No. 24-437

In the Supreme Court of the United States

STATE OF OKLAHOMA, PETITIONER

v.

DEPARTMENT OF HEALTH AND HUMAN SERVICES, ET AL.

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

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

Title X of the Public Health Service Act, 42 U.S.C. 300 *et seq.*, authorizes the Department of Health and Human Services (HHS) to make grants for family planning projects. 42 U.S.C. 300(a). Title X grants "shall be made in accordance with such regulations as the [HHS] Secretary may promulgate," 42 U.S.C. 300a-4(a), and "shall be payable * * * 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," 42 U.S.C. 300a-4(b). In 2021, HHS issued a rule restoring longstanding requirements that Title X projects "[o]ffer pregnant clients the opportunity to be provided information" and "nondirective counseling" regarding, among other things, "[p]regnancy termination," followed by "referral upon request." 86 Fed. Reg. 56,144, 56,178-56,179 (Oct. 7, 2021). In this case, HHS allowed the Oklahoma State Department of Health (OSDH), a Title X grantee, to satisfy that requirement by providing individuals with the number for a third-party hotline to obtain information about abortion and any subsequent referral. The questions presented are:

1. Whether the requirements restored by HHS's 2021 rule violate the Spending Clause, U.S. Const. Art. I, § 8, Cl. 1.

2. Whether HHS's termination of OSDH's Title X grant based on OSDH's failure to comply with the 2021 rule violated the Weldon Amendment, which bars government entities from subjecting any "health care entity to discrimination on the basis that the health care entity does not * * * refer for abortions," Pub. L. No. 118-47, Div. D, Tit. V, § 507(d)(1), 138 Stat. 703 (2024).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-59a) is reported at 107 F.4th 1209. The order of the district court (Pet. App. 60a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 15, 2024. The petition for a writ of certiorari was filed on October 15, 2024 (Tuesday following a holiday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

A. Legal Background

1. In 1970, Congress enacted Title X of the Public Health Service Act, ch. 373, 58 Stat. 682, to make "comprehensive voluntary family planning services readily

available to all persons desiring such services." Pub. L. No. 91-572, § 2(1), 84 Stat. 1504 (42 U.S.C. 300 *et seq.*). Title X authorizes the 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). Congress provided that Title X grants "shall be made in accordance with such regulations as the [HHS] Secretary may promulgate," 42 U.S.C. 300a-4(a), and "shall be payable * * * 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," 42 U.S.C. 300a-4(b). Section 1008 of Title X provides that the funds made available under the statute may not be "used in programs where abortion is a method of family planning." 42 U.S.C. 300a-6.

In 2004, Congress enacted an appropriations rider, known as the Weldon Amendment, designed to provide "conscience protection[s]" to certain individuals and healthcare entities. 150 Cong. Rec. 25,044 (2004) (statement of Rep. Weldon). The Weldon Amendment states that none of the funds provided in HHS's annual appropriations act may be "made available to a Federal agency or program, or to a State or local government, if such agency, program, or government subjects any institutional or individual health care entity to discrimination on the basis that the health care entity does not provide, pay for, provide coverage of, or refer for abortions." Pub. L. No. 108-447, Tit. V, § 508(d)(1), 118 Stat. 3163 (2004). Congress has included the Weldon Amendment in each subsequent annual appropriations act for HHS.

See, *e.g.*, Pub. L. No. 118-47, Div. D, Tit. V, § 507(d)(1), 138 Stat. 703 (2024).

2. Beginning in 1981 and continuing "for much of the [Title X] program's history," HHS has required that Title X projects "[o]ffer pregnant clients the opportunity to be provided information" and "nondirective counseling" regarding "[p]renatal care and delivery," "[i]nfant care, foster care, or adoption," and "[p]regnancy termination," followed by "referral upon request." 86 Fed. Reg. 56,144, 56,150, 56,178-56,179 (Oct. 7, 2021). Those requirements allow patients to receive "complete factual information about all medical options and the accompanying risks and benefits." 65 Fed. Reg. 41,281, 41,281 (July 3, 2000). But consistent with Section 1008, HHS has explained that a Title X project may not "promote[] abortion or encourage[] persons to obtain abortion." *Ibid.*

Twice during the Title X program's history, HHS adopted a different policy and placed further restrictions on the type of counseling and referrals that Title X projects may provide. First, in 1988, the agency issued a rule prohibiting projects from "provid[ing] counseling concerning the use of abortion as a method of family planning or provid[ing] referral for abortion as a method of family planning." 53 Fed. Reg. 2922, 2945 (Feb. 2, 1988). In *Rust* v. *Sullivan*, 500 U.S. 173 (1991), this Court upheld that rule. Applying *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the Court found Section 1008's language "ambiguous" and was "unable to say that the Secretary's construction of the prohibition in § 1008 to require a ban on counseling" or "referral" was "impermissible." *Rust*, 500 U.S. at 184.

Despite this Court's decision upholding the 1988 rule, the rule was "never implemented on a nationwide basis." 65 Fed. Reg. 41,270, 41,271 (July 3, 2000). In 1993, HHS suspended the 1988 rule and reverted to its pre-1988 standards. 58 Fed. Reg. 7462, 7462 (Feb. 5, 1993). In 2000, the agency issued a final rule codifying those standards, including the requirement for nondirective options counseling and referral upon request. 65 Fed. Reg. at 41,279. That rule remained in place for nearly two decades. And since 1996, Congress has explicitly acknowledged that longstanding policy by including a rider in annual Title X appropriations specifying that "all pregnancy counseling shall be nondirective." Pub. L. No. 104-134, Tit. II, 110 Stat. 1321-221 (1996); see, *e.g.*, Pub. L. No. 118-47, Div. D, Tit. II, 138 Stat. 652 (2024).

