NO. 20-454

IN THE

Supreme Court of the United States

ALEX M. AZAR II, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL.,

Petitioners,

v.

MAYOR AND CITY COUNCIL OF BALTIMORE,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF AMICI CURIAE THE AMERICAN ASSOCIATION OF PRO-LIFE OBSTETRICIANS & GYNECOLOGISTS AND CHRISTIAN MEDICAL AND DENTAL ASSOCIATIONS IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Title X of the Public Health Service Act, which authorizes federal funding for family planning services, provides that "[n]one of the funds appropriated under this subchapter shall be used in programs where abortion is a method of family planning." 42 U.S.C. 300a-6. In *Rust* v. *Sullivan*, 500 U.S. 173 (1991), this Court upheld a regulation that, among other things, prohibited recipients of Title X funds from making elective-abortion referrals in Title X clinics and also required them to maintain physical separation between those clinics and any abortion-related activities. This Court explained that those referral and separation provisions were authorized by statute, the product of reasoned decisionmaking, and consistent with the Constitution. Relying on that decision, the Department of Health and Human Services issued a final rule in 2019 that reinstated materially indistinguishable referral and separation provisions. The questions presented are as follows:

1. Whether the rule falls within the agency's statutory authority.

2. Whether the rule is the product of reasoned decisionmaking.

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AMICI CURIAE'S STATEMENT OF INTEREST[1]

The American Association of Pro-Life Obstetricians & Gynecologists (AAPLOG) is a nonprofit professional medical organization with over 4,000 obstetrician-gynecologist members and associates. Before the American College/Congress of Obstetricians and Gynecologists discontinued the title, it recognized the American Association of Pro-Life Obstetricians and Gynecologists as a "special interest group" for 40 years. AAPLOG strives to ensure that pregnant women receive quality care, and that they are informed of abortions' potential long-term consequences on women's health. AAPLOG offers healthcare providers and the public a better understanding of abortion-related health risks, such as depression, substance abuse, suicide, subsequent preterm birth, and *placenta previa*.

The Christian Medical and Dental Associations (CMDA) educates, encourages, and equips Christian healthcare professionals to glorify God by following Christ, serving with excellence and compassion, caring for all people, and advancing Biblical principles of health care within the Church and throughout the world. CMDA has 20,000 members and 329 chapters at medical, dental, optometry, physician assistant, and undergraduate schools across the country.

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[1] No counsel for a party authored this brief in whole or in part, and no person other than amici and their counsel made any monetary contribution intended to fund the preparation or submission of this brief. Counsel were timely notified of this brief as required by Supreme Court Rule 37.2, and all parties consented to its filing.

AAPLOG and CMDA have a strong interest in ensuring that Congress's refusal to fund abortion counseling and advocacy through the public fisc is respected, and in defending the agency's effort to implement Congress's conscience protections, which make pro-life healthcare organizations and providers' participation in the Title X program possible.

INTRODUCTION AND SUMMARY OF ARGUMENT

Hewing closely to the statutory language, the U.S. Department of Health and Human Services (HHS) issued a final rule executing Congress's instruction that "programs where abortion is a method of family planning" not receive Title X funds. 42 U.S.C. 300a-6. The final rule essentially revives Title X regulations this Court approved in *Rust* v. *Sullivan*, 500 U.S. 173 (1991). Yet the Fourth Circuit en banc majority took extraordinary measures to overturn it. In so doing, the Fourth Circuit dismissed *Rust* and an earlier Ninth Circuit en banc ruling that is well-reasoned and textually sound, creating a circuit split in the process.

This Court's review is urgently needed to prevent the Administrative Procedure Act (APA) from becoming a mechanism for lower courts to substitute their own policy views for that of the elected branches of government. In this case, the Fourth Circuit's en banc ruling is factually wrong because it ignored HHS' thorough analysis of the matters at hand.

None of the APA violations the Fourth Circuit identified bear scrutiny. Congressionally-enacted statutes control HHS's oversight of the Title X program, not leading medical associations' ethical notions. Lower courts cannot overlook complementary conscience statutes that Congress wrote in favor of private ethics opinions with no legal force. And the APA does not require HHS to promote commenters' cost-benefit analyses above its own. Moreover, no amount of twisting can transform Congress's allowance of nondirective pregnancy counseling into an abortion-referral mandate. Nor does anything in the ACA alter how HHS implements Title X.

