No. 19-35394

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

NATIONAL FAMILY PLANNING & REPRODUCTIVE HEALTH ASSOCIATION, ET AL.,
Plaintiffs-Appellees,

v.

ALEX M. AZAR II, in his official capacity as the Secretary of Health and Human Services, ET AL.,
Defendants-Appellants.

On Appeal from the United States District Court
for the Eastern District of Washington Nos. 19-cv-3040, 19-cv-3045 (Bastian, J.)

PLAINTIFFS-APPELLEES' EMERGENCY MOTION UNDER RULES 27-3 AND 35 FOR REHEARING EN BANC OF MOTION PANEL'S JUNE 20, 2019, PUBLISHED PER CURIAM STAY ORDER

EMILY CHIANG
AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF WASHINGTON
901 Fifth Ave., Suite 630
Seattle, Washington 98164

JOE SHAEFFER
MACDONALD HOAGUE & BAYLESS
705 Second Ave., Suite 1500
Seattle, WA 98104

RUTH E. HARLOW
FIONA KAYE
ANJALI DALAL
ELIZABETH DEUTSCH
BRIGITTE AMIRI
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad St., 18th Floor
New York, New York 10004

Counsel for Plaintiffs-Appellees

CIRCUIT RULE 27-3 CERTIFICATE

(i) The contact information for the attorneys for the parties is as follows:

a. **Counsel for the Plaintiffs-Appellees:**

Ruth E. Harlow (rharlow@aclu.org)
Fiona Kaye (fkaye@aclu.org)
Anjali Dalal (adalal@aclu.org)
Elizabeth Deutsch (edeutsch@aclu.org)
Brigitte Amiri (bamiri@aclu.org)
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad St., 18th Floor
New York, NY 10004
(212) 549-2633

Emily Chiang (echiang@aclu-wa.org)
AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF WASHINGTON
901 Fifth Ave., Suite 630
Seattle, WA 98164
(206) 624-2184

Joe Shaeffer (joe@mhb.com)
MACDONALD HOAGUE & BAYLESS
705 Second Ave., Suite 1500
Seattle, WA 98104
(206) 622-1604

b. **Counsel for the Defendants-Appellants:**

Katherine Twomey Allen (Katherine.T.Allen@usdoj.gov)
Jaynie R. Lilley (Jaynie.Lilley2@usdoj.gov)
Brinton Lucas (Brinton.Lucas@usdoj.gov)
U.S. DEPARTMENT OF JUSTICE
950 Pennsylvania Avenue NW, Room 7321
Washington, DC 20530
(202) 514-3542

(ii) The nature of the emergency is as follows:

As set forth fully herein and in Plaintiffs' emergency motion for a temporary administrative stay filed on June 20, 2019 (Dkt. No. 35-1), emergency reconsideration of a published per curiam order of the motions panel (Leavy, Callahan, Bea, JJ.), issued on June 20, 2019 (Dkt. No. 34), granting Defendants' motion for a stay pending appeal of the district court's preliminary injunction is necessary to prevent grievous, immediate, and irreparable harm. The motions panel's order clears the way for Defendants Alex M. Azar, United States Department of Health and Human Services ("HHS"), Diane Foley, and the Office of Population Affairs ("OPA") to impose drastic regulatory changes on a stable and successful decades-old program, Title X, on which low-income patients across the country rely for necessary health care. This program, as relevant here, has been effectively implemented through consistent federal regulations since its inception. Defendants' new rulemaking, undoing those stable rules, is contrary to law, is arbitrary and capricious, and compels a national network of health care providers to provide substandard care, contravene medical ethics, and rip apart their successful Title X projects. Absent emergency rehearing en banc, the panel's order has greenlit Defendants' to implement the new regulations. If that occurs—even briefly—it will fundamentally dismantle the Title X program, causing irreparable harm to Plaintiffs, their clinicians, their patients, and the public health.

(iii) Notification of parties:

Counsel for Defendants were notified of this emergency motion on June 23, 2019, by electronic mail, and subsequently informed counsel for Plaintiffs that Defendants oppose Plaintiffs' request for rehearing en banc.

Counsel for Plaintiffs will serve counsel for Defendants by e-mail with copies of this motion and supporting documents attached.

(iv) Plaintiffs seek emergency en banc relief under Federal Rule of Appellate Procedure 35, Ninth Circuit Rules 27-3 and 27-10, and Ninth Circuit General Order 6.11. The relief sought in this motion is not available in the district court.

/s/ Fiona Kaye
FIONA KAYE

CORPORATE DISCLOSURE STATEMENT

Under Federal Rule of Appellate Procedure 26.1, the corporate Plaintiffs—National Family Planning & Reproductive Health Association; and Feminist Women's Health Center—disclose that they have no parent corporation, nor is there a publicly held corporation that owns 10% or more of their stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

Other Authorities

INTRODUCTION AND RULE 35 STATEMENT

This matter raises urgent questions of extraordinary legal and real-world import for Plaintiffs and millions of low-income patients who rely on Title X for access to quality family planning care. On June 20, 2019, a motions panel of this Court issued an order allowing the Department of Health and Human Services ("HHS") to immediately impose sweeping new regulations upending the Title X program, which has operated under consistent rules for nearly fifty years. This, in turn, will trigger an exodus of providers from the program because the new regime requires violations of standards of care; subjects patients to that substandard care; and imposes other untenable requirements that will destabilize Plaintiffs' provision of essential health care.

Three district courts in this Circuit preliminarily enjoined HHS's new regulations, 84 Fed. Reg. 7114 (Mar. 4, 2019) ("Rule" or "Final Rule"). Based on extensive factual records, each court determined that the Rule—if permitted to take effect even briefly—would cause immediate and irreparable harms to Plaintiffs and their patients, decimating the Title X network of care. *See Washington v. Azar*, 2019 WL 1868362 (E.D. Wash. Apr. 25, 2019) (attached as Addendum B ("Add.B")); *Oregon v. Azar*, 2019 WL 1897475 (D. Or. Apr. 29, 2019); *California v. Azar*, 2019 WL 1877392 (N.D. Cal. Apr. 26, 2019). Based on that imminent irreparable harm, together with Plaintiffs' likelihood of success on the merits and

the balance of equities, each district court preliminarily blocked the Rule to preserve the status quo and safeguard the Title X program during litigation.

Then, while the parties were in the midst of briefing Defendants' appeal of those preliminary injunctions, a motions panel of this Court short-circuited that review process. The panel published an order that cast aside the district courts' findings of fact, ignored applicable law, reached out to decide merits issues without full briefing, and stayed the preliminary injunctions pending appeal. *See* Dkt. No. 34 (attached as Addendum A ("Add.A")).

The order erred in three primary respects. *First*, it cast aside the district court's factual findings on Plaintiffs' irreparable injuries, ignoring the "clear error" standard of review. Add.A24-A25. The order instead assumed Defendants' unsubstantiated say-so of their own injury. Add.A24-A25.

Second, the order committed numerous legal errors, departing from binding precedent and statutory requirements and incorrectly casting *Rust v. Sullivan*, 500 U.S. 173 (1991), as having addressed Plaintiffs' claims. Add.A22-A24. *Rust* addressed a 1988 HHS rulemaking based on the law and the record *at that time*, not Plaintiffs' claims on this record and under intervening congressional dictates.

Third, the legally erroneous order has summarily, via a stay, lifted three preliminary injunctions under incorrect, *less* exacting standards than Defendants face in their merits appeal of the preliminary injunctions. In so doing, the order

appeared to rely on new arguments from Defendants' brief in their merits appeal of the preliminary injunction. *Compare, e.g.*, Add.A19, *with* Dkt. No. 16 at 29-30. But Plaintiffs have not had an opportunity to respond to those arguments, as their answering brief is not yet due. These process failures require immediate correction by the en banc Court to allow a full and fair review of the preliminary injunction under the correct standards.

This case presents issues of utmost public importance. In the balance hang the effective functioning of a decades-old network of critical health care providers and the wellbeing of low-income patients across the country. The motion panel's order—after an extraordinarily abbreviated process and contrary to applicable legal standards—has invited havoc and irreparable harm nationwide. This Court should grant en banc review and deny any stay of the status-quo-preserving preliminary injunction during the merits appeal already underway. *See, e.g.*, *Feldman v. Ariz. Sec'y of St.'s Office*, 843 F.3d 366, 367 (9th Cir. 2016) (en banc rehearing of injunction pending appeal).

STATEMENT OF THE CASE

For almost fifty years, the Title X program has provided free or reduced-cost family planning care to needy patients across the country. *See* Pub. L. No. 91-572, 84 Stat. 1504 (1970). The program has been governed by largely unchanged rules, and it has been one of this country's most successful public health programs:

reducing rates of unintended pregnancy by facilitating contraceptive access; providing testing and treatment for sexually transmitted infections; screening for breast and cervical cancer; and conducting pregnancy testing and counseling, including referrals. *See* Add.B7-B9.

On March 4, 2019, HHS promulgated new regulations that radically depart from the longstanding standards of Title X. In particular, the Rule compels health care providers in the program to *direct* pregnant patients away from abortion and toward continuing their pregnancy by: (1) mandating referrals for prenatal care, even if a patient wants an abortion; (2) requiring the provision of information about continuing the pregnancy, even if a patient wants an abortion; and (3) barring referrals for abortion, even if requested by a patient. 84 Fed. Reg. at 7788-89. Moreover, the Rule wrests control of counseling discussions away from patients, permitting providers to impose their own values—including by withholding information about abortion. This scheme is inconsistent with medical ethics, the governing statutes, and the prevailing standard of care as reflected in HHS's own guidelines. *See* CDC & OPA, *Providing Quality Family Planning Services* (2014), https://www.cdc.gov/mmwr/pdf/rr/rr6304.pdf ("QFP").

The Rule also mandates separate, duplicate facilities, staff, and electronic health records for Title X projects to "separate" from any activity remotely relating to abortion. 84 Fed. Reg. at 7788-89.

The National Family Planning & Reproductive Health Association ("NFPRHA"), on behalf of its hundreds of Title X-funded members, their staff clinicians, and their patients, together with co-plaintiff providers, filed suit and moved for a preliminary injunction to block the Rule. The district court—as well as two others in this Circuit and one in another circuit—granted a preliminary injunction to preserve the status quo. Add.B1-B19; *Oregon*, 2019 WL 1897475; *California*, 2019 WL 1877392; *Mayor & City Council of Baltimore v. Azar*, 2019 WL 2298808 (D. Md. May 30, 2019).

The district court concluded that Plaintiffs were likely to succeed on the merits on every claim it considered. Add.B14-B16; Dkt. No. 9 at 97-103 (district court's bench ruling). It found the Rule likely is arbitrary and capricious, is contrary to the central purpose of Title X, and violates two other laws: (1) an annual appropriations rider that Congress has passed from 1996 to the present, requiring that "all pregnancy counseling" in the Title X program "shall be nondirective," Pub. L. No. 115-245, 132 Stat. 2981, 3070-3071 (2018) ("Nondirective Mandate"); and (2) a provision of the Patient Protection and Affordable Care Act ("ACA") that prohibits HHS from promulgating "any regulation" that, *inter alia*, "creates any unreasonable barriers to the ability of individuals to obtain appropriate medical care," "impedes timely access to health care services," "interferes with communications" between patients and providers,

or "violates . . . the ethical standards of health care professionals," 42 U.S.C. § 18114 ("Section 1554"). Add.B15.

The district court held that the Rule is likely arbitrary and capricious because, among other reasons, "it reverses long-standing positions . . . without proper consideration of sound medical opinions and the economic and non-economic consequences." Add.B15. What's more, HHS "failed to consider important factors"; "acted counter to and in disregard of the evidence in the administrative record and offered no reasoned analysis based on the record"; and seemingly "relied on the record made 30 years ago, but not the record made in 2018-19." Add.B15-B16.

