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UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

STATE OF OREGON, et al.,

Plaintiffs,

v.

ALEX M. AZAR II, et al.,

Defendants.

AND

AMERICAN MEDICAL ASSOCIATION, et al.**,**

Plaintiffs,

v.

ALEX M. AZAR, II et al,

Defendants.

Case No. 6:19-cv-00317-MC (Lead Case)
Case No. 6:19-cv-00318-MC (Trailing Case)

***AMICUS CURIAE* BRIEF OF AMERICAN CENTER FOR LAW & JUSTICE IN SUPPORT OF DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION**

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CORPORATE DISCLOSURE STATEMENT

The American Center for Law and Justice is a nonprofit organization that has no parent and issues no stock.

MEMORANDUM OF POINTS AND AUTHORITIES
INTEREST OF *AMICUS*

The American Center for Law and Justice ("ACLJ") is an organization dedicated to the defense of constitutional liberties secured by law. ACLJ attorneys have argued before the Supreme Court of the United States in a number of significant cases involving the freedoms of speech and religion.[1] In addition, the ACLJ represented thirty-two individuals and for-profit corporations in seven legal actions against the federal government's contraceptive services mandate ("Mandate").[2] The ACLJ also submitted amicus briefs with the U.S. Supreme Court in support of petitioners in both *Burwell v. Hobby Lobby*, 573 U.S. 682 (2014), and *Zubik v. Burwell*, 136 S. Ct. 1557 (2016).

The ACLJ and its members oppose taxpayer subsidization of the abortion industry. The ACLJ submitted comments in support of the Final Rule, Compliance with Statutory Program Integrity Requirements, 84 Fed. Reg. 7714 (Mar. 4, 2019) (to be effective May 3, 2019 as 42 C.F.R. § 59.5) ("Final Rule"). The Final Rule is necessary because it (a) restores Title X to its proper function as the

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[1] *See, e.g.*, *Pleasant Grove v. Summum*, 555 U.S. 460 (2009) (holding that the government is not required to accept counter-monuments when it displays a war memorial or Ten Commandments monument); *McConnell v. FEC*, 540 U.S. 93 (2003) (holding that minors have First Amendment rights); *Lamb's Chapel v. Ctr. Moriches Sch. Dist.*, 508 U.S. 384 (1993) (holding that denying a church access to public school premises to show a film series violated the First Amendment); *Bd. of Educ. v. Mergens*, 496 U.S. 226 (1990) (holding that allowing a student Bible club to meet on a public school's campus did not violate the Establishment Clause); *Bd. of Airport Comm'rs v. Jews for Jesus*, 482 U.S. 569 (1987) (striking down an airport's ban on First Amendment activities).

[2] *Gilardi v. U.S. HHS*, 733 F.3d 1208 (D.C. Cir. 2013); *Korte v. Sebelius*, 735 F.3d 654 (7th Cir. 2013); *O'Brien v. U.S. HHS*, 766 F.3d 862 (8th Cir. 2014); *Am. Pulverizer Co. v. U.S. HHS*, No. 6:12-cv-03459-MDH (W.D. Mo. Oct. 19, 2012); *Lindsay v. U.S. HHS*, No. 1:13-cv-01210 (N.D. Ill. Feb. 14, 2013); *Bick Holdings, Inc. v. U.S. HHS*, No. 4:13-cv-00462-AGF (E.D. Mo. Mar. 13, 2013); *Hartenbower v. U.S. HHS*, No. 1:13-cv-2253 (N.D. Ill. Mar. 26, 2013).

only domestic federal program solely designed to provide affordable family planning services to low income families without promoting abortion or misusing funds to support indirectly or directly entities that provide abortion; (b) creates a high wall of separation, both physical and financial, between those entities that perform abortions and those that provide sustainable family focused family-planning services under the Title X Family Planning Grant Program; (c) increases the means by which women and their families can seek, and the manner in which Title X providers can offer, these services, including the use of natural family planning; (d) protects women and children by requiring Title X service providers to comply with state and local reporting and notification laws regarding rape, abuse, incest, and neglect; and (e) protects the conscience rights of health care workers and organizations who might seek to become Title X grantees but for their objection to referring pregnant patients for abortion, as required under the 2000 regulations.

The ACLJ and nearly 250,000 of its members file this brief in defense of the Final Rule because they believe it is an important step toward ensuring that the abortion industry is not subsidized either directly or indirectly with federal taxpayer funds.