The Fourth Circuit wrongly assumed that leading medical associations promote objective truths, rather than abortion advocacy. But the bias of these groups is plain to see. And the APA gives no special sanctity to major medical associations' ethical views in any event. HHS may reject their judgments, just as this Court routinely does in cases involving pro-life clinics and speech. Certiorari is warranted.

BACKGROUND

Amici Curiae rely on the government's statement of the case. But certain aspects of this Court's decision in *Rust* bear special mention, as the final rule is essentially a return to the 1988 Title X regulations this Court upheld in a landmark ruling nearly 30 years ago. 84 Fed. Reg. 7714 (Mar. 4, 2019). Five of *Rust*'s conclusions are especially relevant here.

First, Title X's decree "that [n]one of the funds appropriated under this subchapter shall be used in programs where abortion is a method of family planning,'" *Rust*, 500 U.S. at 178 (quoting 42 U.S.C. 300a-6), expresses Congress's "inten[t] that Title X funds be kept separate and distinct from abortion-related activities," *id.* at 190. Congress, in short, "refus[ed] to fund abortion counseling and advocacy." *Id.* at 202.

Second, the federal government may—through the Title X program—lawfully "subsidize family planning services which will lead to conception and childbirth, and decline[ ] to promote or encourage abortion." *Id.* at 193 (cleaned up). "The Government has no affirmative duty to commit any resources to facilitating abortions . . . ." *Id.* at 201 (cleaned up).

Third, regulations like the final rule that "implement the statutory prohibition by prohibiting counseling, referral, and the provision of information regarding abortion as a method of family planning. . . . ensure that the limits of the federal [Title X] program are observed." *Id.* at 193. "[W]hen the Government appropriates public funds to establish a program it is entitled to define the limits of that program," including by barring "a project grantee or its employees from engaging in activities [like abortion counseling or advocacy that are] outside of the project's scope" using taxpayer funds. *Id.* at 194.

Fourth, Title X regulations like the final rule "do not significantly impinge upon the doctor-patient relationship" because "the Title X program [is not] sufficiently all encompassing so as to justify an expectation on the part of the patient of comprehensive medical advice." *Id.* at 200. Because the program "does not provide post conception medical care," any "silence with regard to abortion cannot reasonably be thought to mislead a client"—"abortion is simply beyond the scope of the program." *Ibid.*

Finally, because Congress "refused to fund [abortion-related] activities out of the public fisc," HHS may "require[ ] a certain degree of separation from the Title X project in order to ensure the integrity of the federal funded program." *Id.* at 198. HHS may reasonably conclude that "separate facilities are necessary, especially in light of [42 U.S.C. 300a-6's] express prohibition" on funding a project where abortion is a method of family planning. *Id.* at 190. This divide ensures that abortion-related activities are "separate and independent from the project that receives Title X funds, *id.* at 196.

ARGUMENT

I. The en banc Fourth Circuit's decision is procedurally remarkable and factually wrong.

Under the APA, courts are charged with ensuring that agencies "remain[ ] within the bounds of reasoned decisionmaking." *Dep't of Commerce* v. *New York*, 139 S. Ct. 2551, 2569 (2019) (cleaned up). But too often, lower courts go much further, effectively substituting their own policy judgments for those of the elected branches of government.

This case is a perfect example. The Fourth Circuit wrongfully viewed Title X and HHS' resulting final rule as effecting a government policy of "shov[ing] its way inside the examination room with a woman and her physician." *Mayor & City Council of Balt.* v. *Azar*, 973 F.3d 258, 281 (4th Cir. 2020) (en banc). With that policy judgment in mind, the court pursued a course filled with procedural irregularities and factual mistakes.

