No. 21-4235

IN THE 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, IN HIS OFFICIAL CAPACITY AS SECRETARY OF HEALTH AND HUMAN SERVICES; U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES; JESSICA S. MARCELLA, IN HER OFFICIAL CAPACITY AS DEPUTY ASSISTANT SECRETARY OF POPULATION AFFAIRS; AND OFFICE OF POPULATION AFFAIRS,
Defendants-Appellees,

Appeal from the United States District Court
for the Southern District of Ohio, Western Division, Case No. 1:21-cv-675
The Honorable Timothy S. Black, Judge Presiding.

BRIEF *AMICUS CURIAE* OF AMERICANS UNITED FOR LIFE SUPPORTING PLAINTIFFS-APPELLANTS AND REVERSAL

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CORPORATE DISCLOSURE STATEMENT

Amicus Curiae Americans United for Life has no parent corporations or stock that a publicly held corporation can hold.

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STATEMENT OF INTEREST OF *AMICUS CURIAE*[1]

Founded in 1971, before the Supreme Court's decision in *Roe v. Wade*, 410 U.S. 113 (1973), Americans United for Life (AUL) is the nation's oldest and most active pro-life non-profit advocacy organization. Supreme Court opinions have cited briefs authored by AUL. *See*, *e.g.*, *Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 426 n.9 (1983); *Webster v. Reproductive Health Services*, 492 U.S. 490, 530 (1989) (O'Connor, J., concurring in part and concurring in the judgment); and *June Medical Services L.L.C. v. Russo*, 140 S. Ct. 2103, 2156 n.3 (2020) (Alito, J., dissenting). AUL attorneys regularly evaluate and testify on various bioethics bills and amendments across the country. AUL has created comprehensive model legislation and works extensively with state legislators to enact constitutional pro-life laws, including model bills preventing public funds from subsidizing abortion and protecting healthcare providers' freedom of conscience. *See* Ams. United for Life, *Defending Life 2021* (2021 ed.) (state policy guide providing model bills that protect women's health and healthcare providers' rights of conscience).

[1] No party's counsel authored any part of this brief. No person other than *Amicus Curiae* and its counsel contributed any money intended to fund the preparation or submission of this brief. Counsel for all parties received timely notice. Plaintiffs-Appellants and Defendants-Appellees have consented to the filing of this brief.

SUMMARY OF ARGUMENT

Congress passed Title X of the Family Planning Services & Population Research Act of 1970 to provide federal funding for family planning services. Pub. L. No. 91-572, 84 Stat. 1504 (1970), codified at 42 U.S.C. §§ 300 to 300a-8. Congress placed explicit abortion funding restrictions on Title X through Section 1008, directing that "[n]one of the funds appropriated under this title shall be used in programs where abortion is a method of family planning." 42 U.S.C. § 300a-6 (1970). In 2019, the U.S. Department of Health and Human Services (HHS) determined its Title X rules were contrary to Section 1008 and federal statutory protections for conscience rights. Compliance With Statutory Program Integrity Requirements, 84 Fed. Reg. 7,714, 7,716 (Mar. 4, 2019) (previously codified at 42 C.F.R. pt. 59) ("2019 Rule"). Consequently, HHS removed the abortion referral mandate and instituted program-integrity requirements that required physical and financial separation between Title X funds and abortion services. In 2021, HHS' Final Rule reversed these provisions, removing the program-integrity requirements and again mandating abortion referrals upon the patient's request. Ensuring Access to Equitable, Affordable, Client-Centered, Quality Family Planning Services, 86 Fed. Reg. 56,144 (Oct. 7, 2021) (codified at 42 C.F.R. pt. 59) ("Final Rule").

We agree with Appellants that the Final Rule violates Section 1008 by eliminating all meaningful program-integrity requirements and by mandating

referrals for abortions. Br. of Appellants 22; *see* 5. U.S.C. § 706 (1966) (holding agency action unlawful under the Administrative Procedure Act if it is "arbitrary [and] capricious . . . or otherwise not in accordance with law"). The court's *Amicus* writes separately to contextualize Section 1008, showing it is an early conscience protection in the United States' robust legal history of protecting conscience rights. *Amicus Curiae* also explains why repealing the 2019 Final Rule threatens conscience rights of both healthcare workers and taxpayers and why this court should reverse the trial court's order denying the motion for a preliminary injunction.[2] Our argument is three-fold:

I. The United States has a long history of protecting conscientious objections to taking human life. Abortion historically was a criminal offense. When the abortion legalization movement emerged in the 1950s, it threatened those with conscientious objections to killing. Congress enacted Title X amidst this contentious debate over abortion legalization but did not intend for Title X to encompass abortion services. Title X was, and remains, a pre-pregnancy social welfare program.

