

States' Title X Challenge Returns to Sixth Circuit

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Readers of this Blog may recall that, [earlier this year, we covered the Sixth Circuit's decision declining to enjoin \(pending appeal\) a 2021 Health and Human Services Rule](#) that does two notable things: (1) the Rule eliminates the prior Administration's requirement "that grantees create strict physical and financial separation between their Title X programs and any abortion services they may provide" and (2) the Rule requires "that grantees provide referrals to abortion services when requested by the patient." The motions panel consisted of Judges Boggs, Bush, and Larsen.

Ohio and eleven other States sued under the APA, claiming the Rule was "arbitrary, capricious, and contrary to law," and sought a preliminary injunction. Judge Black of the Southern District of Ohio found that the States had not met their burden of establishing their entitlement to a preliminary injunction. The motions panel agreed, holding that the States had not satisfactorily shown they would suffer irreparable harm.

Now the States, led by Ohio, are back at the Sixth Circuit. This Thursday, October 27, the Sixth Circuit will hear oral argument in the States' merits-stage appeal of the District Court's order denying the States a preliminary injunction. The merits panel consists of Judges Moore, Thapar, and Larsen. (Notably, Judge Larsen was also on the motions panel.) But if you thought this appeal was just the States' motions-stage-appeal redux, you would be mistaken.

Recall, the motions panel held that, at least at the time of the motion panel's decision, it was too speculative to say whether the States would receive less money in the next round of Title X funding. There's been an interesting development on that front, however. Six days after HHS submitted its response brief in this appeal, HHS announced its Title X grant amounts to States and other competing grantees for 2022-23. Notably, the announcement indicates that some of the appellant States will be receiving fewer Title X funds for the upcoming year than they had received the previous year. For example, the Ohio Department of Health was awarded \$7,040,000, which is a decrease of \$1,760,000 from its previous award of \$8,800,000. Meanwhile, Planned Parenthood of Greater Ohio, which had left the program before HHS's adoption of the 2021 Rule, has now been awarded \$2 million. HHS did not contest the States' motion for the Sixth Circuit to take judicial notice of the announcement.

It will be interesting to see whether the decrease in funding for some of the States (and increase in funding for competing grantees) changes the Sixth Circuit's calculus on whether the States are entitled to the preliminary injunction they seek. Of course, to get a preliminary injunction, the States

will also need to show they are likely to succeed on the merits. And because the motions panel largely rested its decision on the States' inability (at the time) to show irreparable harm, we know very little about what the Sixth Circuit thinks about the States' arguments on the merits. Well, perhaps until one tunes into oral argument this Thursday. And tune in, we shall.

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