The district court also made extensive findings of fact regarding Plaintiffs' "substantial" irreparable harm, evinced by fifteen declarations. Add.B16-B18; *see* Dkt. No. 13 Supp.Add. (declarations filed by NFPRHA Plaintiffs). The court found, "NFPRHA has shown that upon its effective date, the Final Rule will cause all current NFPRHA member[] grantees, sub-recipients, and their individual Title X clinicians to face a Hobson's Choice that harms patients as well as the providers": All will be forced either to provide substandard health care in violation of their professional norms; or to exit the Title X program, "leaving low-income individuals without Title X providers." Add.B17. The court found that the Rule will dismantle Title X's network of providers "knit together over the past 45

years," despite "no evidence presented by the Department that Title X is being violated or ignored by this network." Add.B16.

The district court further found that "[p]reserving the status quo will not harm the Government and delaying the effective date of the Final Rule will cost it nothing." Add.B18. "There is no hurry for the Final Rule to become effective and the effective date of May 3, 2019 is arbitrary and unnecessary." Add.B18. In light of these factors and the "substantial equity and public interest in continuing the existing structure and network of health care providers," the court issued the preliminary injunction. Add.B18.

Defendants appealed the district court's order and moved to stay the injunction pending appeal. On May 31, 2019, Defendants filed their opening merits brief; Plaintiffs' answering brief is due on June 28. On June 20, a motions panel of this Court granted a stay pending appeal by published per curiam order. That order overstepped in significant ways, including by ignoring the district court's factual findings related to Plaintiffs' irreparable harm and relying on incorrect legal standards. The panel order prejudged the preliminary injunction appeal, including by apparent reference to Defendants' merits brief.

Absent emergency relief from this Court en banc, Plaintiffs and the Title X program face immediate, irreparable harms and disruption that cannot be undone, particularly for those patients that need care now.

ARGUMENT

I. The Order Improperly Disregarded Extensive Factual Findings on Plaintiffs' Irreparable Harm

The motions panel ignored the narrow, controlling standard of review. On an appeal from a preliminary injunction, "factual findings are reviewed for clear error." *Adidas Am., Inc. v. Skechers USA, Inc.*, 890 F.3d 747, 753 (9th Cir. 2018). This standard "in the preliminary injunction context is very deferential." *Nat'l Wildlife Fed. v. Nat'l Marine Fishers Serv.*, 422 F.3d 782, 794 (9th Cir. 2005). "Clear error is not demonstrated by pointing to conflicting evidence in the record." *Id.* at 795. "Rather, '[a]s long as findings are plausible in light of the record reviewed in its entirety, a reviewing court may not reverse even if it is convinced it would have reached a different result.'" *Id.*

As discussed above, the district court made well-supported findings of fact that the Rule will cause immediate and irreparable harm to the hundreds of Plaintiff health care providers, their patients, and the public health. The panel improperly supplanted those findings with its own cursory determination that Plaintiffs' harms will be "minor." Add.A.24-A25.

The district court made findings that the Rule will "seriously disrupt or destroy the existing network of Title X providers" nationwide to deprive patients of care and that the "harmful consequences of the Final Rule will uniquely impact rural and uninsured patients." Add.B16. For example, "over half of Washington

counties would be unserved by a Title X-funded family planning provider." Add.B16. The district court further found that any Plaintiff providers who stay in Title X will be forced to provide substandard health care. Add.B15-B16.

In disregarding those findings, the panel not only ignored the record evidence on declared impending departures credited by the district court, but also ignored, *inter alia*, evidence of: why the Rule will force providers to leave (its unethical requirements are contrary to HHS's own clinical standards for family planning); the timing of those departures (immediate and ongoing); the huge gaps the departures will cause in Title X access (over 40 percent of patients will be left without their provider overnight); and the persistent nature of those gaps (any new providers, if they exist, will take months or years to establish Title X-funded projects). Add.B16-B18.

The motions panel fleetingly mentioned Plaintiffs' harm of "financial costs." Add.A25. But again, the panel ignored the district court's specific factual findings regarding myriad types of costs stemming from facility, staff, and systems disruption and duplication, and other untenable steps that will "drive many Title X providers from the system." Add.B16. Indeed, the Rule's physical separation requirements will be impossible for many Plaintiff providers to meet, and the infrastructure spending limits will hamstring providers that attempt to stay in the Title X program. *See*, *e.g.*, Dkt. No. 13 at Supp.Add.231-38 (Coleman Decl.).

Despite all of the findings of irreparable harms to Plaintiffs, the motions panel gave "more deference" to Defendants' bare predictions that it could eventually find providers to fill holes from program departures. Add.A.25. That ignored the district court's findings that Defendants' attempt to rebut Plaintiffs' evidence of irreparable harm was "dismissive, speculative, and not based on any evidence presented in the record before this Court." Add.B18; Add.A24-A25.[1] In disregarding these findings, the panel order overstepped, identified no "clear error," and acted contrary to the record. *See Nat'l Wildlife Fed'n*, 422 F.3d at 795.

The order went further. It ignored the district court's findings that HHS will suffer only the abstract harm of delay in effectuating its policy change, which, the district court concluded, carries "no cost" in light of the many decades HHS has operated Title X under preexisting standards. Add.B18. The motions panel stated that HHS and taxpayers likely face irreparable harm, citing unidentified "administrative costs" and "significant uncertainty." Add.A24. But any such costs are the result of HHS's attempt to change the regulatory scheme, not the continued operation of the program under longstanding rules preserved by a preliminary injunction.

[1] The Federal Register page the order cited describes HHS's say-so that the Rule "may" lead to new providers joining Title X, but it contains no supporting evidence. 84 Fed. Reg. at 7780.

The order also relied on the erroneous notion that the preliminary injunction causes "taxpayer dollars" to "fund or subsidize abortions." Add.A24. On the contrary, as Section 1008 requires, Title X funds have never been "used in programs where abortion is a method of family planning." 42 U.S.C. § 300a-6. All Title X funds are spent only on Title X projects', *inter alia*, rent, staff, and services; no federal funds are used to "subsidize abortion[]," even when multiple types of health care providers share buildings. The district court found "no evidence . . . that Title X," including Section 1008, "is being violated or ignored," Add.B16, and there is no harm stemming from any misuse of taxpayer funds. The panel did not find any clear error in the district court's determinations, or otherwise find support for its contrary contentions in the record.

II. The Order Committed Serious Legal Errors in Its Determination of Important Legal Questions on Abbreviated Stay Briefing

1. In assessing whether HHS has shown a strong likelihood of success in setting aside the preliminary injunction, the motions panel erred by repeatedly claiming that the 2019 Rule has been "approved by *Rust*," and that Plaintiffs claims are "foreclosed" by it. Add.A14, A22-A24. Congress's subsequent Nondirective Mandate clarified Section 1008 and makes HHS's 1988 premise for its rulemaking impossible to sustain now.

Rust held that Section 1008 was "ambiguous" at that time, and that Title X did "not speak directly to the issues of counseling, referral, [or] advocacy" about

abortion. 500 U.S. at 184. As of 1991, Congress had not "enumerate[d] what types of medical and counseling services are entitled to Title X funding." *Id.* Moreover, HHS premised its 1988 rulemaking and its defense of those rules in the Supreme Court on Title X having the "limited function of funding *pre*-pregnancy family planning services." 1990 WL 10012655 ("*Rust* Resp. Br."), at *6; *see* 53 Fed. Reg. at 2944. HHS said that, "the project must direct [a pregnant] client to a prenatal care facility *that, unlike a Title X project, can provide pregnancy counseling* and obstetric or other pregnancy-related care." *Rust* Resp. Br. at *6 (emphasis added).

But since *Rust* was decided, Congress has made clear that pregnancy counseling *does* fall within the scope of Title X services and declared that it must always be nondirective. *See, e.g.*, Pub. L. No. 115-245, 132 Stat. at 3070-3071. These mandates from Congress, passed every year since 1996, must be read with the Title X statute to assess whether the 2019 Rule is contrary to law and/or arbitrary and capricious. *See Vance v. Hegstrom*, 793 F.2d 1018, 1022 (9th Cir. 1986) (in prescribing regulatory standards, "the Secretary may not read [one] subsection … independently of" others).[2] Now, pregnancy counseling explicitly

[2] Soon after "a statute is enacted, it may have a range of plausible meanings. Over time, however, subsequent acts can shape or focus those meanings." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 143 (2000). The "implications of a statute may be altered by the implications of a later statute" and applying the

falls within Title X care—though it did not at the time of *Rust*. A court must examine the 2018-2019 record and 2019 Rule, which is different from and more damaging than the 1988 rule, against this newer congressional mandate, as well as the intervening ACA provisions.

2. The motions panel wrongly held that HHS is likely to succeed on its challenge to the district court's preliminary injunction and committed a string of legal errors in considering Plaintiffs' claims that the Rule is contrary to law because it violates the Nondirective Mandate, the ACA, and Title X's central purpose.

Taking each in turn, the panel's order wrongly concluded that the Rule is consistent with the statutory command that "all pregnancy counseling" must be "nondirective." Add.A16-A19. Contrary to HHS's own definition of "nondirective," the Rule improperly allows for the "presentation of options" that "suggest[s] or advis[es] one option over another," 84 Fed. Reg. at 7116, i.e., carrying the pregnancy to term over abortion. The panel ignored that the Rule permits pregnancy counseling that omits discussion of abortion and requires that patients who only seek counseling on abortion receive counseling regarding continuing the pregnancy. *Id.* at 7747. Both of these aspects of the Rule violate

---

collective result is a "classic judicial task"—not implied repeal. *United States v. Fausto*, 484 U.S. 439, 453 (1988).

Congress's clear intent, making Defendants unlikely to prevail in their challenge to the district court's preliminary injunction.

The panel's order incorrectly held that "providing a referral is not 'counseling.'" Add.A18. HHS has itself made clear that counseling includes referrals. *See, e.g.*, *id.* at 7747 (discussing "nondirective pregnancy counseling, or *referrals made . . . during such counseling*") (emphasis added); *id.* at 7748 & n.78; QFP at 13-14 (describing referrals as part of "Pregnancy Testing and Counseling"). Moreover, Congress has emphasized in recent legislation, the Infant Adoption Awareness Act, that referral is a subset of pregnancy counseling—not a wholly separate concept. 42 U.S.C. § 254c-6(a)(1), (6) (2000) ("IAAA") (including adoption "information and referrals" in "nondirective counseling to pregnant women").

The motions panel wrongly read the IAAA to contradict Plaintiffs' claim when it, in fact, supports it. The only way to treat adoption on "an equal basis with all other courses of action" is to offer patients both information and referral on prenatal care and on abortion, equally with offering information and referral on adoption. As a district court recognized, the IAAA and the Nondirective Mandate "appear to be the only instances in which Congress has used the term 'nondirective counseling.'" *See* No. 3:19-cv-1184, Dkt. No. 103, at 29 (N.D. Cal. Apr. 26, 2019). "Congress' use of the identical term 'nondirective counseling' should be

read consistently across" the IAAA and appropriations rider "to include referrals as part of counseling." *Id.* (citing *Dir., OWCP v. Newport News Shipbldg. & Dry Dock Co.*, 514 U.S. 122, 130 (1995) (holding that, in interpreting an ambiguous statutory phrase, "[i]t is particularly illuminating to compare" two different statutes employing the "virtually identical" phrase)).[3]

The panel order also incorrectly held that Defendants are likely to succeed in challenging the district court's holding that the Rule is invalidated by Section 1554 of the ACA. The panel held that the Rule "can reasonably be viewed as a choice to subsidize certain medical services and not others." Add.A21. But Section 1554 governs *any* HHS rulemaking—whether it relates to funding or not.

