21-4235

United States Court of Appeals for the Sixth Circuit

STATE OF OHIO; STATE OF ALABAMA; STATE OF ARIZONA; STATE OF ARKANSAS; STATE OF FLORIDA; STATE OF KANSAS; COMMONWEALTH OF KENTUCKY; STATE OF MISSOURI; STATE OF NEBRASKA; STATE OF OKLAHOMA; STATE OF SOUTH CAROLINA; STATE OF WEST VIRGINIA,

Plaintiffs-Appellants,

v.

XAVIER BECERRA, Secretary, Department of Health and Human Services; JESSICA S. MARCELLA, Deputy Assistant Secretary for Population Affairs, in their official capacities; DEPARTMENT OF HEALTH AND HUMAN SERVICES; OFFICE OF POPULATION AFFAIRS,

Defendants-Appellees.

On Appeal from the United States District Court
for the Southern District of Ohio

BRIEF FOR STATES OF CALIFORNIA, NEW YORK, COLORADO, CONNECTICUT, DELAWARE, HAWAI'I, ILLINOIS, MAINE, MARYLAND, MASSACHUSETTS, MICHIGAN, MINNESOTA, NEVADA, NEW JERSEY, NEW MEXICO, NORTH CAROLINA, OREGON, PENNSYLVANIA, RHODE ISLAND, VERMONT, WASHINGTON, AND WISCONSIN, AND THE DISTRICT OF COLUMBIA AS AMICI CURIAE IN SUPPORT OF APPELLEES

ROB BONTA
Attorney General
State of California
1300 I Street
Sacramento, CA 95814
(916) 210-6276

LETITIA JAMES
Attorney General
State of New York
28 Liberty Street
New York, New York 10005
(212) 416-8020

(Counsel listing continues on signature pages.)

Dated: March 31, 2022

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Page(s)**

Cases **Page(s)**

Regulations

Regulations **Page(s)**

Miscellaneous Authorities

Miscellaneous Authorities **Page(s)**

Miscellaneous Authorities **Page(s)**

Miscellaneous Authorities **Page(s)**

INTERESTS OF AMICI

Appellants challenge an order of the United States District Court for the Southern District of Ohio (Black, J.) that denied their motion for a preliminary injunction to halt the continued application of a 2021 federal rule regulating the operation of the Title X program. *See* Ensuring Access to Equitable, Affordable, Client-Centered, Quality Family Planning Services, 86 Fed. Reg. 56,144 (Oct. 7, 2021) ("2021 Rule"). This Court previously denied appellants' motion for an injunction pending appeal because appellants' alleged expectation of harm from the 2021 Rule was unsupported or too speculative and thus could not establish a likelihood of irreparable injury. The Court's reasoning applies equally at this stage of the proceedings. For that reason and the reasons outlined below, the Court should affirm the district court's order denying appellants' motion for a preliminary injunction. The Court should also reject appellants' request on appeal for entry of judgment and a permanent injunction in their favor.

The States of California, New York, Colorado, Connecticut, Delaware, Hawai'i, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New Mexico, North Carolina, Oregon, Pennsylvania,

Rhode Island, Vermont, Washington, and Wisconsin, and the District of Columbia submit this brief supporting the denial of injunctive relief and to underscore that the balance of equities and the public interest tip heavily against appellants' requested injunction. Amici have a strong interest in the continued application of the 2021 Rule, which reinstated the medical and operational standards that had governed the Title X program for decades—before an abrupt policy change in 2019 forced providers to leave the program en masse. By reverting to the pre-2019 policies, the 2021 Rule has permitted providers to rejoin the Title X program, thereby restoring access to a wide range of healthcare services for amici's residents, including those in low-income, rural, and other underserved communities.

For approximately fifty years, the Title X program has been the linchpin of publicly funded family planning, serving nearly 200 million low-income or uninsured individuals and others. *See* Ensuring Access to Equitable, Affordable, Client-Centered, Quality Family Planning Services, 86 Fed. Reg. 19,812, 19,817 (Apr. 15, 2021) (notice of proposed rule). Title X "clinics have played a critical role in ensuring access to a broad range of family planning and related preventive health services," including

screenings for high blood pressure, anemia, diabetes, sexually transmitted diseases, and cervical and breast cancer. *See id.*

In 2019, the U.S. Department of Health and Human Services (HHS) issued a new rule that departed from nearly three decades of federal policy governing the Title X program by imposing onerous medical restrictions and costly program requirements on providers. *See* Compliance with Statutory Program Integrity Requirements, 84 Fed. Reg. 7,714 (Mar. 4, 2019) ("2019 Rule"). The 2019 Rule barred Title X providers from communicating certain abortion-related medical information to patients and required physical separation of facilities providing Title X–funded care from facilities providing abortion-related services. *Id.* at 7,715; *see id.* at 7,721. By preventing grantees from providing factual, neutral information to patients about their full range of treatment options, these restrictions barred providers from communicating freely with their patients and reduced the quality of care available to patients. And the physical-separation requirement proved cost-prohibitive for many providers that had structured their operations on HHS's longstanding view that Title X requires financial, but not physical, separation.