First, after oral argument revealed the government would likely prevail at the panel level, the Fourth Circuit granted initial en banc review *before* the panel could issue a decision. *Id.* at 302 (Richardson, J., dissenting). The en banc court "circumvent[ed] [the] conventional three-judge panel process," *Mayor & City Council of Balt.* v. *Azar*, 799 F. App'x 193, 196 (4th Cir. 2020) (Richardson, J., dissenting from the order denying motion to stay), because a majority of active judges could not wait for a reasoned decision to intervene. Such impatience, standing alone, was extraordinary.

Second, the Fourth Circuit defied normal waiver rules. Commenters did not raise an Affordable Care Act (ACA) objection to the final rule during notice and comment. Yet the en banc majority considered that argument anyway and ruled for Baltimore. *Mayor of Balt.*, 973 F.3d at 290–91. What's more, the en banc court provided no convincing justification for requiring HHS to refute objections that commentors never made. *Id.* at 313 n.20 (Richardson, J., dissenting) (recognizing Baltimore's ACA claim is waived).

Third, the en banc court did not just enjoin portions of the final rule that relate to abortion counseling, abortion referrals, and maintaining the Title X program's integrity. Overriding the final rule's *express* severability statement, the majority affirmed the district court's permanent "injunction of the entire" rule. *Id.* at 292. In so doing, it defied this Court's heavy "emphasi[s] [on] adherence to the text of severability clauses" only a few months ago. *Barr* v. *Am. Ass'n of Political Consultants, Inc.*, 140 S. Ct. 2335, 2356 (2020) (plurality opinion); accord *id.* at 2363 (Breyer, J., concurring in the judgment with respect to severability and dissenting in part).

Fourth, Title X's text expressly bars funding of any project "where abortion is a method of family planning," 42 U.S.C. 300a-6. That text is strong support for the final rule. Yet the Fourth Circuit's reasoning on the merits of Baltimore's APA claims barely mentions § 300a-6's plain text. That key statutory language—the final rule's bedrock—features only in the majority's *quotation* of (1) this Court's *Rust* opinion, *Mayor of Balt.*, 973 F.3d at 283, 287, (2) HHS's final rule, *id.* at 284, 293; and (3) HHS's pleadings in this litigation, *id.* at 285.

Fifth, the Fourth Circuit misstated the final rule's content and ignored HHS's actual reasoning. The court alleged that the agency "merely stated—with no support—that it 'disagrees with the commenters contending the [Final Rule] infringes on the legal, ethical, or professional obligations of medical professionals.'" *Id.* at 276 (quoting 84 Fed. Reg. at 7724); accord *id.* at 277 (quoting 84 Fed. Reg. at 7724). But that statement is not accurate. *Id.* at 319 (Richardson, J., dissenting). The final rule offers a persuasive response to comments regarding medical ethics.

HHS recognized that "Congress . . . permits pregnancy counseling within the Title X program, so long as such counseling is nondirective." 84 Fed. Reg. at 7724. And the final rule authorizes "a physician or [advanced practice provider (APP) to] provide nondirective pregnancy counseling to pregnant Title X clients on the patient's pregnancy options, including abortion." *Ibid.* In short, the final rules allow medical professionals "to share full and accurate information with the patient." *Ibid*. And it requires a "physician or APP . . . to refer for medical emergencies and for conditions for which non-Title X care is medically necessary for the health and safety of the mother or child." *Ibid.*

Because *Rust* upheld a 1988 rule that *completely banned* "referral for, and counseling about, abortion in the Title X program," *id.* at 7748, HHS concluded that the final rule's more permissive take—based on an appropriations rider Congress first adopted in 1996, 84 Fed. Reg. at 7730—could not violate medical ethics. As HHS explained, this Court in *Rust* did not "uph[o]ld a rule that required the violation of medical

ethics," nor did Congress violate medical ethics by passing laws that protect "the ability of health care personnel to not assist or refer for abortions in the context of HHS funded or administered programs." *Ibid.* To the extent state law reflects a different view, federal law controls how Title X grant money is spent and the Supremacy Clause preempts "any potential State law to the contrary." *Ibid.*

When lower courts overlook HHS's reasons for drafting the final rule a certain way, APA review loses its legitimate purpose. It becomes merely an opportunity for a lower "court . . . to substitute its [policy] judgment for that of the agency," a distortion of the judicial role this Court forbids. *Dep't of Homeland Sec.* v. *Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1905 (2020) (citation omitted). This Court should grant review and reject the en banc Fourth Circuit's results-oriented approach and restore the APA's proper place.