The order committed further legal error in holding that Plaintiffs likely waived any challenge that the Rule violates Section 1554. It used an out-of-circuit decision, *see* Add.A20 (citing *Koretoff v. Vilsack*, 707 F.3d 394, 398 (D.C. Cir. 2013) (per curiam)), not *this* Court's standard. As the district court properly held, that does not require that the claim be stated in "precise legal terms;" it must simply be raised with "sufficient clarity to allow the decision maker to understand

[3] The order further stated that if the Nondirective Mandate is ambiguous, HHS is entitled to *Chevron* deference and its interpretation is reasonable. Add.A18-19, nn.2, 3. But HHS has never claimed deference or purported to interpret that provision.

and rule on the issue raised." *Nat'l Parks & Conservation Ass'n v. Bureau of Land Mgmt.*, 606 F.3d 1058, 1065 (9th Cir. 2010).

The panel order also ignored Ninth Circuit precedent on the proper construction of Section 1554's "notwithstanding" clause. *See* Add.A21 n.4. This Court has rejected the argument that a provision stating, "notwithstanding subsection (a)(1)" limits that provision's application to (a)(1), holding that it was in tension with the ordinary meaning of the word "notwithstanding," which means "in spite of." *See Hooks v. Kitsap Tenant Support Servs., Inc.*, 816 F.3d 550, 559-60 (9th Cir. 2016). So, too, here. Section 1554's clause does not limit its application to the ACA.

Lastly, with respect to Plaintiffs' likelihood of success in showing that the Rule violates the purpose of Title X, the motions panel erred in holding that the argument is "foreclosed . . . by the Supreme Court's contrary finding in *Rust*." Add.A24 n.5. In so concluding, the motions panel ignored the fact that Plaintiffs' claims were *not litigated* in *Rust*. Plaintiffs here argue—and the district court found them likely to show—that the Rule would "so rip apart the Title X program, drive away its providers, and reduce low-income patients' access to quality family planning care that it cannot be squared with" Congress's purpose in establishing and annually funding Title X. Dkt. No. 13 at 14.

3. The motions panel also erred in rejecting the district court's holding that the Rule is likely arbitrary and capricious. The order stated that the district court substituted its judgment for that of the agency. Add.A22-A24. That is wrong. Unlike the motions panel, the district court properly applied Supreme Court precedent and considered Plaintiffs' detailed showings based on the record before HHS.

The panel's order paid lip service to the proper arbitrary-and-capricious analysis—the reasonableness of the agency's decision-making process—but then suggested such review lacks teeth, cursorily stating that the scope of review is "narrow." Add.A22. The panel ignored the well-established *State Farm* factors and the district court's correct application of those factors to the rulemaking record, i.e., that the "Department failed to consider important factors, acted counter to and in disregard of the evidence in the administrative record and offered no reasoned analysis based on the record." Add.B15-B16.

The order committed further legal error by ignoring *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125-26 (2016), which requires an agency to provide "good reasons" for changed policy and to consider "serious reliance interests" engendered by the previous policy. As Plaintiffs argued and the district court held, Plaintiffs are likely to succeed because the Rule, without sufficient justification,

abandons decades-old standards on which Title X grantees and subrecipients have relied. *See* Add.B15.

In addition to committing legal error, the motions panel inappropriately substituted its own conclusory analysis of the facts instead of deferring to the district court. The order misconstrued the record before the agency and asserted that HHS made "predictive judgments" based on "data" and "evidence," in contrast to Plaintiffs' "speculation" that the Rule would "decimate" the network. Add.A22-A23. However, it was *HHS* that relied on mere speculation. Plaintiffs made—and the district court credited—detailed showings that HHS acted contrary to the overwhelming evidence and failed to consider the Rule's harm to the Title X program. Add.B16-B18. The panel's order improperly failed to defer to those findings. Building on all of these errors, the order erroneously held that HHS was likely to prevail on its appeal of the preliminary injunctions.

III. These Issues Are Too Important for the Public and the Parties to Have Them Determined via Stay Order, Instead of on the Merits

As explained above, a motions panel of this Court cursorily took up critically important questions of statutory meaning and proper rulemaking implicating a vital public program; it did so without full briefing and under incorrect legal standards. Plaintiffs ask this Court en banc urgently to administratively stay the panel's order, Dkt. No. 35-1; to rehear the stay issues; and to deny the stay. Lifting the stay and reinstating the preliminary injunction is the

only way to ensure that the Rule will not immediately trigger massive harms. It is also necessary to allow both parties a fair chance to present critical legal issues that bear on the merits of the preliminary injunction.

CONCLUSION

For the foregoing reasons, this Court should grant Plaintiffs' petition for reconsideration en banc, vacate the motions panel order, and allow the preliminary injunctions to stand in force during merits consideration of them.

June 24, 2019

Respectfully submitted,

/s/ Fiona Kaye

RUTH E. HARLOW
FIONA KAYE
ANJALI DALAL
ELIZABETH DEUTSCH
BRIGITTE AMIRI
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad St., 18th Floor
New York, New York 10004

EMILY CHIANG
AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF WASHINGTON
901 Fifth Ave., Suite 630
Seattle, Washington 98164

JOE SHAEFFER
MACDONALD HOAGUE & BAYLESS
705 Second Ave., Suite 1500
Seattle, Washington 98104

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Ninth Circuit Rules 35-4 and 40-1 because it contains 4,199 words, exclusive of the exempted portions of the brief. The brief has been prepared in a format, type face, and type style that comply with Fed. R. App. 32(a)(4)-(6).

/s/ Fiona Kaye
FIONA KAYE

June 24, 2019

CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of June 2019, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF system. Counsel for all parties to the case are registered CM/ECF users and will be served by the appellate CM/ECF system. I have also separately served counsel for Defendants by e-mail.

/s/ Fiona Kaye
FIONA KAYE

ADDENDUM

TABLE OF CONTENTS

Addendum A

Addendum B

ADDENDUM A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STATE OF CALIFORNIA, by and through Attorney General Xavier Becerra, *Plaintiff-Appellee*, v. ALEX M. AZAR II, in his Official Capacity as Secretary of the U.S. Department of Health & Human Services; U.S. DEPARTMENT OF HEALTH & HUMAN SERVICES, *Defendants-Appellants*.	No. 19-15974 D.C. No. 3:19-cv-01184-EMC

ESSENTIAL ACCESS HEALTH, INC.; MELISSA MARSHALL, M.D., *Plaintiffs-Appellees*, v. ALEX M. AZAR II, Secretary of U.S. Department of Health and Human Services; UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, *Defendants-Appellants*.	No. 19-15979 D.C. No. 3:19-cv-01195-EMC

STATE OF OREGON; STATE OF NEW YORK; STATE OF COLORADO; STATE OF CONNECTICUT; STATE OF DELAWARE; DISTRICT OF COLUMBIA; STATE OF HAWAII; STATE OF ILLINOIS; STATE OF MARYLAND; COMMONWEALTH OF MASSACHUSETTS; STATE OF MICHIGAN; STATE OF MINNESOTA; STATE OF NEVADA; STATE OF NEW JERSEY; STATE OF NEW MEXICO; STATE OF NORTH CAROLINA; COMMONWEALTH OF PENNSYLVANIA; STATE OF RHODE ISLAND; STATE OF	No. 19-35386 D.C. Nos. 6:19-cv-00317-MC 6:19-cv-00318-MC

VERMONT; COMMONWEALTH OF VIRGINIA; STATE OF WISCONSIN; AMERICAN MEDICAL ASSOCIATION; OREGON MEDICAL ASSOCIATION; PLANNED PARENTHOOD FEDERATION OF AMERICA, INC.; PLANNED PARENTHOOD OF SOUTHWESTERN OREGON; PLANNED PARENTHOOD COLUMBIA WILLAMETTE; THOMAS N. EWING, M.D.; MICHELE P. MEGREGIAN, C.N.M.,

Plaintiffs-Appellees,

v.

ALEX M. AZAR II; UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; DIANE FOLEY; OFFICE OF POPULATION AFFAIRS,

Defendants-Appellants.

STATE OF WASHINGTON; NATIONAL FAMILY PLANNING AND REPRODUCTIVE HEALTH ASSOCIATION; FEMINIST WOMEN'S HEALTH CENTER; DEBORAH OYER, M.D.; TERESA GALL,
Plaintiffs-Appellees,

v.

ALEX M. AZAR II, in his official capacity as Secretary of the United States Department of Health and Human Services; UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; DIANE FOLEY, MD, in her official capacity as Deputy Assistant Secretary for Population Affairs; OFFICE OF POPULATION AFFAIRS,
Defendants-Appellants.

No. 19-35394

D.C. Nos.
1:19-cv-03040-SAB
1:19-cv-03045-SAB

ORDER ON MOTIONS FOR STAY PENDING APPEAL

Filed June 20, 2019

Before: Edward Leavy, Consuelo M. Callahan, and Carlos T. Bea, Circuit Judges.

Per Curiam Order

SUMMARY*

Civil Rights

The panel granted the United States Department of Health and Human Services' motion for a stay pending appeal of three preliminary injunction orders issued by district courts in three states which enjoined from going into effect the 2019 revised regulations to Title X of the Public Health Service Act, pertaining to pre-pregnancy family planning services.

In 1970, Congress enacted Title X to create a limited grant program for certain types of pre-pregnancy family planning services. Section 1008 of Title X provides that none on the funds appropriated under the subchapter shall be used in programs where abortion is a method of family planning. In 1988, the Department of Health and Human Service promulgated regulations forbidding Title X grantees from providing counseling or referrals for, or otherwise encouraging, promoting, or advocating abortion as a method of family planning. Several years later, the Department suspended the 1988 regulations and promulgated new Title X regulations, which re-interpreted § 1008 as requiring, among other things, that Title X grantees provide "nondirective" abortion counseling and abortion referrals upon request. In 2019, the Department once again revised its Title X regulations, promulgating regulatory language (the "Final Rule") that substantially reverted back to the 1988 regulations. A group of state governments and existing

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

Title X grantees challenged the Final Rule in federal court in three states (California, Washington and Oregon), and sought preliminary injunctive relief. The district courts in all three states granted plaintiffs' preliminary injunction motions on nearly identical grounds. The Department appealed and sought to stay the injunctions pending a decision of the merits of its appeals.

The panel first noted that the Final Rule was a reasonable interpretation of § 1008. The panel further stated that the Supreme Court's decision in *Rust v. Sullivan*, 500 U.S. 173 (1991), largely foreclosed any attempt to argue that the Final Rule was not a reasonable interpretation of the text of § 1008. The panel rejected the district courts' conclusions that two intervening laws, a Health and Human Services appropriations rider and an ancillary provision of the Affordable Care Act, Title I § 1554, rendered the Final Rule invalid. The panel concluded that neither law impliedly repealed or amended § 1008. The panel further held that Final Rule's counseling and referral requirements was not in conflict with the appropriations rider's nondirective pregnancy counseling mandate. Finally, the panel held that even if plaintiffs properly preserved their Affordable Care Act challenge, it was likely that § 1554 did not affect § 1008's prohibition on *funding* programs where abortion was a method of family planning.

The panel held that, in light of the narrow permissible scope of the district court's review of the Department's reasoning under the arbitrary and capricious standard, the Department was likely to prevail on its argument that the district court erred in concluding that the Final Rule's enactment violated the Administrative Procedure Act.

The panel held that the remaining factors also favored a stay pending appeal, noting that the Department and the public at large are likely to suffer irreparable harm in the absence of a stay, which were comparatively greater than the harms plaintiffs were likely to suffer.

COUNSEL

Jaynie Lilley, Katherine Allen, and Michael S. Raab, Appellate Staff; Brinton Lucas, Senior Counsel; Hashim M. Mooppan, Deputy Assistant Attorney General; Joseph H. Hunt, Assistant Attorney General; for Defendants-Appellants.

Anna Rich, Ketakee Kane, and Brenda Ayon Verduzco, Deputy Attorneys General; Kathleen Boergers, Supervising Deputy Attorney General; Michael L. Newman, Senior Assistant Attorney General; Xavier Becerra, Attorney General; Office of the Attorney General, Oakland, California; for Plaintiff-Appellee State of California.