In 2019, HHS issued a rule reinstating much of the 1988 rule, including the general prohibition on referrals for abortion. 84 Fed. Reg. 7714, 7747 (Mar. 4, 2019). In light of the post-1996 appropriations riders, however, the 2019 rule departed from the 1988 rule by allowing projects to "provide nondirective counseling on abortion generally as a part of nondirective pregnancy counseling." *Id.* at 7730; see *id.* at 7789. The Ninth Circuit upheld the 2019 rule, *California ex rel. Becerra* v. *Azar*, 950 F.3d 1067, 1074 (2020) (en banc), while the Fourth Circuit invalidated it, *Mayor of Baltimore* v. *Azar*, 973 F.3d 258, 266 (2020) (en banc). This Court granted certiorari to resolve that conflict, but the parties stipulated to dismissal of the cases after HHS announced its intention to engage in further rulemaking. See *Becerra* v. *Mayor of Baltimore*, 141 S. Ct. 2618 (2021).

3. In October 2021, HHS promulgated a rule restoring the pre-2019 counseling and referral requirements.

See 86 Fed. Reg. at 56,150. HHS determined that the 2019 rule's restrictions had "interfered with the patient-provider relationship," *id.* at 56,146; "compromised [grantees'] ability to provide quality healthcare to all clients," *ibid.*; and "shifted the Title X program away from its history of providing client-centered quality family planning services," *id.* at 56,148. HHS explained that it is "critical for the delivery of quality, client-centered care" to provide "pregnant clients the opportunity to receive neutral, factual information and nondirective counseling on all pregnancy options," in addition to "referral upon request." *Id.* at 56,154.

The 2021 rule explained that a referral for a patient seeking information on abortion "may"—but need not—"include providing a patient with the name, address, telephone number, and other relevant factual information" about a medical provider. 86 Fed. Reg. at 56,150. But HHS emphasized that a Title X project "may not take further affirmative action (such as negotiating a fee reduction, making an appointment, or providing transportation) to secure abortion services for the patient." *Ibid.* (citation omitted). HHS further stated that individuals and entities covered by federal conscience laws such as the Weldon Amendment "will not be required to counsel or refer for abortions in the Title X program in accordance with applicable federal law." *Id.* at 56,153.

4. Oklahoma and 11 other States sued the Secretary of HHS in the United States District Court for the Southern District of Ohio, seeking to preliminarily enjoin enforcement of the 2021 rule. See *Ohio* v. *Becerra*, 577 F. Supp. 3d 678, 687 (S.D. Ohio 2021), aff'd in part, rev'd in part, and remanded, 87 F.4th 759 (6th Cir. 2023). As relevant here, the States contended that the 2021 rule "contravenes Section 1008" by "requiring

referrals" for abortion. *Id.* at 688. The district court held that the States were unlikely to succeed on the merits of that argument and denied a preliminary injunction. *Id.* at 690-693, 700. The Sixth Circuit affirmed in relevant part. *Ohio* v. *Becerra*, 87 F.4th 759, 770-775 (2023).

B. The Present Controversy

1. This case arises from HHS's decision to terminate the Title X grant for the Oklahoma State Department of Health (OSDH). Congress gave HHS discretion to allocate Title X funds among competing applicants based on factors such as "the number of patients to be served" and "the extent to which family planning services are needed locally." 42 U.S.C. 300(b). A Title X grant will generally be awarded for one year, followed by "subsequent continuation awards" provided "for one year at a time." 42 C.F.R. 59.8(b). "A recipient must submit a separate application to have the support continued for each subsequent year," and "continuation awards require a determination by HHS that continued funding is in the best interest of the government." *Ibid.* The total "anticipated period" for a grant award "will usually be for three to five years," after which the grantee must "recompete for funds." 42 C.F.R. 59.8(a).

Once Title X funds are granted, the recipient must spend those funds "in accordance with" applicable "regulations" and "the terms and conditions of the award." 42 C.F.R. 59.9; see 42 U.S.C. 300-4(a) and (b). If the recipient fails to do so, HHS may "terminate" the grant. 45 C.F.R. 75.371(c); see 45 C.F.R. 75.372(a)(1).

2. OSDH has long received Title X grants, including during the decades when HHS regulations have required Title X projects to offer nondirective options counseling and referrals upon request. See Pet. 4. In

2022, HHS awarded a Title X grant to OSDH for the period of April 2022 to March 2023. Pet. App. 6a. HHS explained that a condition of that grant was OSDH's compliance with applicable regulations. *Ibid.* OSDH used the grant to "provide[] funding to the State's 68 county health departments," which offer "family planning public health services." *Id.* at 179a. "OSDH also contract[ed] with the Oklahoma City-County Health Department and the Tulsa County Health Department," which offer the same services "in Oklahoma's most heavily populated counties." *Id.* at 180a.

After this Court's decision in *Dobbs* v. *Jackson Women's Health Organization*, 597 U.S. 215 (2022), OSDH initiated discussions with HHS about changing the counseling and referral policies for its Title X project in light of a newly effective state law generally making it unlawful to "administer[]," "prescrib[e]," or "advis[e] or procur[e]" an abortion. Okla. Stat. Ann. tit. 21, § 861 (2022); see Pet. App. 7a. OSDH proposed to "provid[e] clients seeking counseling on pregnancy termination" with a link to an HHS website. Pet. App. 151a. HHS rejected that proposal as inconsistent with the 2021 rule. *Ibid.* But HHS proposed an accommodation under which OSDH could comply with the rule by ensuring that interested Title X patients were offered the telephone number for a national hotline that would supply the requisite nondirective counseling and referral information. *Id.* at 7a; see *id.* at 151a-152a. OSDH agreed to that accommodation and revised its program accordingly. *Id.* at 7a; see *id.* at 152a-153a. Based on that agreement, HHS approved a continuation award of $4.5 million for OSDH from April 2023 through March 2024. *Id.* at 6a-7a.