[2] A court considers four factors in deciding whether to issue a preliminary injunction. *City of Pontiac Retired Emps. Ass'n v. Schimmel*, 751 F.3d 427, 430 (6th Cir. 2014) (per curiam) (en banc). *Amicus Curiae* focus on how Plaintiffs-Appellants (1) are likely to succeed on their Administrative Procedure Act claim that the Final Rule violates statutory conscience protections and Section 1008 and (4) a preliminary injunction would serve the public interest of conscientiously objecting healthcare workers and taxpayers.

II. Following the passage of Title X, and the Supreme Court's decision in *Roe v. Wade*, Congress strengthened legal protections for conscientious objections to abortion. For healthcare workers and institutions, these conscience safeguards included the Church, Coats-Snowe, and Weldon Amendments. Congress also enacted the Hyde Amendment, imposing abortion funding restrictions to protect taxpayers' conscientious objections to taking human life. Section 1008 similarly protects healthcare workers' and taxpayers' consciences, excluding abortion entirely from the scope of Title X.

III. The trial court noted the 2021 Final Rule "essentially readopts" the 2000 Rule. However, HHS has acknowledged that the 2000 Rule did not consider Title X's interaction with the Coats-Snowe Amendment (enacted in 1996) or subsequently enacted Weldon Amendment (effective in 2005). HHS has further acknowledged the 2000 Rule conflicts with federal conscience protections. Abortion referrals essentially place abortion within Title X's scope. Removal of the program-integrity provision subverts Section 1008's exclusion of abortion services within Title X. Repeal of the 2019 Rule undermines Section 1008 and threatens conscience rights.

ARGUMENT

I. SECTION 1008 OF TITLE X IS AN EARLY CONSCIENCE PROTECTION THAT RESPONDED TO THE ABORTION LEGALIZATION MOVEMENT.

The United States has a long and rich history of protecting conscientious objections to taking human life. There is strong case law for conscience exemptions

to military service and the federal government and many states have adopted conscience protections for prison employees who do not wish to participate in capital punishment.[3] In the ten jurisdictions that have legalized assisted suicide through statute, there are explicit protections for refusing to participate in the lethal practice. *See*, *e.g.*, Cal. Health & Safety Code § 443.14 (2022); Or. Rev. Stat. § 127.885 (2003). As Professor Mark Rienzi describes:

> The decision whether or not to kill another human being—even where the killing is conducted or sanctioned by the government—is . . . [a] higher personal decision that implicates "the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life."

Rienzi, *supra*, at 128 (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992); *Lawrence v. Texas*, 539 U.S. 558, 574 (2003) (citation omitted)).

Abortion raises similar concerns about the forced involvement of healthcare providers who conscientiously object to taking human life. "[A]lthough we have obvious national disagreements over whether abortion is a killing . . . our laws recognize that unwilling individuals cannot and should not be coerced into participating in these practices, even in tangential ways." Rienzi, *supra*, at 175.

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[3] *See, e.g.*, *Welsh v. United States*, 398 U.S. 333, 344 (1970) ("[E]xempt[ing] from military service all those whose consciences, spurred by deeply held moral, ethical, or religious beliefs, would give them no rest or peace if they allowed themselves to become a part of an instrument of war."); 18 U.S.C. § 3597(b) (1994) (protecting employees who morally or religiously object to executions); Mark L. Rienzi, *The Constitutional Right Not to Kill*, 62 Emory L. Rev. 121, 139 (2012).

Section 1008 of Title X codifies these concerns, acting as a conscience protection for both healthcare workers and taxpayers.

A. The Abortion Legalization Movement Emerged in the 1950s and Challenged Existing Legal and Societal Condemnation of the Practice.

Early English and American common law reveal that abortion historically was a criminal offense.[4] "[T]he common law, in its early centuries, treated abortion as a crime in principle because it involved the killing of an unborn child—a tradition that continued with elaboration, but without interruption, until *Roe* changed it." Joseph W. Dellapenna, DISPELLING THE MYTHS OF ABORTION HISTORY 135 (2006).

Not only was pre-modern abortion illegal, but it was also extremely dangerous, and thus, uncommon. *See id*. at 126 ("[T]here simply were no reliable techniques available that were not tantamount to suicide before 1700."); Beverly Wildung Harrison, OUR RIGHT TO CHOOSE: TOWARD A NEW ETHIC OF ABORTION 124 (1983) ("[U]ntil recently any act of abortion always endangered the life of the mother every bit as much as it imperiled the prenatal life in her womb"). For this reason, infanticide was more common than abortion prior to the 18th century.

[4] Justice Blackmun's opinion in *Roe* portrays abortion as a practice that was accepted until the 19th century and common throughout history. This narrative has been heavily critiqued by historians, scholars, and academics. *See* Clarke D. Forsythe, ABUSE OF DISCRETION: THE INSIDE STORY OF *ROE V. WADE* 104–108 (2013) (discussing the common law legal history of abortion); Transcript of Oral Argument at 73–76, *Dobbs v. Jackson Women's Health Org.*, No. 19-1392 (Dec. 1, 2021) (Justice Alito questioning whether the Court can say that "abortion is deeply rooted in the history and traditions of the American people").