INTRODUCTION

Title X is a federal spending program to which "Congress may attach conditions . . . to further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives." *South Dakota v. Dole*, 483 U.S. 203, 206 (1987); *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981) ("Congress may fix the terms on which it shall disburse federal money to the States."). The Supreme Court has repeatedly upheld the constitutionality of Congress's use of conditions to induce state governments and private parties to cooperate with federal policy. *See, e.g.*, *Rust v. Sullivan*, 500 U.S. 173 (1991); *Cal. Bankers Assn. v. Shultz*, 416 U.S. 21 (1974). If state governments and private parties object to a condition on the receipt

of federal funding, their "recourse is to decline the funds. This is no less true when a condition on speech within the program "affects the recipient's exercise of its First Amendment rights." *Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l, Inc.*, 570 U.S. 205, 214 (2013) (citation omitted).

Restrictions on funding recipients' speech *within* the federal program are therefore permissible. For example, in *United States v. American Library Assn., Inc.*, 539 U.S. 194, 212 (2003) (plurality opinion), the Court rejected the argument that a condition upon federal funding for Internet access which required filtering software on library computers violated the First Amendment. Particularly relevant to this case, was the Court's dismissal of the notion that filtering software "distorted the usual function of the library." *Id.* at 213. "[T]o the extent that libraries wish to offer unfiltered access, they are free to do so without federal assistance." *Id.* at 212.

And in *Rust v. Sullivan*, the Supreme Court upheld regulations barring Title X grantees from counseling and referring for abortions in the face of arguments that the restriction 1) infringed the doctor-patient relationship, 500 U.S. at 202; 2) constituted viewpoint discrimination, *id.* at 192; and 3) imposed an unconstitutional condition, *id.* at 196. The Court concluded:

> A doctor's ability to provide, and a woman's right to receive, information concerning abortion and abortion-related services outside the context of the Title X project remains unfettered. It would undoubtedly be easier for a woman seeking an abortion if she could receive information about abortion from a Title X project, but the Constitution does not require that the Government distort the scope of its mandated program in order to provide that information.

Id. at 203. Both patients and doctors are in no different position than they would be if Title X not been enacted. *Id.* at 202.

Title X promotes federal policy favoring childbirth over abortion by prohibiting Title X funds from being used in programs where abortion is a method of family planning. 42 U.S.C. § 300a-6 (2018); *see also* 116 Cong. Rec. 37, 375 (1970) (Statement of Rep. Dingell) ("abortion is not to be encouraged or promoted in any way through this legislation"). Congress may constitutionally

effectuate its policy favoring childbirth over abortion by ensuring that taxpayer monies do not subsidize abortion, either directly or indirectly. *See, e.g.*, *Harris v. McCrae*, 448 U.S. 297, 325 (1980) ("Congress has established incentives that *make childbirth a more attractive alternative* than abortion for persons eligible for Medicaid. These incentives bear a direct relationship to the legitimate congressional interest in protecting human life.") (emphasis added); *Maher v. Roe*, 432 U.S. 464, 474 (1977) (holding that the government may "make a value judgment favoring childbirth over abortion, and . . . implement that judgment by the allocation of public funds"); *Poelker v. Doe*, 432 U.S. 519, 521 (1977) (upholding a city's choice "to provide publicly financed hospital services for childbirth without providing corresponding services for nontherapeutic abortions"); *Rust*, 500 U.S. at 192 (holding that government may "subsidize family planning services which will lead to conception and childbirth," and decline to "promote or encourage abortion").

Plaintiffs' real quarrel is with Congress's requirement that Title X program participants cannot use abortion as a method of family planning. Title X grantees who also operate abortion clinics have benefitted for 19 years from the 2000 regulations which permit the abortion industry to share facilities, staff and resources with Title X grantees and those grantees to enrich the abortion industry by promoting, through referrals and counseling, abortion as a method of family planning.

The Plaintiff States are free to adopt a policy that is neutral between abortion and childbirth, and to use state funds to promote abortion as a method of family planning. None of the Plaintiff States or their Title X provider networks are entitled to Title X funds if they are unwilling to cooperate with federal policy favoring childbirth over abortion by disassociating Title X projects from the abortion industry. And none of the Plaintiffs should be permitted to enlist the federal courts into commandeering continued access to federal taxpayer monies just because many Title X projects have been successfully

promoting abortion as a method of family planning for almost two decades. There is no right to federal funds acquired by laches.