As a result of these restrictions, staggering numbers of providers in amici States exited the Title X program. The loss of federal funding compelled many providers to curtail services, reduce staff, charge higher fees, or close down altogether, which in turn caused patients to lose access to a wide range of critical healthcare. Many amici States sued to stop the 2019 Rule and submitted substantial evidence favoring rescission of these requirements in a comment letter supporting the 2021 Rule.[1] In October 2021, HHS issued the 2021 Rule, which rescinded the physical-separation and abortion-related restrictions of the 2019 Rule.

Amici States have a strong interest in the continued implementation of the 2021 Rule, which reverses the most devastating effects of the 2019 Rule. The 2021 Rule allows providers that were forced to leave the Title X program under the 2019 Rule to now rejoin amici's Title X networks, restoring patients' access to a wide array of critical healthcare services and improving patient health outcomes. The removal of the 2019 Rule's

---

[1] *See California ex rel. Becerra v. Azar*, 950 F.3d 1067, 1074 (9th Cir. 2020) (en banc); Comment Letter from Att'ys Gen. (May 17, 2021) (internet); *see also Mayor & City Council of Baltimore v. Azar*, 973 F.3d 258, 266 (4th Cir. 2020) (en banc). (For sources available on the internet, full URLs appear in the Table of Authorities. All URLs were last visited on March 31, 2022.)

harmful restrictions on clinician-patient communication also furthers amici's interest in safeguarding clinicians' ability to advise and treat patients effectively. These changes particularly benefit underserved and low-income communities and thus bolster amici's efforts to promote health equity and economic stability.

Contrary to appellants' assertion on appeal, this Court cannot simply ignore the irreparable-harm inquiry, the balance of equities, and the public interest, which together preclude injunctive relief. Moreover, even if the Court were to conclude that appellants were entitled to some relief at this stage of the proceedings, any relief would need to account for the significant reliance interests of providers, patients, and amici States in the medical and operational standards that governed the Title X program for nearly three decades: standards that the 2019 Rule upended, but the 2021 Rule has restored.

ARGUMENT

This Court reviews a district court's denial of a preliminary injunction for abuse of discretion, "keeping in mind that a preliminary injunction is 'an extraordinary remedy never awarded as of right.'" *Benisek v. Lamone*, 138 S. Ct. 1942, 1943 (2018) (quoting *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008)); *see D.T. v. Sumner Cnty. Schs.*, 942 F.3d 324, 327 (6th Cir. 2019). To obtain a preliminary injunction, the movants must make a clear showing that they are likely to succeed on the merits, that they are likely to suffer irreparable harm absent a preliminary injunction, that the balance of the equities tips in their favor, and that an injunction is in the public interest. *See Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008); *see also D.T.*, 942 F.3d at 327 (cited in *Ohio v. Becerra*, No. 21-4235, 2022 WL 413680, at *2 (6th Cir. Feb. 8, 2022)).

The district court here properly denied appellants' request for a preliminary injunction to halt the continued application of the 2021 Rule, and there is no basis to direct entry of a preliminary or permanent injunction. This Court previously denied appellants' motion for an injunction pending appeal, holding that appellants failed to demonstrate a likelihood

of irreparable injury that is indispensable to the grant of a preliminary injunction. *Ohio v. Becerra*, No. 21-4235, 2022 WL 413680, at *5 (6th Cir. Feb. 8, 2022). The Court specifically rejected as speculative or unsupported the same assertions of irreparable injury that appellants now press on appeal: namely, that appellants will allegedly (i) face increased competition or costs for Title X funding, (ii) receive less Title X funding and be forced to cut down services, (iii) suffer reputational injuries from a loss of Title X funding, or (iv) be forced to provide official state approval of abortion referrals even though the 2021 Rule recognizes exemptions for objecting providers and grantees. *Id.* at *3-5; *see* Br. of Appellants (Br.) at 49-54. The Court's conclusions remain correct today and counsel against either preliminary or permanent injunctive relief.[2]

[2] HHS's recent award of Title X grant funds for fiscal year 2022 (see *infra* at 24-25) does not undercut this Court's reasoning regarding the lack of irreparable injury. The Court determined that (i) appellants failed to establish that any alleged harm from increased competition would be irreparable, (ii) appellants failed to provide record support for any such harm other than for Ohio, and (iii) the record evidence for Ohio was too speculative to support a finding that any particular decrease in funding would force Ohio to cut down the services offered to patients. *Ohio*, 2022 WL 413680, at *3-4.

Amici States' experience under the 2019 Rule confirms the district court's findings that the public interest and the balance of equities also weigh heavily against an injunction to halt the continued application of the 2021 Rule and to force the Title X program to revert to its status under the 2019 Rule. The 2019 Rule severely harmed patients, providers, and public health by implementing restrictions that forced providers to withdraw from the Title X program. The mass withdrawal of providers obstructed the delivery of critical healthcare and strained amici States' ability to protect public health. In contrast, the 2021 Rule has permitted the reentry of these Title X providers, thereby restoring access to a broad range of quality healthcare and improving outcomes for low-income and uninsured patients and other underserved communities.

POINT I

AMICI STATES' EXPERIENCE CONFIRMS THAT AN INJUNCTION WOULD SEVERELY HARM PATIENTS, PROVIDERS, AND PUBLIC HEALTH

The abrupt policy reversal in the 2019 Rule that imposed onerous medical and physical-separation requirements on Title X providers caused significant harm to Title X patients, providers, and public health in amici States and nationwide. By rescinding those requirements, the 2021 Rule has permitted providers that had relied on longstanding Title X policies to rejoin the Title X program, thereby restoring access to critical health-care for many underserved communities throughout the nation. And these providers will once again be able to rely on Title X funds rather than emergency funds from amici States, conserving amici's public health resources.