Soon thereafter, however, OSDH reversed course and stated that patients in its project who seek pregnancy counseling would not be provided with the hotline number. Pet. App. 7a. In response, HHS informed OSDH that it was violating the 2021 rule and the terms of its grant. *Ibid.* HHS suspended OSDH's Title X award but gave it 30 days to bring its program into compliance. *Id.* at 145a. After OSDH stated that it would not comply, HHS terminated the award. *Id.* at 7a.[1]

3. Although Oklahoma's challenge to the 2021 rule remains pending in the Southern District of Ohio, the State brought a separate suit in a different forum—the Western District of Oklahoma—seeking to preliminarily enjoin the termination of OSDH's 2023-2024 award and to compel HHS to provide further continuation awards in future years. See D. Ct. Doc. 1, at 26 (Nov. 17, 2023). As relevant here, Oklahoma argued that HHS's termination of the grant violated the Spending Clause and the Weldon Amendment. Pet. App. 8a.

The district court denied a preliminary injunction. Pet. App. 60a. In an oral ruling, the court determined that Oklahoma had no "reasonable prospect of prevailing." *Id.* at 122a. The court was "thoroughly unpersuaded by" Oklahoma's "arguments about the Spending Clause." *Id.* at 123a. The court observed that "Congress has specifically said that [it] expect[s] the agency to promulgate rules" governing Title X grants. *Ibid.* And the court found "no serious argument to be made that the State of Oklahoma didn't know what the conditions were" when it accepted Title X funding. *Ibid.*

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[1] The $4.5 million Title X award that HHS terminated represented less than one percent of OSDH's $541.2 million in federal funding. Pet. App. 184a.

The district court was likewise "not persuaded" that HHS's termination of OSDH's grant violated the Weldon Amendment. Pet. App. 125a. The court explained that the Amendment ensures that individual providers and private entities need not "do something related to abortions contrary to their own conscience or religious beliefs." *Id.* at 126a. The court concluded that the Amendment does not apply to a state administrative agency that merely "prefer[s] a different policy." *Ibid.* The court also emphasized that because HHS had made clear that OSDH could retain its grant "simply by supplying a phone number" for a third-party hotline, HHS was not requiring OSDH to refer women for abortions and thus would not be violating the Weldon Amendment even if the statute applied. *Id.* at 127a.

The district court also addressed "the public interest," stating that "the threatened injury to the State of Oklahoma from nonissuance of the injunction" was "overblown." Pet. App. 116a-117a. The court was skeptical that providing the hotline number "could translate into a violation of Oklahoma law." *Id.* at 117a. The court also emphasized "that there has already been litigation [in Ohio] between the parties on substantially the issues arising out of this same dispute," and doubted Oklahoma's interest in "reargu[ing] the same argument" or "rais[ing] other theories that might ultimately support the same claim." *Id.* at 119a-120a.

4. The court of appeals affirmed. Pet. App. 1a-59a. The court found that Oklahoma had "fail[ed] to show a likelihood of success" on the merits and therefore did "not consider the other elements of a preliminary injunction." *Id.* at 34a n.19 (citation omitted).

a. The court of appeals first rejected Oklahoma's Spending Clause argument. Pet. App. 18a. The court

explained that "Congress instructed HHS to determine eligibility for Title X grants" through regulations, *id.* at 11a, and made clear that grants "shall be . . . subject to such conditions as the Secretary may determine to be appropriate" in those regulations, *id.* at 12a (quoting 42 U.S.C. 300a-4(b)). Based on that language, the court reasoned that "Title X unambiguously authorized the agency to impose conditions for federal grants," and HHS did so in the 2021 rule. *Id.* at 14a. The court thus concluded that the Spending Clause's notice requirement was satisfied because "Oklahoma could make an informed decision" about whether to accept a grant. *Ibid.*

The court of appeals acknowledged Oklahoma's argument "that Congress's silence on counseling and referrals [in Section 1008] renders Title X ambiguous" and prevents it from providing the notice required by the Spending Clause. Pet. App. 11a. But the court rejected that argument because Section 1008 "rests alongside other provisions"—including Section 300a-4(a) and (b)—that "unambiguously direct HHS to determine the eligibility requirements" for Title X grants. *Id.* at 15a.

b. The court of appeals next concluded that HHS had likely not violated the Weldon Amendment. Pet. App. 18a-27a. The court explained that for Oklahoma to succeed on its Weldon Amendment argument, it would need to prove both that (1) OSDH "constitutes a health-care entity" under the Amendment and (2) "[t]he federal government has discriminated against [OSDH] for declining to *refer* pregnant women *for abortions*." *Id.* at 20a. The court found it unnecessary to address the first element because it determined that Oklahoma had failed to satisfy the second. *Id.* at 21a.

The court of appeals explained that the Weldon Amendment "would apply only if HHS had required [OSDH] to make *referrals for abortions*." Pet. App. 21a. In the court's view, HHS had not done so; instead, it had allowed OSDH to meet its obligations simply by "inform[ing] pregnant women of a national call-in number." *Ibid.* And "the mere act of sharing the national call-in number," the court reasoned, would not "constitute a referral for the purpose of facilitating an abortion." *Ibid.*[2]

c. Judge Federico dissented. Pet. App. 35a-59a. Although he "agree[d] with most of the majority's opinion," including its conclusion "that the 2021 HHS rule did not violate the Spending Clause," *id.* at 43a & n.4, he believed that Oklahoma was likely to succeed on its Weldon Amendment argument, *id.* at 46a.

