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11 **IN THE UNITED STATES DISTRICT COURT**
 12 **FOR THE EASTERN DISTRICT OF WASHINGTON**
 13 **AT YAKIMA**

<p>14 STATE OF WASHINGTON, 15 Plaintiff, 16 v. 17 ALEX M. AZAR II, et al., 18 Defendants.</p>	<p>1:19-cv-03040-SAB AMICI CURIAE BRIEF OF THE STATES OF OHIO, ALABAMA, ARKANSAS, INDIANA, KANSAS, KENTUCKY (by and through its Governor), LOUISIANA, MISSOURI, OKLAHOMA, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, and TEXAS OPPOSING INJUNCTION</p>
<p>19 20 NATIONAL FAMILY PLANNING & REPRODUCTIVE HEALTH ASSOCIATION, et al., 21 Plaintiff, 22 v. 23 24 25 ALEX M. AZAR II, et al., 26 Defendants.</p>	<p>NOTED FOR: April 18, 2019 with oral argument at 10:00 AM</p>

<p>27 <i>Amici Curiae</i> Brief of Ohio et al. Supporting the United States 28 Opposing a Preliminary Injunction</p>	<p>ATTORNEY GENERAL OF OHIO 30 E. Broad St., 17th Floor Columbus, OH 43215 614-466-8980</p>
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27 *Amici Curiae* Brief of Ohio et al. Supporting the United States
28 in Opposing a Preliminary Injunction

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INTRODUCTION AND STATEMENT OF AMICI INTEREST

Ohio and other *amici* states participate in Title X programs, partnering with the federal government to provide family-planning services and related healthcare to their residents. These States fully support Title X’s mission. The States therefore support administrative regulations that fulfill that mission by following Congress’s mandates.

At the same time, the *amici* states share many of their citizens’ growing concerns about providing government support to entities with links to abortion. That is why Ohio law, for example, makes entities that provide abortions, or that are affiliated with entities that do, ineligible for funding under certain public-health programs—programs that are outside of, but similar to, Medicaid and Title X. *Planned Parenthood of Greater Ohio v. Hodges*, No. 16-4027, 2019 U.S. App. LEXIS 7200 (6th Cir. 2019) (en banc) (per Sutton, J.). Many other States have similar laws designed to ensure that public funds never make their way to abortion providers. These various laws are comparable to Title X itself, which likewise prohibits the use of its funds “in programs where abortion is a method of family planning.” 42 U.S.C. § 300a-6.

The new Title X regulations support Title X’s mission—including its express command not to use Title X funds in furtherance of abortion. And the new rules accomplish this while continuing to honor the desire of many citizens in the *amici* States (and, for that matter, in Washington) to avoid any involvement with abortion. That is why the *amici* States are filing this brief in support of the United States. This brief will not address all the statutory arguments supporting the new regulations; the federal government will ably handle that. Instead, this brief focuses on two important-yet-underappreciated considerations supporting HHS’s “reasoned explanation” for the rule change. *See F.C.C. v. Fox Television Stations*, 556 U.S. 502, 515 (2009). *First*, the new rules help preserve broad support for Title X by keeping a healthy distance between the consensus supporting family-planning

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1 services and the controversy over abortion. Without the new rules, public confusion regarding Title
2 X’s link to abortion will erode support for the law’s uncontroversial and statutorily permissible applica-
3 tions. *Second*, because the new rules ensure that funds will be spent only on programs for which there is
4 consensus support, they promote the intrinsic, democratic interest in governing in a manner that the
5 largest number of people can get behind.

6 The *amici* States address one other point, too—the appropriate remedy if this Court holds that
7 the new rules are invalid. Washington asks for a national injunction. So do the Washington-based pri-
8 vate plaintiffs in the consolidated case. But neither Washington nor the private plaintiffs offer a sound
9 reason to enjoin the new rules in Ohio or in other States that welcome the updated regulations. Courts
10 are beginning to express “uncertainty about the propriety of universal injunctions.” *E. Bay Sanctuary*
11 *Covenant v. Trump*, 909 F.3d 1219, 1255 (9th Cir. 2018); *see also Trump v. Hawaii*, 138 S. Ct. 2392, 2424–
12 29 (2018) (Thomas, J., concurring); Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunc-*
13 *tion*, 131 Harv. L. Rev. 417, 425 (2017). But even assuming national injunctions are ever appropriate,
14 such relief is not appropriate here. Whether the challenged rules apply in the *amici* States or elsewhere
15 is of no legitimate concern to Washington. Surely it cannot show that *it* or its citizens will be irreparably
16 harmed by the rules’ application to *amici* States. And since Rule 65 requires injunctions to be tailored to
17 address the situation at hand, Washington is not entitled to relief that extends beyond its borders—an
18 injunction limited to Washington will eliminate the risk of any supposed irreparable harm to Washing-
19 ton’s citizens.