Appellants' proposed injunction to halt the continued application of the 2021 Rule, and to force the Title X program to revert to its status under the 2019 Rule, would reinstate and exacerbate the harms caused by the 2019 Rule. The equities and the public interest therefore strongly support the district court's denial of appellants' requested injunction.

A. The Abrupt Policy Reversals in the 2019 Rule Caused a Staggering Loss of Title X Providers and Corresponding Reduction in Delivery of Care to Title X Patients.

The 2019 Rule reversed three decades of Title X policy. The Rule restricted providers' ability to give patients relevant and desired medical information, contrary to well-established standards of care. For example, pregnant patients seeking medical advice could not obtain a referral for abortion services even if the patients specifically requested it. And patients seeking counseling on abortion were forced to receive counseling about carrying their pregnancy to term regardless of their wishes. 84 Fed. Reg. at 7,747. These practices run counter to established professional medical standards, which instruct clinicians to "[p]resent relevant information accurately and sensitively, in keeping with the patient's preferences,"[3] and not to "withhold[] information without the patient's knowledge or consent," which "is ethically unacceptable."[4] The 2019 Rule also disqualified family planning clinics with co-located abortion services, which

---

[3] American Med. Ass'n, Code of Medical Ethics Op. E-2.1.1 (2017) (internet).

[4] American Med. Ass'n, Code of Medical Ethics Op. E-2.1.3 (2017) (internet).

upended the expectations of providers that had structured their operations in reliance on HHS's longstanding view that Title X requires only financial, and not physical, separation.

These policy changes inflicted devastating harm. As amici's experience demonstrates, the 2019 Rule forced providers to leave the Title X program, curtail services, or even close down entirely. And new providers did not materialize to fill the deficit, causing patients to lose access to a broad range of critical and quality healthcare services.[5] *See* 86 Fed. Reg. at 56,174.

Before the 2019 Rule, HHS funded 90 grantees supporting approximately 4,000 Title X clinics nationwide. Clinic recipients included specialized family planning clinics such as Planned Parenthood centers; federally qualified health centers; state government health departments; and school-based, faith-based, and other private nonprofit health programs.[6]

---

[5] Comment Letter from Att'ys Gen., *supra*, at 3.

[6] Brittni Frederiksen et al., *Data Note: Impact of New Title X Regulations on Network Participation*, Kaiser Fam. Found. (Sept. 20, 2019) (internet); *see also* Christina Fowler et al., *Title X Family Planning Annual Report: 2018 National Summary* 1 (Off. of Population Affs. 2019) (internet); Brittni Frederiksen et al., *Data Note: Is the Supplemental Title X Funding Awarded by HHS Filling in the Gaps in the Program?*, Kaiser Fam. Found. (Oct. 18, 2019) (internet).

The 2019 Rule's abrupt policy reversal decimated the Title X program. Grantees, subrecipients, and other providers left en masse because the 2019 Rule barred clinicians from providing relevant medical information to their patients and imposed severe financial burdens through the strict physical separation requirement. Between 2018 and 2020, the number of grantees, subrecipients, and service sites dropped by nearly 25%. The Title X program lost 24 out of 99 grantees; 261 out of 1,128 subrecipients; and 923 out of 3,954 service sites.[7] The grantees that withdrew from the Title X program included 11 state departments of health and independent family planning associations and 8 Planned Parenthood organizations. *Id.* at 56,146.

Because of the 2019 Rule, 6 States—Hawai'i, Maine, Oregon, Utah, Vermont, and Washington—lost *all* Title X providers. And grantees representing more than half of the Title X clinics in 8 other States—Alaska,

[7] *Compare* Christina Fowler et al., *Title X Family Planning Annual Report: 2020 National Summary* 9 (Off. of Population Affs. 2021) (internet), *with* Fowler et al., *2018 National Summary*, *supra*, at 7.

Connecticut, Illinois, Maryland, Massachusetts, Minnesota, New Hampshire, and New York—left the Title X program.[8]

Because of these mass provider withdrawals, the number of patients receiving Title X services fell dramatically between 2018 and 2020.[9] Nationwide, the number of Title X patients fell more than 60%, from 3.9 million to 1.5 million.[10] In California, the State's primary Title X grantee saw an 81% decrease in patients from 2018 to 2020.[11] Wisconsin saw an 83% decrease in the number of Title X patients served between 2018 and

---

[8] Brittni Frederiksen et al., *Key Elements of the Biden Administration's Proposed Title X Regulation*, Kaiser Fam. Found. (May 5, 2021) (internet).

[9] Contrary to appellants' assertions below, the drop in Title X patients between 2018 and 2020 resulted primarily from the 2019 Rule, not the COVID-19 pandemic. *See* 86 Fed. Reg. at 56,151-52.

[10] Brittni Frederiksen et al., *Rebuilding Title X: New Regulations for the Federal Family Planning Program*, Kaiser Fam. Found. (Nov. 3, 2021) (internet).