5. This Court denied Oklahoma's application for an injunction pending the filing and disposition of a petition for a writ of certiorari. See *Oklahoma* v. *HHS*, No. 24A146 (Sept. 3, 2024). HHS then completed the disbursement of the available 2024-2025 Title X grant funds to other recipients. Cf. Appl. 3 (explaining that HHS had voluntarily agreed to refrain from distributing the funds Oklahoma sought only until August 30, 2024); Pet. 11 n.3 (noting that "[t]he 2024 funding has presumably gone out the door after this Court declined relief").

DISCUSSION

Oklahoma renews (Pet. 11-37) its arguments under the Spending Clause and the Weldon Amendment. But

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[2] The court of appeals also rejected Oklahoma's argument that HHS acted arbitrarily in terminating OSDH's grant. Pet. App. 28a-34a. Oklahoma has not renewed that argument in this Court.

the court of appeals correctly rejected those arguments, and its decision does not conflict with any decision of this Court or another court appeals. In any event, this unusual case would not be an appropriate vehicle in which to take up the validity of the 2021 rule's counseling and referral requirements even if that issue otherwise warranted this Court's review. The petition should be denied.

A. Oklahoma's Spending Clause Argument Lacks Merit And Does Not Warrant This Court's Review

1. The court of appeals correctly rejected Oklahoma's Spending Clause argument. Title X unambiguously authorizes HHS to impose conditions on family-planning grants. HHS imposed the conditions at issue here pursuant to that authority. And Oklahoma had clear notice of those conditions before accepting Title X funds. The Spending Clause requires nothing more. And Oklahoma's contrary argument would not only invalidate the 2021 rule, but *all* of the various Title X counseling and referral policies applied by every Administration since Ronald Reagan's, including the 1988 and 2019 rules—not to mention countless other conditions on federal funding that agencies have adopted pursuant to delegations like those contained in Title X.

a. The Spending Clause authorizes Congress to "lay and collect Taxes" to provide for the "general Welfare of the United States." U.S. Const. Art. I, § 8, Cl. 1. When legislating under that authority, Congress has "broad power" to "set the terms on which it disburses federal funds." *Cummings* v. *Premier Rehab Keller, P.L.L.C.*, 596 U.S. 212, 216 (2022). Congress has "repeatedly employed" that power "'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) (citation omitted).

This Court has analogized Spending Clause legislation to "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 (1981). And because a State cannot "knowingly accept[] the terms of the 'contract'" if it "is unaware of the conditions," the Court has required Congress to speak "unambiguously" when "impos[ing] a condition on the grant of federal moneys." *Ibid.* (citations omitted); see *Cummings*, 596 U.S. at 219.

One familiar way for Congress to satisfy *Pennhurst*'s clear-statement requirement is to unambiguously provide that an entity accepting federal funds must comply with agency regulations governing the use of those funds. In *Biden* v. *Missouri*, 595 U.S. 87 (2022) (per curiam), for instance, the Court considered a provision authorizing the HHS Secretary "to promulgate, as a condition of a [healthcare] facility's participation in" Medicare and Medicaid, "such 'requirements as [he] finds necessary in the interest of the health and safety of'" patients. *Id.* at 90 (quoting 42 U.S.C. 1395x(e)(9) (2018 & Supp. II 2020)) (brackets in original). Relying on that authority, the Secretary issued a rule "amending the existing conditions of participation in Medicare and Medicaid to add a new requirement—that facilities ensure that their covered staff are vaccinated against COVID-19." *Id.* at 91. A group of States challenged that rule, arguing (among other things) that the rule violated *Pennhurst*. Louisiana Resp. Br. at 26-27, *Missouri*, *supra* (No. 21A241). This Court rejected the States' challenge and held that the Secretary's "rule

f[ell] within the authorities that Congress has conferred upon him." *Missouri*, 595 U.S. at 92.

Similarly, in *Bennett* v. *Kentucky Department of Education*, 470 U.S. 656 (1985), the Court considered Spending Clause legislation providing States with "federal grants to support compensatory education programs for disadvantaged children." *Id.* at 659. When accepting the funds, States "gave assurances" that the funds "would be used" in accordance with "statutory and regulatory requirements." *Id.* at 663. This Court upheld an effort to recoup funds from a State that had "violated existing statutory and regulatory provisions" governing the use of funds. *Id.* at 670. In so doing, the Court rejected the State's argument that *Pennhurst* "bar[red] recovery of [the] misused * * * funds because the State did not accept the grant with 'knowing acceptance' of its terms." *Id.* at 665. "States that chose to participate in the program," the Court explained, "agreed to abide by the requirements of Title I as a condition for receiving funds." *Id.* at 666 (citation omitted). And those requirements were found not only in "statutory provisions," but also in "regulations[] and other guidelines provided by the Department." *Id.* at 670.

b. Applying those principles here, Title X and the 2021 rule plainly satisfy *Pennhurst*'s clear-statement rule. Congress expressly provided that "[g]rants and contracts made under this subchapter shall be made in accordance with such regulations as the Secretary may promulgate" and shall be "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." 42 U.S.C. 300a-4(a) and (b). Those provisions are not materially different from those in *Missouri* and *Bennett*, or in countless other statutes

requiring federal grant recipients to comply with agency regulations as a condition of the grants.[3] Acting pursuant to Section 300a-4, HHS promulgated the 2021 rule requiring Title X grant recipients to comply with the counseling and referral obligations at issue here. See 86 Fed. Reg. at 56,177 (citing 42 U.S.C. 300a-4 as authority).

