enjoining a duly enacted statute, and our assessment that the appellants will likely prevail on the merits tips the public-interest factor further in their favor.").

The district court found that this factor favored HHS because the court found HHS's actions lawful, and both parties had agreed that the public interest lies in the correct application of Title X and its regulations. Because we similarly find that HHS's actions were lawful, we find no abuse of discretion here.

VI.

Tennessee cannot demonstrate how HHS's decision to discontinue its Title X grant due to the state's failure to comply with the 2021 Rule's requirements regarding counseling and referral for abortions, violated the

Spending Clause or the APA. As a result, Tennessee is unable to prove the likelihood of its claims succeeding on the merits. The district court thoroughly assessed the balance of interests and found that they did not support granting an injunction. The district court's handling of Tennessee's claims in denying the motion for a preliminary injunction was consistent with this court's precedent and did not constitute an abuse of discretion. Because the majority of the preliminary injunction factors do not favor Tennessee's position, we find that the balance of the equities weighs in favor of denying a preliminary injunction.

For the reasons above, we **AFFIRM** the judgment of the district court.

DISSENTING IN PART/CONCURRING IN THE JUDGMENT IN PART

KETHLEDGE, Circuit Judge, dissenting in part and concurring in the judgment in part. Tennessee should succeed on its claim under the Administrative Procedure Act, 5 U.S.C. § 706(2)(A), that HHS's abortion-referral requirement is contrary to law. The relevant law here is § 1008 of Title X, which provides that "[n]one of the funds appropriated under this title shall be used in programs where abortion is a method of family planning." 42 U.S.C. § 300a-6. Yet HHS's 2021 Rule specifies—as a condition of Title X funding—that recipients must, upon a patient's request, provide referrals to abortion providers. The question, then, is whether HHS's abortion-referral requirement makes Tennessee's program one in which "abortion is a method of family planning[,]" in violation of § 1008.

A threshold issue is whether authority definitively to interpret § 1008 lies with the courts or with HHS. In *Rust v. Sullivan*, 500 U.S. 173, 184, 111 S. Ct. 1759, 114 L. Ed. 2d 233 (1991), the Supreme Court said the agency had that authority, under the Court's decision seven years earlier in *Chevron, U.S.A. Inc. v. Nat'l Res. Defense Council, Inc.*, 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984). *Rust* was a *Chevron* case down to its bones: in the first sentence of its analysis, the Court said that "[w]e need not dwell on the plain language of" § 1008 because that "language is ambiguous." 500 U.S. at 184. The Court then described the question before it as "whether the agency's answer is based on a permissible construction of the statute."

Id. (quoting *Chevron*, 467 U.S. at 842–43). The agency's answer there was the opposite of its answer here: in its 1988 Rule, HHS stated that, under § 1008, a "Title X project may *not* provide counseling concerning the use of abortion as a method of family planning or provide referral for abortion as a method of family planning." *Id.* at 179 (quoting 42 C.F.R. § 59.8(a)(1) (1989)) (emphasis added). The Court then deferred to that interpretation and deemed the 1988 Rule lawful.

In the decades since, HHS has gone back and forth as to whether Title X programs may or even must provide abortion counseling and referrals. The 2021 Rule at issue here takes the "must provide" approach. Last year, our court acknowledged that *Chevron* and hence *Rust* remained binding precedent—even though the Supreme Court had recently granted certiorari to consider whether to overrule *Chevron*. *See Ohio v. Becerra*, 87 F.4th 759, 769 (6th Cir. 2023); *Loper Bright Enters. v. Raimondo*, 143 S. Ct. 2429, 216 L. Ed. 2d 414 (2023) (mem.). Accordingly, we held, "*Rust*'s holding requires us to reject the States' argument that the 2021 Rule's referral requirement is contrary to law." *Ohio*, 87 F.4th at 771.

During the pendency of this appeal, however, the Supreme Court overruled *Chevron*. *See Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 144 S. Ct. 2244, 2273, 219 L. Ed. 2d 832 (2024). In *Loper Bright*, the Court observed what the Court in *Chevron* had not: that § 706 of the Administrative Procedure Act "directs that, '[t]o the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of

law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action."' *Id.* at 2302 (quoting 5 U.S.C. § 706). Hence, the Court observed, the APA "codifies for agency cases the unremarkable, yet elemental proposition reflected by judicial practice dating back to *Marbury v. Madison*, 5 U.S. 137, 1 Cranch 137, 177, 2 L. Ed. 60 (1803): that courts decide legal questions by applying their own judgment." *Loper Bright*, 144 S. Ct. at 2261. Thus—in agency cases as in any other case of statutory interpretation—the court must identify the statute's "single, best meaning" rather than merely a permissible one. *Id.* at 2266. And in agency cases specifically, "[c]ourts must exercise their independent judgment in deciding whether an agency has acted within its statutory authority, as the APA requires." *Id.* at 2273.

Whether HHS "has acted within its statutory authority" is precisely the question presented here. Yet the Department of Justice (as counsel for HHS) insists that, in answering that question, *Loper Bright* is of no moment whatever. Specifically, before argument, the Department opposed supplemental briefing as to the effect of *Loper Bright* upon our decision in this appeal. Instead, the Department merely asserted that, in *Rust*, the Court concluded that § 1008 "'does not speak' ["directly" is the next word in *Rust*] to 'counseling' or 'referral'"—as if, even after *Loper Bright*, the judicial task was therefore at an end. Dep't. of Justice 28(j) Letter of July 3, 2024 (citing *Rust*, 500 U.S. at 184). And at oral argument, the agency's counsel repeatedly refused to answer questions about what § 1008 means—instead asserting (again)

that we remain bound by *Rust*. Oral Arg. at 20:00-26:45, 33:30-36:20. In support, the Department emphasizes one sentence from *Loper Bright*—in which the Court said its decision did "not call into question prior cases that relied on the *Chevron* framework." 144 S. Ct. at 2273. So in the Department of Justice's view, apparently, *Chevron* lives on in perpetuity as to any statute that the Supreme Court has ever deemed ambiguous under that doctrine.

But the Department studiously overlooks the *extent* to which lower courts remain bound by the Court's "prior cases that relied on the *Chevron* framework." *Id.* And in the very next sentence of *Loper Bright*, the Chief Justice was surpassingly clear in defining that extent: "The holdings of those cases *that specific agency actions are lawful*—including the Clean Air Act holding of *Chevron* itself—are still subject to statutory *stare decisis* despite our change in interpretive methodology." *Id.* (emphasis added).

The "specific agency action" held lawful in *Rust* was the 1988 Rule, which has since been rescinded. Thus, in this appeal, we have no occasion to defer to that holding. Instead, we "must exercise [our] independent judgment in deciding whether [the] agency has acted within its statutory authority, as the APA requires." *Id.* We would therefore contravene *Loper Bright* if we deferred to the agency's interpretation of § 1008 in the 2021 Rule. (And to say the agency actually interpreted § 1008 is generous, since in the Rule the agency nowhere deigns to interpret it.)

So our court must determine for itself whether the 2021 Rule's abortion-referral requirement is contrary to law. Again, § 1008 provides: "None of the funds appropriated in this title shall be used in programs where abortion is a method of family planning." I have no quarrel with HHS's definition of "family planning"—under the prior administration's 2019 Rule and the 2021 Rule alike—as a process by which individuals can determine "the number and spacing" of their children. *See* 42 C.F.R. § 59.1 (2019); 42 C.F.R. § 59.1 (2021). And the word "where," as used in § 1008, pretty clearly means "in which[.]" *See* Bryan A. Garner, *Garner's Modern American Usage* 856 (3d ed. 2009); *Webster's Third New International Dictionary* (*Unabridged*) 2602 (1971). A "method," in turn, is not merely a means of obtaining a particular end, but a "regular, orderly," or "systematic" means of doing so. *See Webster's New Universal Unabridged Dictionary* 1134 (2d ed. 1983); *Webster's Third New International Dictionary* 2322. So a method is a deliberate or systematic means of obtaining a particular end.

Section 1008 thus denies funding to programs in which abortion is a regular or systematic means of enabling individuals to determine the number and spacing of their children. For achieving that end, of course, there are many means other than abortion: contraception, abstinence, in vitro fertilization, adoption. A program that has nothing to do with a particular means is not a program in which that means is a "method." For a program to be one in which a particular means "is a method of family planning," rather, the program must assist the patient in using or obtaining that means, and do so in a deliberate or systematic way.

Yet the program itself need not provide the ultimate service or product necessary for those means: the 2019 and 2021 Rules both expressly contemplate referrals to "actual providers of services," 42 C.F.R. § 59.5(b)(8), (9) (2019) and 42 C.F.R. § 59.5(b)(8), (9) (2021); and surely adoption and IVF, for example, are methods of family planning for programs that help patients obtain those services elsewhere. For a means to be attributable to a program as a "method," therefore, deliberate or systematic facilitation must be enough.

Facilitation means assistance toward a particular end. In this context, facilitation means assistance toward a patient's use of a particular means of family planning. Referral is such assistance, regardless of the means the patient seeks. For in family planning, as in life generally, knowledge of where to obtain a product or procedure is the first step toward actually obtaining it. Indeed, in the 2021 Rule, HHS itself acknowledged that referrals to abortion providers are "affirmative action" toward actually obtaining an abortion—when HHS stated that, apart from the referral itself, a Title X funds recipient "may not take *further* affirmative action (such as negotiating a fee reduction, making an appointment, providing transportation) to secure abortion services for the patient." 86 Fed. Reg. 56144, 56150 (Oct. 7, 2021) (emphasis added). For purposes of § 1008, however, HHS's distinction between referrals and these other affirmative actions is without a difference: all these actions provide assistance toward "secur[ing] abortion services for the patient." *Id.* And the referral requirement makes that assistance systematic, since by its terms every recipient of Title X funds must provide it.

Just as adoption or IVF are methods of family planning for programs that refer patients to providers for those services, therefore, so too is abortion a method of family planning for programs that refer patients to abortion providers. And the 2021 Rule mandates that every Title X program do exactly that. Thus, HHS's abortion-referral requirement makes every Title X program one "where abortion is a method of family planning."

HHS counters, in passing, that Tennessee could comply with the referral requirement "by providing Title X patients the number for a call-in hotline where operators would supply the requisite information." Br. at 10. But the "hotline" would supply the patient with the same information ("requisite" for obtaining an abortion) that handing her a printed list of abortion providers would. That indeed would transparently be the whole point of the exercise. Providing the patient with the hotline number would facilitate actually obtaining an abortion just as handing her the form would. That the hotline would contrive to add a step to that referral process (namely, that of dialing a phone number) should make zero difference to the analysis under § 1008. Courts enforce legal rules, rather than allow parties patently to circumvent them.

In sum, the abortion-referral requirement likely violates § 1008's proscription, and I would enjoin its enforcement.

* * *

A closer question is whether the 2021 Rule's requirement of nondirective counseling regarding abortion is likewise contrary to § 1008. The 2021 Rule provides in relevant part:

> A project must:
>
> (i) Offer pregnant clients the opportunity to be provided information and counseling regarding each of the following options:
>
> (A) Prenatal care and delivery;
>
> (B) Infant care, foster care, or adoption; and
>
> (C) Pregnancy termination.
>
> (ii) If requested to provide such information and counseling, provide neutral, factual information and nondirective counseling on each of the options, and, referral upon request, except with respect to any option(s) about which the pregnant client indicates they do not wish to receive such information and counseling.

42 C.F.R. § 59.5 (2021). Counseling on these topics must therefore be "neutral" and "nondirective[.]" The question, then, is whether the counseling requirement—to provide, upon request, nondirective counseling regarding abortion

and various other topics—likewise makes a Title X program one in which abortion is a method of family planning.

An action is not a "method" just because it makes a particular outcome more likely. Rather, a method is deliberate or systematic action toward a particular end. And nondirective counseling by definition is not directed toward a particular outcome. (The same is not true of promotion or advocacy: persuading a person to choose a particular outcome is a deliberate step toward reaching it.) Nondirective counseling helps the patient choose her own means of family planning, but advances none of them. Hence nondirective counseling does not amount to deliberate or systematic facilitation of any of the pregnancy options the counseling might cover. Thus, the 2021 Rule's requirement of nondirective counseling likely does not violate § 1008.

An appropriations rider enacted every year since 1996 (including the years relevant here) all but confirms the point. By way of background, Congress "may amend substantive law in an appropriations statute, as long as it does so clearly." *Robertson v. Seattle Audubon Soc.*, 503 U.S. 429, 440, 112 S. Ct. 1407, 118 L. Ed. 2d 73 (1992). "Clearly" need not mean "expressly." In *Robertson*, for example, the Court held that an appropriations statute had implicitly (though clearly) "modified" provisions of the Migratory Bird Treaty Act, 16 U.S.C. § 703 *et seq.*, among two other Acts. 503 U.S. at 438-40.

Here, the appropriations rider provides in relevant part:

> For carrying out the program under Title X . . . to provide for voluntary family planning projects, $286,479.00: *Provided*, that amounts provided to said projects under such title shall not be expended for abortions, [and] that all pregnancy counseling shall be nondirective[.]

Omnibus Consol. Rescissions and Appropriations Act of 2022, Pub. L. No. 117-103, 136 Stat. 49, 444 (Mar. 15, 2022).

An ordinary reader would understand the phrase "all pregnancy counseling shall be nondirective" to mean that nondirective pregnancy counseling is permissible under Title X. In like fashion, for example, the phrases "all passenger vehicles must have seatbelts" and "all dogs shall be kept on a leash," proscribe neither manufacturing passenger vehicles nor taking dogs for a walk; instead, those phrases specify a condition for doing those things lawfully. Here, the specified condition is that counseling be "nondirective"; and the rider makes clear enough that pregnancy counseling is lawful under Title X so long as that condition is met.

Moreover, the rider's reference to "all" pregnancy counseling suggests that such counseling may concern various topics; and the relevant context—among other things, that the rider's preceding clause ends with the word "abortions"—suggests that abortion is one of them.

Indeed, in light of § 1008, one can surmise that abortion, above all, was the topic Congress had in mind when it mandated that "pregnancy counseling" be nondirective. Thus—regardless of whether one thinks that § 1008, construed within its four corners, would bar nondirective counseling regarding abortion—§ 1008 construed along with the appropriations rider, in the years in which the rider is enacted, very likely permits such counseling. The prior administration thought so, *see* 84 Fed. Reg. 7714, 7745-46 (Mar. 4, 2019); and I think they were likely right. Nor should it matter that the 2019 Rule permitted such counseling, whereas the 2021 Rule requires it: if nondirective counseling falls outside the proscription of § 1008, whether an agency permits or requires it is immaterial for purposes of that proscription. Thus, in my view, Tennessee is unlikely to prevail on its claim under the APA that the 2021 Rule's requirement of nondirective pregnancy counseling is contrary to law; and so I would not enjoin that requirement.

* * *

Given that (in my view) the abortion-referral requirement violates § 1008, I do not reach Tennessee's parallel challenge to that requirement on constitutional grounds (namely under the Spending Clause). *See Northwest Austin Mun. Utility Dist. No. One v. Holder*, 557 U.S. 193, 205, 129 S. Ct. 2504, 174 L. Ed. 2d 140 (2009). Tennessee does claim that the 2021 Rule's requirement of nondirective pregnancy counseling likewise "expressly

violate[s] the Spending Clause by imposing unforeseen conditions far afield from Congress's Title X legislation." Complaint ¶112. But I think that claim will likely fail, since the rider plainly contemplates nondirective pregnancy counseling and indeed prescribes a rule for its legality (namely that the counseling be nondirective). Nor do I think that Tennessee will likely show that the agency's actions with regard to the counseling requirement were arbitrary and capricious under the APA.

I respectfully dissent in part and concur in the judgment in part.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
AT KNOXVILLE

Case No. 3:23-cv-384

Judge Travis R. McDonough

Magistrate Judge Jill E. McCook

STATE OF TENNESSEE,

Plaintiff,

v.

UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, XAVIER BECERRA, IN HIS OFFICIAL CAPACITY, OFFICE OF POPULATION AFFAIRS, AND JESSICA S. MARCELLA, IN HER OFFICIAL CAPACITY,

Defendants.

Filed March 11, 2024

MEMORANDUM OPINION

For years, Tennessee accepted millions of dollars in federal grant funding to support its family-planning

project. These funds were expressly conditioned on the project's provision of abortion counseling and referrals upon women's requests. And, for years, Tennessee willingly accepted and complied with this condition. But, following the Supreme Court's decision to overturn *Roe v. Wade*, Tennessee refused to satisfy the same condition. Tennessee still wants the federal funds, it wants them free of this condition, and it wants this Court to order a federal agency to provide that funding—all despite the disavowal of its prior agreement with the agency. For the reasons set forth below, Tennessee's motion for a preliminary injunction (Doc. 20) will be **DENIED**.

I. BACKGROUND

A. HHS's Abortion Counseling and Referral Regulations Before 2021

Title X of the Public Health Service Act authorizes the United States Department of Health and Human Services ("HHS") "to make grants to and enter into contracts with public or nonprofit private entities to assist in the establishment and operation of voluntary family planning projects which shall offer a broad range of acceptable and effective family planning methods and services." 42 U.S.C. § 300(a). Grants under Title X "shall be made in accordance with such regulations as the Secretary may promulgate" and are "subject to such conditions as the Secretary may determine to be appropriate to assure that such grants will be effectively utilized for the purposes for which made." *Id.* § 300a-4(a)-(b). HHS typically awards these grants for a one-year period, but it may also issue

"continuation awards" that allow a grantee to receive funding for a five-year period without having to reapply each year. 42 C.F.R. § 59.8(a)–(b).

Title X funds may not "be used in programs where abortion is a method of family planning." 42 U.S.C. § 300a-6. HHS's interpretation of this restriction has changed several times since 1980. In 1981, HHS "for the first time required nondirective 'options counsleling' [sic] on pregnancy termination (abortion) . . . when a woman with an unintended pregnancy requests information on her options, followed by referral for these services if she so requests." Statutory Prohibition on Use of Appropriated Funds in Programs Where Abortion is a Method of Family Planning; Standard of Compliance for Family Planning Services Projects 53 Fed. Reg. 2922 (Feb. 2, 1988). This "Counseling and Referral Rule" was in place until 1988 when HHS promulgated new regulations, commonly known as the "Gag Rule," barring Title X grantees from providing such counseling or referrals. *Id.* at 2945; Standards of Compliance for Abortion-Related Services in Family Planning Services Projects, 65 Fed. Reg. 41270 (July 3, 2000). HHS suspended the Gag Rule in 1993 and provisionally reinstated the Counseling and Referral Rule. Standards of Compliance for Abortion-Related Services in Family Planning Service Projects, 58 Fed. Reg. 7464 (Feb. 5, 1993). HHS officially reinstated the Counseling and Referral Rule in 2000. 65 Fed. Reg. 41270. It remained in place until 2019, when HHS reinstated the ban on abortion referrals and rescinded the requirement (but did not impose a prohibition) that grantees provide nondirective counseling when requested (the "2019 Rule"). Compliance

with Statutory Program Integrity Requirements, 84 Fed. Reg. 7714, 7789 (Mar. 4, 2019).