20 Some of the private plaintiffs in the consolidated case do have an interest in the new rules’ ap-
21 plicability in other States. But as we illustrate below, the States manage their public-health programs in
22 general and their Title X programs in particular in many diverse ways. Some States (Alabama, for ex-
23 ample) even administer Title X programs themselves, without any reliance on private parties, thus elim-
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1 inating any connection between Title X funding and abortion providers. Given this diversity of ap-
2 proaches to Title X, and given the equitable, fact-specific nature of injunctive relief, there is no way to
3 properly tailor nationwide injunctive relief. Indeed, while the private plaintiffs claim that their mem-
4 bers will suffer harm in every jurisdiction nationwide without an injunction, that is not so. Instead of
5 trying to resolve this dispute for the entire nation, this Court should tailor any relief to be specific to
6 Washington, leaving other courts to assess the rules’ impact elsewhere.

7 **ARGUMENT**

8 **I. The new regulations better promote Title X’s mission by separating the controversy over**
9 **abortion from the consensus support for funding family-planning services.**

10 Americans disagree passionately about abortion. But they can all agree that abortion has long
11 been among the country’s most divisive issues. These opposing views make public expenditure in sup-
12 port of abortion highly controversial. And as a result, the federal and most state governments avoid
13 funding the practice. *See Rust v. Sullivan*, 500 U.S. 173, 201–02 (1991); *Harris v. McRae*, 448 U.S. 297,
14 315–17 (1980); *Maher v. Roe*, 432 U.S. 464, 474 (1977). To be sure, some States provide such funding.
15 And many advocates would like to see more public funding. But the broader national consensus against
16 funding elective abortion remains. *See* Pub. L. No. 115-31, §§ 613–14, 131 Stat. 135, 372 (2017) (barring
17 certain federal funds from elective abortion).

18 Title X reflects this consensus. Since its 1970 enactment, the law has funded *non-abortion* family
19 planning. All the while, it has banned the use of Title X funds “in programs where abortion is a method
20 of family planning.” 42 U.S.C. § 300a-6. Needless to say, HHS’s regulations must adhere to this con-
21 gressional mandate.

22 Here, HHS explained that it updated the rules to better satisfy Congress’s mandate—and con-
23 cerned citizens’ expectations. 84 Fed. Reg. 7714 (Mar. 4, 2019). It thus offered “reasoned explana-
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1 tions” for the policy change, and the change is therefore not “arbitrary and capricious” in violation of
2 the Administrative Procedure Act. *F.C.C. v. Fox Television Stations*, 556 U.S. 502, 515 (2009). Wash-
3 ington is mistaken to insist otherwise. *See* Washington PI Mot. at 15–16; 5 U.S.C. § 706(2)(A).

4 Strict separation of Title X funding and abortion serves two important purposes that are of par-
5 ticular interest to the *amici* States, and thus a focus of this brief. *First*, strict separation preserves public
6 support for Title X by preventing it from becoming associated with abortion. *Second*, strict separation
7 advances the federal government’s interest in adopting policies that large numbers can support. The
8 new rules better promote these two interests because they better promote Title X’s mandate to segre-
9 gate abortion services and Title X programs. Part B elaborates on that point. But first, Part A puts the
10 new rules in historical context. That context illustrates that the rules function in much the same way as
11 earlier regulations that the Supreme Court already upheld.

12 **A. The new regulations largely restore the regulatory scheme that the Supreme Court**
13 **upheld as a valid implementation of Title X in *Rust v. Sullivan*.**

14 Title X bans recipients from using its funds “in programs where abortion is a method of family
15 planning.” 42 U.S.C. § 300a-6. It always has. *See* Family Planning Services and Population Research
16 Act of 1970, Pub. L. 91-572 § 6(c), 84 Stat. 1504, 1508 (1970). Over the years, HHS has repeatedly
17 changed its regulatory approach to enforcing this congressional mandate.

18 Begin in 1988, when HHS issued regulations similar to those now at issue. It took this step be-
19 cause it determined that the pre-1988 regulations had failed to “preserve the distinction between Title
20 X programs and abortion as a method of family planning.” 53 Fed. Reg. 2922, 2923–24 (Feb. 2, 1988).
21 To better promote that distinction, the agency adopted new rules that, among other things, barred re-
22 cipients from making abortion referrals and *required* recipients to maintain a strict financial and physical
23 separation between their non-abortion services and their abortion services (if indeed they provided any).

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1 The Supreme Court, in *Rust v. Sullivan*, determined that these regulations properly enforced Ti-
2 tle X, and thus upheld them against regulatory challenges. 500 U.S. 173, 191 (1991). It upheld them
3 against constitutional challenges too, rejecting free-speech and Due Process Clause arguments. *Id.* at
4 192–200, 201–13.

5 The regulations did not last. In 1993, just two weeks into a new administration, the agency re-
6 scinded the just-upheld regulations after determining that they would “inappropriately restrict grant-
7 ees.” 58 Fed. Reg. 7462 (Feb. 5, 1993). The agency settled on a new tack, which it promulgated
8 through interim rules. Once finalized in 2000, those rules required grantees to provide “information
9 and counseling regarding” abortion, and required grantees to provide this information in “non-
10 directive” terms. 42 C.F.R. § 59.5(a)(5)(i-ii) (July 3, 2000). In essence, the HHS replaced the ban on
11 abortion referrals with its polar opposite. HHS justified this requirement by claiming that the *Rust*-
12 approved rules had not been shown to work (even though they were in effect for just a short time), and
13 that grantees preferred looser restrictions. Specifically, HHS said the looser rules were “generally ac-
14 ceptable to the grantee community, in contrast to” the rules that *Rust* upheld. Those standards, HHS
15 said, “were generally unacceptable to the grantee community.” 65 Fed. Reg. 41,270, 41,271 (Jul. 3,
16 2000).