Oklahoma thus had "clear notice" that it would need to follow HHS regulations governing its grant, including the regulation addressing counseling and referral. *Pennhurst*, 451 U.S. at 25. Indeed, Oklahoma has applied for and accepted Title X funds for more than 50 years, see Pet. 4, without suggesting any lack of clarity that compliance with HHS regulations is a condition of those grants. Oklahoma was accordingly able to "exercise [its] choice" to accept Title X funds "knowingly, cognizant of the consequences of [its] participation" in

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[3] See, *e.g.*, 23 U.S.C. 124(j)(2)(E) (Supp. III 2021) (requiring recipients of certain infrastructure grants to follow "all applicable Federal laws (including regulations)"); 42 U.S.C. 254b(k)(3)(N) (requiring health center grantees to comply with "applicable Federal statutes, regulations, and the terms and conditions of the Federal award"); 42 U.S.C. 1437f(d)(2)(C) (requiring recipients of low-income housing assistance to comply with applicable "regulations"); 42 U.S.C. 1793(f)(2) (providing grants for school breakfast programs that "shall be carried out in accordance with applicable nutritional guidelines and regulations issued by the Secretary"); 42 U.S.C. 2000d-1 (authorizing federal agencies to adopt "rules, regulations, or orders" to effectuate Title VI's prohibition on race discrimination and to terminate funding to grantees that fail to comply); 49 U.S.C. 5309(c)(4) (stating that transit grants "shall be subject to all terms, conditions, requirements, and provisions that the Secretary determines to be necessary or appropriate"); 54 U.S.C. 302902(b)(1)(D) (requiring States receiving National Park Service grants for historic preservation to follow such "terms and conditions as the Secretary may consider necessary or advisable").

the program. *Pennhurst*, 451 U.S. at 17. And because participation in Title X is "voluntary," Oklahoma could have "forgo[ne] the benefits of federal funding" if it did not want to comply with the conditions on that funding. *Id.* at 11. Title X's statutory and regulatory scheme thus comfortably satisfies the Spending Clause.

c. Oklahoma's contrary arguments lack merit. Oklahoma primarily asserts (Pet. 12) that because Title X itself does not unambiguously "require abortion referrals," HHS may not condition Title X grants on recipients' compliance with the 2021 rule's counseling and referral requirements. See *Rust* v. *Sullivan*, 500 U.S. 173, 184 (1991) (finding Section 1008 "ambiguous" as to "the issues of counseling" and "referral"). But that assertion ignores Section 300a-4 (quoted above), which unambiguously requires grant recipients to comply with HHS regulations governing the use of grant funds.

Oklahoma appears to maintain that Congress could not condition participation in Title X on compliance with regulatory requirements adopted by HHS, and instead had to set forth all grant conditions in the statute itself. This Court has never suggested that the Spending Clause imposes such a requirement, which would radically alter Title X and countless other federal spending programs. For example, Medicare's "Conditions of Participation" for hospitals alone span some 48 pages in the Code of Federal Regulations. 42 C.F.R. Pt. 482 (capitalization altered; emphasis omitted); see p. 15 n.3, *supra* (listing other examples). On Oklahoma's view, all of those conditions are invalid because they are not specifically set forth in the United States Code.

Oklahoma's view would also necessarily mean that the regulations upheld in *Rust*—the very case on which Oklahoma itself chiefly relies—violated the Spending

Clause. The Court held that Title X was "ambiguous" on "counseling, referral, advocacy, [and] program integrity" because the statute "does not speak directly to [those] issues." *Rust*, 500 U.S. at 184, 187, 206. But the Court nonetheless upheld the 1988 rule's requirements addressing those topics. *Id.* at 187, 189-190. On Oklahoma's view of the Spending Clause, all of the requirements of the 1988 rule were necessarily invalid because —as *Rust* recognized—they were not "unambiguously required by Title X," Pet. 12.

Oklahoma insists (Pet. 12-13) that the Tenth Circuit's decision "authorize[s] executive branch agencies to create critical substantive conditions even where Congress did not speak." But Congress *did* speak when it expressly empowered the Secretary to prescribe the "conditions" he "may determine to be appropriate to assure that [Title X] grants will be effectively utilized for the purposes for which made." 42 U.S.C. 300a-4(b). Contrary to Oklahoma's suggestion (Pet. 13), Section 300a-4 is not merely a "generic" provision. Rather, like the provision at issue in *Missouri*, it includes "broad language" "authoriz[ing] the Secretary to impose conditions on the receipt of" federal funds; and just as there, those conditions may be substantive—not merely "bureaucratic rules regarding the technical administration" of the program. 595 U.S. at 93-94.[4]

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[4] Oklahoma briefly asserts (Pet. 13) that Section 300a-4(b) imposes a "limitation" on funding conditions by stating that grants shall be "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," 42 U.S.C. 300a-4(b). But the court of appeals found that argument forfeited because Oklahoma failed to raise it "in [its] opening brief," Pet. App. 14a n.4, and that argument is also outside the questions presented, see Pet i. In any event, the court of appeals correctly rejected that argument on the

2. The court of appeals' application of settled Spending Clause principles does not conflict with any decision of another court of appeals. Oklahoma does not maintain that the decision below conflicts with any other decision addressing Title X or the 2021 rule. To the contrary, as Oklahoma acknowledges (Pet. 18), the only other court of appeals to resolve the Spending Clause question at issue here—the Sixth Circuit—expressly "agree[d]" with the Tenth Circuit "that Congress's instructions to HHS to determine eligibility for Title X grants likely did not violate the spending powers." *Tennessee* v. *Becerra*, 117 F.4th 348, 358 (6th Cir. 2024). Like the Tenth Circuit, the Sixth Circuit reasoned that the "clear delegation of authority to HHS" to impose grant conditions, "viewed in combination with HHS's 2021 counseling and referral regulation, are sufficient for notice purposes under the Spending Clause." *Id.* at 359.