B. The 2021 Counseling and Referral Rule

On October 7, 2021, HHS reimplemented the Counseling and Referral Rule via notice-and-comment rulemaking (the "2021 Rule").[1] 42 C.F.R. § 59.5; Ensuring Access to Equitable, Affordable, Client-Centered, Quality Family Planning Services, 86 Fed. Reg. 56144 (Oct. 7, 2021). The 2021 Rule largely reinstates the 2000 Rule and requires that Title X grantees provide a pregnant woman with counseling as to all her options, including "[p]renatal care and delivery; [i]nfant care, foster care, or adoption; and [p]regnancy termination." 42 C.F.R. § 59.5(a)(5)(i). "If requested to provide such information and counseling, [a grantee must] provide neutral, factual information and nondirective counseling on each of the options, and, referral upon request."[2] *Id.* § 59.5(a)(5)(ii). Such a referral is limited to "providing a patient with the name, address, telephone number, and other relevant factual information . . . about an abortion provider." 86 Fed. Reg. at 56150 (quoting 65 Fed. Reg. at 41281). A

1. The Court uses the phrase "Counseling and Referral Rule" to refer to the general requirement to counsel and refer for abortions that has existed in various forms since 1981 and uses the phrase "2021 Rule" to refer to the current iteration of the Counseling and Referral Rule.

2. Though the 2021 Rule uses the term "client" rather than "woman," the Court will use the term "woman" for the sake of consistency, as it will be discussing the Rule in the context of past regulations that use the term "woman." *See* 42 C.F.R. § 59.5.

grantee "may not take further affirmative action (such as negotiating a fee reduction, making an appointment, providing transportation) to secure abortion services for the patient." *Id.* The 2021 Rule went into effect on November 8, 2021, and, as a result, compliance with the 2021 Rule was a condition of Tennessee's receipt of a Title X grant in 2022.[3] 86 Fed. Reg. 56144; *Ohio v. Becerra*, 87 F.4th 759, 767 (6th Cir. 2023).

In promulgating the final 2021 Rule, HHS discussed at length why it was revoking the 2019 Rule and reimplementing the Counseling and Referral Rule. *See generally* 86 Fed. Reg. 56144. HHS noted that the 2019 Rule "interfered with the patient-provider relationship and compromised their ability to provide quality healthcare to all clients." *Id.* at 56146. HHS further found that, "the 2019 [R]ule appears to have . . . resulted in a significant loss of grantees, subrecipients, and service sites, and close to one million fewer clients served from 2018 to 2019." *Id.* at 56147. HHS detailed that, while nine states gained Title X service sites following the 2019 Rule, thirty-eight states lost service sites. *Id.* The agency observed that "the 2019 [R]ule shifted the Title X program away from its history of providing client-centered quality family-planning services and instead set limits on the patient-provider relationship and the information that could be provided to the patient by the provider." *Id.* at 56148. HHS expressed particular

3. By this point, the Counseling and Referral Rule had been in place thirty-four of the past forty-one years (and twenty-seven of the past twenty-nine years) Tennessee had received Title X funding. There is no suggestion that Tennessee refused to comply with this condition prior to 2023.

apprehension that "enforcement of the 2019 [R]ule raises the possibility of a two-tiered healthcare system in which those with insurance and full access to healthcare receive full medical information and referrals, while low-income populations [treated at a Title X site under the 2019 Rule] . . . are relegated to inferior access." *Id.* HHS directly considered the concern that the Rule would "compel[] states to adopt policies that conflict with their own laws." *Id.* at 56169. It responded that "states that object to the rule requirements or believe that there is a conflict with state law priorities are free to opt out of the federal grant program."[4] *Id.*

C. Tennessee's Agreement to the Counseling and Referral Rule

Since 1971, the Tennessee Department of Health ("TDH") has received grants from HHS for its Title X project. (Doc. 1, at 6.) TDH provides family-planning services at Title X facilities across the state. (*Id.*) Recently, TDH's Title X grants have totaled approximately $7.1

4. HHS responded to several additional concerns raised in the notice-and-comment period that are not at issue in this case. In response to the concern that the 2021 Rule violated providers' free-speech protections and conscience laws and would limit the type of providers participating in Title X, HHS noted that "objecting individuals and grantees will not be required to counsel or refer for abortions in the Title X program in accordance with applicable federal law." 86 Fed. Reg. at 56153–54. In response to the concern that the 2021 Rule would "result in a decrease in quality of care and would cost more to implement compared to the 2019 rule," HHS asserted that the 2021 Rule would "result in improved outcomes for all clients." *Id.* at 56,155.

million annually. (*Id.* at 7.) In March 2022, HHS approved TDH's Title X grant application for the budget period of April 1, 2022, to March 31, 2023. (Doc. 1-7, at 1.) This grant was a five-year continuation award, anticipated to run through March 31, 2027. (*Id.*) The notice of award specifically stated that "[a]ll recipients must comply with the requirements regarding the provision of family planning services that can be found in the statute (Title X of the Public Health Service Act, 42 U.S.C. § 300 *et seq.*) and the implementing regulations (42 C.F.R. Part 59, Subpart A)." (*Id.* at 4.) By this time, of course, these regulations included the 2021 Rule.

D. Tennessee's Criminalization of Abortion

Back in May 2019, Tennessee adopted a statute criminalizing all elective abortions in the event that *Roe v. Wade*, 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973) was overruled. *See* Human Life Protection Act, 2019 Tennessee Laws Pub. Ch. 351 (H.B. 1029, S.B. 1257); Tenn. Code Ann. § 39-15-213. On June 24, 2022, the Supreme Court of the United States issued its decision in *Dobbs v. Jackson Women's Health Organization*, 597 U.S. 215, 142 S. Ct. 2228, 213 L. Ed. 2d 545 (2022), which did just that, thereby automatically triggering Tennessee's abortion-ban statute. Tenn. Code Ann. § 39-15-213. The statute, which became effective on August 25, 2022, provides that "a person who performs or attempts to perform an abortion commits the offense of criminal abortion . . . a Class C felony." *Id.* § 39-15-213(b). The statute defines "abortion" as "the use of any instrument, medicine, drug, or any other substance or device with intent to terminate

the pregnancy of a woman known to be pregnant with intent other than to increase the probability of a live birth, to preserve the life or health of the child after live birth, to terminate an ectopic or molar pregnancy, or to remove a dead fetus." *Id.* § 39-15-213(a)(1). The statute does not prohibit a doctor from discussing abortion with patients or from referring patients to an abortion provider in a state where abortion is legal. *See generally id.* § 39-15-213.

E. HHS's Program Review and Tennessee's Abandonment of the 2021 Rule's Condition

In June 2022, immediately following the *Dobbs* decision, HHS issued a memorandum stating its position that the 2021 Rule was unaffected by the *Dobbs* decision and that "Title X recipients are required to offer [counseling and referrals]" as they were before *Dobbs*. (Doc. 1-6, at 4.) HHS further stated that "[t]here are no geographic limits for Title X recipients making referrals for their clients" but that the referrals should be made to providers "in close physical proximity to the Title X site, *when feasible*." (*Id.* at 5.)

From July 11, 2022, until July 15, 2022, HHS performed a program review of Tennessee's Title X project to ensure it was meeting HHS's expectations (the "July Review"). (Doc. 1-1.) During the July Review, HHS examined TDH's official policies, observed patient visits, and interviewed its staff. (*See id.*) HHS concluded that TDH had established policies in line with the 2021 Rule. (Doc. 1-1, at 24, 58–60.) It found that "[n]on-directive pregnancy counseling is offered by nurse practitioners"

(*id.* at 24) and that "TDH service sites are allowed to provide resource lists to clients seeking information on pregnancy termination sites" (*Id.* at 60). During the July review, HHS learned that TDH's legal staff was reviewing its current policies and that TDH "expect[s] a decision on what they are allowed to provide to or say to clients seeking pregnancy termination counseling and referral." (*Id.* at 60.) HHS also noted that "[TDH] Staff are concerned they will not be allowed to provide counseling [for pregnancy termination]." (*Id.*) Tennessee asserts that, during the review, TDH informed HHS that, going forward, staff would only be able to "offer counseling and referrals for pregnancy terminations that are legal in Tennessee." (Doc. 1-5, at 3.) This policy is laid out in TDH's July 1, 2022, "Nursing Protocol," which Tennessee states is a "standard instructive guideline for nursing staff in clinical settings." (Doc. 1-4, at 2, 4.)

On October 19, 2022, Trisha Reed, an HHS Title X Project Officer, emailed Tennessee the results of the July Review. (Doc. 1-2.) Reed stated HHS had determined that, "as of the date of the Program Review [July 11 – July 15, 2022]," Tennessee was in compliance with its Title X grant requirements. (*Id.* at 1.) However, Reed noted that HHS had raised concerns during the July Review about the potential effects of Tennessee's impending abortion ban on TDH's ability to comply with the nondirective options counseling requirement. (*Id.* at 1.) Reed asked that Tennessee "update [HHS] on the policy changes in response to enactment of [Tennessee's abortion ban]." (*Id.*) The record does not suggest that Tennessee ever provided HHS with the requested update.

On January 25, 2023, HHS sent a letter to Tennessee and all other Title X service grantees to inform them that HHS was reviewing all Title X grants "to ensure compliance with the requirements for nondirective options counseling and referral, as stated in the 2021 Title X [Rule]." (Doc. 1-8, at 1.) HHS informed grantees that they must submit their current policy "for providing nondirective options counseling and referrals within its Title X project," as well as a written statement confirming that they were in compliance with the 2021 Rule. (*Id.*) HHS further noted that it could terminate grants of out-of-compliance grantees. (*Id.* (citing 45 C.F.R. § 75.372(a)(1)).) Tennessee responded on February 13, 2023, stating only that "[w]e believe we are in compliance with regulatory requirements *for the scope of allowable practice under Tennessee law*." (Doc. 1-3, at 1 (emphasis added).) It also attached a copy of its Nursing Protocol, which noted that "[p]atients with positive pregnancy test must be offered the opportunity to be provided information and counseling *regarding all options that are legal in the State of Tennessee*." (*Id.* at 2–4 (emphasis added).) Tennessee offered no further rationale to suggest it was in compliance.

On March 1, 2023, HHS sent a follow-up letter to Tennessee pointing to its noncompliance with the 2021 Rule. (Doc. 1-9.) Specifically, HHS stated that "[t]he inclusion of 'legal in the state of Tennessee' is not an acceptable addition to your policy as Title X recipients must still follow all Federal regulatory requirements regarding nondirective options counseling and referrals." (*Id.* at 1.) HHS specifically noted that, to comply with the

2021 Rule, "projects are required to provide referrals upon client request, including referrals for abortion." (*Id.* at 2.) HHS gave Tennessee until March 13, 2023, to submit an alternate protocol that complied with the 2021 Rule. (*Id.*) HHS warned Tennessee that, if it failed to do so, its noncompliance with the terms of its Title X grant could lead to suspension or termination of the grant. (*Id.*)

Tennessee responded on March 13, 2023. (Doc. 1-10.) It noted that the 2021 Rule required counseling and referral for "pregnancy termination." (*Id.* (quoting 42 C.F.R. § 59.5(a)(5)).) Tennessee claimed that its abortion ban exempts pregnancy terminations that are done with the intent "to increase the probability of a live birth, to preserve the life or health of the child after live birth, or to remove a dead fetus" from its definition of abortion. (*Id.* (quoting Tenn. Code Ann. § 39-15-213(a)(1)).) It concluded that it therefore "[does] not construe the phrase 'pregnancy termination' to include every possible method of 'pregnancy termination,' such as abortion." (*Id.*) In sum, Tennessee's position was that, because it was still telling patients about the narrow circumstances in which Tennessee allows pregnancy termination, it was in compliance with the 2021 Rule. (*Id.*) It made no attempt to explain how its policies satisfied the 2021 Rule's requirement to offer counseling and referrals for abortions, as that requirement had been applied for a total of nearly three and one-half decades. (*See generally id.*)

On March 20, 2023, HHS replied to Tennessee. (Doc. 1-11.) HHS stated that it "ha[d] reviewed your [March 13, 2023] statement and determined that Tennessee's policy

for providing nondirective options counseling and referral within your Title X project remains not in compliance with the Title X regulatory requirements and, therefore, the terms and conditions of your grant." (*Id.* at 3.) As a result, HHS determined that "Tennessee is unable to comply with the terms and conditions of the award" (*id.* at 1) and that HHS would "not [be] providing Fiscal Year (FY) 2023 continuation funding for the Tennessee Department of Health noncompeting continuation application" (*id.* at 3).

F. Tennessee's Lawsuit

Tennessee filed this action on October 24, 2023 (Doc. 1) and moved for a preliminary injunction against the United States Department of Health and Human Services; Xavier Becerra, the United States Secretary of Health and Human Services; the Office of Population Affairs; and Jessica Marcella, the Deputy Assistant Secretary for Population Affairs (collectively "Defendants") on December 1, 2023 (Doc. 20). Tennessee argues that Defendants' decision not to fund its Title X grant violates both the Spending Clause of the United States Constitution and the Administrative Procedure Act ("APA"), 5 U.S.C. § 500 et seq. (*Id.* at 3.) Tennessee's motion is ripe for the Court's review.

II. STANDARD OF REVIEW

"The purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held." *Certified Restoration Dry Cleaning Network, L.L.C. v. Tenke Corp.*, 511 F.3d 535,

542 (6th Cir. 2007) (quoting *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395, 101 S. Ct. 1830, 68 L. Ed. 2d 175 (1981)). The Court considers the following factors when evaluating a motion for preliminary injunction:

> (1) whether the movant has a strong likelihood of success on the merits;
>
> (2) whether the movant would suffer irreparable injury without the injunction;
>
> (3) whether issuance of the injunction would cause substantial harm to others; and
>
> (4) whether the public interest would be served by the issuance of the injunction.

Id. at 542 (citations omitted).

The Sixth Circuit has noted that "when a party seeks a preliminary injunction on the basis of a potential constitutional violation, the likelihood of success on the merits often will be the determinative factor." *City of Pontiac Retired Emps. Ass'n v. Schimmel*, 751 F.3d 427, 430 (6th Cir. 2014) (citations omitted). Furthermore, the Court need not "make specific findings concerning each of the four factors . . . if fewer factors are dispositive of the issue." *Id.* (citations omitted). However, "it is generally useful for the district court to analyze all four of the preliminary injunction factors." *Id.* (quoting *Leary v. Daeschner*, 228 F.3d 729, 739 n.3 (6th Cir. 2000)). Rather than function as "rigid and unbending requirements[,]"

the factors "simply guide the discretion of the court." *In re Eagle-Picher Indus., Inc.*, 963 F.2d 855, 859 (6th Cir. 1992) (citation omitted).

"The party seeking a preliminary injunction bears the burden of justifying such relief." *Memphis A. Philip Randolph Inst. v. Hargett*, 2 F.4th 548, 554 (6th Cir. 2021) (citations omitted). While a party seeking a preliminary injunction need not "prove [its] case in full at a preliminary injunction hearing," *Tenke*, 511 F.3d at 542 (citations omitted), a preliminary injunction is an "extraordinary and drastic remedy." *Fowler v. Benson*, 924 F.3d 247, 256 (6th Cir. 2019) (quoting *Munaf v. Geren*, 553 U.S. 674, 689, 128 S. Ct. 2207, 171 L. Ed. 2d 1 (2008)). A preliminary injunction "may only be awarded upon a clear showing that the plaintiff is entitled to such relief," *id.* (quoting *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22, 129 S. Ct. 365, 172 L. Ed. 2d 249 (2008)), and "the proof required for the plaintiff to obtain a preliminary injunction is much more stringent than the proof required to survive a summary judgment motion." *Leary*, 228 F.3d at 739.

III. ANALYSIS

Tennessee attempts to frame HHS's decision to terminate its Title X grant as an unexpected and unprecedented attack on its sovereignty. The truth is far less dramatic. Tennessee, a longtime Title X grantee, decided to apply for a Title X grant. At the time it accepted the grant, Tennessee knew that it would be required to abide by all HHS regulations, just as it had for decades. One of those regulations required Title X grantees to

provide neutral, medically accurate counseling and referrals for abortion if women so requested. The Supreme Court's issuance of the *Dobbs* decision after Tennessee agreed to that condition triggered a Tennessee law banning abortions. Although that newly effective statute did not prohibit doctors from discussing abortions or referring their patients to abortion providers located where the procedure is legal, Tennessee nevertheless decided that TDH would not comply with the 2021 Rule; it would only allow medical providers to discuss pregnancy terminations that remained legal in Tennessee, and it would not allow counseling about, or referrals for, abortion services.

In receiving a grant from the federal government, a state commonly enters into a simple bargain. The state receives money in return for its agreement to comply with conditions. If a state does not like the conditions, it does not take the money, and the matter ends there. But Tennessee wants to have its cake and eat it too; it wants the federal money but does not want to comply with the federal conditions it knowingly assumed. The law does not support such a result.

A. Likelihood of Success on the Merits

Tennessee asserts that Defendants' decision not to fund its Title X grant is unlawful because it violates the Spending Clause of the United States Constitution and the APA. (Doc. 21, at 16.) Tennessee has failed to demonstrate that it has a strong likelihood of success on either of these grounds.

i. Spending Clause

Tennessee first argues that the 2021 Rule violates the Spending Clause because Congress did not provide clear notice of the conditions of accepting a Title X grant. (*Id.* at 17.) The facts demonstrate otherwise.

The Spending Clause allows Congress to "lay and collect Taxes, Duties, Imposts, and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States." U.S. Const. art. I, § 8, cl. 1. In using this power to spend, "Congress may attach conditions on the receipt of federal funds and has repeatedly employed the power to further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives." *S. Dakota v. Dole*, 483 U.S. 203, 206–07, 107 S. Ct. 2793, 97 L. Ed. 2d 171 (1987) (citations and internal quotation omitted). The Supreme Court has noted that this spending power functions "in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions." *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17, 101 S. Ct. 1531, 67 L. Ed. 2d 694 (1981).

"Congress has broad power under the Spending Clause of the Constitution to set the terms on which it disburses federal funds." *Cummings v. Premier Rehab Keller, P.L.L.C.*, 596 U.S. 212, 216, 142 S. Ct. 1562, 212 L. Ed. 2d 552 (2022). However, "[t]he spending power is of course not unlimited." *Dole*, 483 U.S. at 207 (internal citation omitted). When a state accepts a federal grant, it

must do so "voluntarily and knowingly," just like a party agreeing to the terms of a contract. *Pennhurst*, 451 U.S. at 17 (citation omitted). As such, the Supreme Court has held that "if Congress desires to condition the States' receipt of federal funds, it must do so unambiguously . . . , enabling the States to exercise their choice knowingly, cognizant of the consequences of their participation." *Dole*, 483 U.S. at 207 (cleaned up). To determine whether a state has notice of a condition, a court must view the relevant statute "from the perspective of a state official who is engaged in the process of deciding whether the State should accept [grant] funds and the obligations that go with those funds." *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296, 126 S. Ct. 2455, 165 L. Ed. 2d 526 (2006).

Title X is a grant program that exists to promote family-planning services. *See generally* 42 U.S.C. § 300a. The operative language of Title X provides that "[t]he Secretary is authorized to make grants . . . to State health authorities to assist in planning, establishing, maintaining, coordinating, and evaluating family planning services." *Id.* § 300a(a). The statute provides that "[g]rants and contracts made under this subchapter shall be made in accordance with such regulations as the Secretary may promulgate." *Id.* § 300a-4(a). Additionally, Title X grants are "subject to such conditions as the Secretary may determine to be appropriate to assure that such grants will be effectively utilized for the purposes for which made." *Id.* § 300a-4(b). By adding this clause, Congress made compliance with HHS regulations a clear and unambiguous condition of receiving a Title X grant. Tennessee does not dispute this fact. (*See generally* Docs. 21, 27.)