17 The regulations HHS promulgated in 2000 remain in effect. The agency’s new rules will soon
18 displace them, however. These new rules—which largely mirror the 1988 rules that *Rust* upheld—
19 differ from the current rules both in the procedure by which they were adopted and their substance.
20 Begin with the procedural difference. In 1993, just days after the new administration entered office,
21 HHS rescinded the rules that *Rust* had upheld. Here, in contrast, HHS worked on the issue for signifi-
22 cantly longer, announcing its proposed rules only on June 1, 2018. 83 Fed. Reg. 25,502 (June 1, 2018).

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1 HHS followed notice and comment procedures before any immediate action, and has now issued the
2 updated regulations, explaining its reasons for the changes. 84 Fed. Reg. 7714 (Mar. 4, 2019).

3 The substantive differences between the current rules and the new ones are more relevant to
4 this case. HHS sought to better comply with Title X’s text, and with the expectation of citizen taxpay-
5 ers, by clearly segregating abortion services and Title X funds. *Id.* at 7714–15. In its own words, the new
6 rules “will ensure compliance with, and enhance implementation of, the statutory requirement that
7 none of the funds appropriated for Title X may be used in programs where abortion is a method of fami-
8 ly planning and related statutory requirements.” *Id.* at 7714. How? For one thing, by eliminating the
9 requirement that Title X recipients make abortion referrals, and replacing it with a rule that permits
10 (but does not require) non-directive consulting about the availability of abortion. *Id.* at 7716–17. For
11 another, by requiring Title X recipients to maintain stricter physical and financial separation between
12 abortion services and programs that spend Title X money. *Id.* at 7763–77; 42 C.F.R. § 59.15. The new
13 rule says that “to be physically and financially separate, a Title X project must have an objective integri-
14 ty and independence from prohibited activities. Mere bookkeeping separation of Title X funds from
15 other monies is not sufficient.” 42 C.F.R. § 59.15.

16 HHS will review programs for “objective integrity” based on factors listed in the rule:

- 17 (a) The existence of separate, accurate accounting records;
- 18 (b) The degree of separation from facilities (*e.g.*, treatment, consultation, examination and wait-
19 ing rooms, office entrances and exits, shared phone numbers, email addresses, educational
20 services, and websites) in which prohibited activities occur and the extent of such prohibited
21 activities;
- 22 (c) The existence of separate personnel, electronic or paper-based health care records, and
23 workstations; and

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1 (d) The extent to which signs and other forms of identification of the Title X project are present,
2 and signs and material referencing or promoting abortion are absent.

3 42 C.F.R. § 59.15.

4 Together, these requirements “protect against the unintentional commingling of Title X re-
5 sources with non-Title X resources of programs.” 84 Fed. Reg. at 7715. Preventing such comingling is
6 necessary to give effect to Congress’s prohibition on using Title X funds “in programs where abortion
7 is a method of family planning.” 42 U.S.C. § 300a-6. And by addressing “the potential for ambiguity
8 between approved Title X activities and non-Title X activities and services,” the new rules eliminate
9 what would otherwise be the “significant risk” of “public confusion over the scope of Title X services,
10 including whether Title X funds are allocated for, or spent on, non-Title X services, including abor-
11 tion.” 84 Fed. Reg. at 7715.

12 The agency additionally supported its financial-and-physical-separation rule by citing numerous
13 sources illustrating the failure of the current rule to support Congress’s mandate. Those sources
14 showed that, “under the current arrangement, it is often difficult for patients, or the public, to know
15 when or where Title X services end and non-Title X services involving abortion begin.” 84 Fed. Reg. at
16 7764. “Even with the strictest accounting . . . , a shared facility greatly increases the risk of confusion.”
17 *Id.* The agency noted that this concern sharpened over the years because abortion was increasingly be-
18 ing performed in “nonspecialized clinics”—in other words, clinics that focus on non-abortion services
19 (such as Title X contraception services) but that also provide abortions. *Id.* at 7765. HHS noted that
20 “[a]ccording to the Guttmacher Institute, nonspecialized clinics accounted for 24% of all abortions in
21 2008, 31% in 2011, and 36% in 2014.” *Id.* (citations omitted). That increased the likelihood of confusion
22 about whether Title X supported abortion services.

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B. Strictly segregating Title X funds and abortion is critical for preserving public support for the otherwise-popular program, and for reflecting the values and policy preferences of millions of Americans coast to coast.

The new rules strictly segregate Title X funding and abortion services. These rules are valuable both instrumentally and intrinsically. Their instrumental value lies in preventing “public confusion” regarding Title X’s connection to abortion. If people begin to suspect that Title X is funding abortion even indirectly, the program will lose public support. The new rules stop that loss of support. The rules’ intrinsic value is that they can gain broad support in a pluralistic country made up of millions of individuals with radically different views. In a representative democracy like ours, a law that can gain wide support is, all else equal, better than one that cannot. Since nearly everyone can get behind Title X so long as it has no connection to abortion, the revised rules promote this democratic ideal.