Lacking any plausible claim of a square circuit conflict, Oklahoma primarily asserts (Pet. 15-16) that the court of appeals' analysis is inconsistent with the Eleventh Circuit's analysis of a different statutory scheme in *West Virginia ex rel. Morrisey* v. *U.S. Department of the Treasury*, 59 F.4th 1124 (2023). But the Tenth Circuit specifically distinguished *Morrisey*, correctly

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merits. Pet. App. 14a n.4. As the court explained, Section 300a-4(b) affords the Secretary significant discretion by authorizing him to impose conditions as he "*may determine* to be appropriate to assure" that grants "will be effectively used for the purposes for which made." 42 U.S.C. 300a-4(b) (emphasis added); see Pet. App. 14a n.4. And here, the Secretary found that the counseling and referral requirements satisfied that standard because they "are critical for the delivery of quality, client-centered care" and "enable healthcare providers to offer complete and medically accurate information and counseling to their clients." 86 Fed. Reg. at 56,154.

recognizing that the statute at issue there "differed" from Title X in fundamental ways. Pet. App. 15a.

Morrisey involved a statutory condition barring States from using federal COVID-19 relief funding "to either directly or indirectly offset a reduction in the[ir] net tax revenue" resulting from a tax cut. 42 U.S.C. 802(c)(2)(A); see *Morrisey*, 59 F.4th at 1132. Although the statute also allowed the Treasury Department "to issue such regulations as may be necessary or appropriate to carry out" the program, 42 U.S.C. 802(f), it did not expressly authorize the Treasury Department to impose additional conditions on the granted funds. The Eleventh Circuit held that the statutory funding condition in Section 802(c)(2)(A) was not sufficiently "ascertainable" for purposes of the Spending Clause, because States would not "know what it means to use federal funds to 'directly or indirectly offset a reduction in the[ir] net tax revenue.'" *Morrisey*, 59 F.4th at 1143 (brackets in original). And the court determined that the Treasury Department regulations did not "eliminate[] the constitutional problem" because Section 802(f) "says nothing about the executive agency's power to define the scope of the offset provision" in the statute itself. *Id.* at 1146-1147.

Unlike the statute at issue in *Morrisey*, Title X expressly states that grants are subject to "conditions" adopted by HHS through regulations. 42 U.S.C. 300a-4(b). And the Eleventh Circuit "d[id] not question" that the Spending Clause is satisfied when "a state accepts federal funds" subject to "'the legal requirements in place when the grants were made,'" "includ[ing] existing

regulations." *Morrisey*, 59 F.4th at 1148 (citation omitted). That is precisely what happened here.[5]

Oklahoma's other cited cases are even further afield. In *Commonwealth of Virginia Department of Education* v. *Riley*, 106 F.3d 559 (1997) (per curiam) (en banc), the Fourth Circuit held that an agency was "without authority" to impose a condition that was not "even implicitly" contemplated by the relevant statute. *Id.* at 561. And in *City and County of San Francisco* v. *Trump*, 897 F.3d 1225 (2018), the Ninth Circuit found a separation-of-powers violation where the Executive Branch "ha[d] not even attempted to show that Congress authorized it to withdraw federal grant moneys from jurisdictions that d[id] not agree" with certain "immigration strategies." *Id.* at 1234. Here, by contrast, Congress expressly authorized HHS to impose grant conditions, and HHS acted pursuant to that authority when issuing the conditions in the 2021 rule.

Finally, in *Texas Education Agency* v. *United States Department of Education*, 992 F.3d 350 (2021), the Fifth Circuit addressed "whether the clarity required for a waiver of sovereign immunity to be 'knowing' can be met by regulations clarifying an ambiguous statute." *Id.* at 361. It did not squarely resolve any Spending Clause issue—much less one involving a provision unambiguously requiring funding recipients to comply with regulatory conditions on such funding. Again, such requirements are ubiquitous in federal spending

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[5] Oklahoma also cites (Pet. 17) the Fifth Circuit's decision in *Texas* v. *Yellen*, 105 F.4th 755 (2024), but the court there simply "embrace[d] in full the reasoning of the Eleventh Circuit" in *Morrissey* when finding that the same provision violated the Spending Clause. *Id.* at 768. *Texas* is thus distinguishable from the decision below for the same reasons as *Morrissey*.

programs, and Oklahoma cites no precedent supporting its radical assertion that they violate the Spending Clause.

B. Oklahoma's Weldon Amendment Argument Lacks Merit And Does Not Warrant This Court's Review

Oklahoma's novel Weldon Amendment argument is likewise unsound and unworthy of this Court's review. No court has embraced that argument, and no court other than the courts below has even considered it.