[11] 2020 program data from California's primary Title X grantee shows the devastating results of the 2019 Rule. In 2018, California's Title X program saw 974,331 patients. In 2019, California's Title X program saw 611,642 Title X patients—a 37% drop. In 2020, California's Title X program saw only 186,288 patients—an 81% drop from 2018. Of these Title X patients, a comparison of 2018 to 2020 shows that California's Title X program saw 568,202 fewer patients under 100% of the federal poverty level (FPL); 106,973 fewer patients between 151% and 200% of the FPL; and 31,541 fewer patients between 201% and 250% of the FPL. *See* Comment Letter from Att'ys Gen., *supra*, at 6 & n.22.

2020, Michigan saw a 77% decrease, Colorado saw a 26% decrease, and the District of Columbia saw a 16% decrease.[12] In Pennsylvania, at least three counties were left without any Title X providers and some participating grantees experienced significant reductions in total patients served.[13]

This decimation in Title X patients served was not limited to amici States. The number of Title X patients fell in 41 States and two territories. 86 Fed. Reg. at 56,146. Even many appellant States experienced significant drops in Title X patients; for example, Ohio, Arizona, South Carolina, and Kentucky each saw 40% to 65% fewer Title X patients.[14]

---

[12] *Compare* Fowler et al., *2020 National Summary*, *supra*, app. B at B-4 to -5, *with* Fowler et al., *2018 National Summary*, *supra*, app. B at B-4 to -5. For example, Michigan's Title X program served 62,707 patients in 2018, when Planned Parenthood was a Title X provider. *See* Fowler et al., *2018 National Summary*, *supra*, app. B at B-4. In 2020, when Planned Parenthood was not a Title X provider, Michigan's Title X program served only 14,680 patients. *See* Fowler et al., *2020 National Summary*, *supra*, app. B at B-4.

[13] Comment Letter from Att'ys Gen., *supra*, at 7.

[14] *Compare* Fowler et al., *2020 National Summary*, *supra*, app. B at B-4 to -5, *with* Fowler et al., *2018 National Summary*, *supra*, app. B at B-4 to -5.

B. The 2019 Rule Obstructed Access to Critical Healthcare Services and Severely Harmed Low-Income, Minority, and Rural Communities.

The 2019 Rule also harmed the delivery and quality of healthcare services, with serious consequences for public health. A 2016 survey showed that Title X clinics were the only source of comprehensive medical care for 60% of their patients.[15] After the 2019 Rule, many patients could not access any Title X provider, incurred more out-of-pocket costs, or experienced a disruption in the continuity of their care. Patients who obtained care from a provider that withdrew from the Title X program were often subject to increased fees due to the provider's need to compensate for the loss of Title X funding. 86 Fed. Reg. at 56,151.

Accordingly, organizations saw patients forgo recommended tests, lab work, sexually transmitted infection (STI) testing, clinical breast exams, and Pap tests in large numbers. *Id.* Between 2018 and 2019, Title X clinics performed 90,386 fewer Pap tests to screen for cervical cancer; 188,920 fewer breast exams; 276,109 fewer human immunodeficiency

---

[15] Megan L. Kavanaugh et al., *Use of Health Insurance Among Clients Seeking Contraceptive Services at Title X–Funded Facilities in 2016*, 50 Persps. on Sexual & Reprod. Health 101, 105 (2018) (internet).

virus tests; and over one million fewer STI tests. *Id.* at 56,147; *see also id.* at 56,173. In the same timeframe, 225,688 fewer Title X patients received oral contraceptives; 49,803 fewer patients received hormonal implants; and 86,008 fewer patients received intrauterine devices. 86 Fed. Reg. at 56,147. And some patients who lost access to Title X services reported being forced to switch to a less effective form of contraception. *See id.* at 56,151.[16]

As a result of the decrease in patients able to receive Title X services, it is estimated that the 2019 Rule may have led to up to 181,477 unintended pregnancies. 86 Fed. Reg. at 19,815. Unintended pregnancies are associated with higher risks to maternal health, adverse birth outcomes, and negative psychological outcomes for both mothers and children, thus leading to even broader public health harms.[17]

---

[16] *See also* Kristine Hopkins et al., *Women's Experiences Seeking Publicly Funded Family Planning Services in Texas*, 47 Persps. on Sexual & Reprod. Health 63, 66, 68 (2015) (internet); M. Antonia Biggs et al., *Findings from the 2012 Family PACT Client Exit Interviews* 53-54, 103 (Bixby Ctr. for Glob. Reprod. Health 2014) (internet). In Colorado, for instance, the use of long-acting reversible contraceptives, one of the most effective contraceptive methods, decreased from 39.4% to 38.8% between 2019 and 2020. Comment Letter from Att'ys Gen., *supra*, at 6 n.23.

[17] *See* Kathryn Kost & Laura Lindberg, *Pregnancy Intentions, Maternal Behaviors, and Infant Health: Investigating Relationships with New*

(*continued on the next page*)

In particular, the 2019 Rule severely harmed low-income and uninsured individuals who typically benefit from Title X services. After the 2019 Rule, Title X providers saw 573,650 fewer patients under the federal poverty level (FPL), 86 Fed. Reg. at 56,146—in 2019, an annual income of $25,750 for a family of four.[18] Title X providers also saw 139,801 fewer patients between 101% and 150% of the FPL; 65,735 fewer patients between 151% and 200% of the FPL; and 30,194 fewer patients between 201% and 250% of the FPL.[19] And Title X providers saw 324,776 fewer uninsured patients in 2019 as compared to 2018. *Id.* at 56,147.