II. None of the en banc Fourth Circuit's reasons for enjoining the final rule withstand scrutiny, and they all conflict with the en banc Ninth Circuit's proper APA analysis.

The Fourth Circuit held that the final rule is arbitrary and capricious, and not in accord with law. But none of its reasons for enjoining the final rule withstand scrutiny, and they all conflict with the en banc Ninth Circuit's proper APA analysis.

1. *Medical ethics*. The Fourth Circuit said that HHS's "decision that the Final Rule is 'not inconsistent' with medical ethics is arbitrary and capricious." *Mayor of Balt.*, 973 F.3d at 281. And it relied on comments arguing that medical ethics require doctors to "provide . . . referrals to abortion providers . . . if directly required by the patient," otherwise the government would "intru[de]" into the patient-physician relationship." *Id.* at 277 (cleaned up).

Yet it is easy to see why HHS rejected these objections. Private associations' notion of medical ethics, which carry no legal force, does not control how HHS implements Title X. The words Congress wrote and this Court's analysis in *Rust* do. When faced with a conflict between Title X's explicit ban on tax money flowing to "programs where abortion is a method of family planning," 42 U.S.C. 300a-6, and medical associations' insistence that the government treat abortion as a valid family-planning method, the decision is easy: Congress wins.

As HHS explained, many "commenters appear[ed] to be either unaware of, or confused about (or to have intentionally ignored), the fact that Title X explicitly excludes funding for projects where abortion is a method of family planning." 84 Fed. Reg. at 7729. The agency "has no statutory authority to consider family planning under Title X to include abortion." *Ibid*. When commenters invite agencies to violate the law, the answer *should* be no. And that is doubly true here. The *Rust* Court already recognized that, due to the Title X programs' limited scope, patients cannot "expect[ ] . . . comprehensive medical advice." 500 U.S. at 200. So neither Title X nor the final rule has an ethics problem. Medical professionals who

seriously disagree may decline Title X funds. *Id.* at 199 n.5.

The Fourth Circuit refused to heed Title X's text or credit HHS's refusal to countermand Congress. In stark contrast, the Ninth Circuit took the opposite approach, accepting that "HHS examined the relevant considerations arising from commenters citing medical ethics and rationally articulated an explanation for its conclusion." *California* v. *Azar*, 950 F.3d 1067, 1103 (9th Cir. 2020) (en banc), *petition for cert. filed*, Nos. 20-429 and 20-539 (U.S. 2020). Only this Court may resolve the conflict.

2. *Conscience statutes*. The Fourth Circuit labeled it arbitrary and capricious for HHS to take conscience statutes like the Church Amendments, Coats-Snowe Amendment, and Weldon Amendment into account when drafting the final rule because they are "of no moment." *Mayor of Balt.*, 973 F.3d at 279. But no corollary statute Congress enacts is irrelevant. HHS rightly took *all* relevant statutes seriously. Its prior regulations' mandate that "Title X projects . . . provide abortion referral and nondirective counseling on abortion, if requested. . . . is inconsistent with federal conscience laws" and Title X. 84 Fed. Reg. at 7716. As the final rule correctly explained, "in most instances when a referral is provided for abortion, that referral necessarily treats abortion as a method of family planning." *Id.* at 7717. The abortion referral and resulting abortion procedure "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, contrary to [42 U.S.C. 300a-6]." *Ibid.*

The Fourth Circuit opinion never addressed HHS's well-reasoned analysis of Title X's text because it ignored § 300a-6's abortion exclusion and dismissed statutes enhancing that safeguard of conscience rights. Instead, the opinion focused (once again) on private medical association's comments, citing an ethics opinion by one of them that (1) would sharply limit conscientious objections to abortion in violation of federal conscience statutes, and (2) wrongly demeans objections to taking innocent human life as "deviat[ion] from standard [medical] practices." *Mayor of Balt.*, 973 F.3d at 279–80 (cleaned up).