The plaintiffs’ briefs fail to appreciate either point—perhaps because they fail to appreciate the concerns of citizens who do not share their views of the issue. This brief aims to fill the gap.

1. Because many citizens oppose abortion, federal and state laws have long banned the public funding of abortion facilities and services. *See Harris*, 448 U.S. at 315-17; *Maher*, 432 U.S. at 474. For millions of Americans, these laws do not go far enough. For one thing, money is fungible. Thus, giving money to abortion providers for purposes unrelated to abortion is often no different from funding abortion itself; if the government doles out \$100 to spend on STD tests, an abortion provider can accept the money, buy the tests, and use \$100 that it would have spent on the same tests to support its abortion services. *See Holder v. Humanitarian Law Project*, 561 U.S. 1, 31 (2010). In addition to their concern with fungibility, many Americans believe that prohibitions on direct funding do too little to express a legitimate policy preference against government-endorsed elective abortion. These citizens believe that permitting abortion providers or advocates to participate in providing a government-funded service im-

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1 plies a public imprimatur on abortion—an imprimatur that citizens legitimately seek to withhold. *See*
2 *Planned Parenthood*, 2019 U.S. App. LEXIS 7200 at *4.

3 The fungibility and public-imprimatur concerns led many citizens to call for laws putting a
4 greater distance between public funding and abortion-performing entities. Their representatives lis-
5 tened, and passed laws doing just that. Ohio, for example, enacted a law barring public funds under
6 several non-Title X programs from going to entities affiliated with abortion providers. This law is de-
7 signed to “promote childbirth over abortion, to avoid ‘muddl[ing]’ that message by using abortion pro-
8 viders as the face of state healthcare programs, and to avoid entangling program funding and abortion
9 funding.” *Id.* at *4 (citing Ohio’s brief at 39–41). In upholding the law, the en banc Sixth Circuit, in an
10 opinion by Judge Sutton, recognized the validity of Ohio’s interest: “Governments generally may do
11 what they wish with public funds,” so they may “subsidize some organizations but not others and []
12 condition receipt of public funds on compliance with certain obligations.” *Id.* at *6 (citing *Rust*, 500
13 U.S. at 192–94). So when a State’s citizens do not wish to promote abortion, that State may choose not
14 to spend its citizens’ money doing so. *See id.* The Sixth Circuit’s en banc ruling thus establishes the
15 legitimacy of, and confirms the desire for, laws putting a greater distance between public funds and
16 abortion.

17 Ohio is not alone. In 2011, Indiana enacted a law providing that state agencies “may not[] enter
18 into a contract with, or make a grant to, any entity that performs abortions or maintains or operates a
19 facility where abortions are performed,” other than hospitals and ambulatory surgical centers. The
20 same law cancelled existing contracts with covered abortion providers. *Planned Parenthood of Ind., Inc.*
21 *v. Comm’r of the Ind. State Dep’t of Health*, 699 F.3d 962, 969–70 (7th Cir. 2012). Arizona passed a simi-
22 lar law in 2012, barring state agencies and subdivisions from entering family-planning services contracts
23 with, or awarding family-planning services grants to, any person performing “nonfederally qualified
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1 abortions” or maintaining or operating a facility in which those abortions were performed. *Planned*
2 *Parenthood Ariz., Inc. v. Betlach*, 727 F.3d 960, 964 (9th Cir. 2013). The pace of such laws is increasing:
3 the Guttmacher Institute reports that, while State have sought for decades to bar family-planning funds
4 from going to those who perform abortions or even referrals or counseling, at least eighteen States
5 adopted new fungibility-based restrictions between 2011 and 2016. See “Fungibility”: The Argument
6 at the Center of a 40-Year Campaign to Undermine Reproductive Health and Rights at [www.](http://www.guttmacher.org/gpr/2016/10/fungibility-argument-center-40-year-campaign-undermine-reproductive-health-and-rights)
7 [guttmacher.org/gpr/2016/10/fungibility-argument-center-40-year-campaign-undermine-reproductive-](http://www.guttmacher.org/gpr/2016/10/fungibility-argument-center-40-year-campaign-undermine-reproductive-health-and-rights)
8 [health-and-rights](http://www.guttmacher.org/gpr/2016/10/fungibility-argument-center-40-year-campaign-undermine-reproductive-health-and-rights).