Minority and rural communities were also severely affected by the 2019 Rule. Of the patients receiving Title X services in 2019 as compared to 2018, there were 128,882 fewer Black or African Americans; 50,039 fewer Asians; 8,724 fewer American Indians or Alaska Natives; 7,218 fewer Native Hawaiians or Pacific Islanders; and 269,569 fewer Hispanics

---

Measures and Propensity Score Analysis, 52 Demography 83, 99-101, 103 (2015) (internet).

[18] *See* Office of the Assistant Sec'y for Plan. & Evaluation, U.S. Dep't of Health & Hum. Servs., *2019 Poverty Guidelines* (n.d.) (internet).

[19] Comment Letter from George M. Abraham, President, Am. Coll. of Physicians 4 (May 17, 2021) (internet).

or Latinos.[20] The HHS Office of Population Affairs estimates that in 2020 as compared to 2019, Title X providers saw 37% fewer patients with limited English proficiency.[21]

Rural areas also lost Title X care, which is especially critical in such areas due to provider shortages, lack of transportation, and other factors that often limit rural residents' access to needed healthcare.[22] For example, Connecticut lost nearly all of its Title X providers, leaving the State with service sites only in the urban New Haven area.[23] And in Colorado, 20 rural counties lost all or most healthcare providers offering contraceptive services.[24]

---

[20] *See* Christina Fowler et al., *Title X Family Planning Annual Report: 2019 National Summary* app. A at A-10, A-12 (Off. of Population Affs. 2020) (internet).

[21] Fowler et al., *2020 National Summary*, *supra*, at 26.

[22] *See* American Coll. of Obstetricians & Gynecologists, Comm. on Health Care for Underserved Women, Comm. Op. No. 586, at 1 (2014) (internet) ("Rural women experience poorer health outcomes and have less access to health care than urban women. . . . Health care professionals should be aware of this issue and advocate for reducing health disparities in rural women.").

[23] Frederiksen et al., *Data Note: Is the Supplemental Title X Funding Awarded by HHS Filling in the Gaps in the Program?*, *supra*.

[24] Comment Letter from Att'ys Gen., *supra*, at 6.

C. The 2019 Rule Harmed Amici States' Budgets and Capacity to Promote Public Health.

Amici's experience under the 2019 Rule confirms that appellants' requested injunction would significantly strain States' budgets and their capacity to promote public health. In the past two years, many amici have been forced to spend millions in state funds to keep clinics open and ensure access to necessary healthcare. For instance:

- California provided $348,488 in one-time grants to two health-care facilities and their affiliates.[25]
- New York made emergency appropriations to cover the loss of Title X funds from fall 2019 through March 2020, and thereafter established annual appropriations to offset the loss of Title X funds. A total of $14.2 million was allocated for this purpose in fiscal year 2021. That significant appropriation required the state department of health to divert funds that had been intended for other program initiatives, and it is not expected that the State would be able to continue this level of investment in the future.
- Colorado spent nearly $400,000 in 2020 and 2021 to mitigate the loss of Title X funds.
- Connecticut was not able to provide additional funding until the biennial state budget for 2021-2022, which included an additional $2.1 million per year for Planned Parenthood of

[25] *See* Comment Letter from Att'ys Gen., *supra*, at 7. California also passed legislation specifically intended to increase funding and investment in reproductive healthcare to respond to the previous federal administration's restrictions on reproductive freedom. *See id.* at 7 n.29.

Southern New England, the State's primary Title X provider before the 2019 Rule.

- Hawai'i made a one-time appropriation of $750,000 in state funds to offset the absence of Title X funds in fiscal year 2020. However, additional funding was not appropriated for fiscal year 2021. As a result, there was a 100% reduction of the Hawai'i State Department of Health's Title X–funded staff in 2021.

- Illinois supplied $3.7 million to fill the gap created by the loss of Title X funds.

- Maine's clinics remain open but rely on state and private funds instead of Title X funds.

- Michigan allocated approximately $1.6 million to make up the loss of Title X funds.

- Massachusetts made an annual emergency appropriation of $6.7 to $8 million in state funds to replace lost Title X funds in fiscal years 2020, 2021, and 2022.

- New Jersey made an appropriation of $9.5 million to the state department of health for family planning services to make up for the loss of Title X funds in fiscal year 2020. The family planning line item, which has continued to factor into the state budget, is $19.5 million in the fiscal year 2021 budget and in the fiscal year 2022 budget.

- Oregon has provided state funds of approximately $3 million per year to replace lost Title X funds and continue its family planning programs. Such funding was included in the current budget which runs from July 2021 to June 2023.

- Vermont has dedicated approximately $1.6 million for two fiscal years to fill the gap in Title X funds.

- Washington, whose state health department was the State's sole Title X grantee, allocated $8.4 million from general state

> funds as a temporary funding measure for a two-year period ending in June 2022 to offset the loss of Title X funds.[26]

Many of these supplemental funds are one-time grants or rely on other finite sources of support that have been or will be exhausted. And the need to replace Title X funds means fewer resources available for other public health purposes. The temporary infusion of millions of dollars in state healthcare spending, particularly during the time of exceptional public need caused by COVID-19, strained state budgets and left family planning programs uncertain of their ability to continue providing care. An injunction halting the continued implementation of the 2021 Rule would further impair amici's capacity to deliver critical healthcare to their residents, in contravention of amici's long and substantial reliance on Title X funding.