Whether private medical associations agree with respecting conscience rights is immaterial. *Id.* at 321 (Richardson, J., dissenting). Congress writes the laws, and the executive implements them. Nothing in the APA requires HHS to "adopt[ ] [private medical associations'] preferred regulatory approach." *California*, 950 F.3d at 1102. The Ninth Circuit recognized as much; the Fourth Circuit made those private preferences controlling.

3. *Physical and financial separation*. The Fourth Circuit opinion said that HHS did not adequately consider the financial costs of maintaining physical and financial separation between grantees' Title X programs and abortion activities that fall outside Title X's scope, and also failed to explain why it rejected hostile commenters' cost-benefit analyses. *Mayor of Balt.*, 973 F.3d at 282. Neither criticism is valid.

Notably, the Fourth Circuit relied on comments that characterize the final rule's financial separation requirements as "needless." *Id.* at 281 (citation omitted). But Title X grantees are not likely to admit that misdirecting taxpayer dollars is a serious

problem. Conceding that fact is directly opposed to their financial interests. So this comment is hardly probative.

HHS responded that "physical and financial separation [is necessary] to protect the statutory integrity of the Title X program, to eliminate the risk of co-mingling or misuse of Title X funds, and to prevent the dilution of Title X resources." 84 Fed. Reg. at 7715. *Rust* approved a nearly-identical rationale, confirming that HHS may "require[] a certain degree of separation [of abortion] from the Title X project in order to ensure the integrity of the federally funded program," 500 U.S. at 198, "especially in light of [42 U.S.C. 300a-6's] express prohibition" on funding programs where abortion is a method of family planning, *id.* at 190. Because this text has not changed, there is no justification for casting *Rust*'s holding aside.

What's more, the Fourth Circuit credited comments implying that abortion providers will be forced to spend "hundreds of thousands, or even millions, of dollars to locate and open [a new] health care facility" or else "shutter[ ] . . . a number of invaluable clinics." *Mayor of Balt.*, 973 F.3d at 281–82 (cleaned up). Yet HHS made clear these commenters "did not provide sufficient data to estimate these [cost] effects across the Title X program." 84 Fed. Reg. at 7781. And HHS further clarified that these commenters wrongly "provided extremely high cost estimates based on assumptions that they would have to build new facilities in order to comply" with the physical-separation requirement. *Ibid.* But those projections are untenable because "entities will likely choose the lowest cost method" of compliance, which

is unlikely to include the "construction of new facilities." *Ibid.*

The en banc opinion disregarded the final rule's content and sought to enforce naysayers' views. The Ninth Circuit, in contrast, rightly held that commenter's "'pessimistic' [cost] predictions and assumptions are 'simply evidence for the [agency] to consider,' *Dep't of Commerce*, 139 S. Ct. at 2571, and are not entitled to controlling weight. HHS need not produce 'some special justification for drawing [its] own inferences and adopting [its] own assumptions.' *Id.*" *California*, 950 F.3d at 1100. Yet that is what the Fourth Circuit required.

4. *Nondirective pregnancy counseling*. Every year since 1996, Congress has enacted an appropriations rider that provides (among other things) funding given to Title X projects "shall not be expended for abortions, [and] that all pregnancy counseling shall be nondirective." Pub. L. No. 115-245, 132 Stat. 2981, 3070–71. The final rule thus correctly acknowledged that "Congress . . . permits pregnancy counseling within the Title X program, so long as such counseling is nondirective." 84 Fed. Reg. at 7724. In spite of this textual symmetry, the en banc opinion concluded that HHS's final rule violates the appropriations rider.