9 These laws do not even count the executive actions terminating funding. Between 2015 and
10 2016, officials in Arkansas, Kansas, and Utah all sought to terminate funding for non-abortion services
11 to Planned Parenthood affiliates. See *Doe v. Gillespie*, 867 F.3d 1034, 1037–38 (8th Cir. 2017) (Arkan-
12 sas); *Planned Parenthood of Kan. & Mid-Mo. v. Anderson*, 882 F.3d 1205, 1212–14 (10th Cir. 2018) (Kan-
13 sas); *Planned Parenthood Ass’n of Utah v. Herbert*, 828 F.3d 1245 (10th Cir. 2016) (Utah). And in 2015,
14 the Louisiana Department of Health and Hospitals terminated Planned Parenthood of Gulf Coast’s
15 Medicaid provider agreements, apparently in response to concerns related to particular aspects of
16 Planned Parenthood’s abortion practices. It canceled these agreements even though Planned
17 Parenthood claimed also to be providing various public-health services, including pregnancy testing and
18 counseling, contraception and contraceptive counseling, testing and treating specified sexually trans-
19 mitted diseases, and more. *Planned Parenthood of Gulf Coast, Inc. v. Gee*, 862 F.3d 445, 450–52 (5th Cir.
20 2017), *cert. denied*, 139 S. Ct. 408 (2018).

21 These laws and executive acts have no direct bearing on Title X; each involves a change to a
22 program receiving no Title X funds. They are nonetheless significant because they reflect a common,
23 concrete reality: many Americans are concerned that public family-planning funding or other public-
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1 health funding is linked to abortion. Even the *impression* that a law steers money to abortions can stir
2 intense voter passion. In 2010, an advocacy group in Ohio “issued a press release announcing its plan
3 to ‘educat[e] voters that their representative voted for a health care bill that includes taxpayer-funded
4 abortion.’” The same group “sought to display a billboard in [a representative’s] district condemning
5 that vote.” *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 153–54 & n.2 (2014). The public’s con-
6 cerns may be based on the fungibility of funds. They may rest on a desire to withhold the government’s
7 “stamp of approval” for organizations connected to abortion. But whatever motivates these concerns,
8 there is no doubt they are deeply held and here to stay. The many laws and executive actions discussed
9 above leave no doubt about that.

10 2. All of this matters to Title X. Many Americans—perhaps a hundred million or more—do
11 not want their money going to fund abortions, directly or indirectly. If Title X provides such funding, or
12 *appears to* provide such funding, support for the program will erode. HHS properly accounted for that.

13 The updated rules, once implemented, will assure concerned citizens that their tax money is fol-
14 lowing Title X’s mandate and not being “used in programs where abortion is a method of family plan-
15 ning.” 42 U.S.C. § 300a-6. They will also address distinct citizen concerns. The enhanced financial-
16 separation requirement addresses concerns about fungibility of funds. Higher figurative walls between
17 any entity’s Title X funds and abortion-related funds ensure that no indirect subsidy occurs. The phys-
18 ical-separation requirement addresses the “imprimatur” or approval concern, as it assures citizens that
19 their Title X dollars are not indirectly supporting abortions by attracting patients to a facility that per-
20 forms abortions on the other side of a literal wall. These assurances ultimately help to preserve and
21 promote public support for Title X itself. That support might be threatened if the strong, continued
22 sentiment against abortion combines with a growing concern that Title X funds abortion indirectly.

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1 Keeping Title X funds far away from abortion ensures that the consensus support for Title X is not
2 eroded by any connection to the controversial practice of abortion.

3 The agency recognized all this. As explained above, *see above* 6-7, HHS explained how the pre-
4 vious administrative regime did not adequately reassure citizens of the separation they expect, and that
5 Congress’s mandate requires. The new rules do.

6 3. The agency’s new rules are important for another reason: they reflect the virtues of govern-
7 ment of the People, by the People, for the People. Washington speaks as though the federal government
8 could please everyone by simply giving the States block grants through Title X and allowing them to
9 send that money to whomever they wish. But as the above shows, that is wrong. Many American do
10 not want to fund abortion, and the block-grant model would force them to do so.

11 Most people, whether they are pro-life or pro-choice or neither, support funding family-planning
12 services *unrelated to* abortion. The new rules assure the public that Title X will continue providing that
13 support, but that it will do so without indirectly supporting abortion. For example, the new rules bar
14 recipients from making abortion referrals, in contrast to the old rules which *required* referral. The rules
15 will no longer require “nondirective pregnancy counseling” (though they will permit it). The rules will
16 also encourage family participation in family-planning decisionmaking, and will require training regard-
17 ing compliance with State and local sexual-abuse reporting requirements. 84 Fed. Reg. at 7715-18.
18 These and other changes reflect (in addition to Congress’s mandate) the consensus position that public
19 funding for services unrelated to abortion is appropriate, while keeping the government from funding
20 abortion even indirectly.

21 The new rules are hardly unique in funding priorities that can achieve greater consensus. In-
22 deed, funding limits of this sort are quite common. Voters may, through their representatives, some-
23 times fund “all comers” in a certain category. But they may do the opposite too, even in areas that
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1 touch on constitutional rights. Thus, for example, the federal government may issue grants to promote
 2 art projects that are consistent with the “general standards of decency and respect for the diverse be-
 3 liefs and values of the American public.” 20 U.S.C. § 954(d)(1); *see also Nat’l Endowment for the Arts v.*
 4 *Finley*, 524 U.S. 569, 580 (1998). In a pluralistic society, it is fully appropriate for a government to
 5 spend its taxpayers’ money on art that many will deem worthy of funding—and not, for example, a pho-
 6 tograph of a crucifix submerged in urine. *See Finley*, 524 U.S. at 574. Supreme Court precedent further
 7 establishes that when a government elects to fund education, it may elect not to fund religious studies if
 8 many of its citizens object to the public funding of religious training. *Locke v. Davey*, 540 U.S. 712, 720–
 9 22 (2004). The fact of the matter is that funding decisions require policy choices. In a constitutional
 10 democracy, one reasonable way to make such choices is to fund the projects that can gain broad support.