The Department of Health and Human Services ("HHS") correctly determined that Congress's intent, as expressed in Title X, is being frustrated by the 2000 regulations. The Final Rule tracks regulations adopted in 1988 and upheld in *Rust v. Sullivan.* As more fully explained in Defendants' Memorandum of Opposition, *Rust* is dispositive of Plaintiffs' claims. Yet Plaintiffs attempt to circumvent *Rust* by asserting that two Congressional enactments render it irrelevant. AMA Plaintiffs argue further that *Rust* is invalidated by two of the Supreme Court's 2018 compelled speech cases, neither of which had anything to do with federal funding program conditions. Because Plaintiffs' arguments are meritless, *Rust* compels the conclusion that they cannot carry their burden of demonstrating substantial likelihood of success on the merits.

ARGUMENT

A preliminary injunction is an "extraordinary and drastic remedy." *Munaf v. Geren*, 553 U.S. 674, 689–90 (2008). It should never be awarded as of right, and should only be granted if the movant carries the burden of persuasion and demonstrates "a substantial likelihood of success on the merits." *Winter v. NRDC, Inc.*, 555 U.S. 7, 20 (2008); *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (per curiam). Where binding Supreme Court precedent governs the legal claims, the movant cannot establish likelihood of success on the merits. *Glossip v. Gross*, 135 S. Ct. 2726 (2015). Here Plaintiffs do not carry their heavy burden because their claims against the Final Rule are controlled by *Rust v. Sullivan*, 500 U.S. 173 (1991).

I. Section 1554 of the Patient Protection and Affordable Care Act Has No Bearing on the Secretary's Authority to Promulgate Regulations Implementing Title X.

Plaintiffs contend that the Final Rule conflicts with Section 1554 of the Patient Protection and Affordable Care Act ("ACA"). Oregon Mem. at 14; AMA Mem. at 32-36. To read section 1554 of

the ACA as circumscribing the Secretary's authority to promulgate the Final Rule under Title X turns the statutory interpretation rule against "amendment by implication" on its head. "While a later enacted statute can sometimes operate to amend or even repeal an earlier statutory provision, repeals and amendments by 'implication are not favored' and will not be presumed unless the 'intention of the legislature to repeal [is] clear and manifest.'" *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 663 (2007) (quoting *Watt v. Alaska*, 451 U.S. 259, 267 (1981)); *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153 (1976) ("A statute dealing with a narrow, precise, and specific subject is not submerged by a later enacted statute covering a more generalized spectrum.").

This principle applies with equal force when a later enacted statute facially appears to constrain an administrative agency's authority to implement an earlier enacted law. In *Defenders of Wildlife*, the Supreme Court rejected an argument remarkably similar to Plaintiffs' section 1554 argument. In that case, there was a conflict between a provision of the Endangered Species Act ("ESA") and a provision of Clean Water Act ("CWA"). 551 U.S. at 661. The ESA had been passed after the CWA, and the Ninth Circuit held that the later enacted ESA provision effectively altered the EPA's authority under the CWA to grant National Pollution Discharge Elimination System permits to Plaintiffs. *Defs. of Wildlife v. EPA*, 420 F.3d 946, 961–62 (9th Cir. 2005).

Reversing the Ninth Circuit, the Supreme Court held that the lower court's ruling was predicated on the erroneous conclusion that the ESA amended the CWA by implication. *Defs. of Wildlife*, 551 U.S. at 662–63. The lower court's reading of the two statutory provisions would "effectively repeal the mandatory and exclusive list of criteria" that the EPA was obligated to consider under the CWA and "replace it with a new, expanded list of criteria [under the ESA]." *Id.* at 662.

Defenders of Wildlife requires rejection of Plaintiffs' section 1554 argument. Title X is nowhere mentioned in section 1554, and Congress did not evince "clear and manifest" intent, *Watt v. Alaska*,

451 U.S. at 267, that section 1554 of the ACA was to have any impact on Title X's implementation. Section 1554 provides:

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

42 U.S.C. § 18114.

The ACA effectuates an entirely different federal policy than Title X. Enacted under Congress's Commerce Clause and Taxing powers, *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 547 (2012), the ACA's goals were to expand health insurance coverage, mandate the services that health insurance must cover, and revamp the health care delivery system.[3] The ACA established a mandate for all Americans to obtain health insurance through (1) the creation of an insurance exchange that provides some individuals and families with federal subsidies for health insurance costs, (2) expansion of eligibility for Medicaid and reduction in the growth of Medicare's payment rates, (3) raising revenue from a variety of new taxes, and (4) reduction and reorganization of spending under the nation's largest health insurance plan.[4]