The en banc majority did so by conflating permissible pregnancy *counseling* with prohibited abortion *referrals*. *Mayor of Balt.*, 973 F.3d at 283–85. Congress' appropriations rider never speaks to abortion referrals. So the Fourth Circuit's analysis misses the mark. But Congress' rider *does* prohibit expending Title X funds for abortions, much like the language of 42 U.S.C. 300a-6. HHS rightly concluded that Title X bars abortion referrals because "in most

instances when a referral is provided for abortion, that referral necessarily treats abortion as a method of family planning," 84 Fed. Reg. at 7717, as abortions for other reasons are comparatively rare.[2]

Alternatively, the Fourth Circuit reasoned that "a patient may come in seeking an abortion, but the only counseling done is on prenatal care, and on the [referral] list provided, none of the physicians perform abortions." *Mayor of Balt.*, 973 F.3d at 286. But prenatal care is "medically necessary for pregnant women. . . . to optimize the health of the mother and unborn child, and . . . help ameliorate the current health inequality as it relates to low income women." 84 Fed. Reg. at 7762. Using abortion as a family-planning method is not. So the majority compared apples to oranges. Accord *California*, 950 F.3d at 1089–90. Moreover, *Rust* established that the federal government may favor "conception and childbirth, and decline[] to promote or encourage abortion." 500 U.S. at 193 (cleaned up). That is what Congress directed through the rider and § 300a-6, and HHS's final rule merely reflects that policy judgment.

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[2] Contraception, *Reasons Why Women Have Induced Abortions* (July 2017) at 238, https://bit.ly/3655At6 (citing postponing childbearing, wanting no (more) children, and socioeconomic concerns as the common reasons for obtaining an abortion in the United States); Guttmacher Inst., *Reasons U.S. Women Have Abortions* (Sept. 2005), https://bit.ly/32ckBIs (characterizing the most common reasons for having an abortion as interference with education, work or caring for dependents; economic concerns; and single motherhood or relationship problems).

The Ninth Circuit rightly held that nothing in the appropriation rider indicates that Congress understood "nondirective pregnancy counseling" to include "referrals." *California*, 950 F.3d at 1088. Nor does "nondirective" mean "present[ing] . . . all options on an equal basis." *Ibid.* It simply requires Title X projects to "present options in a neutral manner and refrain from encouraging the client to select a particular option." *Ibid*. Referral lists, which merely name licensed healthcare providers, cannot "encourage[ ] or promote[ ] a specific option," so the rider has no application to them. *Id.* at 1091.

Yet the Fourth Circuit majority discarded this careful textual analysis without explanation, creating a circuit split. *Mayor of Balt.*, 973 F.3d at 283. Now HHS's final rule does not apply to Title X projects in Maryland, though it applies nearly everywhere else. This Court's review is needed to correct the Fourth Circuit's errors and ensure that Congress's repeated refusal to facilitate abortion with taxpayer dollars is enforced nationwide.

5. *ACA restrictions.* The en banc Fourth Circuit said that the final rule violates a section of the ACA that (among other things) bars HHS from promulgating regulations—"[n]otwithstanding any other provision of this Act"—that (a) create unreasonable barriers to obtaining appropriate medical care, (b) impede timely access to health care services, (c) interfere with communications regarding a full range of treatment options, or (d) restrict health care providers' ability to provide full disclosure of all relevant information to patients. 42 U.S.C. 18114(1)–(4). But commenters did not allege the final rule violated this ACA provision during notice and

comment, so the argument is waived, as the Ninth Circuit indicated. *California*, 950 F.3d at 1092 n.23; accord *Mayor of Balt.*, 973 F.3d at 313 n.20 (Richardson, J., dissenting).

In any event, the Fourth Circuit's opinion misread the ACA. Section 18114's restrictions apply *not* to HHS regulations generally but "[n]otwithstanding any other provision of this Act," meaning "any regulation" HHS "promulgate[s]" *under the ACA*. So the ACA has no bearing on the final rule, which HHS promulgated under Title X. As the Ninth Circuit explained, "Congress intended to ensure that HHS, in implementing the broad authority provided by the ACA, does not improperly impose regulatory burdens on doctors and patients," it "did not seek to alter the relationship between federally funded grant programs and abortion in a fundamental way." *California*, 950 F.3d at 1094. "In short, the ACA did not address the implementation of Congress's choice not to subsidize certain activities" in Title X. *Id.* at 1095.

The Fourth Circuit opinion's contrary conclusion stretches § 18114's text beyond recognition and invites lower courts to overturn all manner of non-ACA regulations based on their own policy judgments. By virtue of the ACA's plain text, its restrictions do not extend to HHS regulations promulgated in any non-ACA context. This Court should step in and enforce the ACA's plain language.