---

[26] *See* Comment Letter from Att'ys Gen., *supra*, at 7-9.

D. The 2021 Rule's Return to the Longstanding Policies of the Title X Program Has Permitted Providers to Reenter the Program and Expand Access to Healthcare.

By reverting to the longstanding policies of the Title X program before 2019, the 2021 Rule has already permitted providers to rejoin the Title X networks in amici States and across the country and will allow expansion of the networks as new Title X grants are awarded. The rebuilding of the Title X program under the 2021 Rule will have a corresponding positive impact on the restoration and expansion of Title X services, including in rural and underserved areas that had lost all such services, and will permit clinics to return to Title X fee scales, including sliding fees based on patients' ability to pay. These positive impacts heavily outweigh any speculative harms alleged by appellants.

The 2021 Rule has allowed former Title X grantees forced out of the program by the 2019 Rule to rapidly reenter the program and expand Title X networks to serve many more patients. For example, before the 2021 Rule took effect in November 2021, California had 242 clinic sites receiving Title X funding. Only a few months after the 2021 Rule was implemented, the number of clinic sites is now 396—an increase of more than 160%. And between 2021 and 2022, the number of patients in

California receiving Title X services has more than doubled, from 222,154 to 500,000. Similarly, in Michigan, Planned Parenthood of Michigan has reentered the Title X program, restoring Title X funding to 16 former service sites throughout the State.

Grantees in other amici States have similarly expanded their Title X networks, including in underserved communities. For example, two subrecipients in Pennsylvania that had left because of the 2019 Rule have now rejoined the Title X network. And depending on the amount of Title X funds awarded in 2022, grantees in Pennsylvania plan to add at least 9 more providers to their Title X network—including at least 5 providers that had left because of the 2019 Rule. Some of these providers would be located in counties where there is no Title X provider within 25 miles. One Pennsylvania grantee's mobile health program serves hundreds of individuals in a largely rural 23-county area by providing reproductive care, cervical and breast cancer screenings, vaccinations, and food pantry access. Subrecipients of a grantee in Nevada have also applied for Title X funds under the 2021 Rule and plan to expand to new locations; increase hours; and provide additional healthcare services for hard-to-

reach communities, including the uninsured, young, rural, and homeless populations.

There is no support for appellants' contention that providers will object to the longstanding policies restored by the 2021 Rule, and that Title X networks will therefore shrink. As this Court recognized, appellants have provided no evidence that the 2021 Rule has caused a decrease in Title X providers or services in appellant States or any other State. *See Ohio*, 2022 WL 413680, at *3-4, *3 n.3. Instead, former Title X grantees in amici States and even in appellant States have successfully sought Title X funds after the implementation of the 2021 Rule. In January 2022, HHS awarded $6.6 million in emergency grant funds to assist States currently without Title X providers or in need of increased Title X services.[27] And in late March 2022, HHS awarded $256.6 million in grant funds to restore and expand Title X networks across the country. Grantees in amici States received $120.5 million in Title X funds. And grantees in the 12

[27] Press Release, U.S. Dep't of Health & Hum. Servs., *HHS Awards $6.6 Million to Address Increased Need for Title X Family Planning Services* (Jan. 21, 2022) (internet). Indeed, a grantee in Alabama—a State appearing as an appellant in this appeal—received nearly $1.5 million in Title X funds. *See id.*

States appearing as appellants here received more than $64 million—over 25% of the total funds awarded. Thus, under the 2021 Rule, grantees in amici States and in each of the twelve appellant States have sought and obtained funding that can be used to immediately restore Title X networks and expand services.[28]

POINT II

INJUNCTIVE RELIEF IS NOT WARRANTED AT THIS STAGE OF THE PROCEEDINGS AND, IF GRANTED AT ALL, MUST ACCOUNT FOR AMICI'S SIGNIFICANT RELIANCE INTERESTS

Appellants have failed to show a likelihood of irreparable injury necessary to obtain a preliminary injunction halting the implementation of the 2021 Rule and restoring the 2019 Rule's policies. And neither the equities nor public interest support such an injunction, as demonstrated by the 2019 Rule's devastating impact on patients and public health, and the 2021 Rule's beneficial impact on the restoration of the Title X network. This Court therefore need not address appellants' likelihood of success on the merits. For the same reasons, contrary to appellant's suggestion,

---

[28] Press Release, U.S. Dep't of Health & Hum. Servs., *HHS Awards $256.6 Million to Expand and Restore Access to Equitable and Affordable Title X Family Planning Services Nationwide* (Mar. 30, 2022) (internet).

appellants are not entitled to a decision on the merits or a permanent injunction in their favor at this stage of the proceedings.[29] *See* Br. at 56-57.

"An injunction is a matter of equitable discretion; it does not follow from success on the merits as a matter of course." *Winter*, 555 U.S. at 32. *see also Benisek*, 138 S. Ct. at 1943-44. To enter a preliminary or permanent injunction, a court must find that the plaintiff has established a likelihood of irreparable injury that is "immediate, not speculative or theoretical." *D.T.*, 942 F.3d at 327 (quotation marks omitted); *see also Winter*, 555 U.S. at 22. The court must also consider whether the balance of equities tips in favor of the movant and whether an injunction is in the public interest. *Winter*, 555 U.S. at 20. And the court "should pay particular regard for the public consequences" in exercising its discretion regarding "the extraordinary remedy of injunction." *Id.* at 24 (quotation marks omitted).