Dellapenna, *supra*, at 89. Although some medical advances removed the near-certainty of death from abortive procedures throughout the 1800s, it was not until the development of antibiotics in the early 1900s that abortion became commonly viewed as survivable. *Id*. at 548.

However, abortion was not historically criminalized simply to protect the mother, but also to guard the unborn child against violence. "Before the debate about abortion began in earnest in the 1960s, it was accepted by lawyers, both 'pro-life' and 'pro-choice,' that abortion had been prohibited by Anglo-American criminal law for 700 years and that the law's main, if not sole, purpose was protection of the fetus." John Keown, *Abortion Distortion: A Review of* Dispelling the Myths of Abortion History *by Joseph W. Dellapenna*, 35 J. L. Med. & Ethics 325 (2007).

Throughout U.S. history, abortion was condemned first as a common law and subsequently a statutory offense. "There is no doubt that at common law the destruction of an infant unborn is a high misdemeanor, and at an early period it seems to have been deemed murder." Francis Wharton, A TREATISE ON THE CRIMINAL LAW OF THE UNITED STATES VOL. 1 1220 (5th rev. ed. 1861). However, because the procedure itself was so dangerous and because often the only witnesses were the participants, prosecution of abortion was not commonplace. By 1868, all but seven states had passed statutes making abortion a crime, and by 1896, it was illegal across

the nation. *See* Dellapenna, *supra*, at 315–319, n.3, 10–19 (collecting statutes from all 50 states).

When Title X was enacted in December 1970, abortion was not considered "family planning" because it was illegal in all but four states.[5] Fourteen states permitted abortion in the case of rape or incest, but a majority (30) banned it in all circumstances. This was the status quo until 1973 when the Supreme Court invalidated all abortion laws in *Roe v. Wade*.

During the 1960s, a fundamental shift took place in U.S. courts and in the social and political climate which changed the prevailing perspective on abortion. On May 11, 1960, the Food and Drug Administration announced its approval of the contraceptive pill. Five years later, the Supreme Court decided *Griswold v. Connecticut*, which invalidated a state law prohibiting the use or distribution of birth control devices to married couples. 381 U.S. 479 (1965). The Court decreed that a couple's decisions about childbirth were within the Constitution's "penumbral rights of 'privacy and repose,'" and that the government could not interfere in any personal decisions in that area. *Id.* at 485.

The Supreme Court was not the only public body that catalyzed the shift towards supporting the practice of abortion. A few years before *Griswold*, the

[5] Alaska, Hawaii, Washington, and New York had repealed their restrictions on abortions in early pregnancy. Dellapenna, *supra*, at 629.

American Law Institute published a model law that proposed legalizing abortion in certain circumstances:

> Even antiabortion legal scholars acknowledged the ALI model as "the first major stimulus toward significant liberalization." After it was published in 1962, it became the model for the thirteen states that passed "reform" bills between 1967 and 1970. These created the impression of widening public support, even when public opinion was mixed.

Clarke D. Forsythe, ABUSE OF DISCRETION: THE INSIDE STORY OF *ROE V. WADE* 69 (2013).

Recognizing the opportunity, prominent organizations like Planned Parenthood and the American Public Health Association switched their stance on abortion. Dellapenna, *supra*, at 629. But as late as 1960, abortion was still considered at best divisive and at worst, repugnant. Even Dr. Mary Calderone, medical director of Planned Parenthood, condemned abortion as murder. Mary Steichen Calderone, *Illegal Abortion as a Public Health Problem*, 50 Am. J. Pub. Health 948, 951 (1960). But with the opportunity for change emerging from the legal field, what had been a push for reform became a demand for repeal of all abortion laws. At the end of the 1960s, the National Association for the Repeal of Abortion Laws (now NARAL Pro-Choice America) was founded. "Abortion went, in a mere fifteen years (1958-1973), from a practice shrouded in shame and guilt to a fundamental right protected by the Constitution in the United States." Dellapenna, *supra*, at 10. Abortion was illegal in

nearly every state when Title X was passed, but society's view of the practice was beginning to shift.

B. Title X Is a Pre-pregnancy Program and Section 1008 Acts as An Early Conscience Protection.

Title X was enacted in 1970 amid contentious national debate over abortion legalization, but Congress did not intend Title X to touch on the subject. Its legislative history reflects the goals of funding research, infertility services, and birth control, but not abortion. *See* 116 Cong. Rec. 37,365–66 (1970) (listing the purposes of the proposed act). In fact, because Title X is a *pre*-pregnancy funding program, its scope has intentionally excluded abortion from the very beginning. *See* 42 U.S.C. § 300a-6. The Family Planning Services and Population Research Act of 1970, which created the Title X family planning program at issue today, was the culmination of decades of worry about overpopulation and the economy's ability to handle a growing US population. Although overpopulation fears have now been discredited as groundless,[6] they were at the forefront of legislative thought in the 1960s.