III. The Fourth Circuit wrongly assumed that prominent medical associations promote objective truths, rather than abortion advocacy.

Underlying the Fourth Circuit's ruling is an unwarranted assumption that prominent medical associations promote objective truths, rather than abortion advocacy. The majority opinion reflects disbelief that HHS could reasonably "disagree[ ] with every major medication association" that submitted comments. *Mayor of Balt.*, 973 F.3d at 276. But HHS is well-aware that leading medical associations are not neutral arbiters; these associations are highly partisan and among our nation's leading proponents of abortion on demand. *E.g.*, 84 Fed. Reg. at 7729 (reproaching some commentors for "intentionally ignor[ing]" the fact that "Title X explicitly excludes funding for projects where abortion is a method of family planning").

One example illustrates the wider problem. The American Medical Association (AMA) promotes itself as the largest professional association of physicians, residents, and medical students in the United States, which promotes the science and art of medicine, and promotes the betterment of public health. But that description is incomplete. The AMA has a litigation center that "brings lawsuits, files amicus briefs and otherwise" represents the AMA's interests in court. AMA, *The Litigation Center*, https://bit.ly/32fu1mn. Among the AMA litigation center's key interests is promoting abortion. And the AMA advances that interest in earnest.

For example, the AMA has advocated "unencumbered . . . access" to abortion and characterizes the ending of an early human life as a "reproductive health service[ ] [of] unparalleled importance" that women must be able to access "without delay." Br. of Am. Coll. of Obstetricians & Gynecologists, et al. at 5, *McCullen* v. *Coakley*, No. 12-1168 (Nov. 22, 2013), https://bit.ly/388Uw0E. It frequently cites "medical . . . ethics" as requiring courts to adopt its policy views.[3] Br. of Am. Coll. of Obstetricians & Gynecologists, et al. at 5, *June Med. Servs. L.L.C.* v. *Gee*, Nos. 18-1323 & 18-1460 (Dec. 2, 2019), https://bit.ly/2U07fKB. In fact, the AMA initiated a lawsuit to strike down the final rule at issue in this case and recently filed a cert. petition demanding that result based (in part) on "medical ethics." Pet. for a Writ of Certiorari at 23, *Am. Med. Ass'n* v. *Azar*, No. 20-429 (Oct. 1, 2020), https://bit.ly/3l0OMJT.

But this Court has never acquiesced to the AMA's policy views simply because it is a significant medical association. Quite the opposite, the AMA's pro-abortion policy positions have not fared well in this Court, which rejected the AMA's call to force a pro-life pregnancy clinic in California to advertise for the abortion industry based (in part) on its dubious view of medical ethics. Br. of Am. Med. Ass'n at 9–10, 14–15, *Nat'l Inst. of Family & Life Advocates* v. *Becerra*,

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[3] Accord Br. of Medical Associations in Supp. of Pls.' Opp'n to Defs.' Appl. for Stay Pending Appeal at 15, *U.S. Food & Drug Admin.* v. *Am. Coll. of Obstetricians & Gynecologists*, No. 20A34 (Sept. 8, 2020), https://bit.ly/2HZLUym (contending the FDA's in-person dispensing requirement for Mifeprex, which is used to effect medication abortions, violates "[m]edical ethics")

No. 16-1140 (Feb. 27, 2018), https://bit.ly/36aSzOO. The Court also rightly spurned the AMA's assertion that pro-life sidewalk counselors in Massachusetts have no First Amendment right to speak in public byways outside of an abortion clinic. Br. of Am. Med. Ass'n at 5–7, *McCullen* v. *Coakley*, No. 12-1168 (Nov. 22, 2013), https://bit.ly/388Uw0E.

Just like this Court, HHS was free to reject the AMA's pro-abortion advocacy. Nothing in the APA gives "major medical association['s]" views sanctity, contrary to the Fourth Circuit's opinion. *Mayor of Balt.*, 973 F.3d at 266, 276, 278. As the Ninth Circuit recognized, the AMA's judgments are not "entitled to controlling weight." *California*, 950 F.3d at 1100.

CONCLUSION

The petition for certiorari should be granted.

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