---

[29] In any event, HHS's brief to this Court explains that appellants have failed to demonstrate a likelihood of success on the merits of their claims that the 2021 Rule is contrary to law or arbitrary and capricious. *See* Br. for Appellees at 26-45.

Appellants are not entitled to a preliminary or permanent injunction here because they cannot establish a likelihood of irreparable injury or that the equities and public interest favor an injunction. This Court has already determined that appellants' assertions of irreparable injury are insufficient to support injunctive relief on this record, *see Ohio*, 2022 WL 413680, at *3-5, and amici's experience confirms that the equities and public interest tip heavily against appellants' requested injunction. The district court therefore correctly denied appellants' motion for a preliminary injunction. For those same reasons, entry of a permanent injunction on this record and at this stage of the proceedings would be improper, as a permanent injunction requires the same showing as a preliminary injunction regarding irreparable injury, the balance of equities, and the public interest. *See Winter*, 555 U.S. at 20, 32-33; *see also eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006) (permanent injunction standard).

In the unlikely event that this Court chooses to reach the merits and concludes that appellants have shown sufficient likelihood of success, together with the other relevant factors, to warrant some injunctive relief, any such relief must account for the reliance interests that would be

affected by undercutting the 2021 Rule. Such interests include amici States' significant stake in the continuation of three decades of federal policy governing the Title X program, which the 2019 Rule briefly upended but the 2021 Rule has restored.[30]

Equitable remedies such as injunctions are distinguished by their "[f]lexibility rather than rigidity," which affords the judiciary the power to "mould each decree to the necessities of the particular case." *Hecht Co. v. Bowles*, 321 U.S. 321, 329 (1944). Consistent with these principles, courts have been especially careful to devise remedies that minimize harm to long-established programs or policies with substantial nationwide impact.[31]

For example, courts have sometimes remanded a matter to an agency without vacating the agency's underlying action, despite holding

---

[30] In contrast to amici's "serious reliance interests" on HHS's "long-standing polic[y]" before 2019, *see Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 222 (2016) (quotation marks omitted), appellants proffered evidence concerning the reliance interests that only one of the 12 appellants (Ohio) had purportedly developed based on the short-lived 2019 Rule. *See* Br. at 38-39; *see also Ohio*, 2022 WL 413680, at *3 & n.3.

[31] Ronald M. Levin, *"Vacation" at Sea: Judicial Remedies and Equitable Discretion in Administrative Law*, 53 Duke L.J. 291, 323, 326-29 (2003) (internet).

that the agency violated the Administrative Procedure Act. *See, e.g.*, *Texas Ass'n of Mfrs. v. United States Consumer Prod. Safety Comm'n*, 989 F.3d 368, 389-90 (5th Cir. 2021); *Central & S.W. Servs., Inc. v. EPA*, 220 F.3d 683, 692, 702 (5th Cir. 2000).[32] Courts have employed this approach where vacatur would be "disruptive" and there is "at least a serious possibility that the agency will be able to substantiate its decision given an opportunity to do so." *Central & S.W. Servs.*, 220 F.3d at 692 (quotation and alteration marks omitted); *see also Radio-Television News Dirs. Ass'n v. FCC*, 184 F.3d 872, 888 (D.C. Cir. 1999) (remanding matter for agency's further consideration, including possibility of conducting a new rulemaking); *Allied-Signal, Inc. v. U.S. Nuclear Regul. Comm'n*, 988 F.2d 146, 151 (D.C. Cir. 1993) (remanding where it was "conceivable" that the agency could explain its action).

---

[32] *See also Black Warrior Riverkeeper, Inc. v. U.S. Army Corps of Eng'rs*, 781 F.3d 1271, 1290-92 (11th Cir. 2015) (collecting cases); *accord Department of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1907-08 (2020) (recognizing that, where an agency's explanation for its action is inadequate, a court "may remand [the matter] for the agency" to provide a fuller explanation of its reasoning or take new agency action).

Courts have also sometimes vacated an agency action but stayed the order of vacatur for a "limited time to allow the agency to attempt to cure the defects that the court has identified." *NAACP v. Trump*, 298 F. Supp. 3d 209, 244, 245 (D.D.C. 2018). In other cases, courts have stayed an order of vacatur pending development of a new plan or promulgation of a new rule. *See Natural Res. Def. Council, Inc. v. EPA*, 301 F. Supp. 3d 133, 145 (D.D.C. 2018); *see also Friends of the Earth, Inc. v. EPA*, 446 F.3d 140, 148 (D.C. Cir. 2006) (recognizing that district courts "retain[] some remedial discretion" to stay their orders and give a regulated entity a "reasonable opportunity" to develop a plan to come into compliance with federal law). Indeed, courts have employed similar methods to minimize harm to significant reliance interests even when holding laws or governmental actions unconstitutional. *See, e.g.*, *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 87 (1982) (plurality opinion) (temporarily staying judgment to allow Congress to address constitutional deficiency); *Buckley v. Valeo*, 424 U.S. 1, 143 (1976) (per curiam) (same).[33]

---

[33] *See also, e.g.*, *Aurelius Inv., LLC v. Puerto Rico*, 915 F.3d 838, 862-63 (1st Cir. 2019) (staying mandate for 90 days to allow the President

(*continued on the next page*)

Accordingly, even if the Court were to conclude that injunctive relief is warranted here, any such relief must be carefully crafted to take account of amici's significant reliance interests and to minimize the harms that would flow from invalidating HHS's longstanding policies governing the Title X program.