By contrast, Title X, passed pursuant to Congress's Spending Clause power, *Rust*, 500 U.S. at 197, allocates federal funds for the very narrow purpose of supporting preventive, preconception family planning services, population research, infertility services, and other related medical, informational,

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[3] *See* David Blumenthal et al., *The Affordable Care Act at 5 Years*, N. Engl. J. Med. 2451–58 (2015).
[4] *See* Jonathan Gruber, *The Impacts of the Affordable Care Act: How Reasonable are the Projections?*, 64 Nat'l Tax J. 893–94 (2011); *see also CBO's Analysis of the Major Health Care Legislation Enacted in March 2010: Testimony Before the Subcomm. on Heath Comm. on Energy and Com. U.S. House of Representatives*, 1–2 (2011) (statement of Douglas Elmendorf, Dir. of the Cong. Budget Office).

and educational activities. H.R. Conf. Rep. No. 91–1667, at 8 (1970). Title X has nothing to do with either expanding health insurance coverage, or mandating what services health insurance must cover. And, regarding abortion, Congress explicitly "limited its availability" in Title X projects inasmuch as it cannot be used as a method of family planning. 42 U.S.C. § 300a-6. Section 1554 of the ACA is thus irrelevant to the Secretary's authority to promulgate the Final Rule.

In addition, the prefatory language of section 1554 demonstrates that section 1554 governs only the Secretary's authority under the ACA. Section 1554 begins, "Notwithstanding any other provision of *this Act.*" If section 1554 had begun with the prefatory language, "notwithstanding *any other provision of law*," Plaintiffs' argument might have slightly more merit, although even then the Ninth Circuit has held that the phrase "notwithstanding any other law" is not to be construed literally. *See, e.g.*, *Or. Nat. Res. Council v. Thomas*, 92 F.3d 792, 797 (9th Cir. 1996); *In re Glacier Bay*, 944 F.2d 577, 582 (9th Cir. 1991). But the prefatory language refers only to the ACA, evincing Congress's intent that section 1554 pertained only to the Secretary's authority to promulgate regulations under the ACA.

II. The Final Rule Complies with the Nondirective Pregnancy Counseling Requirement And Does Not Undercut the Central Holdings of *Rust v. Sullivan*.

Plaintiffs contend that the Final Rule conflicts with the nondirective pregnancy counseling rider in appropriations acts dating back to 1996[5] because (they claim) the riders require abortion referrals. Oregon Mem. at 12-13; AMA Mem. at 15. Plaintiffs both misread the nondirective pregnancy

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[5] The 2018 Consolidated Appropriations Act provides:

> For carrying out the program under title X of the PHS Act to provide for voluntary family planning projects, $286,479,000: Provided, That amounts provided to said projects under such title shall not be expended for abortions, that all pregnancy counseling shall be nondirective, and that such amounts shall not be expended for any activity (including the publication or distribution of literature) that in any way tends to promote public support or opposition to any legislative proposal or candidate for public office.

counseling requirement and attribute much greater significance to it than it claims for itself. Equally important, Plaintiffs' ignore that the Final Rule complies with the requirement as it is properly read. The nondirective pregnancy counseling requirement says nothing about abortion referral, nor does it in the least detract from *Rust's* holding that a rule banning abortion referrals is a constitutional interpretation of section 42 U.S.C. §300a-6.

It is important to emphasize what the nondirective pregnancy counseling riders do not do: (1) they do not mandate that Title X grantees provide pregnancy counseling, undoubtedly due to Congress's recognition that Title X's purpose is limited to provide *preconception* family planning services only. H.R. Conf. Rep. No. 91-1667, p. 8, *Rust*, 500 U.S. at 179; (2) they do not amend or repeal Title X's prohibition against program funds being used where abortion is a method of family planning; (3) they do not mention, much less mandate abortion referrals; (4) they do not indicate that federal policy is now neutral between childbirth and abortion. In short, the riders do nothing to supersede the *Rust* decision upholding the constitutionality of the 1988 regulations (1) requiring physical and financial separation between Title X projects and abortion services or activities, and (2) barring Title X projects from providing abortion referrals, or otherwise promoting abortion as a method of family planning.