That the statute itself does not set out in detail every condition for receiving a grant is immaterial because the conditions are readily discernable from HHS regulations. The Supreme Court has found that notice of spending conditions can be provided by agency regulations. *See Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 183, 125 S. Ct. 1497, 161 L. Ed. 2d 361 (2005) (finding that a grantee had adequate notice that by accepting federal funding, a school may be liable for retaliation when "[t]he regulations implementing Title IX clearly prohibit retaliation and have been on the books for nearly 30 years") (citation omitted); *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 630, 119 S. Ct. 1661, 143 L. Ed. 2d 839 (1999) (finding a Title IX funding recipient was on notice of condition when "the regulatory scheme surrounding Title IX has long provided funding recipients with notice that they may be liable for their failure to respond the discriminatory acts of certain nonagents"). This makes sense, as any state official seeking to identify the conditions of accepting a grant can easily find them in HHS regulations. *See Arlington*, 548 U.S. at 295–96; 42 C.F.R. § 59.5. Such transparency allows states to "exercise their choice knowingly, cognizant of the consequences of their participation." *Dole*, 483 U.S. at 207 (citation omitted).

The undisputed facts expose as a figment Tennessee's argument that the Counseling and Referral Rule is a "newly derived Title X condition" of which it had no notice. (Doc. 21, at 18.) Tennessee knew it was required to comply with HHS regulations, and the 2021 Rule was in place

at the time Tennessee applied for and accepted Title X funding in March 2022. *See generally* 86 Fed. Reg. 56144. Tennessee's claim of unfair surprise is further undercut by the fact that the Counseling and Referral Rule had, as of March 2022, been in place twenty-seven of the last twenty-nine years and had always required counseling and referrals for abortions.[5] *See Ohio*, 87 F.4th at 765–67 (laying out the history of the Counseling and Referral Rule). During this entire period, HHS never suggested that a state's obligation to counsel and refer for abortions could be limited by a state's laws. *See generally id.* And there is no evidence that Tennessee did either. HHS did not suggest that its regulatory requirements would change if *Roe* were to be overturned. *Id.* It is Tennessee, not HHS, that has unilaterally abandoned its obligations while seeking to retain the benefits received in exchange for agreeing to those very obligations.

---

5. As Tennessee notes, it has been a Title X grantee for this entire period. (Doc. 21, at 10.) Analyzed within the contract-law framework, this long course of dealing between Tennessee and HHS is worth considering to determine whether Tennessee had notice of the requirement that it counsel and refer for abortions. *See Miss. Comm'n on Env't Quality v. E.P.A.*, 790 F.3d 138, 179, 416 U.S. App. D.C. 69 (D.C. Cir. 2015) ("[T]he fact that the State has long accepted billions of dollars notwithstanding the challenged conditions may be an additional relevant factor in the contract-like analysis the Court has in mind for assessing the constitutionality of Spending Clause legislation."); *Jackson*, 544 U.S. at 183 (finding that a grantee had adequate notice when "[t]he regulations implementing Title IX clearly prohibit retaliation and have been on the books for nearly 30 years") (citation omitted).

Tennessee does not argue that the statutory requirement that a state comply with HHS regulations is unclear.[6] (*See* Doc. 21, at 17–21.) Tennessee instead argues that "Congress [cannot] use a general rulemaking delegation to funnel its constitutionally vested spending-conditions power to agencies." (*Id.* at 19.) In other words, Congress cannot make compliance with agency regulations a condition of receiving a federal grant, because those regulations are not a part of the statutory text. Despite Tennessee's claims to the contrary (*id.* at 22), this is nothing less than a facial challenge to the Title X program, and indeed to *any* statute that conditions receiving a grant on compliance with agency regulations not fully described by the authorizing statute.[7] (*Id.* at 19–21.) Tennessee cites

6. Tennessee argues that Title X's prohibition on abortion being used as a method of family planning is ambiguous and therefore it could not have had notice that it would have to counsel and refer for abortions. (Doc. 21, at 17–19.) However, the statutory provision at issue in this case is not Title X's prohibition on abortion being used as a method of family planning but rather its unambiguous requirement that grantees abide by HHS regulations.

7. Tennessee seems to acknowledge this fact in its briefing while suggesting it meant nothing so drastic. (Doc. 27, at 9.) It states that it "does not dispute agencies' power to help carry out clear congressional conditions" but that an agency may not set "an entirely new and controversial funding condition." (*Id.*) Tennessee does not bother to explain this distinction. Congress clearly directed HHS to make grants to promote family planning services and to promulgate regulations ensuring that grants are "effectively utilized for the purposes for which made." 42 U.S.C. § 300a-4(b). It is necessary for HHS to create regulations, *i.e.*, funding conditions, to carry out the mandate given to it by Congress.

no caselaw to support this proposition, for good reason. In *Dole*, the Supreme Court noted that it is commonplace for Congress to make compliance with agency regulations a condition for receiving a federal grant. 483 U.S. at 206 ("Congress may attach conditions on the receipt of federal funds, and has repeatedly employed the power to further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and *administrative directives*.") (emphasis added) (citations and internal quotation omitted).

Title X is just one of many federal grant programs requiring compliance with regulations as a condition of a grant. *See, e.g.*, 42 U.S.C. § 254b(k)(3)(N) (health center grant program requiring grantees to "ensure the appropriate use of Federal funds in compliance with applicable Federal statutes, regulations, and the terms and conditions of the Federal award"); 42 U.S.C. § 1793(f)(2) (grant program providing funds for state educational agencies to serve free school breakfasts on the condition that the breakfast program "shall be carried out in accordance with applicable nutritional guidelines and regulations issued by the Secretary"); 49 U.S.C. § 5309(c)(4) (providing that grants for new and expanded rail, bus rapid transit, and ferry systems "shall be subject to all terms, conditions, requirements, and provisions that the Secretary determines to be necessary or appropriate"). If Tennessee were correct, significant parts of the federal grant system would vanish. The fact that Tennessee urges

such a radical outcome weighs heavily against the Court finding a strong likelihood of success on this point.[8] [9]

---

8. Tennessee primarily relies on *Kentucky v. Yellen*, 54 F.4th 325 (6th Cir. 2022) and *W. Virginia ex rel. Morrisey v. U.S. Dep't of Treasury*, 59 F.4th 1124 (11th Cir. 2023) to support its argument that an agency cannot make an unclear statutory funding condition clear via its own interpretation. (Doc. 21, at 18–20.) However, both cases concern an unclear statutory provision that an agency tried to clarify with its own rulemaking. *See generally id.* Here, HHS is not interpreting an unclear statutory provision. Title X contains a clear requirement that grantees comply with agency regulations and a clear directive from Congress for HHS to promulgate those regulations. 42 U.S.C. § 300a-4(b). *Yellen* did not hold, nor did it even discuss, whether Congress could condition funding on compliance with agency regulations. *See generally* 54 F.4th 325. *Morrisey* is equally unhelpful to Tennessee. In *Morrisey*, the Eleventh Circuit explicitly acknowledged that Congress may require grantees to abide by "'the legal requirements in place when the grants were made' [and] [t]hese 'legal requirements' include existing regulations." 59 F.4th at 1148 (quoting *Bennett v. Ky. Dep't of Educ.*, 470 U.S. 656, 670, 105 S. Ct. 1544, 84 L. Ed. 2d 590 (1985)). That is the situation facing Tennessee here.

9. Tennessee claims that Congress allowing HHS to promulgate regulations that a grantee must abide by runs afoul of the nondelegation doctrine. (Doc. 27, at 8.) "[A] statutory delegation is constitutional as long as Congress 'lay[s] down by legislative act an intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform.'" *Gundy v. United States*, 588 U.S. 128, 139 S. Ct. 2116, 2123, 204 L. Ed. 2d 522 (2019) (alteration in original) (quoting *Mistretta v. United States*, 488 U.S. 361, 372, 109 S. Ct. 647, 102 L. Ed. 2d 714 (1989)). "[T]he answer requires construing the challenged statute to figure out what task it delegates and what instructions it provides." *Id.* (citations omitted). Additionally, pursuant to the "major questions doctrine" courts "expect Congress to speak clearly when authorizing an agency

to exercise powers of vast economic and political significance." *Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs.*, 594 U.S. 758, 141 S. Ct. 2485, 2489, 210 L. Ed. 2d 856 (2021) (citations and internal quotation omitted). In such "extraordinary cases," "the 'history and the breadth of the authority that [the agency] has asserted,' and the 'economic and political significance' of that assertion, provide a 'reason to hesitate before concluding that Congress' meant to confer such authority." *W. Virginia v. EPA*, 597 U.S. 697, 142 S. Ct. 2587, 2608, 213 L. Ed. 2d 896 (2022) (alteration in original) (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159–60, 120 S. Ct. 1291, 146 L. Ed. 2d 121 (2000)).

Title X does not run afoul of the nondelegation doctrine. Title X provides that the secretary shall "make grants to and enter into contracts with public or nonprofit private entities to assist in the establishment and operation of voluntary family planning projects which shall offer a broad range of acceptable and effective family planning methods and services." 42 U.S.C. § 300(a). This directive to make grants in support of voluntary family-planning programs that offer a range of acceptable and effective family-planning methods is a satisfactorily intelligible principle to support Congress's delegation. *See Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 474, 121 S. Ct. 903, 149 L. Ed. 2d 1 (2001) (collecting cases in which less-than-precise standards constitute an intelligible principle, including statutes "authorizing regulation in the 'public interest'") (citations omitted).

HHS also does not "exercise powers of vast economic and political significance." *See Ala. Ass'n of Realtors*, 141 S. Ct. at 2489. In 2023, HHS awarded Title X grants to only eighty-six Title X grantees nationwide. Office of Population Affairs, *Fiscal Year 2023 Title X Service Grant Awards*, https://opa.hhs.gov/grant-programs/title-x-service-grants/current-title-x-service-grantees/fy2023-title-X-service-grant-awards (last accessed Mar. 11, 2024). Each grant had an average value of $3 million. *Id.* This relatively modest grant-making power is far from the type of administrative power that the

Because applying the 2021 Rule to Tennessee does not violate the Spending Clause, Tennessee has not made a strong showing of likelihood of success on the merits on this ground.

ii. APA

Tennessee next argues that HHS's decision not to continue funding its grant violates the APA. (Doc. 21, at 21–22.) Specifically, Tennessee asserts that HHS's interpretation of the 2021 Rule: (1) exceeds HHS's regulatory authority under Title X; (2) is unreasonable; (3) is arbitrary and capricious; and (4) represents a new legislative rule which may only be promulgated via notice-and-comment rulemaking. (*Id.* at 22–30.)

a. Statutory Authority

A court must "hold unlawful and set aside agency action . . . found to be . . . in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. § 706(2). As noted above, Title X is a grant program which exists to promote family-planning services. *See generally* 42 U.S.C. § 300a. Title X provides that "[t]he Secretary is authorized to make grants . . . to State

---

Supreme Court has held to violate the nondelegation doctrine. *See Util. Air Regul. Grp. v. E.P.A.*, 573 U.S. 302, 322, 134 S. Ct. 2427, 189 L. Ed. 2d 372 (2014) (finding a nondelegation issue when "newly [regulated] sources would face permitting costs of $147 billion"); *Brown & Williamson*, 529 U.S. at 159 (finding a nondelegation issue when "the FDA has now asserted jurisdiction to regulate an industry constituting a significant portion of the American economy.").

health authorities to assist in planning, establishing, maintaining, coordinating, and evaluating family planning services." *Id.* § 300a(a). Title X also states that "[n]one of the funds appropriated under this subchapter shall be used in programs where abortion is a method of family planning." *Id.* § 300a-6. In *Rust v. Sullivan*, 500 U.S. 173, 111 S. Ct. 1759, 114 L. Ed. 2d 233 (1991), the Supreme Court, along with "every court to have addressed the issue," found that this language was ambiguous. 500 U.S. at 184. Applying the "*Chevron* Deference" framework, the court found that HHS's interpretation of the abortion provision was reasonable and therefore the agency acted within its authority in issuing the Gag Rule. *Id.* at 184–86. In 2023, the Sixth Circuit, finding that *Rust* controlled, held that HHS acted within its authority by issuing its 2021 Rule requiring Title X grantees to counsel and refer for abortions. *Ohio*, 87 F.4th at 770–771. Tennessee's argument that the agency's interpretation of Title X is not reasonable is a naked attempt to relitigate *Rust* and *Ohio*. (Doc. 21, at 22.) The fact that Tennessee resorts to relitigating binding precedent that explicitly decided the 2021 Rule is valid weighs against finding Tennessee is likely to succeed on this point.[10]

---

10. Tennessee appears to argue that, because Tennessee has outlawed abortions, Title X no longer authorizes HHS to apply the 2021 Rule, even though there have been no changes to Title X itself. (Doc. 21, at 22–24.) Tennessee argues that "HHS's Rescindment—*and its underlying policy of applying the 2021 Rule to States who outlaw abortion*—uniquely opens a Pandora's Box of public-health and compliance challenges HHS has not answered for." (*Id.* at 24 (emphasis added).) Tennessee points to no caselaw that supports this proposition that a subsequent change in state law can effectively nullify a federal agency's prior interpretation of a statute and

Because there is binding precedent holding that HHS has the authority to promulgate the 2021 Rule, Tennessee has not clearly demonstrated that it is likely to succeed on this basis.[11]

b. HHS Regulations

Tennessee argues that HHS's interpretation of the 2021 Rule as requiring all Title X grantees to counsel and refer for abortions, even if the referral must be made to an out-of-state provider, is unreasonable because it conflicts with the plain meaning of several of the Rule's provisions. (Doc. 21, at 24–25.)

The Supreme Court has instructed lower courts that in certain circumstances "a court should defer to the agency's construction of its own regulation." *Kisor v. Wilkie*, 588 U.S. 558, 139 S. Ct. 2400, 2411, 204 L. Ed. 2d 841 (2019). This is commonly referred to as "*Auer* Deference." *Id.* Under the *Auer* standard, "[t]he deference accorded to an agency's interpretation of its

---

retroactively render it unenforceable. There is good reason why no precedent exists for such a proposition. *See generally* Respecting the Nullifying Laws of South Carolina, 11 Stat. 771 (1832). Tennessee is part of a supremely sovereign nation; it is not a signatory to a compact with, or in league with, other states. U.S. Const. art. VI, cl. 2.

11. Tennessee also briefly invokes "avoidance" to support its argument that the 2021 Rule is no longer authorized by Title X, stating that "HHS's position uniquely presents constitutional problems, which further undercuts it reasonableness." (Doc. 21, at 23.) Tennessee does not develop this argument any further, and it is not the Court's job to try to do so on Tennessee's behalf.

own ambiguous regulation is substantial and afforded even greater consideration than the *Chevron* deference accorded to an interpretation of an ambiguous statute." *Ohio Dep't of Medicaid v. Price*, 864 F.3d 469, 477 (6th Cir. 2017) (citation omitted). However, courts "need not defer to an agency's interpretation that is plainly erroneous or inconsistent with the regulation[s] or where there is any other reason to suspect that the interpretation does not reflect the agency's fair and considered judgment on the matter in question." *In re AmTrust Fin. Corp.*, 694 F.3d 741, 754–55 (6th Cir. 2012) (quoting *Chase Bank USA, N.A. v. McCoy*, 562 U.S. 195, 209–10, 131 S. Ct. 871, 178 L. Ed. 2d 716 (2011) (internal quotation marks omitted)). And even if the "regulation is ambiguous and deference is due . . . [the Court] must be satisfied that the agency's action minimally involved a 'rational connection between the facts found and the choice made.'" *Summit Petroleum Corp. v. E.P.A*, 690 F.3d 733, 741 (6th Cir. 2012) (internal citations omitted).

"The possibility of [*Auer*] deference can arise only if a regulation is genuinely ambiguous." *Kisor*, 139 S. Ct. at 2414. To determine if a regulation is ambiguous, a court must apply "all the standard tools of interpretation" and "carefully consider the text, structure, history, and purpose of a regulation." *Id.* at 2414–15 (citation and internal quotation omitted). If the regulation is unambiguous, a court must simply apply the regulation's plain language. *Christensen v. Harris Cnty.*, 529 U.S. 576, 588, 120 S. Ct. 1655, 146 L. Ed. 2d 621 (2000) (applying the regulation's "obvious meaning" and holding that "[b]ecause the regulation is not ambiguous . . . *Auer* deference is unwarranted").

Here, *Auer* deference to HHS's interpretation of the 2021 Rule is unnecessary, as it has a plain and unambiguous meaning. *See Kisor*, 139 S. Ct. at 2414 ("[T]he possibility of [*Auer*] deference can arise only if a regulation is genuinely ambiguous."). As explained below, HHS's interpretation of the 2021 Rule as requiring all Title X grantees to counsel and refer for abortions, even if the referral must be made to an out-of-state provider, is in line with the unambiguous meaning of the regulation.

The 2021 Rule requires that Title X grantees "[o]ffer pregnant [women] the opportunity to be provided information and counseling regarding . . . (A) Prenatal care and delivery; (B) Infant care, foster care, or adoption; and (C) Pregnancy termination." 42 C.F.R. § 59.5(a)(5)(i). The Rule further provides that grantees, "[i]f requested to provide such information and counseling, provide neutral, factual information and nondirective counseling on each of the options, and, referral upon request." *Id.* § 59.5(a)(5)(ii). "Pregnancy termination" is an unambiguous phrase which simply means the ending of a pregnancy. *See Termination*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/termination (defining "termination" as "end in time or existence") (last accessed Mar. 11, 2024). Abortion falls within that broad definition.[12] *See Abortion*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/abortion (defining "abortion" as "the termination of a

12. Tennessee's abortion ban itself recognizes that abortion is encompassed by the phrase "pregnancy termination." *See* Tenn. Code Ann. § 39-15-213(a)(1) ("'Abortion' means the use of any instrument, medicine, drug, or any other substance or device with intent to terminate the pregnancy of a woman . . . .").

pregnancy after, accompanied by, resulting in, or closely followed by the death of the embryo or fetus") (last accessed Mar. 11, 2024). Furthermore, HHS has made clear, in promulgating every iteration of the Counseling and Referral Rule and the Gag Rule, that it uses the term "pregnancy termination" to mean "abortion."[13] Finally, the Sixth Circuit did not distinguish between a "pregnancy termination" and an "abortion" in *Ohio. Ohio*, 87 F.4th at 767 (finding that the 2021 Rule "mandate[d] that Title X projects make *abortion* referrals upon request") (emphasis added). Tennessee does not dispute this, but merely points out that the 2021 Rule uses both the terms "pregnancy termination" and "abortion" and notes that "such differences in language typically convey differences in meaning."[14] (Doc. 21, at 24–25 (internal quotation and

13. *See* 53 Fed. Reg. at 2922–23 (noting in promulgating the Gag Rule that "[f]ew issues facing our society today are more divisive than that of abortion" and explaining that the 1981 Rule required counseling "on pregnancy termination (abortion)"); 58 Fed. Reg. at 7464 (reinstating the 1981 Rule and noting that "[u]nder these compliance standards[,] Title X projects would be required . . . to provide nondirective counseling to the patient on all options relating to her pregnancy, including abortion, and to refer her for abortion); 65 Fed. Reg. at 41270 ("Title X projects [are] required, in the event of an unplanned pregnancy and where the patient requests such action, to provide nondirective counseling to the patient on all options relating to her pregnancy, including abortion, and to refer her for abortion"); 84 Fed. Reg. at 7716–17 (noting that "[t]he 2000 regulations require Title X projects to provide abortion referral [] and nondirective counseling on abortion" and "finaliz[ing] the prohibition against using Title X funds to refer for abortion"); 86 Fed. Reg. at 56144 (noting that the agency was "readopting the 2000 regulations").

14. Tennessee appears to argue that "pregnancy termination" in the 2021 Rule instead means "pregnancy terminations that are

citation omitted).) While perhaps "typically" the case, it is clear in the context of decades of HHS regulation that the terms are synonymous as used here.