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[6] *See* Alex Berezow, *Overpopulation Myth: New Study Predicts Population Decline This Century*, AMERICAN COUNCIL ON SCIENCE AND HEALTH (Aug. 5, 2020), https://www.acsh.org/news/2020/08/05/overpopulation-myth-new-study-predicts-population-decline-century-14953 ("By now, the overpopulation myth should be dead and buried. There isn't a single scrap of data to support it. Instead, we should focus on reality and the consequences that accompany it.").

But legislators were not simply worried about the increasing population—they were also concerned that this increase would lead to higher abortion rates. Congress hoped to decrease the number of abortions (which were at that time criminalized in most states) through a robust program supporting education and pre-pregnancy services. "If there is any direct relationship between family planning and abortion, it would be this, that properly operated family planning programs should reduce the incidence of abortion." 116 Cong. Rec. 37,375 (statement of Rep. John Dingell).

With this in mind, Congress passed the Family Planning Services and Population Research Act, which authorized funding for research, education, and pre-pregnancy services. Pub. L. No. 91-572, 84 Stat. 1504. The first proposed version of Title X did not include Section 1008, what is now 42 U.S.C. § 300a-6: "None of the funds appropriated under this subchapter shall be used in programs where abortion is a method of family planning." The first version was met with uncertainty and pushback on whether the funding outlets for the proposed "family planning" program would include abortion. 116 Cong. Rec. 37,375 (statement of Rep. John Dingell) ("During the course of House hearings on H.R. 19318 there was some confusion regarding the nature of the family planning programs envisioned, whether or not they extended to include abortion as a method of family planning."). This ultimately led to the addition of Section 1008, which removed all ambiguity from

the language of the Act. The pre-pregnancy focus was made clear in the final committee statement:

> It is, and has been, the intent of both Houses that the funds authorized under this legislation be used only to support preventive family planning services, population research, infertility services, and other related medical, informational, and educational activities. The conferees have adopted the language contained in section 1008, which prohibits the use of such funds for abortion, in order to make clear this intent.

116 Cong. Rec. 39,873.

Not only does the legislative history of the Act reflect the intent to fund only research and pre-pregnancy services, but it records the care taken to ensure that abortion was excluded both from the funding of the program and from any hint of endorsement by the U.S. Congress. Democratic Congressman John Dingell, who proposed the addition of Section 1008, explained:

> With the "prohibition of abortion" amendment—title X, section 1008—the committee members clearly intend that abortion is not to be encouraged or promoted in any way through this legislation. Programs which include abortion as a method of family planning are not eligible for funds allocated through this act. . . . There is a fundamental difference between the prevention of conception and the destruction of developing human life.

116 Cong. Rec. 37,375 (statement of Rep. John Dingell).

The record also shows specific concern for respecting the conscience rights of the American people in the scope and the language of Title X. As one of the sponsors

of the original legislation that became Title X, future President George H.W. Bush explained, conscience was considered non-negotiable in the Act from the beginning:

> We heard testimony from numerous experts in the field of family planning—distinguished demographers, medical scientists and high-level Government officials. Every witness emphasized the need for legislation of the nature of H.R. 19318—legislation that is careful, as is this bill, to respect the consciences of people of all faiths and does not seek to coerce any persons into any position contrary to their religious faith.

116 Cong. Rec. 37,370. Title X, as a pre-pregnancy program, was never related to abortion. Dingell proposed Section 1008 to ensure that the Act honored conscience rights while still providing social welfare support to those most in need.

Moreover, maternity and infant care funding was already coming through the Maternal and Child Health Block Grant (Title V of the Social Security Act). Since 1935, this federal-state partnership grant has funded health services for mothers, children, and families, including "assur[ing] mothers and children (in particular those with low income or with limited availability of health services) access to quality maternal and child health services," and "maternal and child health centers which . . . provide prenatal, delivery, and postpartum care for pregnant women and preventive and primary care services for infants." 42 U.S.C. §§ 701(a)(1)(A), (a)(3)(d) (2019).

Title X is only one piece in the bigger puzzle of federal funding to support women and children. While Title X funds family planning and support for women

not yet pregnant, the Social Security Act supports maternal health, pregnancy, delivery, and child health. *See* Health Resources and Services Administration, Title V Maternal and Child Health (MCH) Block Grant, (last reviewed Jan. 2022) https://mchb.hrsa.gov/programs-impact/programs/title-v-maternal-child-health-mch-block-grant (explaining that "In 2019, [the Title V] grant helped provide services for: 92% of all pregnant women, 98% of infants, [and] 60% of children nationwide, including children with special health care needs").