Contrary to Plaintiffs' argument, the Final Rule complies with the nondirective pregnancy counseling requirement. First, consistent with appropriation act riders, the Final Rule properly gives grantees the option not to provide any pregnancy counseling. 42 C.F.R. § 59.5(a)(5) (effective May 3, 2019). Second, the Final Rule allows Title X projects to engage in nondirective pregnancy counseling entailing "the meaningful presentation of options" of which abortion is included. 84 Fed. Reg. at 7716. The HHS rejected comments recommending that the new regulations "prohibit discussion of abortion in nondirective pregnancy counseling." 84 Fed. Reg. at 7746. Thus, when a Title X patient is confirmed

to be pregnant, a Title X physician may "exercise discretion on whether to offer such counseling." *Id.* at 7747. *See also* *Rust*, 500 U.S. at 193 (prenatal counseling is outside the scope of Title X). If the Title X service provider provides pregnancy counseling, the counseling must be "designed to assist the patient in making a free and informed decision." *Id.*

> Each option discussed in such counseling must be presented in a nondirective manner. This involves presenting the options in a factual, objective, and unbiased manner and (consistent with other Title X requirements and restrictions) offering factual resources that are objective, rather than presenting the options in a subjective or coercive manner. Physicians or APPs should discuss the possible risks and side effects to both mother and unborn child of any pregnancy option presented, consistent with the obligation of health care providers to provide patients with accurate information to inform their health care decisions.

Id. The HHS explained further that its understanding of nondirective pregnancy counseling offers patient-centered "guidance."

> Clients take an active role in processing their experiences and identifying the direction of the interaction. In nondirective counseling, the Title X physicians and APPs promote the client's self-awareness and empower the client to be informed about a range of options, consistent with the client's expressed need and with the statutory and regulatory requirements governing the Title X program. In addition, the Title X provider may provide a list of licensed, qualified, comprehensive primary health care providers (including providers of prenatal care), some (but not the majority) of which may provide abortion in addition to comprehensive primary care.

Id. at 7716.

Adhering to section 1008's prohibition against funds being used in programs where abortion is a method of family planning, 42 U.S.C. § 300a-6, HHS stated that Title X projects could not use nondirective pregnancy counseling "as an indirect means of encouraging or promoting abortion as a method of family planning." 84 Fed. Reg. at 7716. "Title X projects and service providers must be careful that nondirective counseling related to abortion does not diverge from providing neutral, nondirective information into encouraging or promoting abortion." *Id.*

In sum, Plaintiffs' claim that the Final Rule conflicts with the nondirective pregnancy counseling requirement misrepresents both the substance of the requirement and the Final Rule.

III. Neither of the Supreme Court's 2018 Compelled Speech Cases Undercuts *Rust*.

AMA Plaintiffs claim the Supreme Court's 2018 compelled speech decisions "undermine" *Rust*. AMA Mem. at 28–29. To the contrary, neither *Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018) nor *Janus v. American Federation of State, Cty, & Mun. Emps.*, 138 S. Ct. 2448 (2018) involved conditions in a federal spending program. *Nat'l Inst. of Family & Life Advocates* struck down a state law requiring crisis pregnancy centers to inform women about how they could obtain state-subsidized abortions. The law was constitutionally infirm because it was a content-based regulation of speech that required pro-life pregnancy centers to engage in speech to which they were opposed. 138 S. Ct. at 2371.

Janus v. American Federation of State, Cty, & Mun. Emps. held unconstitutional a state law which forced public employees to subsidize a union, even if they chose not to join and strongly objected to the union's positions in collective bargaining and related activities. The law violated the free speech rights of nonmembers by compelling them to subsidize private speech on matters of substantial public concern. 138 S. Ct. at 2460.

Janus and *NIFLA* provide no support for AMA Plaintiffs' effort to evade *Rust*. Their misplaced reliance on the two decisions ignores the "basic difference between direct state interference with a protected activity" and government "encouragement of an alternative activity consonant with legislative policy." *Maher v. Roe*, 432 U.S. 464, 476 (1977). Constitutional concerns are at their apex when, as was true in *NIFLA* and *Janus*, the State "attempts to impose its will by force of law." *See* 432 U.S. at 476. The government's power to "encourage actions deemed to be in the public interest is necessarily far broader." *Id.*; *See also Buckley v. Valeo*, 424 U.S. 1, 94–95 (1976) (distinguishing between state law restrictions that constituted "direct burdens not only on the candidate's ability to run for office but also on the voter's ability to voice preferences regarding representative government and

contemporary issues" and denial of public financing to some presidential candidates which was not restrictive of voters' rights and was less restrictive of candidates' rights).