1. The Weldon Amendment provides that annually appropriated HHS funds, including Title X funds, may not be "made available to a Federal agency or program, or to a State or local government, if such agency, program, or government subjects any institutional or individual health care entity to discrimination on the basis that the health care entity does not provide, pay for, provide coverage of, or refer for abortions." Pub. L. No. 118-47, Div. D, Tit. V, § 507(d)(1), 138 Stat. 703 (2024). As the court of appeals explained, "Oklahoma must prove two elements" to succeed on its Weldon Amendment claim: (1) OSDH "constitutes a health-care entity"; and (2) HHS "has discriminated against [OSDH] for declining to *refer* pregnant women *for abortions*." Pet. App. 20a. Oklahoma has not carried its burden as to either element. And even if it had, it still would not have established OSDH's right to continued Title X funding because it appears that at least some services under OSDH's grant were provided by non-state entities, and the Weldon Amendment would not justify OSDH's refusal to allow those entities to provide the phone number for the third-party hotline upon a patient's request.

a. As a threshold matter, a state administrative agency like OSDH is not a "health care entity" under

the Weldon Amendment. The Amendment defines "'health care entity'" to "include[] an individual physician or other health care professional, a hospital, a provider-sponsored organization, a health maintenance organization, a health insurance plan, or any other kind of health care facility, organization, or plan." § 507(d)(2), 138 Stat. 703. That definition does not include government administrative agencies within its listed terms. To the contrary, the Amendment's sole mention of "State or local government[s]" is in describing the actors that are barred from "subject[ing]" *other* entities "to discrimination." § 507(d)(1), 138 Stat. 703. That further confirms that Congress did not extend the Amendment's protection to state administrative agencies as potential *victims* of discrimination.

Oklahoma asserts (Pet. 25-26) that OSDH qualifies as a "'health care entity'" because it falls within the statutory definition's residual phrase, "any other kind of health care facility, organization, or plan," § 507(d)(2), 138 Stat. 703. But especially when read in context, that language does not naturally include a state administrative agency. Oklahoma itself recognized as much in the Ohio litigation. There, it represented to the Sixth Circuit that States are "not protected under" the Weldon Amendment, explaining that "while individual doctors working for the States might be" protected, the Amendment does not apply to "a government grantee." Br. of Appellants at 54, *Ohio* v. *Becerra*, 87 F.4th 759 (6th Cir. 2023) (No. 21-4235). Oklahoma was right before: State administrative agencies do not qualify as "health care entities" under the Weldon Amendment, and OSDH thus cannot invoke the Amendment's protections here.[6]

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[6] Although a 2019 HHS regulation stated without analyzing the statutory text that "components of State or local governments may

b. Even if OSDH could qualify as a "health care entity," the Weldon Amendment still would not apply because HHS has not discriminated against OSDH for refusing to "refer for abortions." § 507(d)(1), 138 Stat. 703; see Pet. App. 22a-23a. A "referral" is "[t]he act or an instance of sending or directing to another for information, service, consideration, or decision." *Black's Law Dictionary* 1533 (11th ed. 2019); see *The New Oxford American Dictionary* 1423 (2d ed. 2005) ("an act of referring someone or something for consultation, review, or further action"). And the preposition "for" is "'a function word to indicate purpose'" or "'an intended goal.'" Pet. App. 22a (citation and emphasis omitted). It therefore "link[s] conduct to a particular purpose." *Ibid.* Accordingly, "[t]he combined phrase (*refer for*) * * * suggests that the Weldon Amendment prohibits discrimination against entities for refusing to refer individuals *for the purpose* of getting abortions." *Ibid.*

Here, HHS did not terminate OSDH's grant because OSDH refused to refer individuals to medical providers for the purpose of obtaining abortions. Rather, HHS terminated the grant because OSDH refused to ensure that interested patients received a "national call-in number" for a hotline whose third-party operators would satisfy the requirement to "supply neutral information" about a variety of options for pregnant women, including abortion. Pet. App. 23a-24a; see *id.* at 152a-153a (HHS grant termination letter). A clinic thus could have responded to a patient's request for information about abortion by saying: "We cannot discuss abortion

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be health care entities under the Weldon Amendment," 84 Fed. Reg. 23,170, 23,264 (May 21, 2019), that regulation has been rescinded in relevant part through notice-and-comment rulemaking. See 89 Fed. Reg. 2078, 2081-2082 (Jan. 11, 2024).

with you or direct you to an abortion provider, but you may call this hotline for nondirective information about your options." That statement is not a referral for abortion within the meaning of the Weldon Amendment, and HHS thus did not violate the Amendment by allowing OSDH to satisfy its regulatory obligations by ensuring that interested patients received the hotline number.

Oklahoma also contends (Pet. 33) that HHS's actions violate the Weldon Amendment because HHS's grant termination cited the 2021 rule, which requires Title X projects to provide a "referral upon request" "on each of the [family-planning] options," including "[p]regnancy termination." 42 C.F.R. 59.5(a)(5)(i)(C) and (ii). But as this case illustrates, HHS does not interpret the rule to require the sort of referral addressed by the Weldon Amendment—a direction to a medical provider for the purpose of obtaining an abortion. Instead, HHS interprets the rule to allow objecting grantees to provide individuals with the number for a third-party hotline to obtain information about their options and any subsequent referral to a specific provider. And because this case involves not a challenge to the rule but instead a challenge to a specific grant termination, the question here is not whether the rule's referral requirement is facially consistent with the Weldon Amendment or could be applied in a manner inconsistent with the Amendment. Instead, the only question presented here is whether HHS violated the Weldon Amendment by allowing OSDH to meet its regulatory obligations by ensuring that interested patients receive the number for a third-party hotline. It did not.

c. Finally, even if Oklahoma could show that OSDH is a "health care entity" protected by the Weldon Amendment and that the mere provision of the hotline

number constitutes a referral for abortion within the meaning of the Amendment, it still would not be entitled to relief. The Amendment provides that a health care entity may not be subjected to discrimination "on the basis that *the health care entity* does not * * * refer for abortions." § 507(d)(1), 138 Stat. 703 (emphasis added). At most, that would mean that HHS could not require that OSDH *itself* provide covered referrals—it would not allow OSDH to prevent any *other* providers funded by the grant from providing referrals. And although the preliminary-injunction record contains limited information about how services were provided under OSDH's grant, it appears that at least some services were provided by other entities.