II. FOLLOWING ENACTMENT OF TITLE X, THE UNITED STATES HAS CONTINUED TO PROTECT CONSCIENCE RIGHTS AGAINST ABORTION.

A. The United States Has a Rich Legal Tradition of Protecting Healthcare Workers' Conscience Rights Against Abortion.

Since 1970, the United States has had a robust legal tradition of protecting conscientious objections to abortion. Title X was not the only the only pre-*Roe* statute with conscience protections. As Professor Mark Rienzi writes, "[e]ven before *Roe* was decided, states that permitted abortion were taking action to protect those physicians or hospitals that objected to participation in abortions." Rienzi, *supra*, at 148. For example, "[i]n 1971, New York enacted a criminal law prohibiting discrimination against any person for his or her refusal to participate in abortions. Many other states . . . included explicit conscience protections for individuals and institutions in the same statutes that liberalized their abortion laws." *Id*. (citing eight state statutory conscience protections).

In 1973 in *Roe v. Wade*, the Supreme Court determined "[the] right of privacy . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." 410 U.S. at 153. However, even as the Court created this abortion right, it implicitly recognized in *Roe*'s companion case, *Doe v. Bolton,* that healthcare providers may conscientiously object to providing an abortion. 410 U.S. 179, 197–198 (1973) (discussing conscience protections for hospitals and healthcare personnel within Georgia's challenged statute); *Doe v. Bellin Mem'l Hosp.*, 479 F.2d 756, 760 (7th Cir. 1973) ("The Supreme Court did not expressly pass on the validity of that [conscience] provision, but since it was attacked in one of the amicus briefs, and since the Court reviewed the entire statute in such detail, it is reasonable to infer that it considered such authorization unobjectionable.").

In the months following *Roe*, courts grappled with how to weigh conscientious objections to the newly manufactured abortion right. That same year, Senator Frank Church introduced an amendment to protect conscience rights from the repercussions of *Roe v. Wade*. As he described, "[*Roe*] rests upon the court's interpretation of the Constitution, the supreme law of the land. . . . [T]he decision does raise a serious question as to its possible impact upon the Federal Government's extensive involvement in medicine and medical care." 119 Cong. Rec. 9,595 (1973) (statement of Sen. Frank Church). According to Senator Church, since Congress often conditions federal funds upon compliance with federal regulations, the

legislature needed to clarify and protect conscience rights which were under threat following *Roe*. *Id*.[7]

Congress passed the Church Amendment, which applies to entities receiving certain social services funding, in order to address conscience concerns. 42 U.S.C. § 300a-7 (2000). Healthcare facilities and individuals have the right to conscientiously object "to perform[ing] or assist[ing] in the performance of any . . . abortion if . . . [it] would be contrary to his religious beliefs or moral convictions." *Id*. § 300a-7(b)(1). Employers also may not discriminate against employees exercising their conscience rights. *Id*. § 300a-7(c)(1). The Church Amendment further protects healthcare facilities that conscientiously object to permitting abortion in its facilities if it is against the entity's "religious beliefs or moral convictions." *Id*. § 300a-7(b)(2).

States also drastically expanded conscience protections following *Roe*. "Today, virtually every state in the country has some sort of statute protecting individuals and, in many cases, entities who refuse to provide abortions. Most of

[7] Fears of threats to conscience rights were founded. Shortly after the Supreme Court decided *Roe*, for example, the District Court of Montana determined a private, Catholic, charitable hospital must provide sterilizations against the hospital's religious conscientious objections since the hospital had accepted federal aid under the Hill Burton Act and thus, must follow federal law. *Taylor v. St. Vincent's Hosp.*, 369 F. Supp. 948 (D. Mont. 1973). Citing this case, Senator Church raised concerns about the effect the Hill-Burton Act, in combination with *Roe*'s creation of an abortion right, would have upon healthcare providers conscientiously objecting to abortion. 119 Cong. Rec. 9,595.

these statutes arose in the decade following *Roe*." Rienzi, *supra*, at 148–149. These statutes may focus on conscientious objections to abortion or may generally protect conscientious objections to other medical procedures. *Id*. Ohio, for example, has a broad conscience protection statute that recognizes "a medical practitioner, health care institution, or health care payer has the freedom to decline to perform, participate in, or pay for any health care service which violates the practitioner's, institution's, or payer's conscience as informed by the moral, ethical, or religious beliefs or principles held by the practitioner, institution, or payer." Ohio Rev. Code § 4743.10(B) (2021).

Over the past few decades, the federal government likewise has expanded its conscience protections. In 1988, Congress adopted the Danforth Amendment to the Civil Rights Restoration Act. 20 U.S.C. § 1688 (1988). The amendment clarifies that sex discrimination under Title IX of the Education Amendments of 1972 "[cannot] be construed to require . . . any person, or public or private entity, to provide or pay for any benefit or service, including the use of facilities, related to an abortion." *Id*.; Lynn D. Wardle, *Protection of Health-Care Providers' Rights of Conscience in American Law: Present, Past, and Future*, 9 Ave Maria L. Rev. 1, 30 (2010).