HHS's referral requirement is similarly unambiguous. The 2021 Rule imposes a broad requirement that "[i]f requested to provide [] information and counseling, [a grantee must] provide neutral, factual information and nondirective counseling on each of the options, and, referral upon request." 42 C.F.R. § 59.5(a)(5)(ii). The Rule also requires that referrals for health services, including abortion, be made to healthcare providers "who are in close physical proximity to the Title X site, when feasible, in order to promote access to services and provide a seamless continuum of care." *Id.* § 59.5(b)(8). In context, the phrase "when feasible" plainly means that doctors must refer patients to healthcare providers that are close to them when it is possible to do so. *See Feasible*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/feasible (defining "feasible" as "capable of being done or carried out") (last accessed Mar. 11, 2024). If it is not possible for a doctor to refer a patient to a nearby provider, perhaps because the patient lives in a remote area or because the patient lives in a state where abortion is illegal, he may refer the patient to a provider farther away. This interpretation is further supported by the explanation HHS gave for why it was including

---

allowable under state law." (Doc. 21, at 25.) The obvious issue with Tennessee's reading is that it would require the Court to read in a limiting clause to narrow the definition of "pregnancy termination" to "types of pregnancy terminations that are legal in a given state." Tennessee has provided no basis for the Court to do so.

this provision in the 2021 Rule. HHS explained that the provision was intended to *expand* access to health services, not to limit access. *See* 86 Fed. Reg. at 56164 ("[I]t is important for Title X clinics to provide referrals and linkages to a wide range of healthcare services to help facilitate access for Title X clients . . . ."). There is no conflict between this provision and HHS's interpretation of the 2021 Rule.

Tennessee argues that this provision, which applies to all referrals and not just abortion referrals, amounts to a total ban on referring patients to healthcare providers that are not "in close physical proximity to the Title X site." (Doc. 21, at 25.) Tennessee's tortured reading would destroy the plain meaning of the provision: if a doctor at a Title X site in Cheyenne, Wyoming, found that one of her patients had cancer that required treatment at the University of Colorado Cancer Center, about a ninety minutes' drive away, then Tennessee's interpretation would sanction the doctor's refusal to refer that woman for treatment, despite the provision's stated goal of expanding access to health services. Nothing about the regulation's language supports such an understanding. After all, the regulation is most likely to impact underserved populations and logically would aim to increase the likelihood they receive services. Encouraging a referral to a provider more easily accessible to that population due to proximity, it stands to reason, raises the likelihood that the patient will receive the necessary care. A referral to an unnecessarily distant provider could accomplish the opposite. But if the most feasible referral is to a provider some distance away, the regulation plainly contemplates such a referral.

Tennessee also suggests that this provision gives Title X providers the authority to refuse to provide referrals for any type of medical service if the provider deems that doing so is not "feasible." (Doc. 21, at 25.) Tennessee points to no part of the administrative record, notice of proposed rulemaking, or the 2021 Rule itself that supports its reading that "when feasible" allows providers to unilaterally veto the 2021 Rule's referral requirement. As noted, the provision requires referrals be made to healthcare providers "who are in close physical proximity to the Title X site, when feasible, in order to promote access to services and provide a seamless continuum of care." 42 C.F.R. § 59.5(b)(8). The first part of the provision, which precedes the phrase "when feasible," is concerned with the *distance* between providers, requiring referrals to providers "who are in close physical proximity to the Title X site." *Id.* The second part of the provision, following "when feasible," explains *why* nearby referrals are preferable—because they "promote access to services and provide a seamless continuum of care." *Id.* Neither of these clauses, surrounding and potentially modified by "when feasible," addresses what *kind* of referrals providers are required to make. The phrase "when feasible" modifies a preference for nearby referrals; it does not even remotely invoke the idea of whether a procedure is legal inside the state. Tennessee's interpretation of the 2021 Rule is plainly unreasonable.

Nor is it plausible to believe that HHS would draft a regulation that both requires referrals for abortions and allows providers to completely ignore that requirement if they decide, for whatever reason, it is not "feasible." If

HHS sought to give providers broad discretion to refuse to refer patients for medical services, it would either do so clearly or simply eschew any mandatory conditions as to when referrals must be made. Moreover, as explained below, it is entirely "feasible" for providers to refer patients for abortions while still complying with Tennessee law.

Finally, Tennessee argues that HHS cannot require it to counsel and refer for abortions because to do so is not "allowable" under state law. (Doc. 21, at 24 (citing 42 C.F.R. § 59.5(b)(6).) The 2021 Rule requires that "family planning medical services will be performed under the direction of a clinical services provider, with services offered within their scope of practice and allowable under state law, and with special training or experience in family planning." 42 C.F.R. § 59.5(b)(6). In promulgating the final 2021 Rule, HHS received comments that "were specific to advanced practice registered nurses (APRNs)." 86 Fed. Reg. at 56163. The commenters asked that the final rule specify that APRNs "be able to serve as the medical director (in states with full practice authority)." *Id.* HHS stated that it agreed and would add the phrase "allowable under state law" in order to "more clearly reflect the role of a broader range of *healthcare providers* in providing Title X services." *Id.* at 56163–64 (emphasis added). This language relates to *who* specifically may serve as a clinical services provider and has no relation to whether the *services* being provided in general are allowable under state law. HHS's interpretation of the 2021 Rule is in line with the plain meaning of this provision.

Tennessee's argument independently fails because providing counseling and referrals for abortions *is*

"allowable under state law." Tennessee's abortion ban and the 2021 Rule do not conflict. Tennessee's statute contains no language whatsoever related to counseling or referral for abortions. *See generally* Tenn. Code Ann. § 39-15-213. It merely provides that "[a] person who performs or attempts to perform an abortion commits the offense of criminal abortion." *Id.* § 39-15-213(b). There is no basis for prosecuting a doctor who counsels or refers a woman for an abortion. *Id.* Abortion counseling and referral are therefore plainly "allowable under state law." Tennessee's law in no way hinders its Title X project staff from complying with the 2021 Rule.

Because HHS's interpretation is in line with the plain meaning of the 2021 Rule, Tennessee has not clearly demonstrated that it is likely to succeed on this basis.

c. Arbitrary and Capricious

An agency action would "normally . . . be arbitrary and capricious if the agency has: [1] relied on factors which Congress has not intended it to consider, [2] entirely failed to consider an important aspect of the problem, [3] offered an explanation for its decision that runs counter to the evidence before the agency, or [4] is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43, 103 S. Ct. 2856, 77 L. Ed. 2d 443 (1983); *Ohio*, 87 F.4th at 772. "Although courts are to engage in a careful review of the facts and record, our ultimate standard of review is narrow and deferential." *Ohio*, 87 F.4th at 772

(citation and internal quotation omitted). As such, "a court is not to substitute its judgment for that of the agency," *State Farm*, 463 U.S. at 43, and the court must "respect [the agency's] policy choice." *Ohio*, 87 F.4th at 772.

Under the arbitrary-and-capricious standard of review, the core duty of the court is to "ensure that the agency 'articulate a rational connection between the facts found and the choice made and . . . provide something in the way of documentary support for its action.'" *Hosseini v. Nielsen*, 911 F.3d 366, 371 (6th Cir. 2018) (cleaned up) (quoting *GTE Midwest, Inc. v. Fed. Commc'ns Comm'n*, 233 F.3d 341, 345 (6th Cir. 2000)). Importantly, while an agency must generally explain its reasoning, a court should still "uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned." *State Farm*, 463 U.S. at 43 (quoting *Bowman Transp., Inc. v. Ark.-Best Freight Sys., Inc.*, 419 U.S. 281, 286, 95 S. Ct. 438, 42 L. Ed. 2d 447 (1974); *Ohio*, 87 F.4th at 775 ("As long as the agency's explanation is clear enough that its path may reasonably be discerned, we must respect its policy choice.") (internal quotations and citation omitted).

Tennessee argues that HHS's decision not to fund its Title X grant was arbitrary and capricious because HHS: (1) ignored important aspects of the problem; (2) changed its position on what the 2021 Rule required without explanation; and (3) disregarded Tennessee's reliance interest in receiving Title X funding. (Doc. 21, at 25–29.)

1. Ignoring Important Aspects of the Regulatory Problem

An agency action may be arbitrary and capricious if the agency "entirely failed to consider an important aspect of the problem." *State Farm*, 463 U.S. at 43. Tennessee argues that, in requiring grantees to refer for abortions, HHS failed to consider four important aspects of the regulatory problem: (1) whether post-*Dobbs* application of the 2021 Rule to states banning abortion is reasonable; (2) whether out-of-state referrals are medically appropriate; (3) whether the 2021 Rule would increase compliance costs; and (4) whether this application would lead to a reduction in the quality of care for Tennesseans. (Doc. 21, at 26–27.)

Tennessee essentially contends that, in light of the *Dobbs* decision, HHS was required to revisit and reconsider whether it should have promulgated the 2021 Rule in the first place. The Supreme Court explicitly rejected the same argument in *Auer*, 519 U.S. 452, 117 S. Ct. 905, 137 L. Ed. 2d 79. In *Auer*, police sergeants challenged an overtime-pay regulation promulgated by the Secretary of Labor prior to a Supreme Court decision that upheld the application of the Fair Labor Standards Act to public-sector employees. *Id.* at 454–55. The challenge turned on whether it was arbitrary and capricious for the agency, in the wake of the Supreme Court decision, not "to give adequate consideration to whether it really [made] sense to apply [an agency rule] to the public sector." *Id.* at 458. The Supreme Court rejected the argument, holding that "where, as here, the claim is . . . that it was 'arbitrary' and 'capricious' not to conduct amendatory rulemaking

(which might well have resulted in no change), there is no basis for the court to set aside the agency's action prior to any application for relief addressed to the agency itself." *Id.* at 458–59. The court explained that a party desiring an agency to reconsider its rule must petition the agency to amend its rule. *Id.* (citing 5 U.S.C. § 553).

As the Sixth Circuit pointed out in *Ohio*, while "[t]he impact of *Dobbs* on the Title X program is undoubtedly an 'important aspect' of the question now, [] judicial review of agency action is limited to the grounds that the agency invoked when it took the action." *Ohio*, 87 F.4th at 774 n.7 (quoting *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 591 U.S. 1, 140 S. Ct. 1891, 1907, 207 L. Ed. 2d 353 (2020)). The only thing HHS was required to do in refusing to fund Tennessee's grant was to determine whether TDH was out compliance with the 2021 Rule and, if so, explain why it was out of compliance. *See Hosseini*, 911 F.3d at 371 (noting that under the arbitrary and capricious standard, an agency must "articulate a rational connection between the facts found and the choice made and . . . provide something in the way of documentary support for its action") (citation and internal quotations omitted). HHS did just that. It explained in both of its March 2023 letters that, as a condition of receiving a Title X grant, Tennessee was required to comply with HHS regulations. (*See* Docs. 1-9, 1-11.) HHS further explained that Tennessee's current policy to only counsel and refer for pregnancy-termination options that are "legal in the state of Tennessee" was not in compliance with the 2021 Rule's requirement that grantees counsel and refer for abortion. (*See id.*) HHS even noted how Tennessee's policy

could be changed to comply with the Rule. (*See* Doc. 1-9.) When Tennessee refused to change its policy, HHS stated that it would not fund Tennessee's Title X grant, because "Tennessee is out of compliance with the Title X regulation requirements." (Doc. 1-11, at 1.) Nothing required HHS to do more.

Because HHS reasonably explained the basis for its decision, Tennessee has not demonstrated it is likely to succeed on this basis.

2. Unlawful Position Change

Tennessee next argues that HHS unlawfully changed its interpretation of the 2021 Rule without explanation. (Doc. 21, at 28.)

"Agencies are free to change their existing policies as long as they provide a reasoned explanation for the change." *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 221, 136 S. Ct. 2117, 195 L. Ed. 2d 382 (2016) (citations omitted). As such, "[a]n agency may not . . . depart from a prior policy *sub silentio* or simply disregard rules that are still on the books." *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515, 129 S. Ct. 1800, 173 L. Ed. 2d 738 (2009) (citation omitted). While a change in an agency position does not require a greater degree of justification, the agency still must "provide reasoned explanation for its action" and the agency must "display awareness that it *is* changing position." *Id.* "Reasoned decision making, therefore, necessarily requires the agency to acknowledge and provide an adequate explanation for its departure

from established precedent." *Dillmon v. Nat'l Transp. Safety Bd.*, 588 F.3d 1085, 1089–90, 388 U.S. App. D.C. 411 (D.C. Cir. 2009) (citing *Fox*, 556 U.S. at 515).

Since its inception, HHS has interpreted the 2021 Rule as requiring counseling and referrals for abortion.[15] *See* 86 Fed. Reg. at 56144 (noting that "[t]he effect of this 2021 final rule is to revoke the requirements of the 2019 regulations, including removing restrictions on nondirective options counseling and referrals for abortion services"). HHS has never suggested that this requirement could be modified by a state's abortion laws. *See generally id.* Post-*Dobbs*, HHS issued guidance which reaffirmed that *Roe*'s overturning did not affect what the 2021 Rule required. (*See* Doc. 1-6, at 4 (noting that *post*-Dobbs, "per the 2021 Title X rule, Title X recipients are required to offer pregnant clients the opportunity to be provided information and counseling regarding [pregnancy termination]" and "referral upon request"). In finding that Tennessee was not complying with the 2021 Rule's abortion counseling and referral requirements, HHS continued to apply this same interpretation. It did not "depart from a prior policy" and was therefore not required to acknowledge it was changing course or provide an explanation for why it was changing course. *Fox*, 556 U.S. at 515.

Nevertheless, Tennessee claims that HHS unlawfully changed its interpretation of the 2021 Rule without

15. As the Court has noted, all previous iterations of the Counseling and Referral Rule have been interpreted by both HHS and courts as concerning counseling and referrals for abortions. *See supra* Section I.A–B.

explanation, an argument which hinges on Tennessee's unsupported view of HHS's July 2022 Review of Tennessee's Title X project. (Doc. 21, at 28.) During the review, Tennessee informed HHS that its new Nursing Protocol allowed staff only to "offer counseling and referrals for pregnancy terminations that are legal in Tennessee." (Doc. 1-5, at 3, 5.) Tennessee argues that, because the Nursing Protocol was in place during the July Review (*id.* at 7) and because HHS was aware that Tennessee's abortion ban would trigger on August 25, 2022, HHS implicitly blessed Tennessee's *future* practice of not counseling and referring for abortions. (Doc. 21, at 28.) But HHS's July Review only assessed Tennessee's compliance at the time of that review, and, at that time, Tennessee's anti-abortion law had not gone into effect. *See* Doc. 1-2, at 1 (email noting that HHS had found Tennessee in compliance "as of the date of the [July] Review"); Tenn. Code Ann. § 39-15-213 (establishing August 25, 2022, as the effective date of Tennessee's anti-abortion law). This meant that Tennessee, pursuant to the July 2022 Nursing Protocol, continued at that point to provide counseling and referrals for abortion in compliance with HHS's regulation. (*See* Doc. 1-5, at 3, 5 (noting that nurses should provide counseling on options that are "legal in the State of Tennessee")); (Doc. 1-1, at 24, 58 (summarizing the July Review's findings that "non-directive pregnancy counseling [was] offered by nurse practitioners," and noting that TDH policies required "staff to offer clients with positive pregnancy tests all options counseling and referrals upon request").)[16] After all, abortion was still

16. Tennessee cites to the notes HHS made in its July Review to insinuate that Tennessee had already halted abortion referrals

at the time of the Review and that HHS blessed this stance. (*See* Doc 1, at 15 ("[HHS's] Program Review Report evaluated whether Tennessee's Health Department complied with the Referral Mandate and found '[t]his expectation was met.' That conclusion held, [HHS] elaborated, despite '[n]o referrals for abortion [being] made.'") (quoting July Review)); (Doc 21, at 28 ("That review addressed Tennessee's abortion policy directly, concluding that . . . Tennessee was 'in compliance' with governing HHS rules, even when '[n]o referrals for abortion are made.'") (quoting July Review)); (Doc. 27, at 13 ("Under the July 2022 policy, HHS wrote, '[n]o referrals for abortion are made,' but still the 2021 Rule's 'expectation was MET.'") (quoting July Review)).)

Tellingly, Tennessee is very careful to never once assert factually that it was not providing abortion referrals at the time of the review. If it were true, Tennessee would surely submit evidence that it had not been complying with the 2021 Rule's referral requirement. Instead, Tennessee shapes its argument to invite a presumption that it was not providing abortion referrals. The Court will make no such presumption, despite the efforts to befog the issue.

It is true that the July Review is not entirely clear as to what the line "[n]o referrals for abortion are made" means. However, the Court finds it highly doubtful that it reflects a drastic and unexplained break from agency policy. It is far more likely that this line merely embodies the expectation that Title X grantees not set up appointments for women seeking abortions. 86 Fed. Reg. at 56150 (stating that referrals for abortion are limited to "providing a patient with the name, address, telephone number, and other relevant factual information" and that a grantee "may not take further affirmative action (such as negotiating a fee reduction, making an appointment, providing transportation) to secure abortion services for the patient"). Regardless, any lack of clarity cuts against Tennessee at the preliminary-injunction phase, as Tennessee bears the burden of making a clear showing of success on the merits. *See Pub. Int. Rsch. Grp. of Mich. (Pingam) v. Brinegar*, 517 F.2d 917, 918 (6th Cir.

legal in Tennessee at that time. The July Review did not assess whether Tennessee would be in compliance in the future and certainly did not endorse or approve Tennessee's future policy of not referring for abortions.[17]

Tennessee also leans heavily on an October 19, 2022 email sent by Trisha Reed, an HHS Title X Project Officer, to TDH officials. (Doc. 1-2.) Tennessee points out that in this email Reed stated that Tennessee had "a wonderful review" and "a strong Title X program." (*Id.* at 1.) Tennessee again argues that, because HHS was aware of its anticipated policy that it would not counsel and refer for abortions, the email represents tacit approval of Tennessee's policy. (Doc. 21, at 28.) It does not. This email simply provides the results of the July Review and states that HHS determined that Tennessee was in compliance with HHS regulations at the time of the review—before Tennessee's anti-abortion law went into effect. The fact that Reed asked that Tennessee "update us on the policy changes [to patient counseling] in response to enactment

---

1975) (finding that the district court "clearly acted within the scope of a proper exercise of discretion in refusing to grant a preliminary injunction" when "the possibility that the appellants would succeed on the merits was at best uncertain and problematical").

17. The July Review suggests that HHS did in fact inform Tennessee that it would still be required to refer women for abortion after its abortion ban went into effect. In assessing Tennessee's referral policy, an HHS "reviewer recommended that out-of-state abortion referral resources are available at the Hamilton site to clients who request this information for an unintended pregnancy, (insofar as this procedure will no longer be available in Tennessee)." (Doc. 1-1, at 31.)

of [Tennessee's abortion ban]," suggests that HHS had concerns over whether Tennessee continued to meet its obligations under the 2021 Rule after the state's abortion ban took effect two months prior. (Doc. 1-2, at 1.) If HHS had truly already given approval to a policy of not counseling or referring for abortions, there would be no need for an update.[18]

Because HHS did not change its position as to what the 2021 Rule required, Tennessee has not shown that it is likely to succeed on this basis.