Michelle Ybarra, Sarah Salomon, Sophie Hood, and Justine Sessions, Keker Van Nest & Peters LLP, San Francisco, California, for Plaintiffs-Appellees. Essential Access Health, Inc. and Melissa Marshall, M.D.

Judith N. Vale, Senior Assistant Solicitor General; Barbara D. Underwood, Solicitor General; Letitia James, Attorney General; Office of the Attorney General, Albany, New York; Benjamin Gutman, Solicitor General; Jona J. Maukonen, Senior Assistant Attorney General; Ellen F. Rosenblum, Attorney General; Office of the Attorney General, Salem, Oregon; Phil Weiser, Attorney General, State of Colorado; William Tong, Attorney General, State of Connecticut;

Kathy Jennings, Attorney General, State of Delaware; Karl A. Racine, Attorney General, District of Columbia; Clare E. Connors, Attorney General, State of Hawaii; Kwame Raoul, Attorney General, State of Illinois; Brian E. Frosh, Attorney General, State of Maryland; Maura Healey, Attorney General, Commonwealth of Massachusetts; Dana Nessel, Attorney General, State of Michigan; Keith Ellison, Attorney General, State of Minnesota; Aaron Ford, Attorney General, State of Nevada; Gurbir Singh Grewal, Attorney General, State of New Jersey; Hector Balderas, Attorney General, State of New Mexico; Josh Stein, Attorney General, State of North Carolina; Josh Shapiro, Attorney General, Commonwealth of Pennsylvania; Peter F. Neronha, Attorney General, State of Rhode Island; T.J. Donovan, Attorney General, State of Vermont; Mark R. Herring, Attorney General, Commonwealth of Virginia; Josh Kaul, Attorney General, State of Wisconsin; for Plaintiffs-Appellees State of Oregon, State of New York, State of Colorado, State of Connecticut, State of Delaware, District of Columbia, State of Hawaii, State of Illinois, State of Maryland, Commonwealth of Massachusetts, State of Michigan, State of Minnesota, State of Nevada, State of New Jersey, State of New Mexico, State of North Carolina, Commonwealth of Pennsylvania, State of Rhode Island, State of Vermont, Commonwealth of Virginia, and State of Wisconsin.

Alan E. Schoenfeld, Wilmer Cutler Pickering Hale and Dorr LLP, New York, New York; Joshua M. Koppel, Albinas J. Prizgintas, Kimberly A. Parker, and Paul R.Q. Wolfson, Wilmer Cutler Pickering Hale and Dorr LLP, Washington, D.C.; Kennon Scott, Per A. Ramfjord, and Jeremy D. Sacks, Stoel Rives LLP, Portland, Oregon; Erin G. Sutton, Leonard A. Nelson, and Brian D. Vandenberg, Office of General Counsel, American Medical Association, Chicago, Illinois;

Mark Bonnano, General Counsel, Oregon Medical Association, Portland, Oregon; Carri Y. Flaxman and Helene T. Krasnoff, Planned Parenthood Federation of America Inc., Washington, D.C.; for Plaintiffs-Appellees American Medical Association; Oregon Medical Association; Planned Parenthood Federation of America, Inc.; Planned Parenthood of Southwestern Oregon; Planned Parenthood Columbia Willamette; Thomas N. Ewing, M.D.; Michele P. Megregian, C.N.M.

Kristin Beneski, Paul M. Crisalli, and Jeffrey T. Sprung, Assistant Attorneys General; Norah G. Purcell, Solicitor General; Robert Ferguson, Attorney General; Office of the Attorney General, Seattle, Washington; for Plaintiff-Appellee State of Washington

Fiona Kaye, Brigitte Amiri, Elizabeth Deutsch, Anjali Dalal, and Ruth E. Harlow, American Civil Liberties Union Foundation; Emily Chiang, American Civil Liberties Union Foundation of Washington; Joe Shaeffer, MacDonald Hoague & Bayless, Seattle, Washington; Brandon D. Harper, Jennifer B. Sokoler, and Nicole M. Argentieri, O'Melveny & Myers LLP, New York, New York; Sara Zdeb, O'Melveny & Myers LLP, Washington, D.C.; for Plaintiffs-Appellees National Family Planning and Reproductive Health Association, Feminist Women's Health Center. Deborah Oyer M.D., and Teresa Gall.

ORDER

PER CURIAM:

BACKGROUND

In 1970, Congress enacted Title X of the Public Health Service Act ("Title X") to create a limited grant program for certain types of pre-pregnancy family planning services. *See* Pub. L. No. 91-572, 84 Stat. 1504 (1970). Section 1008 of Title X, which has remained unchanged since its enactment, is titled "Prohibition of Abortion," and provides:

> None 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 1988, the Department of Health and Human Services ("HHS") explained that it "interpreted [§] 1008 . . . as prohibiting Title X projects from in any way promoting or encouraging abortion as a method of family planning," and "as requiring that the Title X program be 'separate and distinct' from any abortion activities of a grantee." 53 Fed. Reg. at 2923. Accordingly, HHS promulgated regulations forbidding Title X grantees from providing counseling or referrals for, or otherwise encouraging, promoting, or advocating abortion as a method of family planning. *Id.* at 2945. To prevent grantees from evading these restrictions, the regulations placed limitations on the list of medical providers that a program must offer patients as part of a required referral for prenatal care. *See id.* Such a list was required to exclude providers whose principal business is the provision of abortions, had to include providers who do not provide abortions, and could not weigh in favor of

providers who perform abortions. *Id.* at 2945. The regulations also required grantees to keep their Title X funded projects "physically and financially separate" from all abortion-related services that the grantee might also provide (the "physical-separation" requirement). *Id.*

In 1991, the Supreme Court upheld the 1988 regulations against a challenge in *Rust v. Sullivan*, 500 U.S. 173 (1991). *Rust* held that § 1008 of Title X was ambiguous as to whether grantees could counsel abortion as a family planning option and make referrals to abortion providers. *Id.* at 184. Applying deference under *Chevron, USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842–43 (1984), the Supreme Court found that the 1988 regulations were a permissible interpretation of § 1008. *Id.* at 184–85. The Supreme Court also held that the 1988 regulations were not arbitrary or capricious because the regulations were justified by "reasoned analysis," that the regulations were consistent with the plain language of Title X, and that they did not violate the First or Fifth Amendments. *Id.* at 198–201.

Several years later (and under a new presidential administration), HHS suspended the 1988 regulations. 58 Fed. Reg. 7455 (1993). HHS finally promulgated new Title X regulations in 2000, which re-interpreted § 1008 as requiring Title X grantees to provide "nondirective"[1] abortion counseling and abortion referrals upon request. 65 Fed. Reg. 41270–79. The 2000 regulations also

[1] Under the 2000 regulations, "nondirective" counseling meant the provision of "factual, neutral information about any option, including abortion, as [medical providers] consider warranted by the circumstances, . . . [without] steer[ing] or direct[ing] clients toward selecting any option." 65 Fed. Reg. 41270–01.

eliminated the 1988 regulations' physical-separation requirement. *Id.*

In 2019, HHS once again revised its Title X regulations, promulgating regulatory language (the "Final Rule") that substantially reverts back to the 1988 regulations. 84 Fed. Reg. 7714. Under the Final Rule, Title X grantees are prohibited from providing referrals for, and from engaging in activities that otherwise encourage or promote, abortion as a method of family planning. *Id.* at 7788–90. Providers are required to refer pregnant women to a non-abortion pre-natal care provider, and may also provide women with a list of other providers (which may not be composed of more abortion providers than non-abortion providers). *See id.* at 7789. Notably, however, the Final Rule is less restrictive than the 1988 regulations: it allows (but does not require) the neutral presentation of abortion information during nondirective pregnancy counseling in Title X programs. *Id.* The Final Rule also revives the 1988 regulations' physical-separation requirement, imposes limits on which medical professionals can provide pregnancy counseling, clarifies the previous requirement that family planning methods be "medically approved," and creates a requirement that providers encourage family participation in decisions. *Id.* at 7789.

The Final Rule was scheduled to take effect on May 3, 2019, although grantees would have until March 4, 2020, to comply with the physical-separation requirement. *Id.* at 7714. But a group of state governments and existing Title X grantees ("Plaintiffs") challenged the Final Rule in federal court in three states (California, Washington, and Oregon), and sought preliminary injunctive relief. The district courts in all three states granted Plaintiffs' preliminary injunction motions on nearly identical grounds. *See Washington v.*

Azar, 19-cv-3040, 2019 WL 1868632 (E.D. Wash. Apr. 25, 2019); *Oregon v. Azar*, 19-cv-317, 2019 WL 1897475 (D. Oregon Apr. 29, 2019); *California v. Azar*, 19-cv-1184, 19-cv-1195, 2019 WL 1877392 (N.D. Cal. Apr. 26, 2019). As a result of the three preliminary injunctions, the Final Rule has not gone into effect.

HHS appealed all three preliminary injunction orders to this court, and filed motions to stay the injunctions pending a decision on the merits of its appeals. Because the three motions for a stay pending appeal present nearly identical issues, we consider all three motions jointly.

ANALYSIS

In ruling on a stay motion, we are guided by four factors: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Nken v. Holder*, 556 U.S. 418, 434 (2009) (internal quotation marks omitted). Although review of a district court's grant of a preliminary injunction is for abuse of discretion, *Southwest Voter Registration Education Project v. Shelley*, 344 F.3d 914, 918 (9th Cir. 2003), "[a] district court by definition abuses its discretion when it makes an error of law," *Koon v. United States*, 518 U.S. 81, 100 (1996).

I.

We conclude that the Government is likely to prevail on its challenge to the district courts' preliminary injunctions based on their findings that the Final Rule is likely invalid as

both contrary to law and arbitrary and capricious under 5 U.S.C. § 706(2)(A).

As a threshold matter, we note that the Final Rule is a reasonable interpretation of § 1008. Congress enacted § 1008 to ensure 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. If a program promotes, encourages, or advocates abortion as a method of family planning, or if the program refers patients to abortion providers for family planning purposes, then that program is logically one "where abortion is a method of family planning." Accordingly, the Final Rule's prohibitions on advocating, encouraging, or promoting abortion, as well as on referring patients for abortions, are reasonable and in accord with § 1008. Indeed, the Supreme Court has held that § 1008 "plainly allows" such a construction of the statute. *Rust*, 500 U.S. at 184 (upholding as a reasonable interpretation of § 1008 regulations that (1) prohibited abortion referrals and counseling, (2) required referrals for prenatal care, (3) placed restrictions on referral lists, (4) prohibited promoting, encouraging, or advocating abortion, and (5) mandated financial and physical separation of Title X projects from abortion-related activities). The text of § 1008 has not changed.

II.

Because *Rust* largely forecloses any attempt to argue that the Final Rule is not a reasonable interpretation of the text of § 1008, the district courts instead relied on two purportedly intervening laws that they say likely render the Final Rule "not in accordance with law." 5 U.S.C. § 706(2)(A). The first is an "appropriations rider" that Congress has included in every HHS appropriations act since 1996. The 2018 version states:

> For carrying out the program under [T]itle X of the PHS Act to provide for voluntary family planning projects, $286,479,000: Provided, [t]hat amounts provided to said projects under such title shall not be expended for abortions, *that all pregnancy counseling shall be nondirective*, and that such amounts shall not be expended for any activity (including the publication or distribution of literature) that in any way tends to promote public support or opposition to any legislative proposal or candidate for public office.