11 The plaintiffs’ briefs seem to rest on an assumption that pro-life views, despite being shared by
 12 millions in and outside of Washington’s borders, are illegitimate—and that the federal government may
 13 not accommodate or advance such views. The Supreme Court disagrees. The very same case that cre-
 14 ated the modern abortion-rights framework acknowledged that States may pass legislation to “express
 15 profound respect for the life of the unborn.” *Planned Parenthood v. Casey*, 505 U.S. 833, 877 (1992) (plu-
 16 rality op.). The federal government may likewise “use its voice and its regulatory authority to show its
 17 profound respect for the life within the woman.” *Gonzales v. Carhart*, 550 U.S. 124, 157 (2007). The
 18 federal ban on partial-birth abortion serves precisely that purpose: it bans a gruesome procedure, “‘dis-
 19 turbing’” in its “‘similarity to the killing of a newborn infant,’” because the procedure is “laden with
 20 the power to devalue human life” and “implicates additional ethical and moral concerns that justify a
 21 special prohibition.” *Id.* at 158 (citation omitted). If the federal government can pass laws to prevent
 22 the devaluation of human life, so can the States. They can do so by declining to fund elective abortions,
 23 *Harris*, 448 U.S. at 315-17 and *Maher*, 432 U.S. at 474, or by ensuring that non-abortion funding is insu-
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1 lated from abortion activities, *Rust*, 500 U.S. at 201–02. Or they may do so by cutting abortion provid-
2 ers off from state funds altogether. *See Planned Parenthood*, 2019 U.S. App. LEXIS 7200 at *3, 20–21.

3 If the People can ban entire procedures in order to express their preference for life, surely they
4 can also take the much smaller step of ensuring that abortions do not happen on their dime, or with
5 seeming public approval.

6 4. Critically, the new rules will serve these instrumental and intrinsic purposes without posing
7 any threat to the vitality of Title X programs. We know this because many States administer their own
8 public-health programs without funding abortion providers. *See above* 8–10. And we also know this be-
9 cause many States administer Title X programs themselves, they do so effectively, and they do so with-
10 out providing abortions. This confirms that there is no necessary connection between the success of
11 Title X’s family-planning mission and the comingling of abortion and Title X funds.

12 To understand this, start with the fact that it is unusual for a State to rely heavily on private par-
13 ties to provide Title X-funded services. Most Title X funds go to fund services at state agencies and
14 county health departments. *See Title X Family Planning Directory* at [https://www.hhs.gov/opa/sites](https://www.hhs.gov/opa/sites/default/files/Title-X-Family-Planning-Directory-December2018.pdf)
15 [/default/files/Title-X-Family-Planning-Directory-December2018.pdf](https://www.hhs.gov/opa/sites/default/files/Title-X-Family-Planning-Directory-December2018.pdf) (last visited April 4, 2019); *see*
16 *also Title X Family Planning Service Grants Award by State* at [https://www.hhs.gov/opa/grants-and-](https://www.hhs.gov/opa/grants-and-funding/recent-grant-awards/index.html)
17 [funding/recent-grant-awards/index.html](https://www.hhs.gov/opa/grants-and-funding/recent-grant-awards/index.html) (last visited April 4, 2019). Several States have laws that ex-
18 press a preference that Title X funds be prioritized for public entities, even if it is possible for leftover
19 funds to be subgranted to private organizations. *See, e.g.*, Kan. Stat. Ann. § 65-103b; Ky. Rev. Stat. Ann.
20 § 311.715; Wis. Stat. § 253.07(5)(a). These public programs of course provide no abortion services.
21 They are nonetheless able to serve the public by providing precisely the services that Title X is designed
22 to fund.

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1 Other States do not subgrant federal Title X funds to private parties *at all*. Consider, for exam-
2 ple, the State of Alabama. The State Department of Public Health is the sole Title X grantee in Ala-
3 bama. See Title X Family Planning Directory at [https://www.hhs.gov/opa/sites/default/files/Title-X-](https://www.hhs.gov/opa/sites/default/files/Title-X-Family-Planning-Directory-December2018.pdf)
4 [Family-Planning-Directory-December2018.pdf](https://www.hhs.gov/opa/sites/default/files/Title-X-Family-Planning-Directory-December2018.pdf) (last visited April 4, 2019). It uses Title X funds to sup-
5 port more than 80 health centers across the state, all of which are operated by state and local county
6 health departments. *See id.* These local health centers provide contraceptive services, pelvic exams,
7 screening for STDs, infertility services, and health education. The Department’s 2019 grant award is
8 over \$5,000,000, which it will use to provide services to roughly one hundred thousand people. *See* Ti-
9 tle X Family Planning Service Grants Award by State at [https://www.hhs.gov/opa/grants-and-funding](https://www.hhs.gov/opa/grants-and-funding/recent-grant-awards/index.html)
10 [/recent-grant-awards/index.html](https://www.hhs.gov/opa/grants-and-funding/recent-grant-awards/index.html) (last visited April 4, 2019).