3. Reliance Interests

The Supreme Court has noted that a change of an official agency policy or position "that does not take

18. Tennessee also briefly argues that HHS had taken the position that states would not be required to comply with the Counseling and Referral Rule if they objected to it. (Doc. 21, at 28.) This is not the case. HHS has only ever noted that individual providers, not entire states, could qualify as objectors under applicable federal conscience laws. *See* 42 C.F.R. § 59.5(a)(5) n.2 ("Providers may separately be covered by federal statutes protecting conscience and/or civil rights."); 86 Fed. Reg. at 56153–54 (noting that "objecting individuals and grantees will not be required to counsel or refer for abortions in the Title X program in accordance with applicable federal law"). In promulgating the 2021 Rule, HHS explicitly acknowledged that the Rule may conflict with the preferred policies of some states but in no way suggested that those states would qualify as objectors. 86 Fed. Reg. at 56169. HHS instead noted that "states that object to the rule requirements or believe that there is a conflict with state law priorities are free to opt out of the federal grant program." *Id.*; *see also Ohio*, 87 F.4th at 774 n.8 (noting that, "[b]oth HHS and the States seem to agree that the States are not 'health care entities' entitled to conscience protection").

account of legitimate reliance on [a] prior interpretation . . . may be arbitrary, capricious [or] an abuse of discretion." *Smiley v. Citibank (S. Dakota), N.A.*, 517 U.S. 735, 742, 116 S. Ct. 1730, 135 L. Ed. 2d 25 (1996) (citations and quotations omitted). When the agency's official prior position has created this "reliance interest," an agency must provide "a reasoned explanation . . . for disregarding facts and circumstances that underlay or were engendered by the prior policy." *Fox*, 556 U.S. at 516. Reliance interests are only created by "longstanding [agency] policies." *Encino*, 579 U.S. at 222. Agency policies that have only existed for a short period of time do not create reliance interests that the agency is bound to consider when changing course. *Compare Breeze Smoke, LLC v. FDA*, 18 F.4th 499, 507 (6th Cir. 2021) (holding that a two-year old agency guidance "does not qualify as longstanding" agency policy) *with Encino*, 579 U.S. at 222 (finding that a reliance interest was created by an agency guidance which had existed for thirty-three years).

An agency must only consider reliance interests when departing from a previous official position. *See Regents*, 140 S. Ct. at 1913 (noting that reliance interests must be considered "when an agency changes course"). As the Court has already determined, *see supra* Section III.A.ii.c.2., HHS never changed its position as to what the 2021 Rule required. HHS therefore did not need to consider any reliance interest that Tennessee may have had. *See Smiley*, 517 U.S. at 742 (finding that reliance interests were not implicated because "we do not think that anything which can accurately be described as a change of official agency position has occurred here").

Furthermore, if HHS took the position that Tennessee could comply with the 2021 Rule by counseling and referring for only pregnancy terminations that were legal in Tennessee after its abortion ban had taken effect, it did so, at the earliest, on October 19, 2022, when Tennessee received the results of the July Review.[19] (Doc. 1-2.) Fewer than five months later on March 1, 2023, HHS notified Tennessee that it was out of compliance with the 2021 Rule. An agency position that has existed for only a few months is not "longstanding policy" that can create a reliance interest. *See Breeze Smoke*, 18 F.4th at 507.

Tennessee appears to suggest it has a fifty-year-old reliance interest in receiving Title X grants simply because it has received the funding throughout this period. (Doc. 21, at 28–29.) A reliance interest is created only by reliance on an official agency policy or position. *Encino*, 579 U.S. at 222. Tennessee would only have a reliance interest in receiving Title X grants if it had been HHS's official position or policy to always give Tennessee a grant regardless of whether it complied with HHS rules. It has never been HHS's official policy or position to simply give Tennessee money.[20]

---

19. Tennessee received this email a mere thirty-seven business days (or fifty-five calendar days) after its abortion ban went into effect. Accepting Tennessee's argument would also require the Court to ignore the fact that this same email raised concerns about the effect of the ban on the 2021 Rule and asked Tennessee to provide an update. (*See* Doc. 1-2.)

20. The Court notes that the requirement that an agency account for reliance interests in its decision making is based largely

Because Tennessee did not have a reliance interest in receiving Title X funding, Tennessee has not shown that it is likely to succeed on this basis.

iii. Notice and Comment Rulemaking

An agency action is a "legislative rule" if it "impose[s] new rights or duties and change[s] the legal status of regulated parties." *Mann Constr., Inc. v. United State*s, 27 F.4th 1138, 1143 (6th Cir. 2022) (citation omitted). Generally, an agency may only impose a legislative rule via notice-and-comment rulemaking procedures. *See Nat'l Council for Adoption v. Blinken*, 4 F.4th 106, 114, 453 U.S. App. D.C. 199 (D.C. Cir. 2021) ("[L]egislative rules require notice and comment . . . .") (citation omitted). However, an agency action that merely interprets or applies an existing regulation does not require notice-and-comment rulemaking. *See id.* (noting that interpretive rules explain "preexisting legal obligations or rights" and do not require notice and comment); *Shalala v. Guernsey Mem'l Hosp.*, 514 U.S. 87, 99, 115 S. Ct. 1232, 131 L. Ed. 2d 106 (1995) ("Interpretive rules do not require notice

---

on "the principle that agencies should provide regulated parties fair warning of the conduct a regulation prohibits or requires." *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 156, 132 S. Ct. 2156, 183 L. Ed. 2d 153 (2012) (internal quotation and citation omitted). As the Court has explained, *see supra* Section III.A.i., Tennessee has always been on notice that it must comply with agency regulations to receive Title X funding, and it was on notice that the 2021 Rule required counseling and referrals for abortions. The rationale for considering reliance interests does not apply here.

and comment . . . ."); *R/T 182, LLC v. F.A.A.*, 519 F.3d 307, 310 (6th Cir. 2008) ("We find that this is an adjudication, and therefore not subject to the notice and comment requirements of rule-making . . . .").

Tennessee argues that HHS's position that the 2021 Rule requires counseling and referrals for abortions is a new regulation which can only be promulgated via-notice-and-comment rulemaking.[21] (Doc. 21, at 29.) However, as noted above, *see supra* Section III.A.ii.c.2., the 2021 Rule has always required counseling and referrals for abortions. Simply continuing to apply the 2021 Rule does not create "new rights or duties" and cannot be considered a legislative rule requiring notice-and-comment rulemaking. *Mann*, 27 F.4th at 1143. Tennessee has the same duties it has always had under the Rule: to counsel and refer for abortions upon a woman's request. Because HHS's interpretation of the 2021 Rule did not impose new duties or obligations, Tennessee has not shown that it is likely to succeed on this basis.

In sum, the Court finds that Tennessee has no chance of success on the merits. Though the Court need not analyze any other factor, it will briefly do so. *Mich. State AFL–CIO v. Miller*, 103 F.3d 1240, 1249 (6th Cir. 1997)

---

21. Tennessee's claim here is premised on its argument that HHS's interpretation of the 2021 Rule is inconsistent with the language of the Rule itself. (Doc. 21, at 22.) Because the Court has found HHS has correctly interpreted the 2021 Rule, *see supra* Section III.A.ii.b., Tennessee's argument is without merit.

(holding that "a preliminary injunction issued where there is simply no likelihood of success on the merits must be reversed").

B. Irreparable Harm

"A plaintiff's harm from the denial of a preliminary injunction is irreparable if it is not fully compensable by monetary damages." *Overstreet v. Lexington-Fayette Urb. Cnty. Gov't*, 305 F.3d 566, 578 (6th Cir. 2002) (citing *Basicomputer Corp. v. Scott*, 973 F.2d 507, 511 (6th Cir. 1992)). The party seeking the injunction bears the burden of clearly showing that its "injury [is] both certain and immediate, not speculative or theoretical." *D.T. v. Sumner Cnty. Sch.*, 942 F.3d 324, 327 (6th Cir. 2019) (citation and internal quotations omitted).

Simply showing some degree of irreparable harm will occur is not enough to merit a preliminary injunction; a court must also determine the degree of harm. *See Kentucky v. Biden*, 57 F.4th 545, 556 (6th Cir. 2023) ("[I] n our view, the peculiarity and size of a harm affects its weight in the equitable balance."); *Mich. Coal. of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 154 (6th Cir. 1991) (noting that courts should consider "the substantiality of the injury alleged"). When the likelihood of success on the merits is low, a plaintiff must show a high degree of irreparable harm. *See Friendship Materials, Inc. v. Mich. Brick, Inc.*, 679 F.2d 100, 105 (6th Cir. 1982) ("[I]n general, the likelihood of success that need be shown . . . will vary inversely with the degree of injury the plaintiff will suffer absent an

injunction.") (citation omitted); *Ohio ex rel. Celebrezze v. Nuclear Regul. Comm'n*, 812 F.2d 288, 290 (6th Cir. 1987) ("[A] stay may be granted with either a high probability of success and some injury or vice versa.").

Here, Tennessee asserts four forms of irreparable harm: (1) the loss of Title X funding; (2) the loss of its entire Title X project; (3) harm to its reputation; and (4) harm to its "sovereign interest in limiting abortion." (Doc. 21, at 30–31.)

Tennessee first states that without an injunction it will not receive the roughly $7 million it otherwise would receive on April 1, 2024. (Doc. 21, at 30; Doc. 21-1, at 2–3.) This represents a degree of imminent and irreparable harm. *See Ohio*, 87 F.4th at 783 (finding that the loss of $1.8 million of Title X funding constituted an irreparable harm to the State of Ohio). However, in light of the Court's finding that Tennessee has very little chance of success on the merits, Tennessee must show a high degree of irreparable harm. *See Friendship Materials*, 679 F.2d at 105. This $7 million represents a very small fraction of the Federal funding that TDH receives, as Tennessee itself notes. (*See* Doc. 21, at 31 (noting that TDH currently receives Federal grants "totaling $1.4 billion").) As such, this relatively minor loss does not represent a great enough degree of irreparable harm to justify granting

injunctive relief.[22] [23] *See Kentucky*, 57 F.4th at 556. This damage, on its own or in conjunction with the other harms Tennessee asserts, is not enough to justify a preliminary injunction.

---

22. Tennessee argues that, because the Sixth Circuit found in *Ohio* that a loss of $1.8 million represented irreparable harm, its $7.1 million loss "alone suffice[s] to support relief." (Doc. 21, at 30); (Doc. 27, at 14); *Ohio*, 87 F.4th at 783. While Tennessee is correct that this loss represents a degree of irreparable harm, that is not where the analysis ends. The Court must still assess the degree of any harm and weigh it against the other preliminary-injunction factors. Unlike in *Ohio*, Tennessee has not established that it is likely to succeed on the merits of its claims. *See id* at 780. As the Sixth Circuit has explained, the degree of irreparable harm is crucial when a plaintiff has not shown a high likelihood of success on the merits. *See Celebrezze*, 812 F.2d at 290 ("[A] stay may be granted with either a high probability of success and some injury or vice versa."). Furthermore, though the court in *Ohio* did not grapple with the size of the monetary harm, it also did not purport to overrule any of its binding precedent requiring courts to weigh the degree of irreparable harm. *See Ohio*, 87 F.4th at 780–83.

23. Tennessee also notes that it will lose "sizable discounts under the 340B drug-purchase program," which are only available to Title X grantees. (Doc. 21, at 30; Doc. 21-1, at 4.) While Tennessee has established that this harm is likely to occur, Tennessee bears the burden of establishing the size of this monetary harm. *See Hargett*, 2 F.4th at 554 ("The party seeking a preliminary injunction bears the burden of justifying such relief."). Tennessee could surely assess how valuable these discounts have been in recent years, but it has not provided this information to the Court. The Court therefore cannot meaningfully weigh this harm in favor of Tennessee, even crediting Tennessee's unsupported claim that these discounts are "sizable." *See Ohio*, 87 F.4th at 783 (limiting injunctive relief to the State of Ohio because "Ohio is the only plaintiff-State that provided the requisite facts and affidavits supporting the States' assertion that the 2021 Rule would cause them to suffer the competition-based harm").

Tennessee next claims that without a preliminary injunction it may lose "[its] Title X program entirely."[24] (Doc. 21, at 30.) This speculative loss does not establish irreparable injury. *See D.T.*, 942 F.3d at 327 (requiring that an irreparable harm not be speculative); *Griepentrog*, 945 F.2d at 154 ("[T]he harm alleged must be both certain and immediate, rather than speculative or theoretical."). The Tennessee General Assembly is providing Tennessee's Title X project with the $7 million it would have otherwise received from HHS. (Doc. 21-1, at 3.) While Tennessee claims that "[c]ontinued state funding for the program is not guaranteed," it presents no evidence that the legislature is considering cutting funding for the Title X project. (Doc. 21, at 31.) To the contrary, the legislature has designated its appropriation as "recurring." (Doc. 21-1, at 3.)

Tennessee next claims that it will suffer reputational harm if HHS reports Tennessee's violation of the terms of its grant to the Federal Awardee Performance and Integrity Information System ("FAPIIS"). (Doc. 21, at 31.) Tennessee argues that being reported could in turn affect its ability to obtain future federal grants. (*Id.*) Tennessee again fails to provide any evidence suggesting this harm is likely to occur, or the extent of the harm if it were to occur. For one, it is not entirely clear that HHS intends to report

24. Tennessee's Title X project received approximately $18.6 million in funding from April 1, 2022 to March 31, 2023. (Doc. 1-1, at 3.) The HHS grant represented $7.1 million of that funding. While a loss of this funding would be significant, Tennessee has not provided evidence that the entire program will collapse if the federal portion of funding is lost.

Tennessee.[25] More importantly, however, Tennessee has provided no evidence as to how being reported would affect the grants it currently receives or will receive in the future. While Tennessee cites the monetary value of all the federal grants TDH receives, it provides no evidence as to what extent these grants could be affected, if at all. (*Id.*) Because Tennessee has failed to provide any such evidence, Tennessee's theory of reputational injury is too speculative. *See Ohio*, 87 F.4th at 784 (finding that the plaintiffs' inability to provide the "requisite facts and affidavits" supporting their theory of [reputational] harm rendered their injury too speculative).

Finally, Tennessee claims that "HHS's interference in Tennessee's sovereign interest in limiting abortion to promote fetal life constitutes a form of irreparable injury." (Doc. 21, at 31 (citation and quotations omitted).)

---

25. The parties dispute how likely it is that Tennessee will be reported. Defendants argue that there is good reason to believe that Tennessee will not be reported. (Doc. 26, at 30.) Nearly a year has passed since HHS found Tennessee to be out of compliance, and HHS has still not reported Tennessee. (*Id.*) Furthermore, HHS's Chief Grants Management Officer informed Tennessee in May 2023 that "[a]t this time, [HHS] do[es] not intend to report any concerns regarding the award to [FAPIIS]." (Doc. 1-17, at 1.) There is no evidence that HHS's position has changed. However, HHS regulations state that "[w]hen an HHS awarding agency terminates a Federal award prior to the end of the period of performance due to the non-Federal entity's material failure to comply with the Federal award terms and conditions, the HHS awarding agency *must* report the termination to . . . [FAPIIS]." 45 C.F.R. § 75.372(b) (emphasis added). HHS's position appears to be in conflict with its own regulations.

Tennessee does not cite binding precedent that supports its claim that impairing a state's generalized "sovereign interest" constitutes a form of irreparable harm.[26] The Sixth Circuit opinion that Tennessee primarily relies upon, *Priorities USA v. Nessel*, 860 F. App'x 419, 423 (6th Cir. 2021), simply holds that preventing a state from "passing and enforcing its laws" represents a form of irreparable harm but says nothing about "sovereign interests" or a state's policy preferences more generally. *See Thompson v. DeWine*, 976 F.3d 610, 619 (6th Cir. 2020) ("Any time a State is enjoined by a court from *effectuating statutes* enacted by representatives of its people, it suffers a form of irreparable injury.") (emphasis added) (citation and internal quotations omitted). Tennessee does not argue that HHS has prevented it from passing and enforcing its own laws (Doc. 21, at 31; Doc. 27, at 14), and it is clear that Tennessee's abortion ban and the 2021 Rule are not

26. Tennessee does point to *Tennessee v. United States Department of Education*, 615 F. Supp. 3d 807 (E.D. Tenn. 2022) to support its argument. (Doc. 27, at 15.) However, the court in *Tennessee* found "Plaintiffs suffered an immediate injury to their sovereign interests . . . [because] Defendants' guidance and several of Plaintiffs' statutes conflict." *Tennessee*, 615 F. Supp. 3d at 841. This begs the fundamental question whether, in general, a state that has subjected itself to the U.S. Constitution's Supremacy Clause can be irreparably harmed, for the purposes of Federal Rule of Civil Procedure 65, by the federal government's insistence that the state abide by otherwise valid federal law. Even assuming that a conflict between a federal regulation and a state statute represents an irreparable injury to a state's "sovereign interest," there is no existent conflict here between Tennessee's abortion ban and the 2021 Rule. Therefore, the Court need not decide whether Tennessee's assertion of irreparable harm must necessarily rise and fall with the likelihood of success on the merits.

in conflict. *See supra* Section III.A.ii.b. It is not impossible for Tennessee to enforce its statute banning abortion while also following the 2021 Rule. It merely prefers not to.[27] Furthermore, even if a generalized harm to state sovereignty represented a form of irreparable injury, the Supreme Court has noted that "[r]equiring States to honor the obligations voluntarily assumed as a condition of federal funding before recognizing their ownership of funds simply does not intrude on their sovereignty." *Bell v. New Jersey*, 461 U.S. 773, 790, 103 S. Ct. 2187, 76 L. Ed. 2d 312 (1983). Even if HHS regulations and Tennessee law were in conflict, there would therefore be no irreparable harm.

Tennessee has established it will suffer only a small degree of irreparable harm. This is not enough to justify granting an injunction without a strong showing of likelihood of success on the merits. Tennessee has not made this showing. *See Griepentrog*, 945 F.2d at 153–54 ("[E]ven if a movant demonstrates irreparable harm that decidedly outweighs any potential harm to the defendant if a stay is granted, he is still required to show, at a minimum, serious questions going to the merits.") (citation and internal quotations omitted).

---

27. Tennessee asserts that it directed TDH to stop counseling and referring for abortions in order to "adhere to the State's changed abortion landscape." (Doc. 21, at 13.) Tennessee does not explain what this vague phrase means. And Tennessee never explains why it is impossible for a doctor to comply with Tennessee's abortion ban and the 2021 Rule. Tennessee instead suggests that the state now seeks to limit women's access to abortion, even outside the state.

C. HARM TO OTHERS AND PUBLIC INTEREST

The third and fourth factors of the preliminary-injunction analysis—harm to others and the public interest—"merge when the Government is the opposing party." *Nken v. Holder*, 556 U.S. 418, 435, 129 S. Ct. 1749, 173 L. Ed. 2d 550 (2009). It is in the public interest to enforce legitimate laws and regulations that implicate a matter of public importance. *See Priorities USA*, 860 F. App'x at 423 ("[T]he public interest necessarily weighs against enjoining a duly enacted statute, and our assessment that the appellants will likely prevail on the merits tips the public-interest factor further in their favor."); *Kentucky v. Biden*, 23 F.4th 585, 612 (6th Cir. 2022) ("[T]he public's true interest lies in the correct application of the law.") (citation omitted).

Both parties agree that the public interest lies in the correct application of Title X and its regulations. (*See* Doc. 21, at 32; Doc. 26, at 31.) Because the Court has determined that HHS's actions were lawful, this factor favors Defendants.[28]

---

28. Tennessee argues that HHS's actions are not in the public interest, because its refusal to fund Tennessee's Title X grant will "strip[] untold thousands of needy Tennesseans of their access to vital family planning services." (Doc. 21, at 32.) As noted above, this harm is highly speculative. Moreover, HHS has determined that it is in the public interest that Title X patients receive medically accurate information from their doctor and has further determined that this information leads to better health outcomes. *See generally* 86 Fed. Reg. 56144. Unlike Tennessee, HHS has presented evidence indicating that a Gag Rule, such as the one Tennessee is attempting to impose on a state level, has negative health consequences. *Id.* This too weighs in favor of Defendants' position.