Congress enacted the Coats-Snowe Amendment in 1996 to protect conscience rights from "[t]he Federal Government, and any State or local government that

receives Federal financial assistance." 42 U.S.C. § 238n(a) (1996).[8] Under the amendment, federal fund recipients cannot discriminate against any healthcare entity that "refuses to undergo training in the performance of induced abortions, to require or provide such training, to perform such abortions, or to provide referrals for such training or such abortions." *Id*. § 238n(a)(1). The Coats-Snowe Amendment defines "health care entity" broadly to "include[] an individual physician, a postgraduate physician training program, and a participant in a program of training in the health professions." *Id*. § 238n(c)(2).

In 1997, Congress amended the federal Medicaid and Medicare programs "to prohibit managed-care plans from restricting the ability of health-care providers to discuss treatment options." Wardle, *supra*, at 31. Congress, however, simultaneously "exempted managed-care providers from the requirement to provide, reimburse, or cover counseling or referral services if they objected on moral or religious grounds." *Id*. at 31–32; *see* 42 U.S.C. § 1395w-22(j)(3)(B) (2020) (protecting conscience rights in Medicare program) *and* 42 U.S.C. § 1396u-2(b)(3)(B) (2020) (codifying conscience protections in Medicaid program).

[8] The Coats-Snowe Amendment was a response to the Accreditation Council for Graduate Medical Education (ACGME)'s 1995 adoption of "new accreditation standards requiring obstetrics and gynecology residency programs to provide abortion training." Wardle, *supra*, at 30. "[The new ACGME accreditation standards] meant that all fifty Catholic hospitals with OB/GYN residency programs, as well as other religiously-affiliated hospitals, would have to provide abortion training or lose accreditation to train OB/GYN residents." *Id*.

Since 2004, every HHS appropriations bill has readopted the Weldon Amendment. Office for Civil Rights, *Conscience Protections for Health Care Providers*, U.S. Dep't of Health & Hum. Servs. (last reviewed Sept. 14, 2021), https://www.hhs.gov/conscience/conscience-protections/index.html. Under the amendment,

> None of the funds made available in this 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.

See, *e.g.*, Consolidated Appropriations Act of 2021, Pub. L. No. 116-260, div. H, tit. V § 507(d)(1), 134 Stat. 1182, 1622 (2020). The amendment broadly protects conscience rights, safeguarding "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." *Id*. § 507(d)(2), 134 Stat. 1622.

The Weldon Amendment was adopted before the full committee. 150 Cong. Rec. H10,090 (daily ed. Nov. 20, 2004) (statement of Rep. David Weldon). As the Committee on Appropriations reported, in addition to preexisting conscience protections, the Weldon Amendment "requires that in awarding grants for natural family planning . . . no applicant shall be discriminated against because of such applicant's religious or conscientious commitment to offer only natural family

planning." H.R. Rep. No. 108-599, at 13 (2004). As Representative David Weldon explained, his amendment "is a continuation of the Hyde policy of conscience protection" and a response to aggressive litigation attempts to infringe on conscience rights. 150 Cong. Rec. H10,090 (referencing, *e.g.*, *Valley Hosp. Ass'n, Inc. v. Mat-Su Coal. for Choice*, 948 P.2d 963 (Alaska 1997) (requiring a nonprofit hospital to perform elective abortions at its facility over the hospital's conscientious objections)). The Weldon Amendment helps protect "[t]he right of conscience [which] is fundamental to our American freedoms." *Id*.

In 2010, Congress passed the Affordable Care Act (ACA), which includes conscience protections regarding insurance. 42 U.S.C. § 18023(b)(4) (2010). Under the ACA, "[n]o qualified health plan offered through an Exchange may discriminate against any individual health care provider or health care facility because of its unwillingness to provide, pay for, provide coverage of, or refer for abortions." *Id*.

This long and robust history shows Congress has consistently protected healthcare providers against evolving abortion conscience threats. By excluding abortion from Title X, Section 1008 is part of a fifty-year legal tradition that protects healthcare workers from abortion conscience threats.

B. Abortion Funding Restrictions Permit Important Social Welfare Legislation to Pass Congress and Protect Taxpayers' Conscience Rights.

Abortion funding restrictions are critical for social welfare appropriations. Abortion is "a highly politicized and contentious arena." *June Med. Servs.*, 140 S. Ct. at 2182 (Gorsuch, J., dissenting). The majority of Americans oppose taxpayer funding of abortions. *New Knights of Columbus/Marist Poll: A Majority of Americans Support Legal Limits on Abortion, and Oppose Taxpayer Funding*, Knights of Columbus (Jan. 20, 2022), https://www.kofc.org/en/news-room/polls/americans-support-legal-limits-on-abortion.html (finding in a 2022 poll that 54% of Americans oppose or strongly oppose taxpayer funding of abortions). Instead of becoming embroiled in the abortion debate, Congress has determined to restrict the scope of its appropriations, thus facilitating the passage of important social welfare legislation. *See*, *e.g.*, 116 Cong. Rec. 37,371 (statement of Rep. J.J. Pickle) ("[W]e are dealing with peoples' consciences. . . To [not include abortion funding restrictions] would be to go against everything this country stands for, and quite possibly would be to render the whole issue of population stabilization [and Title X's passage] politically unfeasible.").