11 Finally, some States that subgrant Title X funding to private organizations already do so subject
12 to state laws that mirror the challenged regulations. At least thirteen States—Arizona, Arkansas, Colo-
13 rado, Indiana, Iowa, Louisiana, Michigan, Mississippi, Missouri, North Carolina, Ohio, Texas, and
14 Wisconsin—have laws that also prevent federal pass-through family planning funds from being used to
15 pay for abortions. See Ariz. Rev. Stat. Ann. § 35-196.02; Colo. Rev. Stat. Ann. § 25.5-3-106; La. Rev.
16 Stat. § 40:1061.6; Iowa Code Ann. § 217.41B; Miss. Code. Ann. § 41-41-91; Mich. Comp. Laws Ann.
17 § 400.109a; Mo. Ann. Stat. § 188.205; N.C. Gen. Stat. Ann. § 143C-6-5.5; Ohio Rev. Code § 5101.56;
18 Tex. Health & Safety Code Ann. § 32.005; Wis. Stat. Ann. § 20.927. Several of these States have fur-
19 ther restricted family-planning funds from any organizations that provide abortion, that contract with
20 abortion providers, or that refer patients to get abortions. See Ark. Code Ann. § 20-16-1602; La. Rev.
21 Stat. § 49:200.51; Ind. Code Ann. § 5-22-17-5.5; Wis. Stat. Ann. § 253.07(5). The upshot is that the
22 challenged regulations will help—not hinder—these States administer Title X programs.

23 * * *

1 In a country of more than 300 million people, no one gets his way all the time. Everyone has to
2 compromise a bit. Title X reflects that compromise, by funding the services that large number of Amer-
3 icans support while withholding that funding from services that large numbers oppose. The new federal
4 rules promote that compromise, by helping to ensure that Title X provides no direct or indirect funding
5 to abortion services. In so doing, the rules merely respect Congress’s promise from 1970, which per-
6 haps will finally be met.

7 **II. Any potential injunction should be limited to the parties and should not be imposed on the**
8 ***amici* States.**

9 If the Court does enjoin HHS’s new rules, it should enjoin their application only within the
10 State of Washington. The plaintiffs seek a nationwide injunction, but there is no good reason to award
11 one here.

12 The first problem with Washington’s request is that it is doubtful district courts have any au-
13 thority to award such relief. The Ninth Circuit recently recognized the “uncertainty” surrounding the
14 propriety of nationwide injunctions. *E. Bay Sanctuary Covenant*, 909 F.3d at 1255. The uncertainty is
15 well founded. For one thing, such injunctions are a relatively recent development unrelated to tradi-
16 tional understandings of jurisdiction and equity. *Trump*, 138 S. Ct. at 2424–29 (Thomas, J., concur-
17 ring); *see also* Bray, *Multiple Chancellors*, 131 Harv. L. Rev. at 425. More fundamentally, they exceed the
18 proper bounds of the judicial power. Article III limits courts to addressing cases or controversies. That
19 empowers “the Judiciary to provide relief to claimants, in individual or class actions, who have suffered,
20 or will imminently suffer, actual harm.” *Lewis v. Casey*, 518 U.S. 343, 349 (1996). National injunctions
21 ignore this limit, awarding relief to *non-parties*, and thus resolving more than is at issue in any one
22 “case” or “controversy.” Any injunction that awards relief to non-parties exceeds the bounds of Arti-
23 cle III. *Trump*, 138 S. Ct. at 2427–28 (Thomas, J., concurring).

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1 But assume that national injunctions can be appropriate in some cases. Even then, there is no
2 reason to award such relief here. Washington wants relief for *its* citizens. Indeed, it alleges harms to
3 “thousands of Washington residents,” saying that it speaks for *its citizens’* health interests. *See* Wash-
4 ington Mot. at 43-44. It also claims harm to Washington’s own interests in preserving “its family plan-
5 ning network” of Title X providers. *Id.* at 40. It supports its request for an injunction with evidence of
6 alleged harms to the *Washington and its citizens* and to *its* particular Title X provider networks. *Id.* at 39-
7 44. None of those interests extend to justifying an injunction against applying the new regulations in
8 Ohio or any State other than Washington, especially as to the *amici* States.

9 That is all the more true because the *amici* States *support* the updated regulations; they do not
10 want to assist in the funding of entities linked to abortion. What interest does Washington have in forc-
11 ing its values upon Ohio or upon any *amicus* State here? To be sure, people and entities *in Ohio* may
12 have an interest in enjoining the new regulations’ operation in that State. But if they do, they can sue in
13 Ohio to achieve that result. The same goes for the other *amici* States. For proof, look no further than
14 California, Maine, and Oregon, where suits identical to this one are pending already. Indeed, to the ex-
15 tent that universal injunctions might be urged to avoid “multiplicity of suits,” *Trump*, 138 S. Ct. at 2427
16 (Thomas, J., concurring) (citing Bray, *Multiple Chancellors*, 131 Harv. L. Rev. at 426), that rationale cuts
17 against that practice here. Multiple cases already exist, so a nationwide injunction here risks conflict
18 with the outcomes in those cases.