Oklahoma's declarant in the district court stated that OSDH disbursed its Title X funding "to the State's 68 county health departments ('County Partners')," which provide the relevant services. Pet. App. 179a. Oklahoma now suggests (Pet. 25) that at least some of the providers in the county health departments are OSDH employees. But the State's declarant also explained that in the State's "most heavily populated counties," OSDH does not provide services itself but instead "contracts with the Oklahoma City-County Health Department and the Tulsa County Health Department." Pet. App. 180a. Oklahoma has not asserted that those contractors are part of OSDH, and it has elsewhere described them as "autonomous offices managed outside of state government." Transparent Oklahoma Performance, *Okla. State Dep't of Health* (Apr. 11, 2024), https://oklahoma.gov/top/agency/340.html.

Oklahoma has never suggested that those local contractors object to providing interested patients with the hotline number. And it has not attempted to explain

how OSDH could transform the shield provided by the Weldon Amendment into a sword empowering it to prohibit *other* willing providers from making referrals. Accordingly, even if Oklahoma were likely to prevail on both its argument that OSDH itself is a "health care entity" and its argument that merely providing the hotline number is a referral within the meaning of the Weldon Amendment, that still would not justify its refusal to allow *any* provider within its Title X project to provide the hotline number. And that refusal would have provided a valid basis for HHS's decision to terminate OSDH's grant even if Oklahoma's Weldon Amendment arguments were correct. See 45 C.F.R. 75.371(c).

2. In addition to lacking merit, Oklahoma's Weldon Amendment claim does not satisfy this Court's other traditional criteria for review. No other court has even considered the Weldon Amendment question, which the dissent below correctly described as one "of first impression." Pet. App. 46a. Particularly because this case is "the first to address" the issue, the Court should not "grant review." *Does 1-3* v. *Mills*, 142 S. Ct. 17, 18 (2021) (Barrett, J., concurring in the denial of application for in-junctive relief).

Similarly, the Weldon Amendment issue lacks nationwide significance. Except for OSDH and one state entity in Tennessee, all state Title X grantees have confirmed their compliance with the 2021 rule's counseling and referral requirements. See Office of Population Affairs, HHS, *Fiscal Year 2023 Title X Service Grant Awards*, https://perma.cc/H2QK-P5ZX. And although Tennessee has filed a separate suit challenging the termination of the grant to its state entity, it has not attempted to invoke the Weldon Amendment.

C. This Case Would Not Be An Appropriate Vehicle For Considering The Validity Of The 2021 Rule's Counseling And Referral Requirements

This case is unusual because Oklahoma and other States have separately challenged HHS's 2021 rule in the Southern District of Ohio. See pp. 5-6, *supra*. In an apparent attempt to mitigate concerns about the inequity of its simultaneous pursuit of equivalent relief in two different courts, Oklahoma has sought to distinguish its claims here from the claims it has pursued in the Ohio litigation. And for multiple reasons, that unusual bifurcation would make this case an unsuitable vehicle in which to consider the 2021 rule.

First, Oklahoma is not advancing the primary claim the States are pursuing in the Ohio litigation and that Tennessee is pursuing in its own separate litigation—that is, a claim that the 2021 rule's counseling and referral requirements are facially inconsistent with Section 1008. In the Ohio case, the States argued that the rule contradicts "the plain text of § 1008." *Ohio*, 87 F.4th at 771. And in Tennessee's suit, it has likewise argued that the rule "misinterpret[s] § 1008's prohibition." *Tennessee*, 117 F.4th at 362. Here, in contrast, Oklahoma's petition raises Section 1008 only in the context of its Spending Clause claim premised on the repeated concession that Section 1008 and Title X as a whole are silent or "ambiguous" on counseling and referrals. Pet. 13. Oklahoma's petition thus does not present the statutory question the Sixth Circuit considered in *Ohio* and *Tennessee*.

Second, because Oklahoma has emphasized that it has not brought "a facial challenge to the [2021] regulation," Pet. App. 80a, this case does not present any question about the facial validity of the 2021 rule's requirement

that Title X projects offer nondirective counseling on pregnancy termination and "referral upon request." 42 C.F.R. 59.5(a)(5)(ii). Instead, it presents only a challenge to the particular accommodation HHS offered to Oklahoma—providing interested patients with the number for a third-party hotline. See pp. 23-25, *infra*.

Third, in the Ohio litigation, Oklahoma and the other States did not assert any claim under the Weldon Amendment. (Nor has Tennessee asserted such a claim in its own separate suit.) To the contrary, as Oklahoma acknowledges (Pet. 26), and as noted above, the States in the Ohio case conceded that state entities are "not protected under any of [the federal conscience] statutes," including the Weldon Amendment. Br. of Appellants at 54, *Ohio*, *supra* (No. 21-4235). "[W]hile individual doctors working for the States might be" protected, the States explained, "no statute would free a government grantee from complying with the referral requirement." *Ibid.* Oklahoma likewise did not raise the Weldon Amendment in its discussions with HHS before HHS terminated its grant. And although Oklahoma has now reversed course and asserted that OSDH is a "healthcare entity" under the Weldon Amendment because state employees provided some of the services funded under the grant, the preliminary-injunction record does not include potentially relevant facts about how the grant was administered. See pp. 25-26, *supra*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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