132 Stat 2981, 3070–71 (2018) (emphasis added). The second is an ancillary provision of the Affordable Care Act (ACA), located within a subchapter of the law entitled "Miscellaneous Provisions," which reads:

> Notwithstanding any other provision of this Act, the Secretary of Health and Human Services shall not promulgate any regulation that—
>
> (1) creates any unreasonable barriers to the ability of individuals to obtain appropriate medical care;
>
> (2) impedes timely access to health care services;
>
> (3) interferes with communications regarding a full range of treatment options between the patient and the provider;

> (4) restricts the ability of health care providers to provide full disclosure of all relevant information to patients making health care decisions;
>
> (5) violates the principles of informed consent and the ethical standards of health care professionals; or
>
> (6) limits the availability of health care treatment for the full duration of a patient's medical needs.

Pub. L. No. 111-148, title I, § 1554 (42 U.S.C. § 18114) ("§ 1554").

These two provisions could render the Final Rule "not in accordance with law" only by impliedly repealing or amending § 1008, or by directly contravening the Final Rule's regulatory provisions.

First, we conclude that neither law impliedly repealed or amended § 1008. *See Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 663 (2007) ("[E]very amendment of a statute effects a partial repeal to the extent that the new statutory command displaces earlier, inconsistent commands."). "[R]epeals by implication are not favored and will not be presumed unless the intention of the legislature to repeal is clear and manifest." *Id.* at 662 (internal quotation marks and alterations omitted); *United States v. Madigan*, 300 U.S. 500, 506 (1937) ("[T]he modification by implication of the settled construction of an earlier and different section is not favored."). Indeed, "[w]e will not infer a statutory repeal unless the later statute expressly contradict[s] the original act or unless such a construction is

absolutely necessary . . . in order that [the] words [of the later statute] shall have any meaning at all." *Nat'l Ass'n of Home Builders*, 551 U.S. at 662.

Plaintiffs admit that there is no irreconcilable conflict between § 1008 and either the appropriations rider or § 1554 of the ACA. *E.g.*, California State Opposition to Motion for Stay at p. 14; Essential Access Opposition to Motion for Stay at p.14. And we discern no "clear and manifest" intent by Congress to amend or repeal § 1008 via either of these laws—indeed, neither law even refers to § 1008. The appropriations rider mentions abortion only to prohibit appropriated funds from being expended for abortions; and § 1554 of the ACA does not even *mention* abortion.

As neither statute impliedly amended or repealed § 1008, the question is therefore whether the Final Rule is nonetheless "not in accordance with law" because its provisions are incompatible with the appropriations rider or § 1554 of the ACA. 5 U.S.C. § 706(2)(A). We think that HHS is likely to succeed on its challenge to the district courts' preliminary injunctions because the Final Rule is not contrary to either provision.

The appropriations rider conditions HHS funding on a requirement that no Title X funds be expended on abortion, and that "all pregnancy counseling shall be nondirective." Pub. L. No. 115-245, div. B, tit. II, 132 Stat 2981, 3070–71 (2018). (The plain text of the rider actually seems to *reinforce* § 1008's restrictions on funding abortion-related activities.)

The district courts held that the Final Rule's counseling and referral requirements directly conflicted with the appropriations rider's "nondirective" mandate. But its mandate is *not* that nondirective counseling be given in

every case. It is that such counseling as is given shall be nondirective. The Final Rule similarly does not require that any pregnancy counseling be given, only that if given, such counseling shall be nondirective (and may include neutrally-presented information about abortion). 84 Fed. Reg. 7716 ("Under the [F]inal [R]ule, the Title X regulations no longer require pregnancy counseling, but permits the use of Title X funds in programs that provide pregnancy counseling, so long as it is nondirective."). The Final Rule is therefore not in conflict with the appropriations rider's nondirective pregnancy counseling mandate.

Although the Final Rule *does* require the provision of referrals to non-abortion providers, *id.* at 7788–90, such referrals do not constitute "pregnancy counseling." First, providing a referral is not "counseling." HHS has defined "nondirective counseling" as "the meaningful presentation of options where the [medical professional] is not suggesting or advising one option over another," 84 Fed. Reg. at 7716, whereas a "referral" involves linking a patient to another provider who can give further counseling or treatment, *id.* at 7748. The Final Rule treats referral and counseling as distinct terms, as has Congress and HHS under previous administrations. *See, e.g.*, 42 U.S.C. § 300z-10; 53 Fed. Reg. at 2923; 2928–38 (1988); 65 Fed. Reg. 41272–75 (2000). We therefore conclude that the Final Rule's referral requirement is not contrary to the appropriations rider's nondirective pregnancy counseling mandate.[2]

[2] But to the extent there is any ambiguity, "when reviewing an agency's statutory interpretation under the APA's 'not in accordance with law' standard, . . . [we] adhere to the familiar two-step test of *Chevron*." *Nw. Envtl. Advocates v. U.S. E.P.A.*, 537 F.3d 1006, 1014 (9th Cir. 2008). Applying *Chevron* deference, we would conclude that

But even if referrals are included under the rubric of "pregnancy counseling," it is not clear that referring a patient to a non-abortion doctor is necessarily "directive." Nondirective counseling does not require equal treatment of all pregnancy options—rather, it just requires that a provider not affirmatively endorse one option over another. 84 Fed. Reg. at 7716. When Congress wants specific pregnancy options to be given equal treatment, it knows how to say so *explicitly*. For example, Congress has mandated that "adoption information and referrals" shall be provided "on an equal basis with all other courses of action included in nondirective counseling." 42 U.S.C. § 254c-6(a)(1) (emphasis added). If "nondirective" already meant that all pregnancy options (including adoption) shall be given equal treatment, it would render meaningless Congress's explicit instruction that adoption be treated on an *equal basis* with other pregnancy options. "[C]ourts avoid a reading that renders some words altogether redundant." Scalia, Antonin, and Garner, Bryan A., Reading Law: The Interpretation of Legal Texts (2012) 176. Congress has enacted no such statutory provision explicitly requiring the equal treatment of abortion in pregnancy counseling and referrals.[3]

We next consider § 1554 of the ACA. As a threshold matter, it seems likely that any challenge to the Final Rule

HHS's treatment of counseling and referral as distinct concepts is a reasonable interpretation of the applicable statutes.

[3] But as discussed above, to the extent there is any ambiguity as to whether the appropriation rider's nondirective mandate means that Title X grantees must be allowed to provide referrals to abortion providers on an equal basis with non-abortion providers, we would defer to HHS's reasonable interpretation under *Chevron* that referral to non-abortion providers is consistent with the provision of nondirective pregnancy counseling.

relying on § 1554 is waived because Plaintiffs concede that HHS was not put on notice of this specific challenge during the public comment period, such that HHS did not have an "opportunity to consider the issue." *Portland Gen. Elec. Co. v. Bonneville Power Admin.*, 501 F.3d 1009, 1024 (9th Cir. 2007) ("The waiver rule protects the agency's prerogative to apply its expertise, to correct its own errors, and to create a record for our review."). Although some commenters stated that the proposed Final Rule was contrary to the ACA *generally*, and still others used generic language similar to that contained in § 1554, preservation of a challenge requires that the "specific argument" must "be raised before the agency, not merely the same general legal issue." *Koretoff v. Vilsack*, 707 F.3d 394, 398 (D.C. Cir. 2013) (per curiam). Although "agencies are required to ensure that they have authority to issue a particular regulation," they "have no obligation to anticipate every conceivable argument about why they might lack such statutory authority." *Id.* at 398.

But even if this challenge were preserved, it seems likely that § 1554 does not affect § 1008's prohibition on *funding* programs where abortion is a method of family planning. Section 1554 prohibits "creat[ing] any unreasonable barriers to the ability of individuals to obtain appropriate medical care," "imped[ing] timely access to health care services," "interfer[ing] with communications regarding a full range of treatment options between the patient and the provider," "restrict[ing] the ability of health care providers to provide full disclosure of all relevant information to patients making health care decisions," "violat[ing] the principles of informed consent and the ethical standards of health care professionals," and "limit[ing] the availability of health care treatment for the full duration of a patient's medical needs." 42 U.S.C. § 18114. But as the Supreme Court noted in *Rust*, there is a clear distinction between affirmatively impeding

or interfering with something, and refusing to subsidize it. *Rust*, 500 U.S. at 200–01. In holding that the 1988 regulations did not violate the Fifth Amendment, the Supreme Court reasoned that "[t]he Government has no constitutional duty to subsidize an activity merely because the activity is constitutionally protected," and that the Government "may validly choose to fund childbirth over abortion and implement that judgment by the allocation of public funds for medical services relating to childbirth but not to those relating to abortion." *Id.* at 201. The Government's "decision to fund childbirth but not abortion places no governmental obstacle in the path of a woman who chooses to terminate her pregnancy, but rather, by means of unequal subsidization of abortion and other medical services, encourages alternative activity deemed in the public interest." *Id.* (internal quotations and citations omitted). Indeed, the Supreme Court has recognized that "[t]he difficulty that a woman encounters when a Title X project does not provide abortion counseling or referral leaves her in no different position than she would have been if the Government had not enacted Title X." *Id.* at 202. *Rust*'s reasoning is equally applicable to counter the district courts' conclusions that the Final Rule is invalidated by § 1554. Title X is a limited grant program focused on providing pre-pregnancy family planning services—it does not fund medical care for pregnant women. The Final Rule can reasonably be viewed as a choice to subsidize certain medical services and not others.[4]

[4] The preamble to § 1554 also suggests that this section was not intended to restrict HHS interpretations of provisions outside the ACA. If Congress intended § 1554 to have sweeping effects on all HHS regulations, even those unrelated to the ACA, it would have stated that § 1554 applies "notwithstanding any other provision *of law*," rather than

III.

The district courts also held that the Final Rule likely violates the Administrative Procedure Act (APA)'s prohibition on "arbitrary and capricious" regulations. 5 U.S.C. § 706(2)(A). "'Arbitrary and capricious' review under the APA focuses on the reasonableness of an agency's decision-making process." *CHW W. Bay v. Thompson*, 246 F. 3d 1218, 1223 (9th Cir. 2001) (emphasis in original). But "[t]he scope of review under the 'arbitrary and capricious' standard is narrow and a court is not to substitute its judgment for that of the agency." *Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). We think that is precisely what the district courts did.

To find that the Final Rule's enactment was arbitrary and capricious, the district courts generally ignored HHS's explanations, reasoning, and predictions whenever they disagreed with the policy conclusions that flowed therefrom.

For example, with respect to the physical separation requirement, the district courts ignored HHS's reasoning for its re-imposition of that requirement (which was approved by *Rust*): that physical separation would ensure that Title X funds are not used to subsidize abortions via co-location of Title X programs in abortion clinics. *See* 84 Fed. Reg. at 7763–68. HHS's reasoning included citation to data suggesting "that abortions are increasingly performed at sites that focus primarily on contraceptive and family

"[n]otwithstanding any other provision *of this Act*." *See, e.g., Andreiu v. Ashcroft*, 253 F.3d 477, 482 (9th Cir. 2001) (holding that the phrase "notwithstanding any other provision of law" in 8 U.S.C. § 1252(f)(2) meant that the provision "trumps any contrary provision elsewhere in the law").

planning services—sites that could be recipients of Title X funds." *Id.* at 7765. Similarly, the district courts ignored HHS's primary reasoning for prohibiting abortion counseling and referrals: that such restrictions are required by HHS's reasonable reading of § 1008 (again, approved by *Rust*). *Id.* at 7746–47. Further, the district courts ignored HHS's consideration of the effects that the Final Rule would likely have on the number of Title X providers, and credited Plaintiffs' speculation that the Final Rule would "decimate" the Title X provider network, rather than HHS's prediction—based on evidence cited in the administrative record—"that honoring statutory protections of conscience in Title X may increase the number of providers in the program," by attracting new providers who were previously deterred from participating in the program by the former requirement to provide abortion referrals. *See id.* at 7780. Such predictive judgments "are entitled to particularly deferential review." *Trout Unlimited v. Lohn*, 559 F.3d 946, 959 (9th Cir. 2009). With respect to the Final Rule's definition of "advanced practice provider," and its provision on whether family planning methods must be "medically approved," HHS reasoned that these provisions would clarify subjects that had caused confusion in the past. 84 Fed. Reg. at 7727–28, 32. Although the district courts insist that HHS failed to consider that the Final Rule requires providers to violate medical ethics, HHS did consider and respond to comments arguing just that. *See id.* at 7724, 7748. HHS similarly considered the costs of compliance with the Final Rule. *Id.* at 7780.