IV. CONCLUSION

Tennessee had two options: comply with the 2021 Rule and receive the Title X grant money or choose not to comply and forego the money. It made its choice, knowingly and voluntarily. It has no basis to force funding from HHS without meeting the obligations upon which the funding is conditioned. For the reasons stated above, Tennessee's motion for a preliminary injunction (Doc. 20) is **DENIED**.

SO ORDERED.

/s/ Travis R. McDonough
TRAVIS R. MCDONOUGH
UNITED STATES DISTRICT JUDGE

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 24-5220

STATE OF TENNESSEE,

Plaintiff-Appellant,

v.

XAVIER BECERRA, IN HIS OFFICIAL CAPACITY AS SECRETARY OF HEALTH AND HUMAN SERVICES; UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; JESSICA S. MARCELLA, IN HER OFFICIAL CAPACITY AS DEPUTY ASSISTANT SECRETARY FOR POPULATION AFFAIRS; OFFICE OF POPULATION AFFAIRS,

Defendants-Appellees.

Filed May 9, 2025

ORDER

BEFORE: GIBBONS, KETHLEDGE, and DAVIS, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

APPENDIX E

United States Constitution
Article I, Section 8, Clause 1

The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States....

APPENDIX F

42 U.S.C. § 300(a)

The Secretary is authorized to make grants to and enter into contracts with public or nonprofit private entities to assist in the establishment and operation of voluntary family planning projects which shall offer a broad range of acceptable and effective family planning methods and services (including natural family planning methods, infertility services, and services for adolescents). To the extent practical, entities which receive grants or contracts under this subsection shall encourage familiy[1] participation in projects assisted under this subsection.

1. So in original. Probably should be "family".

APPENDIX G

42 U.S.C. § 300a-4(a)–(b)

Grants and contracts made under this subchapter shall be made in accordance with such regulations as the Secretary may promulgate....

Grants under this subchapter shall be payable in such installments and subject to such conditions as the Secretary may determine to be appropriate to assure that such grants will be effectively utilized for the purposes for which made.

APPENDIX H

42 U.S.C. § 300a-6

None of the funds appropriated under this subchapter shall be used in programs where abortion is a method of family planning.

APPENDIX I

DEPARTMENT OF HEALTH & HUMAN SERVICES Office of the Secretary

Office of the Assistant Secretary for Health
Grants & Acquisitions Management
Rockville, MD 20852

May 27, 2025

To: Yoshie Darnall (yoshie.damall@tn.gov)
Project Director/Principal Investigator

Dr. Ralph Alvarado (ralph.alvarado@tn.gov)
Authorized Official

Tennessee Department of Health
710 James Robertson Pkwy
64 Andrew Johnson Tower
Family Health and Wellness
Nashville, TN 37243

Re: Clarification Regarding Award# 6
FPHPA006553-01-05

This letter provides clarification regarding your recent Title X continuation award for the budget period 4/1/2025 through 3/31/2026. The budget period listed in Box 19 of your award (4/01/2022-03/31/2026) is inaccurate. As stated in the Remarks (p. 3), the correct budget period for this award is "4/1/2025 through 3/31/202[6]." As also noted in the Remarks, Box 19 is inaccurate because of

technical limitations in the computer system in reinstating the award.

The Remarks also make clear that the amount awarded represents only partial funding for the fourth year of the performance period (Box 26). Due to the OMB apportionment process during the FY 25 continuing resolutions, all Title X grantees are receiving full-year funding for their continuation awards in two rounds of partial funding. Along these lines, subject to appropriations, HHS intends to restore Tennessee's grant at approximately full funding prospectively. Tennessee DOH was awarded $3,111,621 for an initial round of partial funding for the budget period 4/1/2025 through 3/31/2026. HHS plans to award a second round of partial funding of $3,526,503, which, combined with the first round of partial funding, will provide full year funding for Tennessee's grant for a total of $6,638,124. Although this amount is slightly lower than the $7,108,750 million awarded in March 2022, it is commensurate with a slight decrease in funding across the board for all Title X grants due to an overall lower amount of funding available for all Title X service grants. Due to appropriations laws, HHS will not award funding for previous fiscal years' budget periods.

On page 3, under Remarks, the revised Notice of Award references a "settlement agreement" with the state. HHS confirms that no settlement has been entered into, and language in the grant award referencing a "settlement agreement" was thus premature and inaccurate. We hope the prospective funding being restored and agreement by Tennessee to receive the funding will lead to the case being dismissed.

Finally, the Notice of Award states: "In accepting this award, you stipulate that the award and any activities thereunder are in compliance with the requirements regarding the provision of family planning services in the statute . . . and the implementing regulations . . ." (Special Terms and Requirements 2.A). Tennessee is one of only two states to have lost funding for failure to comply with the Title X 2021 regulations requiring counseling and referral for abortion, 42 CFR § 59.5(a)(5). The Department is declining to enforce this provision against the state, and you may rely on this letter to that effect.

Respectfully,

ERIC C. WEST-S

Digitally signed by ERIC C. WEST-S
Date: 2025.05.27 13:37:53 -04'00'

Eric West
Acting Chief Grants Management Officer, OASH

AMY L. MARGOLIS-S

Digitally signed by AMY L. MARGOLIS-S
Date: 2025.05.27 09:49:29 -04'00'

Amy Margolis
Deputy Director, OP

CC

Tisha Reed, Federal Project Officer, OPA
Robin Fuller, Grants Management Specialist, OASH

Attachments: Notice of Award

APPENDIX J

DEPARTMENT OF HEALTH AND HUMAN SERVICES
Office of the Secretary

Notice of Award
Award# 6 FPBPA006553-01-05
FAIN# FPBPA006553
Federal Award Date: 03/31/2025

Recipient Information

1. **Recipient Name**

   TENNESSEE DEPARTMENT OF HEALTH
   710 James Robertson Pkwy 64 Andrew Johnson Tower
   Family Health and Wellness
   Nashville, TN 37243-0001
   [NO DATA]

2. **Congressional District of Recipient**

   00

3. **Payment System Identifier (ID)** [redacted]
4. **Employer Identification Number (EIN)**

   [redacted]

5. **Data Universal Numbering System (DUNS)**

   172636268

6. Recipient's Unique Entity Identifier (UEI)

EA5JN3P55GR1

7. Project Director or Principal Investigator

Yoshie Darnall
yoshie.darnall@tn.gov
615-770-1177

8. Authorized Official

Dr. Ralph Alvarado
Commissioner
Ralph.Alvarado@tn.gov
615-532-6942

Federal Agency Information

OASH Grants and Acquisitions Management Division

9. Awarding Agency Contact Information

Miss Robin Fuller
Senior Grants Management Specialist
robin.fuller@hhs.gov
240-453-8830

10. Program Official Contact Information

Haley Johnston
Adolescent Pregnancy Prevention Specialist
haley.johnston@hhs.gov
202-205-2373

Federal Award Information

11. Award Number

6 FPHPA006553-01-05

12. Unique Federal Award Identification Number (FAIN)

FPHPA006553

13. Statutory Authority

42 U.S.C. § 300 (Section 1001 of the Public Health Service Act)

14. Federal Award Project Title

Title X Family Planning Services

15. Assistance Listing Number

93.217

16. Assistance Listing Program Title

Family Planning Services

17. Award Action Type

NOA Revision with 424

18. Is the Award R&D?

No

Summary Federal Award Financial Information	
19. Budget Period Start Date – End Date	
04/01/2022 – 03/31/2026	
20. Total Amount of Federal Funds Obligated by this Action	$3,111,621.00
20a. Direct Cost Amount	$8,505,871.00
20b. Indirect Cost Amount	($250,000.00)
21. Authorized Carryover	$0.00
22. Offset	$0.00
23. Total Amount of Federal Funds Obligated this budget period	$7,108,750.00
24. Total Approved Cost Sharing or Matching, where applicable	$0.00
25. Total Federal and Non-Federal Approved this Budget Period	$10,220,371.00
26. Period of Performance Start Date – End Date	
04/01/2022 –03/31/2027	
27. Total Amount of the Federal Award including Approved Cost Sharing or Matching this Period of Performance	$10,220,371.00

28. Authorized Treatment of Program Income

OTHER (See REMARKS)

29. Grants Management Officer – Signature

Dr. Scott Moore
Grants Management Officer

30. Remarks

This award is being restored pursuant to a settlement agreement with the recipient. The amount awarded represents partial funding for the Budget Period 4/1/2025 through 3/31/202 (this differs from Box 19 because of technical limitations in reinstating an award). Final funding level will be determined after consideration of such factors as your progress and management practices and the availability of funds. In all cases, continuation awards require a determination by HHS that continued funding is in the best interest of the government. (42 CFR 59.8(b)).An updated detailed workplan and budget justifications for the budget period outlining all planned activities is due April 15, 2025.

31. Assistance Type

Project Grant

32. Type of Award

Service

33. Approved Budget (Excludes Direct Assistance)	
I. Financial Assistance from the Federal Awarding Agency Only	
II. Total project costs including grant funds and all other financial participation	
a. Salaries and Wages	$1,000,000.00
b. Fringe Benefits	$550,000.00
c. Total Personnel Costs	$1,550,000.00
d. Equipment	$0.00
e. Supplies	$50,000.00
f. Travel	$50,000.00
g. Construction	$0.00
h. Other	$3,997,129.00
i. Contractual	$4,573,242.00
j. TOTAL DIRECT COSTS	$10,220,371.00
k. INDIRECT COSTS	$0.00
l. TOTAL APPROVED BUDGET	$10,220,371.00
m. Federal Share	$10,220,371.00
n. Non-Federal Share	$0.00

34. Accounting Classification Codes

FY-ACCOUNT NO	DOCUMENT NO.	ADMINISTRATIVE CODE	OBJECT CLASS
5-3980663	FPHPA6553A	FPH70	41.51

ASSISTANCE LISTING	AMT ACTION FINANCIAL ASSISTANCE	APPROPRIATION
93.217	$3,111,621.00	75-25-0359

35. Terms And Conditions

SPECIAL TERMS AND REQUIREMENTS

1. ***Replacement of Prior Terms, Conditions, and Requirements.*** Terms, conditions, and requirements have been updated to align with the HHS transition from 45 CFR part 75 to 2 CFR part 200 as described in the Interim Final Rule published October 2, 2024, in the Federal Register. Selected provisions of 2 CFR part 200 as described in Standard Term 4 below replaced their 45 CFR part 75 counterparts effective October 1, 2024. HHS will replace 45 CFR part 75 in full with 2 CFR part 200 and 2 CFR part 300 effective October 1, 2025.

   Effective with the start of the budget period on this Notice of Award, all prior terms, conditions, and requirements are removed and replaced with the revised terms, conditions, and requirements in this Notice of Award to align with the phased transition to 2 CFR part 200 and 2 CFR part 300 as described in the Interim Final Rule.

2. ***Title X Family Planning Services Program-Specific Requirements.***

   A. Applicability of Program Statute and Regulations.

   In accepting this award, you stipulate that the award and any activities thereunder are in compliance with the requirements regarding the provision of family planning services in the statute (Title X of the Public

Health Service (PHS) Act, 42 USC § 300 et seq.) and the implementing regulations (42 CFR Part 59, Subpart A). Pursuant to the Title X statute and regulations, your family planning project is prohibited from providing abortion as a method of family planning (42 USC 300a-6 (Section 1008, PHS Act); 42 CFR 59.5(a)(5)). In addition, sterilization of clients as part of the Title X program must be consistent with 42 CFR Part 50, Subpart B.

Title X Priorities include all the legal requirements covered within the Title X statute, regulations, and legislative mandates. This award is subject to all provisions of those statutes, regulations, and legislative mandates currently in effect now or implemented during the period of performance as of their effectiveness date.

B. Use of Program Income.

Program income funds (45 CFR 75.307 to be replaced by 2 CFR 200.307 October 1, 2025) must be used for the purposes of this award during the period of performance. Line 28 "Authorized Treatment of Program Income" on this Notice of Award (NoA) indicates that program income must be used according to "E. Other (See Remarks)."

For Title X Family Planning Service grants, "Other" means you may apply program income toward your cost sharing requirement on Line 24. Thus, your cost sharing obligation toward the non-federal share of the

scope of project may be met through a combination of program income (fees, premiums, third-party reimbursements which the project may reasonably expect to receive), as well as State, local and other operational funding, as defined in your approved application and approved budget.

Program income may be applied toward the cost share requirement until the commitment on Line 24 is met. Program income not applied toward cost share commitment must be used to further the project objectives using the additive method (45 CFR § 75.307 (e) to be replaced by 2 CFR 200.307(b) on October 1, 2025). The program income amount applied to cost sharing must be reported under the heading "Recipient Share" on the Federal Financial Report (FFR, see Reporting) as part of your non-federal share of the project. Program income not applied to meeting the cost share commitment must be reported under "Program Income" on the FFR.

Regardless of whether you apply program income to meeting your cost sharing commitment, the amount of the Federal funds awarded stays the same.

C. Service Site Database.

In order to maintain an accurate record of current Title X service sites, you are required to tell the Office of Population Affairs (OPA) of any deletions, additions, or changes to the name, location, street address, email address, services provided on-site,

and contact information for service sites supported as part of this award. OPA's database will also be used to verify eligibility for 340B program registration and recertification. You must enter your changes to the Title X database within 30 days from the official approval of the change at https://www.opa-fpclinicdb.com/. This does not replace the prior approval requirement under HHS grants policy for changes in project scope, including clinic closures.

If the addition or deletion of a service site results in a change in the service area covered by the project, this would be a change in scope requiring prior approval by the grants management officer.

D. 340B Program Participation.

If you or your sub-recipient(s) enrolls in the 340B Program, you must comply with all 340B Program requirements. You may be subject to audit at any time regarding 340B Program compliance. 340B Program requirements are available at https://www.hrsa.gov/opa/program-requirements.

E. Family Planning Annual Report (FPAR).

You must collect and report data on an annual basis using FPAR. You must collect all FPAR data and report to OPA on an annual basis (OMB# No. 0990-0479, expires 02/28/2025, renewal pending).

F. Program Evaluation Participation.

If selected, you must participate in OPA research and evaluation activities and must agree to follow all evaluation protocols established by OPA or its designee.

G. National Grantee Meetings.

The Title X National Grantee Meeting is typically held in late Summer or early Fall of odd number years in the Washington, DC metro area. You are encouraged to send up to three individuals to the meeting. This meeting is for individuals from the grantee organization only. Travel expenses are allowable consistent with 45 CFR part 75, subpart E (to be replaced by 2 CFR part 200, subpart E October 1, 2025).

3. ***Grants Policy Statement October 2024 Update.*** HHS published the updated Grants Policy Statement (GPS) with an effective date of October 1, 2024. The updated GPS applies to all OASH awards as of its effective date. The GPS update does not apply retroactively to actions or activities prior to its effective date.
4. ***Budget Period and Continuation Awards***. This award is for the budget period noted on line 19. Continuation awards may be awarded for up to 12 months at a time, ending at the project period end date on line 26. Costs for activities during a budget period should be liquidated within 90 days of the end of that budget period.

As the recipient, you must submit a continuation application for review each budget period for a continuation award. This will typically consist of an updated detailed workplan for the next budget period and a detailed budget with justification. Your performance progress reports (PPR) will be considered along with the continuation application. The program officer will provide through Grant Solutions the continuation application instructions at least three months before the end of the current budget period. OASH must approve that application for you to receive continued support for that year.

Pursuant to 42 CFR 59.8, decisions regarding continuation awards and the funding level of such awards will be made after consideration of such factors as project progress and management practices, and the availability of funds. In all cases, continuation awards require a determination by HHS that continued funding is in the best interest of the government.

5. ***Proposed Vehicle Purchases Require Further Justification Before Approval*. No mobile health unit(s) or other vehicle(s), even if proposed in the application for this award, may be purchased with award funds without prior written approval from the grant management officer. Requests for approval of such purchases must include a justification with a cost-benefit analysis comparing, at a minimum, purchase and lease options. Such requests must be submitted as a Budget Revision Amendment in Grant Solutions.**

Any vehicle purchases approved will be subject to the applicable equipment disposition requirements in either 45 CFR 75.439 (before October 1, 2025) or 2 CFR 200.313 (on or after October 1, 2025) using the definition of equipment in 2 CFR 200.1.

STANDARD TERMS

1. ***Accepting the Award.*** You accept the terms and conditions of this award in their entirety by drawing or otherwise obtaining funds for the award from the grant payment system (currently the HHS Payment Management System (PMS)).

   We expect that you will make your first drawdown of funds within the first 30-days of the budget period. If you have not drawn any funds within that period, we may contact you to obtain your written confirmation of your acceptance of the award as issued or your declination of the award.

   By accepting this award, you agree to the prudent management of all expenditures and actions affecting the award, including the monitoring of all subrecipients. You also agree to comply with all applicable federal requirements for grants and cooperative agreements and all terms, conditions, and requirements outlined in this Notice of Award.

2. ***Recipient Responsibilities.*** As the recipient of this award, you have the full responsibility for the conduct of the project or activity supported under

this award and for adherence to all award terms and conditions, statutory, regulatory, or policy requirements applicable to grants and cooperative agreements as of their effective date. The approved project or activity is described in the application for this award subject to any OASH grant management officer (GMO) approved amendments. Approval of the project does not waive or negate any statutory, regulatory, or policy requirements applicable to federal grants and cooperative agreements.

We encourage you to seek the advice and opinion of the Federal Project Officer (FPO)(Box 10) and Grants Management Specialist (GMS)(Box 9) on special problems that may arise. However, such advice does not diminish your responsibility as the recipient for making sound programmatic and administrative judgments and does not imply that the responsibility for operating decisions has shifted to HHS, OASH, or the program office.

Failure to meet these responsibilities and maintain compliance with requirements may result in an administrative action such as disallowance of funds, drawdown restriction, suspension, or termination. Should OASH decide to terminate the award prior to the end of the period of performance based on a material failure to comply with this condition of the award, OASH must report the termination to the government-wide integrity and performance system (now in SAM.gov under responsibility/qualification information).

3. ***Compliance with Requirements.*** Specifically, you must comply with:

   - All terms and conditions contained in this Notice of Award.
   - Award policy terms and conditions contained in the applicable Department of Health and Human Services (HHS) Grant Policy Statement (GPS) and its subsequent updates as of their effective date.
   - All requirements imposed by applicable program statutes and regulations, and HHS grant administration regulations, including any updates or revisions to these requirements as of their effective date. This includes compliance with all applicable statutes and regulations listed in the Certifications and Representations of your SAM registration, which must be active during the award.
   - Requirements or limitations in any applicable appropriations acts as of their effective date, (e.g., Salary Limitation).

4. ***Transition from 45 CFR part 75 to 2 CFR part 200.*** In October 2024, HHS published in the Federal Register the Interim Final Rule (IFR) for its phased implementation of 2 CFR part 200 and eventual rescinding of 45 CFR part 75. HHS will retain certain HHS modifications in 2 CFR part 300.

   HHS intends to adopt 2 CFR part 200 in full effective October 1, 2025. At that time 2 CFR part 200 will apply

to this award in full. Several provisions of 2 CFR part 200 became effective on October 1, 2024. The following replacement provisions are effective October 1, 2024.