Funding restrictions are an important safeguard for taxpayers' conscience rights. In virtually all cases, federal courts do not have jurisdiction to hear taxpayer suits to enjoin federal appropriations. *Massachusetts v. Mellon*, 262 U.S. 447, 486–

489 (1923). The Supreme Court has refused to recognize a religious freedom right to object to a specific tax that violates a taxpayer's religious conscience. *United States v. Lee*, 455 U.S. 252, 261 (1982). Although the government is not required to accommodate taxpayers' conscientious objections, Congress has the discretion to include funding restrictions to protect conscientious objections to abortion.

The most prominent abortion funding restriction is the Hyde Amendment, which has been a cornerstone of every federal health and welfare appropriations bill since Congressman Henry Hyde first proposed it in 1976. *See* Pub. L. No. 94-439 tit. II, § 209, 90 Stat. 1418, 1434 (1976) ("None of the funds contained in this Act shall be used to perform abortions except where the life of the mother would be endangered if the fetus were carried to term."). In introducing his amendment, Congressman Hyde explained, "we who seek to protect that most defenseless and innocent of human lives, the unborn—seek to inhibit the use of Federal funds to pay for and thus encourage abortion as an answer to the human and compelling problem of an unwanted child." 122 Cong. Rec. 20,410 (1976) (statement of Rep. Henry Hyde). Title X includes the present form of the Hyde Amendment, which restricts abortion funding except for medical emergencies and cases of rape or incest. Consolidated Appropriations Act of 2021, div. H., tit. V, §§ 506–507, 134 Stat. 1622.

Section 1008, passed during the initial enactment of Title X, ensures Title X respects taxpayers' conscientious objections by excluding abortion entirely from the

scope of the program. *See* 42 U.S.C. § 300a-6. Similarly, Section 1008 allows Title X to avoid the political controversy surrounding abortion and facilitate the passage of appropriations bills for natural family planning services.

III. REPEAL OF THE 2019 FINAL RULE THREATENS HEALTHCARE PROVIDERS' AND TAXPAYERS' CONSCIENCE RIGHTS.

HHS has repealed the 2019 Rule and "effectively re-adopt[ed] the 2000 Rule by eliminating strict physical and financial separation between Title X services and abortion services and by requiring nondirective pregnancy counseling and referrals for abortion services when requested." *State of Ohio v. Becerra*, No. 1:21-cv-675, slip op. at 9 (S.D. Ohio Dec. 29, 2021) (emphasis omitted). But reverting to the 2000 Rule overlooks the new rights of conscience landscape, *i.e.*, the Coats-Snowe Amendment and Weldon Amendment, and HHS' own discussion of Title X's tension with statutory conscience protections. By repealing the 2019 Rule, the Final Rule ultimately undermines federal conscience protections.

The trial court noted "[t]he 2000 Rule remained in effect, unchallenged, for more than 18 years." *State of Ohio*, slip op. at 6 (emphasis omitted). This assertion overlooks the fundamental problem with the 2000 Rule; the 2000 Rule could not fully consider *current* statutory conscience protections. The Weldon Amendment first took effect in 2005, five years after HHS adopted the 2000 Rule. The Weldon Amendment provides one of the most comprehensive anti-discrimination laws for healthcare individuals and entities who conscientiously object to abortion. *See*

Consolidated Appropriations Act of 2021, Pub. L. No. 116-260, div. H, tit. V § 507(d), 134 Stat. 1622. HHS further acknowledged in 2019 that the "Department's 2000 analysis failed to consider that the Coats-Snowe Amendment (and the subsequently passed Weldon Amendment) protects institutional health care providers from discrimination by federal programs, including Title X, on the basis of their refusal to . . . refer for abortion." 84 Fed. Reg. 7716, n.10 (referencing Standards of Compliance for Abortion-Related Services in Family Planning Services Projects, 65 Fed. Reg. 41,270 (July 3, 2000) (previously codified at 42 C.F.R. pt. 59)). Thus, reverting to the 2000 Rule disregards Title X's interaction with the Coats-Snowe and Weldon Amendments.