In light of the narrow permissible scope of the district court's review of HHS's reasoning under the arbitrary and capricious standard, we conclude that HHS is likely to prevail on its argument that the district court erred in

concluding that the Final Rule's enactment violated the APA.[5]

IV.

The remaining factors also favor a stay pending appeal. HHS and the public at large are likely to suffer irreparable harm in the absence of a stay, which are comparatively greater than the harms Plaintiffs are likely to suffer.

Absent a stay, HHS will be forced to allow taxpayer dollars to be spent in a manner that it has concluded violates the law, as well as the Government's important policy interest (recognized by Congress in § 1008) in ensuring that taxpayer dollars do not go to fund or subsidize abortions. As the Supreme Court held in *Rust*, "the government may 'make a value judgment favoring childbirth over abortion, and . . . implement that judgment by the allocation of public funds,'" and by "declining to 'promote or encourage abortion.'" *Rust*, 500 U.S. at 193. Additionally, forcing HHS to wait until the conclusion of a potentially lengthy appeals process to implement the Final Rule will necessarily result in predictable administrative costs, and will beget significant uncertainty in the Title X program.

The harms that Plaintiffs would likely suffer if a stay is granted are comparatively minor. The main potential harms that Plaintiffs identify are based on their prediction that implementation of the Final Rule will cause an immediate

[5] The district court in Washington also briefly stated that the Final Rule was likely invalid because it "violates the central purpose of Title X, which is to equalize access to comprehensive, evidence-based, and voluntary family planning." Washington Preliminary Injunction Order at 15. But this conclusion is foreclosed by the existence of § 1008, and by the Supreme Court's contrary finding in *Rust*.

and steep decline in the number of Title X providers. But these potential harms obviously rely on crediting Plaintiffs' predictions about the effect of implementing the Final Rule, over HHS's predictions that implementation of the final rule will have the *opposite* effect. As described above, we think that HHS's predictions—supported by reasoning and evidence in the record (84 Fed. Reg. at 7780)—is entitled to more deference than Plaintiffs' contrary predictions. While some Title X grantees will certainly incur financial costs associated with complying with the Final Rule if the preliminary injunctions are stayed, we think that harm is minor relative to the harms to the Government described above.

V.

Because HHS and the public interest would be irreparably harmed absent a stay, harms to Plaintiffs from a stay will be comparatively minor, and HHS is likely to prevail in its challenge of the preliminary injunction orders before a merits panel of this court (which is set to hear the cases on an expedited basis), we conclude that a stay of the district courts' preliminary injunction orders pending appeal is proper.

The motion for a stay pending appeal is **GRANTED**.

ADDENDUM B

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WASHINGTON

STATE OF WASHINGTON, Plaintiff, v. ALEX M. AZAR II, in his official capacity as Secretary of the United States Department of Health and Human Services; and UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, Defendants.	No. 1:19-cv-03040-SAB **ORDER GRANTING PLAINTIFFS' MOTIONS FOR PRELIMINARY INJUNCTION**
NATIONAL FAMILY PLANNING & REPRODUCTIVE HEALTH ASSOCIATION, FEMINIST WOMEN'S HEALTH CENTER, DEBORAH OYER, M.D. and TERESA GALL, F.N.P., Plaintiffs, v. ALEX M. AZAR II, in his official capacity as Secretary of the United States	

Department of Health and Human Services; and UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, DIANE FOLEY, M.D., in her official capacity as Deputy Assistance Secretary for Population Affairs, and OFFICE OF POPULATION AFFAIRS,

Defendants.

Before the Court are Plaintiffs' Motions for Preliminary Injunction, ECF Nos. 9 and 18. A hearing on the motions was held on April 25, 2019. The State of Washington was represented by Jeffrey Sprung, Kristin Beneski and Paul Crisalli. Plaintiffs National Family Planning and Reproductive Health Association, *et al.*, (NFPRHA) were represented by Ruth Harlow, Fiona Kaye, Brigitte Amiri, Elizabeth Deutsch, and Joseph Shaeffer. Defendants were represented by Bradley Humphreys. The Court also received *amicus* briefs from American Academy of Pediatrics, *et al*.; Institute of Policy Integrity; State of Ohio, *et al*., and Susan B. Anthony List. This Order memorializes the Court's oral ruling.

Introduction

Plaintiffs seek to set aside the Office of Population Affairs (OPA), Department of Health and Human Services ("Department") March 4, 2019 Final Rule that revises the regulations that govern Title X family planning programs. 84 Fed. Reg. 77141-01, 2019 WL 1002719 (Mar. 4, 2019). The new regulations were proposed to "clarify grantee responsibilities under Title X, to remove the requirement for nondirective abortion counseling and referral, to prohibit referral for abortion, and to clarify compliance obligations under state and local laws . . . to clarify access to family planning services where an employer exercises a

religious and moral objection . . . and to require physical and financial separation to ensure clarity regarding the purpose of Title X and compliance with the statutory program integrity provisions, and to encourage family participation in family planning decisions, as required by Federal law." *Id.*

Plaintiffs contend the Final Rule is in excess of the agency's statutory authority, is arbitrary and capricious, violates the Administrative Procedures Act, violates Title X requirements, violates congressional Non-directive Mandates, violates Section 1554 of the Patient Protection and Affordable Care Act ("ACA"), and is otherwise unconstitutional.

Plaintiffs assert the Final Rule is not designed to further the purposes of Title X, which is to equalize access to comprehensive, evidence-based, voluntary family planning. Rather it is designed to exclude and eliminate health care providers who provide abortion care and referral—which by extension will impede patients' access to abortion—even when Title X funds are not used to provide abortion care, counseling or referral.

Plaintiffs also believe the Final Rule appears to be designed to limit patients' access to modern, effective, medically approved contraception and family planning health care. Plaintiffs argue the Final Rule was designed by the Department to direct Title X funds to providers who emphasize ineffective and inefficient family planning.

Finally, Plaintiffs believe the Final Rule is politically motivated and not based on facts. Instead, it intentionally ignores comprehensive, ethical, and evidence-based health care, and impermissibly interferes with the patient-doctor relationship.

Defendants assert the Final Rule adopted by the Secretary is consistent with the Administrative Procedures Act, consistent with Title X, the Non-directive

Mandates, and Section 1554 of the ACA[1], and is otherwise constitutional.

Defendants believe the Final Rule is indistinguishable from regulations adopted over 30 years ago, which were held to be valid by the United States Supreme Court in *Rust v. Sullivan*, 500 U.S. 173 (1991). Finally, Defendants argue Plaintiffs have not shown, at this early stage in the litigation, that the Final Rule violates Section 1008 of Title X—in fact, Plaintiffs cannot make that showing—primarily because of *Rust*.

At issue in this hearing are Plaintiffs' Motions for Preliminary Injunction. The Final Rule is scheduled to take effect on May 3, 2019. Plaintiffs seek to preserve the status quo pending a final determination on the merits.

Motion Standard

"A preliminary injunction is a matter of equitable discretion and is 'an extraordinary remedy that may only be awarded upon a clear showing that a plaintiff is entitled to such relief.'" *California v. Azar*, 911 F.3d 558, 575 (9th Cir. 2018) (quoting *Winter v. NRDC*, 555 U.S. 7, 22 (2008)). "A party can obtain a preliminary injunction by showing that (1) it is 'likely to succeed on the merits,' (2) it is 'likely to suffer irreparable harm in the absence of preliminary relief,' (3) 'the balance of equities tips in [its] favor,' and (4) 'an injunction is in the public interest.'" *Disney Enters., Inc. v. VidAngel, Inc.*, 869 F.3d 848, 856 (9th Cir. 2017) (alteration in original) (quoting *Winter*, 555 U.S. at 20). The Ninth Circuit uses a "sliding scale" approach in which the elements are "balanced so that a stronger

---

[1] Defendants also argue Plaintiffs have waived their argument that the Final Rule violates Section 1554 of the ACA by failing to refer to Section 1554 in their comments prior to the Final Rule being published. It is doubtful that an APA claim asserting that an agency exceeded the scope of its authority to act can be waived. Moreover, it appears that during the rule making process the agency was apprised of the substance of the violation.

showing of one element may offset a weaker showing of another." *Hernandez v. Sessions*, 872 F.3d 976, 990 (9th Cir. 2017) (quotation omitted). When the government is a party, the last two factors merge. *Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1092 (9th Cir. 2014). This means that when the government is a party, the court considers the balance of equities and the public interest together. *Azar*, 911 F.3d at 575. "[B]alancing the equities is not an exact science." *Id.* (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 609 (1952) (Frankfurter, J., concurring) ("Balancing the equities . . . is lawyers' jargon for choosing between conflicting public interests")).

Likelihood of success on the merits is the most important factor; if a movant fails to meet this threshold inquiry, the court need not consider the other factors. *Disney*, 869 F.3d at 856 (citation omitted). A plaintiff seeking preliminary relief must "demonstrate that irreparable injury is likely in the absence of an injunction." *Winter*, 555 U.S. at 22. The analysis focuses on irreparability, "irrespective of the magnitude of the injury." *Simula, Inc. v. Autoliv, Inc.*, 175 F.3d 716, 725 (9th Cir. 1999). Economic harm is not normally considered irreparable. *L.A. Mem'l Coliseum Comm'n v. Nat'l Football League*, 634 F.2d 1197, 1202 (9th Cir. 1980).

"'[I]njunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs' before the Court." *L.A. Haven Hospice, Inc. v. Sebelius*, 638 F.3d 644, 664 (9th Cir. 2011) (quoting *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979). This is particularly true where there is no class certification. *See Easyriders Freedom F.I.G.H.T. v. Hannigan*, 92 F.3d 1486, 1501 (9th Cir. 1996) ("[I]njunctive relief generally should be limited to apply only to named plaintiffs where there is no class certification."); *Meinhold v. U.S. Dep't of Defense*, 34 F.3d 1469, 1480 (9th Cir.1994) (district court erred in enjoining the defendant from improperly applying a regulation to all military personnel (*citing Califano*, 442 U.S. at 702)).

That being said, there is no bar against nationwide relief in the district courts or courts of appeal, even if the case was not certified as a class action, if such broad relief is necessary to give prevailing parties the relief to which they are entitled. *Bresgal v. Brock*, 843 F.2d 1163, 1170–71 (9th Cir. 1987).

Federal Administrative Agency Rule-Making

Federal administrative agencies are required to engage in "reasoned decisionmarking." *Michigan v. E.P.A.*, __ U.S. __, 135 S.Ct. 2699 (2015). "Not only must an agency's decreed result be within the scope of its lawful authority, but the process by which it reaches that result must be logical and rational." *Id.* (quoting *Allentown Mack Sales & Service, Inc. v. NLRB*, 522 U.S. 359, 374 (1998)).