2 CFR part 200 citation	**Replaces 45 CFR part 75 citation**
2 CFR § 200.1. Definitions, *"Modified Total Direct Cost"*	45 CFR § 75.2. Definitions, *"Modified Total Direct Cost"*
2 CFR § 200.1. Definitions, *"Equipment"*	45 CFR § 75.2. Definitions, *"Equipment"*
2 CFR § 200.1. Definitions, *"Supplies"*	45 CFR § 75.2. Definitions, *"Supplies"*
2 CFR § 200.313(e). Equipment, *Disposition*	45 CFR § 75.320(e). Equipment, *Disposition*
2 CFR § 200.314(a). Supplies	45 CFR § 75.321(a). Supplies
2 CFR § 200.320. Procurement methods	45 CFR § 75.329. Procurement procedures
2 CFR § 200.333. Fixed amount subawards	45 CFR § 75.353. Fixed amount subawards
2 CFR § 200.344. Closeout	45 CFR § 75.381. Closeout
2 CFR § 200.414(f). Indirect costs, *De Minimis Rate*	45 CFR § 75.414(f). Indirect (F&A) costs, (f)
2 CFR § 200.501. Audit requirements	45 CFR § 75.501. Audit requirements

5. ***Use of Grant Solutions.*** Grant Solutions is our official web-based grants management system. OASH will use it to manage your grant throughout its life cycle

except for financial activities. Use of the HHS Payment Management System (PMS) is required for financial functions such as drawing award funds and submitting FFRs. All award related requests and submissions must be submitted through Grant Solutions unless otherwise directed. See Special Terms and Conditions for any exceptions such as a programmatic data collection system approved by OMB that are outside of the Grant Solutions platform.

Contact Grant Solutions User Support to establish an account if you do not have one. Your Grants Management Specialist (Box 9) may create a Grant Solutions account for your Authorized Official and Program Director/Principal Investigator roles only. Financial Officer accounts may only be established by GrantSolutions staff. All account requests must be signed by the prospective user and their supervisor or other authorized organization official.

Grant Solutions is a role-based system in which a user's role determines the permissions and functions available. As an organization, you may assign additional personnel to the roles you chose. You bear all risk and responsibility for the roles you assign to those individuals. Multiple individuals may have the same role. For example, more than one person may be assigned a PD/PI role in Grant Solutions to perform functions such as uploading reports and other documents requiring that level of access. However, assigning someone a role does not constitute a change in PD/PI that otherwise requires Grants Management Officer prior approval.

OASH recognizes only the named AO and PD/PI on the Notice of Award for official purposes such as requesting amendments or changes to the award.

6. ***Prior Approval Requirements.*** Certain changes to the project, its assigned personnel, and all terms and conditions of this award require the prior written approval from the Grants Management Officer (GMO). Requests for such approvals or any other modification of the terms of this Notice of Award (NOA) must be submitted as an Amendment Request in Grant Solutions.

   Your Authorizing Official (AO)(Box 8) and/or Project Director/Principal Investigator (PD/PI)(Box 7) must sign all amendment requests for actions requiring prior approval. A request to change the PD/PI requires the signature of the AO.

   No expanded authorities are granted under this award. Prior approval is required for 45 CFR 75.308(c)-(d) (to be replaced on October 1, 2025 by 2 CFR 200.308(f)-(g)):

   - Change in the scope or an objective of the project (even if there is no associated budget revision).
   - Change in PD/PI or PD/PI's disengagement from the project for more than three months, or a 25 percent reduction in time and effort devoted to the project.
   - Change in key personnel (including employees and contractors).

- Inclusion of costs that require prior approval in subpart E, Cost Principles.
- Transfer of funds budgeted for participant support costs to other budget categories.
- Subaward activities not proposed in the application and approved. A change of subrecipient requires prior approval if there is a transfer of substantive project effort. This requirement does not apply to procurement transactions for goods and services.
- Changes in the total approved cost-sharing amount.
- Additional Federal funds to complete the project.
- No-cost extension (meaning, an extension of time that does not require the obligation of additional Federal funds) of the period of performance.
- Carry-over of unobligated balance (UOB) from a prior budget period.
- Transfer of funds among direct cost categories (e.g., personnel, travel, and supplies) or programs, functions, and activities when the Federal share of the award exceeds the simplified acquisition threshold (currently $250,000) and the cumulative amount of a transfer exceeds or is expected to exceed 10 percent of the total budget, including cost share, as last approved by the Federal agency.

Prior approval is effective when the GMO issues a new NOA. No other signature will constitute a valid approval of the request. If you act in reliance on a response from any other federal officials or individuals,

you do so at your own risk. Such responses will not be considered binding by or upon any OASH office or HHS component. Acting without prior approval may lead to cost disallowance or other corrective action. The GMO is not obligated to provide retroactive approvals. You should expect prior approval request decision within 30 days of submission of a complete request.

Notice Requirements. Any notices or other correspondence not relating to a prior approval item should be uploaded to Grant Messages within Grant Solutions. Items that require notice only and not prior approval include a change in your AO, address, phone, or email address.

If your AO has changed, an official with the authority to designate a representative must provide notice of the change in AO on letterhead with a signature.

All correspondence submitted outside of Grant Solutions must include the Federal Award Identification Number (FAIN) and signature of the AO and/or the PD/PI to avoid delays.

7. ***Standards of Conduct and Conflicts of Interest.*** Per the HHS Grant Policy Statement (GPS), you must maintain written standards of conduct covering conflicts of interest. Individuals affiliated with a recipient organization cannot participate in the selection, award, or administration of a contract supported by a federal award if they have a real or apparent conflict of interest with:

- Employees
- Officers
- Agents
- Immediate family members, spouses, or partners
- Potential employer

These individuals are prohibited from soliciting gratuities, favors, or anything of monetary value from subrecipients. However, you may set standards for situations where financial interest is not substantial or the gift is an unsolicited item of insignificant value. These standards of conduct must be applied for violations of the standards by officers, employees, or agents of the organization.

If your organization is part of a parent, affiliate, or subsidiary organization that is not a state, local government, or Indian tribe, you are required to have an organizational conflict of interest policy.

8. ***Intangible Property and Data Rights.*** Intellectual property and data you produce or collect with award funds are subject to the following:

    1. Data (45 CFR 75.322(d) to be replaced by 2 CFR 200.315(d) on October 1, 2025). The federal government has the right to: 1) Obtain, reproduce, publish, or otherwise use the data produced under this award; and 2) Authorize others to receive, reproduce, publish, or otherwise use such data for federal purposes.

2. Copyright (45 CFR 75.322(b) to be replaced by 2 CFR 200.315(b) on October 1, 2025). You may copyright any work that is subject to copyright and was developed, or for which ownership was acquired, under a federal award. The HHS awarding agency reserves a royalty-free, nonexclusive and irrevocable right to reproduce, publish, or otherwise use the work for Federal purposes, and to authorize others to do so.

3. Patents and Inventions (45 CFR 75.322(c) to be replaced by 2 CFR 200.315(c) on October 1, 2025). You are subject to applicable regulations governing patents and inventions, including government- wide regulations issued by the Department of Commerce at 37 CFR part 401.

9. ***Acknowledgement of Federal Grant Support.*** When issuing statements, press releases, publications, requests for proposal, bid solicitations and other documents—such as tool-kits, resource guides, websites, and presentations (hereafter "statements")—describing the projects or programs funded in whole or in part with U.S. Department of Health and Human Services (HHS) federal funds, **you must clearly state**:

   1. the percentage and dollar amount of the total costs of the program or project funded with federal money; and,

   2. the percentage and dollar amount of the total costs of the project or program funded by non-governmental sources.

The federal award total must reflect total costs (direct and indirect) for all authorized funds for the total award up to the time of the public statement.

When issuing statements resulting from activities supported by this award, you must include an acknowledgement. Whenever possible, your acknowledgement should include the Federal Award Identification Number (FAIN) that appears on line 12 of this NOA.

The Grants Policy Statement (GPS) has sample acknowledgement statements for two different cases: 1) when the project is 100% funded through this award; or 2) when the project is funded partially by this award and with other funding sources, including any cost share.

For documents with space limitations (e.g., postcards) you may instead provide link or QR code that will lead to a compliant acknowledgement statement.

If you plan to issue a press release concerning the outcome of activities supported by this financial assistance, you should notify the federal project officer and the grants management officer in advance with sufficient time to allow for coordination.

10. ***Project Participants or Beneficiaries Eligibility.*** You must not restrict participation in the project on the basis of race, color, national origin, religion, sex, disability, age or another protected characteristic.

11. ***Travel costs***. The allowability of travel costs is subject to 45 CFR § 75.474 (to be replaced by 2 CFR 200.475 on October 1, 2025) This Notice of Award approves travel costs for award related purposes that are described in the application or approved amendment requests. Generally, you should follow your organization's written travel policy subject to any exclusions or prohibitions on costs in 45 CFR part 75, subpart E (to be replaced by 2 CFR part 200, subpart E on October 1, 2025).

    This Notice of Award does not provide approval for international travel (i.e., travel outside the 50 United States and its territories and possessions described in the application). OASH requires review and prior approval of international travel. You should allow sufficient time for program and grants management review of the request, typically 30 days prior to the obligation of funds for the travel. Travel must be reasonable and necessary to the conduct of the project.

    The Fly America Act applies to this award. (49 USC 40118 as implemented by 41 CFR 301-10.131 – 301-10.143).

12. ***Promoting Efficient Spending.*** Any activities approved by this award are subject to the HHS Policy on Promoting Efficient Spending and its associated attachments.

    • Attachment 1: **Use of Appropriated Funds for Conferences and Meetings**.

- Attachment 2: **Use of Appropriated Funds for Food**.

- Attachment 3: **Use of Appropriated Funds for Promotional Items**

- Attachment 4: **Use of Appropriated Funds for Printing and Publications**

13. ***Indirect Costs.*** Indirect costs are allowable subject to 45 CFR 75.414 (to be replaced by 2 CFR 200.414 on October 1, 2025). Indirect costs claimed may not exceed the lower of either an amount equal to the approved negotiated indirect cost rate agreement as applied to the modified total direct costs (MTDC) or the amount indicated on this Notice of Award reflecting the lower amount you explicitly offer in the application and accepted by OASH.

    Indirect costs for training awards are limited to a fixed rate of eight percent (45 CFR 75.414(c)(1)(i) to be replaced by 2 CFR 300.414 on October 1, 2025) of MTDC exclusive of tuition and related fees, direct expenditures for equipment, and subawards in excess of $50,000.

    MTDC means all direct salaries and wages, applicable fringe benefits, materials and supplies, services, travel, and up to the first $50,000 of each subaward (regardless of the period of performance of the subawards under the award). MTDC excludes equipment, capital expenditures, charges for patient care, rental costs,

tuition remission, scholarships and fellowships, participant support costs and the portion of each subaward in excess of $50,000 (2 CFR 200.1).

14. ***Lobbying Restriction.*** The restrictions in 45 CFR § 75.450 (to be replaced by 2 CFR 200.450 October 1, 2025) regarding costs associated with lobbying activities apply to this award.

15. ***Human Subjects and the Institutional Review Board (IRB).*** It is your responsibility as the recipient to ensure that any activities meeting the definition of human subjects research are appropriately reviewed according to the HHS human subjects protection regulations (45 CFR part 46). The Office of Human Research Protections website includes a series of decision charts to help assess whether an activity is human subjects research covered by the regulation and when an exemption may apply.

    Exempt Activities. You must have clear procedures in place to determine whether the research is exempt under the HHS human subjects protection regulations consistent with the guidance provided by the Office of Human Research Protections (OHRP). The determination that an exemption applies must be documented and provided in Grant Messages. This must include the name and qualifications of the individual making that determination and identify the specific exemption(s) that applies. You may use the HHS Protection of Human Subjects form on Grants.gov at https://apply07.grants.gov/apply/forms/sample/ProtectionofHumanSubjects 2 0-V2.0.pdf.

Non-Exempt Activities. For non-exempt research activities, Assurances and Institutional Review Board (IRB) approvals must be submitted via Grant Messages within 5 business days of your receipt of approval from the IRB. Do not include protocols; only provide documentation of the approval. No activities that require IRB approval may take place prior to the recipient's receipt of the IRB approval.

16. ***Records Access.*** Per 45 CFR 75.364 (to be replaced by 2 CFR 200.337 on October 1, 2025), the HHS awarding agency, Inspectors General, the Comptroller General of the United States, and the pass-through entity, or any of their authorized representatives, must have the right of access to any documents, papers, or other records of the recipient which are pertinent to the federal award, in order to make audits, examinations, excerpts, and transcripts. The right also includes timely and reasonable access to the entity's personnel for the purpose of interview and discussion related to such documents. Only under extraordinary and rare circumstances as described in 45 CFR 75.364(b) (to be replaced by 2 CFR 200.337(b) October 1, 2025) would such access include review of the true name of victims of a crime.

    The rights of access in this section are not limited to the required retention period but last as long as the records are retained.

17. ***Records Retention.*** Per 45 CFR 75.361 (to be replaced by 2 CFR 200.334 on October 1, 2025), financial

records, supporting documents, statistical records, and all other records pertinent to the award must be retained for a period of three years from the date of submission of the final expenditure report. There are no other record retention requirements, except that:

1. records must be retained until all litigation, claims, or audit findings involving the records have been resolved and final action taken if any litigation, claim, or audit is started before the expiration of the three-year period

2. when you or your subrecipient is notified in writing by the Federal agency or pass-through entity, cognizant agency for audit, oversight agency for audit, or cognizant agency for indirect costs to extend the retention period

3. records for real property and equipment acquired with Federal funds must be retained for 3 years after final disposition.

4. when records are transferred to or maintained by the HHS awarding agency or pass-through entity, the 3-year retention requirement is not applicable to you.

5. Records of program income earned after the period of performance must be retained for three years from the end of your or your subrecipient's fiscal year in which the program income is earned. This only applies if this NOA requires you to report on

program income after the period of performance has ended.

6. The records for indirect cost rate computations or proposals, cost allocation plans, and any similar accounting computations of the rate at which a particular group of costs is chargeable (such as computer usage chargeback rates or composite fringe benefit rates) must be retained according to the applicable option below:

   If submitted for negotiation. When a proposal, plan, or other computation must be submitted to the Federal Government to form the basis for negotiation of an indirect cost rate (or other standard rates), then the three-year retention period for its supporting records starts from the date of submission.

   If not submitted for negotiation. When a proposal, plan, or other computation is not required to be submitted to the Federal Government to form the basis for negotiation of an indirect cost rate (or other standard rates), then the three-year retention period for its supporting records starts from the end of the fiscal year (or other accounting period) covered by the proposal, plan, or other computation.

18. ***Whistleblower Protections.*** The whistleblower protections in 2 CFR 200.217 apply to this award. You and your subrecipients must inform your employees

in writing of employee whistleblower rights and protections under 41 USC 4712.

19. ***Salary Limitation***. Salary costs under this award are subject to the limitation established by federal statute. The salary limitation is based upon the Executive Level II of the Federal Executive Pay Scale. Effective January 2025, the Executive Level II salary is $225,700. This amount is updated annually and posted at www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/.

    For the purposes of the salary limitation, the direct salary is exclusive of fringe benefits and indirect costs. An individual's direct salary is not constrained by the legislative provision for a limitation of salary. The rate limitation simply limits the amount that may be charged to the grant or cooperative agreement. You may pay an individual's salary amount exceeding the salary cap with non-federal funds.

20. ***Subrecipient Monitoring.*** The HHS Grants Policy Statement (GPS) applies to all recipients and the requirements flow down to subrecipients. You must verify that a subrecipient or contractor is not excluded or disqualified consistent with 2 CFR 180.300 before entering into an agreement. Your subrecipients must have a unique entity identifier from SAM.gov prior to your making an award to them (2 CFR 25.300).

    You must have a formal written agreement with each subaward recipient. You must include applicable GPS requirements in your subaward agreements.

Agreements must meet programmatic, administrative, financial, and reporting requirements. At a minimum, the subaward agreement must include the items described in 45 CFR 75.352 (to be replaced by 2 CFR 200.332 on October 1, 2025). Furthermore the subaward agreement must include (HHS Grants Policy Statement, October 1, 2024, page 52):

- the PD or PI and subrecipient staff responsible for the program activity, including roles and responsibilities
- program administration and monitoring procedures
- policies and process for subrecipient funding, such as allowable costs, expenditure approval, funding caps, payment method and schedule, required documentation
- travel, salaries, and fringe benefit policies and procedures
- applicable public policy requirements and applicable assurances and certifications and provisions indicating the intent of the subrecipient to comply, including submission of applicable assurances and certifications
- conflict of interest requirement
- provisions regarding property, program income, publications, reporting, record retention, and audit.

You must monitor the subrecipients' activities to ensure compliance with Federal statutes, regulations, and the terms and conditions of the subaward 45 CFR 75.352 (to be replaced by 2 CFR 200.332 on October 1, 2025). This includes reviewing subrecipients' financial and performance reports and ensuring subrecipients take any corrective actions on all significant developments. You should ensure that subrecipient and contractor costs are liquidated in a timely manner (i.e., within 90 days of the end of the budget period for the activity performed).

21. ***Reporting of Matters Related to Recipient Integrity and Performance.*** (2 CFR part 200, Appendix XII)

A. General Reporting Requirement

If the total value of your active grants, cooperative agreements, and procurement contracts from all Federal agencies exceeds $10,000,000 for any period of time during the period of performance of this Federal award, then you as the recipient must ensure the information available in the responsibility/qualification records through the System for Award Management (SAM.gov), about civil, criminal, or administrative proceedings described in paragraph (b) of this award term is current and complete. This is a statutory requirement under section 872 of Public Law 110-417, as amended (41 U.S.C. 2313). As required by section 3010 of Public Law 111-212, all information posted in responsibility/qualification records in SAM.gov on or after April 15, 2011 (except past performance reviews

required for Federal procurement contracts) will be publicly available.

B. Proceedings About Which You Must Report You must submit the required information about each proceeding that—

1. Is in connection with the award or performance of a grant, cooperative agreement, or procurement contract from the Federal Government;

2. Reached its final disposition during the most recent five-year period; and

3. Is one of the following—

a) A criminal proceeding that resulted in a conviction;

b) A civil proceeding that resulted in a finding of fault and liability and payment of a monetary fine, penalty, reimbursement, restitution, or damages of $5,000 or more;

c) An administrative proceeding that resulted in a finding of fault and liability and your payment of either a monetary fine or penalty of $5,000 or more or reimbursement, restitution, or damages in excess of $100,000; or

d) Any other criminal, civil, or administrative proceeding if—

i. It could have led to an outcome described in paragraph (B)(3)(a) through (c);

ii. It had a different disposition arrived at by consent or compromise with an acknowledgment of fault on your part; and

iii. The requirement in this award term to disclose information about the proceeding does not conflict with applicable laws and regulations.

C. Reporting Procedures

Enter the required information in *SAM.gov* for each proceeding described in paragraph (B) of this award term. You do not need to submit the information a second time under grants and cooperative agreements that you received if you already provided the information in *SAM.gov* because you were required to do so under Federal procurement contracts that you were awarded.

D. Reporting Frequency

During any period of time when you are subject to the requirement in paragraph (a) of this award term, you must report proceedings information in SAM.gov for the most recent five-year period, either to report new information about a proceeding that you have not reported previously or affirm that there is no new

information to report. If you have Federal contract, grant, and cooperative agreement awards with a cumulative total value greater than $10,000,000, you must disclose semiannually any information about the criminal, civil, and administrative proceedings.

E. Definitions

For purposes of this award term:

Administrative proceeding means a non judicial process that is adjudicatory in nature to make a determination of fault or liability (for example, Securities and Exchange Commission Administrative proceedings, Civilian Board of Contract Appeals proceedings, and Armed Services Board of Contract Appeals proceedings). This includes proceedings at the Federal and State level but only in connection with the performance of a Federal contract or grant. It does not include audits, site visits, corrective plans, or inspection of deliverables.