In its 2021 rulemaking, HHS contended that "While the [conscience] statutes may at times interact with the requirements of Title X, interpreting these laws is beyond the scope of this rule. . . ." 86 Fed. Reg. 56,153. Yet HHS previously has acknowledged that the 2000 Rule is contrary to federal conscience protections. 84 Fed. Reg. 7717 ("the Department believes the referral requirement is in conflict with federal conscience protections, such as the Church, Coats-Snowe, and Weldon Amendments, for individuals and institutional entities which object"); Ensuring That Department of Health and Human Services Funds Do Not Support Coercive or Discriminatory Policies or Practices in Violation of Federal Law, 73 Fed. Reg. 78,072, 78,087 (Dec. 19, 2008) (previously codified at 45 C.F.R. pt. 88) ("[T]he

current regulatory requirement that grantees must provide counseling and referrals for abortion upon request (42 CFR 59.5(a)(5)) is inconsistent with the health care provider conscience protection statutory provisions. . . ."). The referral provision is especially concerning because, as HHS described in 2019, "the evidence collected . . . suggests that neither grantees nor their employees may know of the requirements of the [conscience clauses]." 84 Fed. Reg. 7,716 n. 10; *see also* 73 Fed. Reg. 78,088 ("The Department has identified several instances that suggest that providers, employers, and employees are unaware of the protections found in federal law."). Consequently, in "effectively readopting" the 2000 Rule, HHS blatantly disregards its own admissions of how the 2000 Rule infringes upon conscience rights.

Besides the tension between the Final Rule's referral provision and federal conscience laws, the Final Rule also raises grave concerns for taxpayers who conscientiously object to abortion. As discussed above, the government may, but need not, include conscience protections for taxpayers. Here, Congress has chosen to exclude abortion entirely from the scope of Title X. 42 U.S.C. § 300a-6. Yet, "the referral for abortion as a method of family planning, and such abortion procedure itself, are so linked that such a referral makes the Title X project or clinic a program one where abortion is a method of family planning. . . ." 84 Fed. Reg. 7,717. Similarly, without the integrity requirements, taxpayers no longer have an

"assurance that their tax dollars are being used in compliance with the requirements of the Title X program" (84 Fed. Reg. 7,782): namely, that Title X taxpayer dollars are not going to abortion. *See* 42 U.S.C. § 300a-6. Consequently, "because providing abortion as a method of family planning has been statutorily prohibited, and abortion is a source of contentious public debate," repealing the 2019 Rule may inhibit "taxpayers' trust in the Title X program." *See* 84 Fed. Reg. 7,725.

Taxpayers' conscience concerns are founded. In *Family Planning Association v. U.S. Department of Health and Human Services*, for example, Maine Family Planning argued the 2019 Rule's integrity provision violated their patients' due process right to choose abortion, even though Title X excludes abortion from the scope of its program. 466 F. Supp. 3d 259, 271 (D. Me. 2020). Rejecting the abortion clinic's contention, the district court described:

> This argument is a creative reimagining of the economic reliance argument. In effect, because Plaintiffs have built out a statewide network of clinics that provide both Title X services and abortion services, compliance with the Rule would impose unworkable financial burdens because a similarly expansive network of stand-alone abortion clinics is not sustainable. The irony of the argument, of course, is that *it substantiates [HHS'] concern that the Title X program is subsidizing abortion*.

Id. (emphasis added).

Maine Family Planning is not the only litigant that has challenged the integrity rule's impact on abortion, even though Title X excludes abortion from its program's scope. Oregon contended the 2019 Rule "will have consequences on all aspects of

reproductive health for low-income clients, from access to contraception and abortion to screening and treatment for sexually transmitted infections." Pl. States' Mot for Prelim. Inj. at 29, *Oregon v. Azar*, No. 19-317 (D. Or. Mar. 21, 2019). California argued "[t]he [2019] Final Rule constitutes a significant impediment to low-income Title X patients' access to . . . abortion services." Cal.'s Notice of Mot. and Mot. for Prelim. Inj., with Mem. of Points and Authorities at 13, *California v. Azar*, No. 19-1184 (N.D. Cal. Mar. 21, 2019). The dissent from the Ninth Circuit en banc decision upholding the 2019 Rule expressed concerns that the "[2019 Rule's] consequences will be profound, delaying some women's access to time-sensitive care and preventing others from accessing abortion altogether." *California v. Azar*, 950 F.3d 1067, 1109 (9th Cir. 2020) (Paez, J., dissenting). Yet the integrity rule should not affect abortion services, which are outside Title X's scope, unless abortion providers are using Title X funds to subsidize abortion.

In sum, the Final Rule contravenes federal conscience protections and threatens healthcare workers' and taxpayers' conscientious objections to abortion.

CONCLUSION

The United States has a robust legal history of protecting conscientious objections to abortion. Section 1008 is an early conscience clause that excludes abortion from the Title X's scope and protects healthcare workers' and taxpayers' conscientious objections to taking human life. The Final Rule blatantly subverts

Section 1008's purpose and violates federal conscience laws. *Amicus Curiae* respectfully urges this court to reverse the district court's denial of a preliminary injunction.

Respectfully submitted,

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CERTFICATE OF SERVICE

I certify that on March 1, 2022, I electronically filed the foregoing brief with the Clerk of Court throughout the CM/ECF system, which shall send notification of such filing to any CM/ECF participants.

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