Administrative Procedures Act

The Administrative Procedure Act "sets forth the full extent of judicial authority to review executive agency action for procedural correctness." *FCC v. Fox Television Stations, Inc*., 556 U.S. 502, 513 (2009). Under the arbitrary and capricious standard contained in the APA, a reviewing court may not set aside an agency rule that is rational, based on consideration of the relevant factors and within the scope of the authority delegated to the agency by the statute. *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983). "The scope of review under the 'arbitrary and capricious' standard is narrow and a court is not to substitute its judgment for that of the agency. Nevertheless, the agency must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Id.* at 43. (quotation omitted). An agency rule is arbitrary and capricious "if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference

in view or the product of agency expertise." *Id.*

An agency must consider and respond to significant comments received during the period for public comment. *Perez v. Mortgage Bankers Ass'n*, __ U.S.__, 135 S.Ct. 1199, 1203 (2015). The public interest is served by compliance with the APA. *Azar*, 911 F.3d at 581. "The APA creates a statutory scheme for informal or notice-and-comment rulemaking reflecting a judgment by Congress that the public interest is served by a careful and open review of proposed administrative rules and regulations." *Alcaraz v. Block*, 746 F.2d 593, 610 (9th Cir. 1984) (internal quotation marks and citation omitted). "It does not matter that notice and comment could have changed the substantive result; the public interest is served from proper process itself." *Azar*, 911 F.3d at 581.

History of Title X

"*No American woman should be denied access to family planning assistance because of her economic condition*."[2]

In 1970, Congress created the Title X program[3] to address low-income individuals' lack of equal access to the same family planning services, including modern, effective medical contraceptive methods such as "the Pill," available to those with greater economic resources. NFPRHA, *et al*. Complaint, 1:19-cv-3045-SAB, ECF No. 1, ¶4. Title X monetary grants support family planning projects that offer a broad range of acceptable and effective family planning methods and services to patients on a voluntary basis, 42 U.S.C. § 300(a), creating a nationwide of Title X health care providers. *Id.* at ¶5. Title X gives those with incomes below or near the federal poverty level free or low-cost access to clinical professional,

---

[2] President Nixon, *Special Message to the Congress on Problems of Population Growth* (July 18, 1969).

[3] Title X became law as part of the "Family Planning Services and Population Research Act of 1970." Pub. L. No. 91-572, 84 Stat. 1504 (1970).

contraceptive methods and devices, and testing and counseling services related to reproductive health, including pregnancy testing and counseling. *Id.* Over almost five decades, Title X funding has built and sustained a national network of family planning health centers that delivers high-quality care. *Id.* at ¶41. It has enabled millions of low-income patients to prevent unintended pregnancies and protect their reproductive health. *Id.* Approximately 90 federal grants, totaling approximately $260 million, for Title X projects now fund more than 1000 provider organizations across all the states and in the U.S. territories, with more than 3800 health centers offering Title X care. *Id.* at ¶6, ¶52. In 2017, the Title X program served more than four million patients. *Id.*

Washington's Department of Health ("DOH") Family Planning Program is the sole grantee of Title X funds in Washington State. Decl. of Cynthia Harris, ECF No. 11 at ¶14. It provides leadership and oversight to its Family Planning Network of 16 subrecipients offering Title X services at 85 service sites. *Id.* at ¶4. The Family Planning Program collaborates with other programs in the DOH, other state agencies, subrecipient network organizations, and other family planning, primary health care, and social service organizations to ensure that Title X services are available statewide on issues related to women's health, adolescent health, family planning, sexually transmitted infection (STI) and Human Immunodeficiency Virus (HIV) prevention and treatment, intimate partner violence, and unintended pregnancy. *Id.*

NFPRHA represents more than 850 health care organizations in all 50 states, the District of Columbia and the U.S. territories, as well as individual professional members with ties to family planning care. ECF No. 19 at ¶5. NFPRHA currently has more than 65 Title X grantee members and almost 700 Title X subrecipient members. These NFPRHA member organizations operate or fund a network of more than 3,500 health centers that provide family planning services to more than 3.7 million Title X patients each year. *Id.* at ¶7.

The scope of the care provided by Title X programs is summarized in OPA's current Program Requirements:

> All Title X-funded projects are required to offer a broad range of acceptable and effective medically (U.S. Food and Drug Administration (FDA)) approved contraceptive methods and related services on a voluntary and confidential basis. Title X services include the delivery of related preventive health services, including patient education and counseling; cervical and breast cancer screening; sexually transmitted disease (STD) and human immunodeficiency virus (HIV) prevention education, testing and referral; and pregnancy diagnosis and counseling.

POA, *Program Requirements for Title X Funded Family Planning Projects*, at 5 (Apr. 2014), https://www.hhs.gov/opa.sites/default/files/Title-X-2014-Program Requirements.pdf ("Program Requirements"). Title X projects also provide basis infertility services, such as testing and counseling. 1:19-cv-3045-SAB, ECF No. 1, at ¶43.

The Title X statute has always provided 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 ("Section 1008"). The statute authorizes the Secretary to promulgate regulations governing the program. 42 U.S.C. § 300a-4.

The Secretary adopted regulations in 1971 and they remained in effect until 1988 when the Secretary adopted final regulations that drastically altered the landscape in which Title X grantees operated. To summarize, the 1988 regulations:

- Prohibited Title X projects from counseling or referring clients for abortion as a method of family planning;
- Required grantees to separate their Title X project—physically and financially—from prohibited abortion-related activities
- Established compliance standards for family planning projects
- Prohibited certain actions that promote, encourage, or advocate

> abortion as method of family planning, such as using project funds for lobbying for abortion, developing and disseminating materials advocating abortion, or taking legal action to make abortion available as a method of family planning.

Those regulations were challenged in federal courts and ultimately upheld by the United States Supreme Court. *See Rust v. Sullivan*, 500 U.S. 173 (1991)[4]. The 1988 rules were never fully implemented due to ongoing litigation and bipartisan concern over its invasion of the medical provider-patient relation. State of Washington, Complaint, ECF No. 1 at ¶30.

In 1993, President Clinton suspended the 1988 Regulations by way of a Presidential memorandum to the Department:

> Title X of the Public Health Services Act [this subchapter] provides Federal funding for family planning clinics to provide services for low-income patients. The Act specifies that Title X funds may not be used for the performance of abortions, but places no restrictions on the ability of clinics that receive Title X funds to provide abortion counseling and referrals or to perform abortions using non-Title X funds. During the first 18 years of the program, medical professionals at Title X clinics provided complete, uncensored information, including nondirective abortion counseling. In February 1988, the Department of Health and Human Services adopted regulations, which have become known as the "Gag Rule," prohibiting Title X recipients from providing their patients with information, counseling

---

[4] In *Rust*, the United States Supreme Court held that (1) the regulations were based on permissible construction of the statute prohibiting the use of Title X funds in programs in which abortion is a method of family planning; (2) the regulations do not violate First Amendment free speech rights of Title X fund recipients, their staffs or their patients by impermissibly imposing viewpoint-discriminatory conditions on government subsidies; and (3) regulations do not violate a woman's Fifth Amendment right to choose whether to terminate a pregnancy and do not impermissibly infringe on doctor-patient relationship. 500 U.S. at 184-203.

> or referrals concerning abortion. Subsequent attempts by the Bush Administration to modify the Gag Rule and ensuing litigation have created confusion and uncertainty about the current legal status of the regulations.
>
> The Gag Rule endangers women's lives and health by preventing them from receiving complete and accurate medical information and interferes with the doctor-patient relationship by prohibiting information that medical professionals are otherwise ethically and legally required to provide to their patients. Furthermore, the Gag Rule contravenes the clear intent of a majority of the members of both the United States Senate and House of Representatives, which twice passed legislation to block the Gag Rule's enforcement but failed to override Presidential vetoes.
>
> For these reasons, you have informed me that you will suspend the Gag Rule pending the promulgation of new regulations in accordance with the "notice and comment" procedures of the Administrative Procedure Act [5 U.S.C.A. §§ 551 et seq., 701 et seq.].

"The Title X Gag Rule," Memorandum for the Secretary of Health and Human Services, 1993 WL 366490 (Jan. 22, 1993).

New regulations were finalized in 2000, 65 Fed. Reg. 41270 (Jul. 3, 2000), *codified at* 42 C.F.R. Pt. 59, and these regulations remain in effect unless and until the new Final Rule is implemented.

Congressional Intent / The Department's Program Requirements

Plaintiffs argue that laws passed by Congress since *Rust* limit the Department's discretion in implementing Title X regulations. These laws include Section 1554 of the ACA and congressional Non-directive Mandates contained in appropriation bills. They also rely on the Department's own program requirements to support their arguments.

1. § 1554 of the ACA

Section 1554 of the ACA states:

> Notwithstanding any other provision of this Act, the Secretary of Health and Human Services shall not promulgate any regulation that--

(1) creates any unreasonable barriers to the ability of individuals to obtain appropriate medical care;
(2) impedes timely access to health care services;
(3) interferes with communications regarding a full range of treatment options between the patient and the provider;
(4) restricts the ability of health care providers to provide full disclosure of all relevant information to patients making health care decisions;
(5) violates the principles of informed consent and the ethical standards of health care professionals; or
(6) limits the availability of health care treatment for the full duration of a patient's medical needs.

42 U.S.C. § 18114.

2. Appropriations Mandate

With the Non-directive Mandate, Congress has explicitly required every year since 1996 that "all pregnancy counseling [in Title X projects] shall be nondirective." NFPRHA, *et al*. Complaint, 1:19-cv-3045-SAB, ECF No. 1, at ¶78. Non-directive counseling provides the patient with all options relating to her pregnancy, including abortion. *Id.* at ¶76. Congress has been providing Non-directive Mandates in its appropriations bills for the past 24 years.

3. Department of Health and Human Services Program Requirements / Quality Family Planning

Title X grantees are required to follow the Quality Family Planning (QFP) guidelines, issued by the Centers for Disease Control and Prevention and OPA. State of Washington, Complaint, ECF No. 1, at ¶45. This document reflects evidence-based best practices for providing quality family planning services in the United States.[5] It requires that options counseling should be provided to pregnant

[5] "Providing Quality Family Planning Services: Recommendations of CDC and the U.S. Office of Population Affairs," Morbidity and Mortality Weekly Report Vol. 62, No. 4 (April 25, 2014), *available at* https:www.cdc.gov/mmwr/pdf/rr/rr6304.pdf (last accessed April 24, 2019) (the QFP).

patients as recommended by the American College of Obstetricians and Gynecologists and others, including that patients with unwanted pregnancy should be "fully informed in a balanced manner about all options, including raising the child herself, placing the child for adoption, and abortion." *Id.* at ¶46.

The Department's Program Requirements require Title X projects to provide nondirective pregnancy counseling. *Id*. at ¶44.

Federal Conscience Laws

In the Executive Summary of the Final Rule, the Department indicates that one of the purposes of revising the Title X regulations was to eliminate provisions which are inconsistent with the health care conscience statutory provisions. 84 Fed. Reg. 7714, 7716. These provisions include the Church Amendment, the Coats-Snowe Amendment and the Weldon Amendment. *Id.*

1. The Church Amendment

"The Church Amendments, among other things, prohibit certain HHS grantees from discriminating in the employment of, or the extension of staff privileges to, any health care professional because they refused, because of their religious beliefs or moral convictions, to perform or assist in the performance of any lawful sterilization or abortion procedures. The Church Amendments also prohibit individuals from being required to perform or assist in the performance of any health service program or research activity funded in whole or in part under a program administered by the Secretary contrary to their religious beliefs or moral convictions. *See* 42 U.S.C. 300a-7." 84 Fed. Reg. at 7716, n.7.

2. 1996 Coats-Snowe Amendment

"The Coats-Snowe Amendment bars the federal government and any State or local government that receives federal financial assistance from discriminating against a health care entity, as that term is defined in the Amendment, who refuses, among other things, to provide referrals for induced abortions. *See* 42 U.S.C. 238n(a)." 84 Fed. Reg. at 7716, n.8.

3. 2005 Weldon Amendment

"The Weldon Amendment was added to the annual 2005 health spending bill and has been included in subsequent appropriations bills." 84 Fed. Reg. at 7716, n. 9. "The Weldon Amendment bars the use of appropriated funds on a federal agency or programs, 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, among other things, refer for abortions." *Id.*

Analysis

As set forth above, the Ninth Circuit uses a sliding scale approach in determining whether it is appropriate to grant a preliminary injunction. Although Plaintiffs have met their burden of showing that all four factors tip in their favor, the irreparable harm and balance of equities factors tip so strongly in Plaintiffs' favor that a strong showing of likelihood on the merits was not necessary.