Conviction means a judgment or conviction of a criminal offense by any court of competent jurisdiction, whether entered upon a verdict or a plea, and includes a conviction entered upon a plea of nolo contendere.

Total value of currently active grants, cooperative agreements, and procurement contracts includes the value of the Federal share already received plus any anticipated Federal share under those awards (such as continuation funding).

F. Disclosure Requirements. Consistent with 45 C.F.R. § 75.113, applicants and recipients must disclose, in a timely manner, in writing to the HHS Awarding Agency, with a copy to the HHS Office of the Inspector General, all information related to violations of Federal criminal law involving fraud, bribery, or gratuity violations potentially affecting the Federal award. Subrecipients must disclose, in a timely manner, in writing to the prime recipient (pass through entity) and the HHS Office of the Inspector General all information related to violations of Federal criminal law involving fraud, bribery, or gratuity violations potentially affecting the Federal award. Disclosures must be sent in writing to the awarding agency and to the HHS OIG at the following addresses:

HHS OASH Grants and Acquisitions Management
1101 Wootton Parkway, Plaza Level
Rockville, MD 20852

AND

US Department of Health and Human Services
Office of Inspector General
ATTN: OIG HOTLINE OPERATIONS—
MANDATORY GRANT DISCLOSURES
PO Box 23489
Washington, DC 20026

URL: http://oig.hhs.gov/fraud/report-fraud/index.asp (Include "Mandatory Grant Disclosures" in subject line) Fax: 1-800-223-8164 (Include "Mandatory Grant Disclosures" in subject line)

Failure to make required disclosures can result in any of the remedies described in 45 C.F.R. § 75.371 ("Remedies for noncompliance"), including suspension or debarment (See also 2 C.F.R. Parts 180 & 376 and 31 U.S.C. § 3321).

The recipient must include this mandatory disclosure requirement in all subawards and contracts under this award.

22. ***Reporting Subawards and Executive Compensation*** (2 CFR part 170)

A. Reporting of first-tier subawards —

1. Applicability.

Unless the recipient is exempt as provided in paragraph (d) of this award term, the recipient must report each subaward that equals or exceeds $30,000 in Federal funds for a subaward to an entity or Federal agency. The recipient must also report a subaward if a modification increases the Federal funding to an amount that equals or exceeds $30,000. All reported subawards should reflect the total amount of the subaward.

2. Reporting Requirements.

a) The recipient must report each subaward described in paragraph (a)(1) of this award term to the Federal Funding Accountability and

Transparency Act Subaward Reporting System (FSRS) at http://www.fsrs.gov.

b) For subaward information, report no later than the end of the month following the month in which the subaward was issued. (For example, if the subaward was made on November 7, 2025, the subaward must be reported by no later than December 31, 2025).

B. Reporting total compensation of recipient executives for entities —

1. Applicability.

The recipient must report the total compensation for each of the recipient's five most highly compensated executives for the preceding completed fiscal year if:

a) The total Federal funding authorized to date under this Federal award equals or exceeds $30,000;

b) in the preceding fiscal year, the recipient received:

i. 80 percent or more of the recipient's annual gross revenues from Federal procurement contracts (and subcontracts) and Federal awards (and subawards) subject to the Transparency Act; and

ii. $25,000,000 or more in annual gross revenues from Federal procurement contracts (and subcontracts) and Federal awards (and subawards) subject to the Transparency Act; and,

c) The public does not have access to information about the compensation of the executives through periodic reports filed under section 13(a) or 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78m(a), 78o(d)) or section 6104 of the Internal Revenue Code of 1986 after receiving this subaward. (To determine if the public has access to the compensation information, see the U.S. Security and Exchange Commission total compensation filings at http://www.sec.gov/answers/execomp.htm.)

2. Reporting Requirements.

The recipient must report executive total compensation described in paragraph (b)(1) of this appendix:

a) As part of the recipient's registration profile at https://www.sam.gov.

b) No later than the month following the month in which this Federal award is made, and annually after that. (For example, if this Federal award was made on November

7, 2025, the executive total compensation must be reported by no later than December 31, 2025.)

C. Reporting of total compensation of subrecipient executives—

1. Applicability.

Unless a first-tier subrecipient is exempt as provided in paragraph (d) of this appendix, the recipient must report the executive total compensation of each of the subrecipient's five most highly compensated executives for the subrecipient's preceding completed fiscal year, if:

a) The total Federal funding authorized to date under the subaward equals or exceeds $30,000;

b) In the subrecipient's preceding fiscal year, the subrecipient received:

i. 80 percent or more of its annual gross revenues from Federal procurement contracts (and subcontracts) and Federal awards (and subawards) subject to the Transparency Act; and,

ii. $25,000,000 or more in annual gross revenues from Federal procurement contracts (and subcontracts), and Federal

awards (and subawards) subject to the Transparency Act; and

c) The public does not have access to information about the compensation of the executives through periodic reports filed under section 13(a) or 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78m(a), 78o(d)) or section 6104 of the Internal Revenue Code of 1986after receiving this subaward. (To determine if the public has access to the compensation information, see the U.S. Security and Exchange Commission total compensation filings at http://www.sec.gov/answers/execomp.htm.)

2. Reporting Requirements.

Subrecipients must report to the recipient their executive total compensation described in paragraph (c)(1) of this appendix. The recipient is required to submit this information to the Federal Funding Accountability and Transparency Act Subaward Reporting System (FSRS) at http://www.fsrs.gov no later than the end of the month following the month in which the subaward was made. (For example, if the subaward was made on November 7, 2025, the subaward must be reported by no later than December 31, 2025).

D. Exemptions.

1. A recipient with gross income under $300,000 in the previous tax year is exempt from the requirements to report:

a) Subawards, and

b) The total compensation of the five most highly compensated executives of any subrecipient.

E. Definitions.

For purposes of this award term:

Entity includes:

1. Whether for profit or nonprofit

A corporation;
An association;
A partnership;
A limited liability company;
A limited liability partnership;
A sole proprietorship;
Any other legal business entity;
Another grantee or contractor that is not excluded by subparagraph (2); and
Any State or locality;

2. Does not include:

An individual recipient of Federal financial assistance; or A Federal employee.

Executive means an officer, managing partner, or any other employee holding a management position. *Subaward* has the meaning given in 2 CFR 200.1.

Subrecipient has the meaning given in 2 CFR 200.1.

Total Compensation means the cash and noncash dollar value an executive earns during an entity's preceding fiscal year. This includes all items of compensation as prescribed in 17 CFR 229.402(c)(2).

23. System for Award Management (SAM.gov) and Universal Identifier Requirements.

A. *Requirement for System for Award Management.*

1. Unless exempt from this requirement under 2 CFR 25.110, you must maintain a current and active registration in *SAM.gov*. Your registration must always be current and active until you submit all final reports required under this award or receive the final payment, whichever is later. You must review and update your information in *SAM.gov* at least annually from the date of your initial registration or any subsequent

updates to ensure it is current, accurate, and complete. If applicable, this includes identifying your immediate and highest-level owner and subsidiaries and providing information about your predecessors that have received a Federal award or contract within the last three years.

B. ***Requirement for Unique Entity Identifier (UEI).***

1. If the you are authorized to make subawards under this Federal award, you:

a) Must notify potential subrecipients that no entity may receive a subaward until the entity has provided its UEI to you.

b) Must not make a subaward to an entity unless the entity has provided its UEI to the recipient. Subrecipients are not required to complete full registration in *SAM.gov* to obtain a UEI.

C. ***Definitions.*** **For the purposes of this award term:**

System for Award Management (SAM.gov) **means the Federal repository into which you must provide the information required for the conduct of business as a recipient. Additional information about registration procedures may be found in *SAM.gov* (currently at *https://www.sam.gov*).**

Unique entity identifier **means the universal identifier assigned by *SAM.gov* to uniquely identify an entity.**

Entity **is defined at 2 CFR 25.400 and includes all of the following types as defined in 2 CFR 200.1:**

(1) Non-Federal entity;

(2) Foreign organization;

(3) Foreign public entity;

(4) Domestic for-profit organization; and

(5) Federal agency.

Subaward **has the meaning given in 2 CFR 200.1.**

Subrecipient **has the meaning given in 2 CFR 200.1.**

24. Trafficking in Persons (2 CFR part 175)

A. Provisions applicable to a recipient that is a private entity.

1. Under this award, the recipient, its employees, subrecipients under this award, and subrecipient's employees must not engage in:

a) Severe forms of trafficking in persons;

b) The procurement of a commercial sex act during the period of time that this award or any subaward is in effect;

c) The use of forced labor in the performance of this award or any subaward; or

d) Acts that directly support or advance trafficking in persons, including the following acts:

> **i. Destroying, concealing, removing, confiscating, or otherwise denying an employee access to that employee's identity or immigration documents;**
>
> **ii. Failing to provide return transportation or pay for return transportation costs to an employee from a country outside the United States to the country from which the employee was recruited upon the end of employment if requested by the employee, unless:**
>
> > **(a) Exempted from the requirement to provide or pay for such return transportation by the Federal department or agency providing or entering into the grant or cooperative agreement; or**
> >
> > **(b) The employee is a victim of human**

trafficking seeking victim services or legal redress in the country of employment or a witness in a human trafficking enforcement action;

iii. Soliciting a person for the purpose of employment, or offering employment, by means of materially false or fraudulent pretenses, representations, or promises regarding that employment;

iv. Charging recruited employees a placement or recruitment fee; or

v. Providing or arranging housing that fails to meet the host country's housing and safety standards.

2. The Federal agency may unilaterally terminate this award or take any remedial actions authorized by 22 U.S.C. 7104b(c), without penalty, if any private entity under this award:

a) Is determined to have violated a prohibition in paragraph A.1 of this award term; or

b) Has an employee that is determined to have violated a prohibition in paragraph A.1 of this award term through conduct that is either:

i. Associated with the performance under this award; or

ii. Imputed to the recipient or the subrecipient using the standards and due process for imputing the conduct of an individual to an organization that are provided in 2 CFR part 180, "OMB Guidelines to Agencies on Government-wide Debarment and Suspension (Nonprocurement)," as implemented by our agency at 2 CFR Part 376.

B. Provision applicable to a recipient other than a private entity.

1. The Federal agency may unilaterally terminate this award or take any remedial actions authorized by 22 U.S.C. 7104b(c), without penalty, if a subrecipient that is a private entity under this award:

a) Is determined to have violated a prohibition in paragraph A.1 of this award; or

b) Has an employee that is determined to have violated a prohibition in paragraph A.1 of this awaed term through conduct that is either:

i. Associated with the performance under this award; or

ii. Imputed to the subrecipient using the standards and due process for imputing the conduct of an individual to an organization

that are provided in 2 CFR part 180, "OMB Guidelines to Agencies on Government-wide Debarment and Suspension (Nonprocurement)," as implemented by our agency at 2 CFR Part 376.

C. Provisions applicable to any recipient.

1. The recipient must inform the Federal agency and the Inspector General of the Federal agency immediately of any information you receive from any source alleging a violation of a prohibition in paragraph A.1 of this appendix.

2. The Federal agency's right to unilaterally terminate this award as described in paragraphs A.2 or B.1 of this appendix:

a) Implements the requirements of 22 USC 78, and

b) Is in addition to all other remedies for noncompliance that are available to the Federal agency under this award.

3. The recipient must include the requirements of paragraph A.1 of this award term in any subaward it makes to a private entity.

4. If applicable, the recipient must also comply with the compliance plan and certification requirements in 2 CFR 175.105(b).

D. Definitions. For purposes of this award term: Employee means either:

a) An individual employed by the recipient or a subrecipient who is engaged in the performance of the project or program under this award; or

b) Another person engaged in the performance of the project or program under this award and not compensated by the recipient including, but not limited to, a volunteer or individual whose services are contributed by a third party as an in-kind contribution toward cost sharing requirements.

Private Entity means any entity, including for-profit organizations, nonprofit organizations, institutions of higher education, and hospitals. The term does not include foreign public entities, Indian Tribes, local governments, or states as defined in 2 CFR 200.1.

The terms "severe forms of trafficking in persons," "commercial sex act," "sex trafficking," "Abuse or threatened abuse of law or legal process," "coercion," "debt bondage," and "involuntary servitude" have the meanings given at section 103 of the TVPA, as amended (22 USC 7102).

REPORTING REQUIREMENTS

1. ***Financial Reporting Requirement.*** As a recipient, you must submit your quarterly Federal Financial Report

(FFR) (SF-425) to OASH using the Department of Health and Human Services (HHS) Payment Management System (PMS). Failure to submit the FFR in the correct system by the due date may delay processing of any pending requests or applications.

Submission of your SF-425 will enhance the reconciliation of expenditures and disbursements and allow for timely closeout of grants.

To assist in your preparation for submission, a PDF version of the SF-425 and instructions is available on Grants.gov at https://apply07.grants.gov/apply/forms/sample/SF425 3 0-V3.0.pdf.

You must complete all sections of the FFR.

Due Date and Reporting Period. Your quarterly FFR will report cumulatively over the life of the project. Your FFR is due 30 days after the end of each Quarter in the federal fiscal year. That is for the:

- **Quarter ending September 30, your FFR is due October 30**
- **Quarter ending December 31, your FFR is due January 30**
- **Quarter ending March 30, your FFR is due April 30**
- **Quarter ending June 30, your FFR is due July 30.**

Final FFR Due Date. Your final FFR covering the entire project is due 120 days after the end date for your project period.

Past due FFRs. If you have not submitted by the due date, you will receive a message indicating the report is Past Due. Please ensure your PMS account and contact information are up to date so you receive notifications. Past due FFRs may delay action on pending applications for new, continuing, or supplement awards.

Electronic Submission Requirement. Electronic Submissions are required and accepted only via the PMS. No other submission methods will be accepted without prior written approval from the GMO. Your FFR preparer/certifier must be authorized by you to access PMS.

If you encounter any difficulties, contact the PMS Help Desk or your assigned Grants Management Specialist (Box 9).

2. ***Annual Performance Progress Reports.*** You must submit annual progress reports unless otherwise required under Special Terms and Requirements or Special Conditions as required by statute, regulation, or specific circumstances warranting additional monitoring for this award.

   PPR Due Dates. Your PPR reporting period is aligned to end with the end of a federal fiscal year quarter and

with your quarterly FFRs. Annual PPRs are due 90 days after the end of the reporting period.

- **For reporting periods ending September 30, your PPR is due December 30**

- **For reporting period ending December 31, your PPR is due March 30**

- **For reporting period ending March 30, your PPR is due June 30**

- **For reporting period ending June 30, your PPR is due September 30.**

Final PPR Due Date. Your final FFR is due 120 days after the end date for your period of performance.

PPR Content. Your progress reports must include at a minimum:

- Your accomplishments for the period compared to the approved objectives and workplan for the period.

- Your explanation for why any established goals were not met.

- Additional pertinent information including, when appropriate, analysis and explanation of cost overruns or other financial effects of delays.

Additional guidance may be provided by the Program Office.

Past Due PPRs. If you have not submitted by the due date, you will receive a message indicating the report is Past Due. Past due PPRs may delay action on pending applications for new, continuing, or supplement awards.

Electronic Submission. You must submit your PPR electronically via the PPR Module in Grant Solutions.

If you encounter any difficulties, contact the Grant Solutions Help Desk or your assigned Grants Management Specialist (Box 9).

3. ***Audit Requirements.*** The Single Audit Act Amendments of 1996 (31 USC §§ 7501-7507) combined the audit requirements for all entities under one Act. An audit is required for all non-Federal entities expending Federal funds and must be consistent with the standards set out at 45 CFR part 75, subpart F, "Audit Requirements" (except that-2 CFR 200.501 replaced 45 CFR 75.501 on October 1, 2024, and will be replaced in its entirety by 2 CFR part 200, subpart F on October 1, 2025). The audits are due within 30 days of receipt from the auditor or within 9 months of the end of the fiscal year, whichever occurs first. The audit report when completed should be submitted online to the Federal Audit Clearinghouse.
4. ***Closeout Requirements.*** Once the project period has ended, as the recipient, you are required to submit a

Final PPR and the SF-428 Tangible Personal Property report and/or Disposition report in Grant Solutions and a Final FFR (SF-425) using HHS Payment Management System (PMS).

All closeout documentation is due within 120 calendar days after the project and final budget period end date. Failure to submit these required reports when due may result in the imposition of a special award condition or the withholding of support for other active or future projects or activities involving your organization.

Failure to submit acceptable closeout documentation may result in a unilateral closeout of your award. In a unilateral closeout, OASH is required to report you to the government-wide integrity and performance system (now in SAM.gov under responsibility/ qualification information) for material failure to comply with the terms of your award. Such a failure must be considered in future decisions about assistance funding for which you have applied (45 CFR 75.205 to be replaced by 2 CFR 200.206 on October 1, 2025).

Additional instructions for completing all reports will be provided in the Pre-closeout letter from the Grants & Acquisitions Management Division.

- **Final Performance Progress Report (PPR),** Submit your report via the Performance Progress Report (PPR) Module in Grant Solutions. Your report must address content required by 45 CFR § 75.342(b)(2) (to be replaced by 2 CFR 200.329(c)

(2) on October 1, 2025). Additional guidance on content of the progress report may be provided by the Program Office.

- **Final Federal Financial Report (SF-425).** Submit your Final FFR using the HHS Payment Management System (PMS). No other submission methods will be accepted without prior written approval from the GMO. If you encounter any difficulties, contact the HHS Payment Management System Help Desk or your assigned Grants Management Specialist.

- **Tangible Personal Property report and/or Disposition reports (SF-428 and SF-428-B).** Submit reports via attachment to a Grant Message in Grant Solutions. You may find the forms on Grants.gov under Post-Award Reporting Forms.

CONTACTS

1. **Fraud, Waste, and Abuse.** The HHS Inspector General accepts tips and complaints from all sources about potential fraud, waste, abuse, and mismanagement in Department of Health and Human Services' programs. Your information will be reviewed promptly by a professional staff member. Due to the high volume of information that they receive, they are unable to reply to submissions. You may reach the OIG through various channels.

   Internet: https://forms.oig.hhs.gov/hotlineoperations/index.aspx

Phone: 1-800-HHS-TIPS (1-800-447-8477)

Mail: US Department of Health and Human Services Office of Inspector General
ATTN: OIG HOTLINE OPERATIONS
PO Box 23489
Washington, DC 20026

For additional information visit https://oig.hhs.gov/fraud/report-fraud/index.asp.

2. **Payment Procedures.** Payments for grants awarded by OASH Program Offices are made through the Payment Management System (PMS, previously known as the Division of Payment Management) https://pms.psc.gov/home.html.

   PMS is administered by the Program Support Center (PSC), HHS. Contact PMS to establish an account if you do not have one.

   Inquiries regarding payments should be directed to https://pms.psc.gov/home.html; or

   Payment Management Services
   P.O. Box 6021
   Rockville, MD 20852

   or 1-877-614-5533

3. **Grant Solutions.** For assistance on Grant Solutions issues please contact: Grant Solutions User Support

at 202-401- 5282 or 866-577-0771, email help@grantsolutions.gov, Monday – Friday, 8 a.m. – 6 p.m. ET. Frequently Asked Questions and answers are available at https://grantsolutions.secure.force.com/.

4. **Grants Administration Assistance.** For assistance on grants administration issues please contact the Grants Management Specialist (Box 9) or mail:

OASH Grants and Acquisitions Management Division
Department of Health and Human Services
Office of the Assistant Secretary for Health
1101 Wootton Parkway,
Rockville, MD 20852

OASH_Grants@hhs.gov