---

and Senate to remedy defective appointments to oversight board or "reconstitute the Board in accordance with the Appointments Clause," and clarifying that the ruling did not "eliminate any otherwise valid actions of the Board prior to the issuance of our mandate in this case"), *rev'd on other grounds sub nom. Financial Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC*, 140 S. Ct. 1649 (2020); *Moore v. Madigan*, 702 F.3d 933, 942 (7th Cir. 2012) (staying mandate for 180 days to allow Illinois legislature to craft new legislation after holding that the State's law regulating the carrying of firearms in public violated the Second Amendment); *EEOC v. CBS, Inc.*, 743 F.2d 969, 975-76 (2d Cir. 1984) (staying mandate for approximately four months to afford Congress an opportunity to "take appropriate measures" to remedy the invalid transfer of powers to the agency).

CONCLUSION

The Court should affirm the district court's order denying appellants' motion for a preliminary injunction.

Dated: New York, New York
March 31, 2022

Respectfully submitted,

ROB BONTA
Attorney General
State of California
RENU R. GEORGE
Senior Assistant Attorney General
KARLI EISENBERG
KATHLEEN BOERGERS
Supervising Deputy Attorneys General
KETAKEE KANE
LAUREN ZWEIER
Deputy Attorneys General

California Department of Justice
1515 Clay Street, 20th Floor
Oakland, CA 94612-0550
(510) 879-1519
ketakee.kane@doj.ca.gov

LETITIA JAMES
Attorney General
State of New York
BARBARA D. UNDERWOOD
Solicitor General
ANISHA S. DASGUPTA
Deputy Solicitor General
LAURA ETLINGER
Assistant Solicitor General

By: */s/ Blair J. Greenwald*
BLAIR J. GREENWALD
Assistant Solicitor General

Office of the Attorney General
28 Liberty Street
New York, NY 10005
(212) 416-6102
blair.greenwald@ag.ny.gov

(Counsel listing continues on the next two pages.)

PHILIP J. WEISER
Attorney General
State of Colorado
1300 Broadway
Denver, CO 80203

WILLIAM TONG
Attorney General
State of Connecticut
165 Capitol Avenue
Hartford, CT 06106

KATHLEEN JENNINGS
Attorney General
State of Delaware
820 N. French Street
Wilmington, DE 19801

HOLLY T. SHIKADA
Attorney General
State of Hawai'i
425 Queen Street
Honolulu, HI 96813

KWAME RAOUL
Attorney General
State of Illinois
100 West Randolph Street
Chicago, IL 60601

AARON M. FREY
Attorney General
State of Maine
6 State House Station
Augusta, ME 04333

BRIAN E. FROSH
Attorney General
State of Maryland
200 Saint Paul Place
Baltimore, MD 21202

MAURA HEALEY
Attorney General
Commonwealth of Massachusetts
One Ashburton Place
Boston, MA 02108

DANA NESSEL
Attorney General
State of Michigan
P.O. Box 30212
Lansing, MI 48909

KEITH ELLISON
Attorney General
State of Minnesota
102 State Capitol
75 Rev. Dr. Martin Luther King Jr. Blvd.
St. Paul, MN 55155

AARON D. FORD
Attorney General
State of Nevada
100 North Carson Street
Carson City, NV 89701

MATTHEW J. PLATKIN
Acting Attorney General
State of New Jersey
25 Market Street
Trenton, NJ 08625

HECTOR BALDERAS
Attorney General
State of New Mexico
P.O. Drawer 1508
Santa Fe, NM 87504

JOSHUA H. STEIN
Attorney General
State of North Carolina
Department of Justice
114 W. Edenton Street
Raleigh, NC 27603

ELLEN F. ROSENBLUM
Attorney General
State of Oregon
1162 Court Street N.E.
Salem, OR 97301

JOSH SHAPIRO
Attorney General
Commonwealth of Pennsylvania
Strawberry Square
Harrisburg, PA 17120

PETER F. NERONHA
Attorney General
State of Rhode Island
150 South Main Street
Providence, RI 02903

THOMAS J. DONOVAN, JR.
Attorney General
State of Vermont
109 State Street
Montpelier, VT 05609

ROBERT W. FERGUSON
Attorney General
State of Washington
P.O. Box 40100
Olympia, WA 98504

JOSHUA L. KAUL
Attorney General
State of Wisconsin
17 West Main Street
Madison, WI 53703

KARL A. RACINE
Attorney General
District of Columbia
400 6th Street, NW, Suite 8100
Washington, D.C. 20001

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a) of the Federal Rules of Appellate Procedure, Kelly Cheung, an employee in the Office of the Attorney General of the State of New York, hereby certifies that according to the word count feature of the word processing program used to prepare this brief, the brief contains 6,368 words and complies with the typeface requirements and length limits of Rules 29 and 32(a)(5)-(7) and the corresponding local rules.

/s/ *Kelly Cheung*

CERTIFICATE OF SERVICE

I hereby certify that on March 31, 2022, the foregoing was filed electronically. Notice of this filing will be sent to all parties for whom counsel has entered an appearance by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

Dated: New York, NY
March 31, 2022

/s/ Blair J. Greenwald
BLAIR J. GREENWALD