1. Likelihood of Success on the Merits

Plaintiffs have presented reasonable arguments that indicate they are likely to succeed on the merits, thus meeting the threshold inquiry. In so finding, the Court has not concluded that Plaintiffs will definitely prevail on the merits, nor has it concluded that they are more likely going to prevail. The preliminary injunction standard requires neither of these conclusions. *See Azar*, 911 F.3d at 582 ("The purpose of such interim equitable relief is not to conclusively determine the rights of the parties but to balance the equities as the litigation moves forward.") (quoting *Trump v. Int'l Refugee Assistance Proj.*, __ U.S. __, 137 S.Ct. 2080, 2087 (2017)). Rather, it requires a determination that Plaintiff has made a colorable claim—a claim that has merit and a likely chance of success.

First, Plaintiffs have presented initial facts and argument that the separation requirement in the Final Rule forces clinics that provide abortion services to maintain separate facilities and finances for Title X programs will more likely than

not increase their expenses unnecessarily and unreasonably.

Second, Plaintiffs have presented initial facts and argument that the Final Rule gag requirement would be inconsistent with ethical, comprehensive, and evidence-based health care.

Third, Plaintiffs have presented initial facts and argument that the Final Rule violates Title X regulations, the Non-directive Mandates and Section 1554 of the Affordable Care Act and is also arbitrary and capricious.

Specifically, Plaintiffs have demonstrated the Final Rule likely violates the central purpose of Title X, which is to equalize access to comprehensive, evidence-based, and voluntary family planning. They have presented facts and argument that the Final Rule violates the Non-directive Mandate because it requires all pregnant patients to receive referrals for pre-natal care, regardless of whether the patient wants to continue the pregnancy, and regardless of the best medical advice and treatment that might be recommended for that patient.

They have also presented facts and argument that the Final Rule likely violates Section 1554 of the ACA because the Final Rule creates unreasonable barriers for patients to obtain appropriate medical care; impedes timely access to health care services; interferes with communications regarding a full range of treatment options between the patient and the heath care provider, restricts the ability of health care providers to provide full disclosure of all relevant information to patients making health care decisions, and violates the principles of informed consent and the ethical standards of health care professions.

Fourth, Plaintiffs, with the help from *Amicus* parties, have presented facts and argument that the Final Rule is arbitrary and capricious because it reverses long-standing positions of the Department without proper consideration of sound medical opinions and the economic and non-economic consequences.

Finally, Plaintiffs have presented facts and argument that the Department failed to consider important factors, acted counter to and in disregard of the

evidence in the administrative record and offered no reasoned analysis based on the record. Rather, it seems the Department has relied on the record made 30 years ago, but not the record made in 2018-19.

2. Irreparable Harm

Plaintiffs have demonstrated they are likely to suffer irreparable harm in the absence of a preliminary injunction by presenting facts and argument that the Final Rule may or likely will: (1) seriously disrupt or destroy the existing network of Title X providers in both the State of Washington and throughout the entire nation—this network has been carefully knit together over the past 45 years and there is no evidence presented by the Department that Title X is being violated or ignored by this network of providers; (2) impose additional and unnecessary costs on the State of Washington and other states; (3) harm the health of the patients who rely on the existing Title X providers; and (4) drive many Title X providers from the system either because of the increased costs imposed by the new separation requirements or because they cannot or will not comply with the allegedly unprofessional gag rule requirements.

Washington State has shown that it is not legally or logistically feasible for Washington to continue accepting any Title X funding subject to the Final Rule. At the minimum, Washington stands to lose more than $28 million in savings from the loss of federal dollars. It has demonstrated the harmful consequences of the Final Rule will uniquely impact rural and uninsured patients. If the Final Rule is implemented, over half of Washington counties would be unserved by a Title X-funded family planning provider. Students at Washington colleges and universities will be especially hurt by the Final Rule. DOH reports it does not have the funding that would be required to comply with the Final Rule, nor would it be able to comply with the May 3, 2019 deadline.

NFPRHA currently has more than 65 Title X grantee members and almost 700 Title X sub-recipient members. These NFPRHA member organizations

operate or fund a network of more than 3,500 health centers that provide family planning services to more than 3.7 million Title X patients each year. NFPRHA has shown that upon its effective date, the Final Rule will cause all current NFPRHA members grantees, sub-recipients, and their individual Title X clinicians to face a Hobson's Choice that harms patients as well as the providers. Faced with this difficult choice, many NFPRHA members will leave the network once the Final Rule becomes effective, thereby leaving low-income individuals without Title X providers.

It is worth noting that Plaintiffs have submitted substantial evidence of harm, including declarations from Karl Eastlund, President and CEO of Planned Parenthood of Greater Washington and North Idaho, ECF No. 10; Cynthia Harris, program manager for the Family Planning Program, Washington DOH, ECF No. 11; Anuj Khattar, M.D., primary care physician and reproductive health provider, ECF No. 12; Dr. Judy Kimelman, practitioner at Seattle Obstetrics & Gynecology Group, ECF No. 13; Bob Marsalli, CEO of the Washington Association for Community Health, ECF No. 14; David Schumacher, Director of the Office of Financial Management, State of Washington, ECF No. 15; Dr. Judy Zerzan-Thul, Chief Medical Officer for the Washington State Health Care Authority, ECF No. 16; Clare M. Coleman, President and CEO of the National Family Planning & Reproductive Health Association, ECF No. 19; Dr. Kathryn Kost, Acting Vice President of Domestic Research at the Guttmacher Institute, ECF No. 20; Connie Cantrell, Executive Director of the Feminist Women's Health Center, ECF No. 21; Kristin A. Adams, Ph.D, President and CEO of the Indiana Family Health Council, ECF No. 22; J. Elisabeth Kruse, M.S., C.N.M., A.R.N.P, Lead Clinician for Sexual and Reproductive Health and Family Planning at the Public Health Department for Seattle and King County, Washington, ECF No. 23; Tessa Madden, M.D., M.P.H., Director of the Family Planning Division, Department of Obstetrics and Gynecology, Washington University School of Medicine, ECF No. 24; Heather

Maisen, Manager of the Family Planning Program in the Public Health Department for Seattle and King County, Washington, ECF No. 25; and Sarah Prager, M.D., Title X Director of the Feminist Women's Health Center, ECF No. 26.

Yet, the Government's response in this case is dismissive, speculative, and not based on any evidence presented in the record before this Court.

3. Balance of Equities/Public Interest

The balance of equities and the public interest strongly favors a preliminary injunction, which tips the scale sharply in favor of Plaintiffs.

There is no public interest in the perpetration of unlawful agency action. Preserving the status quo will not harm the Government and delaying the effective date of the Final Rule will cost it nothing. There is no hurry for the Final Rule to become effective and the effective date of May 3, 2019 is arbitrary and unnecessary.

On the other hand, there is substantial equity and public interest in continuing the existing structure and network of health care providers, which carefully balances the Title X, the congressional Non-directive Mandates, and Section 1554 of the Affordable Care Act, while the legality of the new Final Rule is reviewed and decided by the Court.

Accordingly, **IT IS HEREBY ORDERED**:

1. The State of Washington's Motion for Preliminary Injunction, ECF No. 9, is **GRANTED**.

2. National Family Planning & Reproductive Health Center, *et al*.'s Motion for Preliminary Injunction, ECF No. 18, is **GRANTED**.

3. Defendants and their officers, agents, servants, employees, and attorneys, and any person in active concert or participation with them, are **ENJOINED** from implementing or enforcing the Final Rule entitled *Compliance with Statutory Program Integrity Requirements*, 84 Fed. Reg. 7714-01 (March 4,

2019), in any manner or in any respect, and shall preserve the status quo pursuant to regulations under 42 C.F.R., Pt. 59 in effect as of the date of April 24, 2019, until further order of the Court.

4. No bond shall be required pursuant to Fed. R. Civ. P. 65(c).

IT IS SO ORDERED. The Clerk of Court is directed to enter this Order and forward copies to counsel.

DATED this 25th day of April 2019.

Stanley A. Bastian
United States District Judge

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WASHINGTON

STATE OF WASHINGTON, Plaintiff, v. ALEX M. AZAR II, in his official capacity as Secretary of the United States Department of Health and Human Services; and UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, Defendants.	No. 1:19-cv-03040-SAB **ORDER DENYING DEFENDANTS' MOTION TO STAY PRELIMINARY INJUNCTION PENDING APPEAL**
NATIONAL FAMILY PLANNING & REPRODUCTIVE HEALTH ASSOCIATION, FEMINIST WOMEN'S HEALTH CENTER, DEBORAH OYER, M.D., and TERESA GALL, F.N.P., Plaintiffs, v. ALEX M. AZAR II, in his official capacity as Secretary of the United States	

Department of Health and Human Services; UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, DIANE FOLEY, M.D., in her official capacity as Deputy Assistant Secretary for Population Affairs, and OFFICE OF POPULATION AFFAIRS,

Defendants.

Before the Court is Defendant's Motion to Stay Preliminary Injunction Pending Appeal, ECF No. 58. The motion was heard without oral argument.

Defendants ask the Court to stay the Court's Order granting Plaintiffs' Motions for Preliminary Injunction, ECF No. 54, entered on April 25, 2019. The Order enjoins Defendants from implementing or enforcing in any way the Final Rule published on March 2019 on a nationwide basis. In essence, Defendants are asking the Court to reconsider its earlier ruling and permit the Final Rule to go into effect. *See Nken v. Holder*, 556 U.S. 418, 428 (2009) ("…a stay operates upon the judicial proceeding itself. It does so either by halting or postponing some portion of the proceeding, or by temporarily divesting an order of enforceability.").

Recently, the Ninth Circuit was facing this same issue when a district court issued a TRO and the United States asked it to say the TRO pending appeal. *See East Bay Sanctuary Covenant v. Trump*, 909 F.3d 1219 (9th Cir. 2018). There, the Circuit set forth the approach courts should use in determining whether to grant a stay pending appeal:

> A stay is an 'intrusion into the ordinary processes of administration and judicial review,' and accordingly 'is not a matter of right, even if

> irreparable injury might otherwise result to the appellant.'" *Nken*, 556 U.S. at 427 (2009) (citations omitted). "It is instead 'an exercise of judicial discretion,' and 'the propriety of its issue is dependent upon the circumstances of the particular case.'" *Id*. at 433 (internal alteration omitted) (*quoting Virginian Ry. Co. v. United States*, 272 U.S. 658, 672–73 (1926)). "The party requesting a stay bears the burden of showing that the circumstances justify an exercise of that discretion," and our analysis is guided by four factors:
>
> > (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.
>
> *Id*. at 433–34 (*quoting Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)). "The first two factors . . . are the most critical," and the "mere possibility" of success or irreparable injury is insufficient to satisfy them. *Id*. at 434 (internal quotation marks omitted).

Id. at 1245-46.

The Court considers the final two factors after it concludes an applicant satisfies the first two. *Id.* at 1236.

Given that the Court has already considered these factors when it granted Plaintiffs' Motions for Preliminary Injunction and concluded it is Plaintiffs, not Defendants, that have a likelihood of success on the merits, and Plaintiffs, not Defendants, that would suffer irreparable harm if the preliminary injunction was not granted, the Court finds that Defendants have not met their burden of showing that a stay in this matter would be appropriate.

//

//

//

//

//

//

Accordingly, **IT IS HEREBY ORDERED**:

1. Defendant's Motion to Stay Preliminary Injunction Pending Appeal, ECF No. 58, is **DENIED**.

IT IS SO ORDERED. The Clerk of Court is directed to enter this Order and forward copies to counsel.

DATED this 3rd day of June 2019.

Stanley A. Bastian
United States District Judge