19 The private plaintiffs have an admittedly better case for a broader injunction, but their request
20 for a nationwide injunction fails nonetheless. For one thing, the *most* they would be entitled to is an in-
21 junction forbidding application of the new rules *to themselves*. Neither Article III nor traditional equity
22 principles permit the Court to enjoin applying the new rules to non-parties. *See above* 17.

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1 But they are not entitled even to that. If this Court finds the rules invalid, it should enjoin their
 2 enforcement only within Washington’s borders. This follows from the principle that injunctive relief
 3 “must be tailored to remedy the specific harm alleged,” *Lamb-Weston, Inc. v. McCain Foods, Ltd.*, 941
 4 F.2d 970, 974 (9th Cir. 1991), and “no more burdensome to the defendant[s] than necessary to provide
 5 complete relief *to the plaintiffs.*” *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979). The private plaintiffs
 6 have not shown, and almost certainly could not show, that a nationwide injunction is “necessary” to
 7 protect their interests *in every State*. True, at least some of the private plaintiffs operate outside of
 8 Washington, and thus seemingly have an interest in seeing the rules’ application enjoined, as to them,
 9 nationwide. The trouble is, the patchwork of approaches to public-health programs generally and Title
 10 X programs in particular makes a nationwide injunction decidedly *unnecessary*. The plaintiffs suffer no
 11 harm *at all* from the rules’ application to States (like Alabama) that administer Title X programs them-
 12 selves; or States (like Indiana) that take no Title X funding at all. For example, Alabama operates its
 13 Title X program through local health departments, and even if some of those departments have joined
 14 the National Family Planning and Reproductive Health Association, that does not justify an injunction
 15 in Alabama. First, the Association does not speak for those public-department members *on this issue*, as
 16 they are arms of the State, and the State of Alabama has taken the opposite position of the Association
 17 by joining this brief. Second, those Alabama departments will not be harmed by the new rules, as they
 18 do not currently act in ways that the rules change: they do not provide abortions in the same location as
 19 Title X programs; they do not refer for abortion; and so on.

20 Even for those states that accept funds and subgrant them to private parties, the sheer diversity
 21 of approaches to public-health funding makes it impossible to properly tailor injunctive relief for the en-
 22 tire nation. For example, some of those private subgrantees are in States that already have State laws
 23 similar to the new rules, so those subgrantees are also not currently acting in ways that will be affected
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1 by the new rules. At a minimum, plaintiffs here have not shown any such effect, and a broad-brush
2 statement about members generally does not do it. The Court should focus on the one issue for which it
3 can feasibly craft injunctive relief: whether the plaintiffs are entitled to injunctive relief in Washington.
4 Other courts in other parts of the country can assess the rules' application there.

5 The availability of nationwide injunctions in cases like this one, where there is no pressing need
6 for national uniformity, creates the potential for forum shopping. See *City of Chicago v. Sessions*, 888
7 F.3d 272, 288 (7th Cir.2018), *vacated by* 2018 U.S. App. LEXIS 21801 (7th Cir. 2018). If courts set a
8 precedent of awarding nationwide injunctions, they will give advocates great incentive to structure their
9 litigation strategies to pick out what they perceive to be the most favorable fora to obtain invalidation of
10 whatever federal law they dislike. "The opportunity for forum shopping is extended by the asymmetric
11 effect of decisions upholding and invalidating a statute, regulation, or order." Bray, *Multiple Chancellors*,
12 131 Harv. L. Rev. at 460. When a court "*upholds* the challenged law, that decision has no effect on other
13 potential plaintiffs. But if one district judge *invalidates* it and issues a national injunction, the injunction
14 controls the defendant's actions with respect to everyone." *Id.* The result? "Shop 'til the statute
15 drops." *Id.* Declining to award a nationwide injunction allows for a multiplicity of suits throughout the
16 nation. And *that* permits courts and parties to continue developing arguments, perspectives, and data,
17 all of which will prove useful when this dispute eventually makes its way to One First Street.

18 But the biggest problem with forum shopping is neither unfairness nor the risk of preventing
19 percolation in lower courts. The biggest problem is the risk it poses to the federal courts' reputation.
20 "Few exercises of the judicial power are more likely to undermine public confidence in the neutrality
21 and integrity of the Judiciary than one which casts the Court in the role of a Council of Revision, confer-
22 ring on itself the power to invalidate laws at the behest of anyone who disagrees with them." *Arizona*

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1 *Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 145–46 (2011). That is precisely the role that courts
2 assume when they issue national injunctions in case where narrower relief will suffice.

3 **CONCLUSION**

4 For the above reasons, the amici States urge the Court to deny Washington’s request for a pre-
5 liminary injunction, or alternatively, to limit any injunction to Washington.

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RESPECTFULLY SUBMITTED this 12th day of April, 2019, by:

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I hereby certify that on April 12, 2019, I filed the foregoing document with the Clerk of the Court by CM/ECF, which automatically sends notice of the filing to all counsel of record.

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