The AMA Plaintiffs' *NIFLA* and *Janus* argument suffers the same fatal defect as their "*Rust* is undermined by subsequent federal statute" arguments: each argument is based on mischaracterization of the cited authority.

IV. *Rust* Requires this Court to Grant Substantial Deference to the Final Rule.

This Court may not disturb HHS's judgment as an abuse of discretion because the Final Rule reflects a plausible construction of the plain language of the all the relevant statutes. *Rust*, 500 U.S. at 184. In reviewing the Final Rule, this Court "need not conclude that the agency construction was the only one it permissibly could have adopted." *United States v. Kollman*, 774 F.3d 592, 597 (9th Cir. 2014) (quoting *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 843 n.11 (1984)). Rather, substantial deference must be accorded to the interpretation of the authorizing statute by the agency authorized with administering it. *Chevron*, 467 U.S. at 844.

The Final Rule represents HHS's well-reasoned judgment about reconciling the statutory objectives reflected in Title X, the Church,[6] Coats-Snowe,[7] and Weldon[8] conscience protection amendments, and the nondirective pregnancy counseling requirement. Under the 2000 regulations, Title X grantees were required to refer for abortions when a client so requested. 42 C.F.R. §59.5 (July 3, 2000). HHS recognized that the 2000 regulations conflicted not only with §1008, but also with the conscience protection amendments. 84 Fed. Reg. at 7717. The HHS concluded that "[e]liminating the requirement to refer for abortion will relieve burdens on conscience that some entities and individuals experienced from complying with the previous requirement, and provide more flexibility for applicants

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[6] 42 U.S.C. § 300a-7 (2018).
[7] 42 U.S.C. § 238n (2018).
[8] Consolidated Appropriations Act, Pub. L. No. 111-117, 123 Stat 3034 (2009).

that otherwise might not have applied due to the burdens on conscience" imposed by the 2000 regulations' abortion referral requirement. *Id*. at 7719.

HHS's recognition of the importance of conscience rights is consistent with the Supreme Court's recent decision in *Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018) which upheld conscience objections to a state law requiring crisis pregnancy centers to inform women how they could obtain state-subsidized abortions. Significantly, the *NIFLA* Court was unpersuaded by the argument presented in an amicus brief from various medical organizations[9] that women's health care would be jeopardized if information about abortion availability was not compelled from the crisis pregnancy centers.

The HHS also correctly concluded that the 2000 regulations' abortion referral requirement conflicted with Title X because referrals for abortion "necessarily treats abortion as a method of family planning." 84 Fed. Reg. at 7718. The HHS's reasoning was approved in *Rust*. *See* 500 U.S. at 191; *see also New York v. Sullivan*, 889 F.2d 401, 407 (2d Cir. 1989) ("It would be wholly anomalous to read Section 1008 to mean that a program that merely counsels but does not perform abortions does not include abortion as a 'method of family planning.'").

That the Final Rule represents a change from the 2000 regulations does not, as Plaintiffs argue, render the Final Rule arbitrary and capricious. AMA Mem. at 37; Oregon Mem. at 19. Administrative agencies are "fully entitled" to change their minds, *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. at 659, especially to adopt regulations that (1) more fully align with a federal policy the enabling statute seeks to promote, and (2) better harmonize relevant provisions in other federal statutes. *See id.* at 666 (upholding agency interpretation which reconciled conflicting statutory provisions); *Rust*,

[9] Amici Curiae Brief of the Am. Acad. of Pediatrics, Cal. et al., *Nat'l Inst. of Family Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018) (No. 16-1140).

500 U.S. at 184–86 (rejecting argument that agency's interpretation is arbitrary and capricious because it represented a sharp break with prior interpretations of Title X). Unlike the 2000 regulations, the Final Rule strikes an appropriate balance between §1008 of Title X, the nondirective pregnancy counseling provision and the conscience amendments. As such, it is entitled to this Court's deference.

CONCLUSION

Amicus requests that this Court deny Plaintiffs' Motion for Preliminary Injunction.

Respectfully submitted,

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Dated: April 15, 2019

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