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8 **UNITED STATES DISTRICT COURT**  
9 **FOR THE EASTERN DISTRICT OF WASHINGTON**  
10 **AT YAKIMA**

11 STATE OF WASHINGTON,

12 Plaintiff,

13 v.

14 ALEX M. AZAR II, et al.,

15 Defendants.

No. 1:19-cv-03040-SAB

THE NATIONAL FAMILY  
PLANNING & REPRODUCTIVE  
HEALTH ASSOCIATION  
PLAINTIFFS' REPLY IN  
SUPPORT OF SUMMARY  
JUDGMENT FOR PLAINTIFFS

16 NATIONAL FAMILY PLANNING &  
17 REPRODUCTIVE HEALTH  
18 ASSOCIATION, et al.,

19 Plaintiffs,

20 v.

21 ALEX M. AZAR II, et al.,

22 Defendants.

February 27, 2020  
With Oral Argument: 10:00 a.m.

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## INTRODUCTION

1  
2 Defendants' opposition to Plaintiffs' motions for summary judgment ("HHS  
3 Opp."), ECF No. 131, ignores central legal obligations for agency notice-and-  
4 comment rulemaking, fails to cite even a single comment or any other factual  
5 evidence from the administrative record, and asks this Court to rubberstamp an  
6 agency decision-making process riddled with arbitrariness. The Department of  
7 Health and Human Services and its officials (collectively "HHS") urge this Court  
8 to uphold their sweeping Title X rulemaking based only on their conclusory  
9 statements and references back to a different rulemaking three decades ago, even  
10 though the evidence that was before HHS in the 2019 administrative record  
11 overwhelmingly *contradicted* HHS's conclusory assertions. In fact, the 2019  
12 record made clear that proceeding with this Rule would severely harm the core  
13 health care purpose of Title X, costing its patients and providers dearly. *See* ECF  
14 No. 121 ("NFPRHA Mot.") at 1-72 & ECF No. 122 (record excerpts); ECF No.  
15 118 ("WA Mot.") at 15-34 & ECF No. 119 (record excerpts).

16 Rather than trying to contend with Plaintiffs' well-documented showing that  
17 this rulemaking exemplifies arbitrary and capricious agency action, *id.*,  
18 Defendants' latest brief repeats faulty assertions from their opening brief. In  
19 addition, Defendants now falsely contend that Plaintiffs' argument is that "the  
20 Court can substitute its judgment" for that of the agency. HHS Opp. at 2. On the  
21 contrary, Plaintiffs properly ask this Court to test HHS's rulemaking process  
22 against the Administrative Procedure Act ("APA")'s standards for decision-  
23 making, and to vacate the Rule because the agency has not engaged in the reasoned

1 rulemaking the law requires for valid administrative action. Indeed, the Supreme  
2 Court has often emphasized the importance of courts carefully examining whether  
3 an agency has engaged in a process of cogent explanation rooted in the record  
4 facts, because without such a reasoned process, bare invocation of agency  
5 “expertise”—as Defendants attempt to rely on here—can “become a monster  
6 which rules with no practical limits.” *Motor Vehicle Mfrs. Ass’n v. State Farm*  
7 *Mut. Auto Ins. Co*, 463 U.S. 29, 48 (1983) (internal quotation omitted).

8         Because Defendants simply sidestep Plaintiffs’ record-based showing that  
9 this rulemaking was shot through with unreasoned and damaging agency choices,  
10 and argue against straw men, Defendants’ opposition fails to undercut Plaintiffs’  
11 showing of arbitrary rulemaking in any way. This reply brief, therefore, does not  
12 revisit that detailed showing, *see* NFPRHA Mot. 1-72 & i-iii (Table of Contents  
13 list of HHS’s pervasive rulemaking failures); ECF. No. 122 (record excerpts); WA  
14 Mot. at 15-34; ECF No. 119 (record excerpts). Instead, this reply brief first  
15 highlights and corrects HHS’s efforts to evade essential legal standards for valid  
16 decision-making under the APA. *Infra* Part I. It then addresses just some of the  
17 mischaracterizations of Plaintiffs’ arguments and other ways in which Defendants’  
18 opposition erroneously attempts to deflect attention from the reality of their  
19 unreasoned decision-making. *Infra* Part II. Finally, this reply shows that HHS’s  
20 pleas for delay and for only a partial vacatur of the Rule are unfounded. *Infra* Part  
21 III. No additional steps need occur before the APA’s protections against arbitrary  
22 rulemaking are enforced, the Rule is vacated in full, and the Title X program is  
23

1 saved from this harmful rulemaking—including its sweeping physical, staff, and  
2 systems separation mandate set to take effect on March 4, 2020.<sup>1</sup>

3 **ARGUMENT**

4 **I. Defendants’ Arguments Disregard Important Legal Standards That**  
5 **Agencies Must Satisfy to Ensure Non-Arbitrary Decision-Making**

6 **A. An Agency Cannot Ignore Its Own Contrary Factual Findings**

7 Defendants attempt to evade a required component of reasoned decision-  
8 making when an agency reverses course: As the Ninth Circuit *en banc* has  
9 emphasized, “if the ‘new policy rests upon factual findings that contradict those  
10 which underlay its prior policy,’” the agency “*must include* ‘a reasoned  
11 explanation ... for disregarding facts and circumstances that underlay or were  
12 engendered by the prior policy.’” *Organized Vill. of Kake v. U.S. Dep’t of*  
13 *Agriculture*, 795 F.3d 956, 966 (2015) (quoting *FCC v. Fox Television Stations,*  
14 *Inc.*, 556 U.S. 502, 515-16 (2009)) (emphasis added); accord *Encino Motorcars,*  
15 *LLC v. Navarro*, 136 S. Ct. 2117, 2126 (2016). “Unexplained inconsistency ... is a  
16 reason for holding an interpretation to be an arbitrary and capricious change.”  
17 *Kake*, 795 F.3d at 966 (internal quotation omitted); see also *Encino*, 136 S. Ct. at

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18  
19 <sup>1</sup> To avoid duplication, the NFPRHA Plaintiffs reply here with regard to Plaintiffs’  
20 APA arbitrary and capricious claims and the proper remedy for all claims, while  
21 the State of Washington replies regarding the APA logical outgrowth claims and  
22 Plaintiffs’ other statutory and constitutional claims. The NFPRHA Plaintiffs adopt  
23 in full and incorporate by reference the Washington reply brief filed today.



1 2127; *Washington v. Azar [III]*, No. 2:19-cv-00183-SAB, 2019 WL 6219541 at \*2  
2 (E.D. Wash. Nov. 21, 2019).

3 HHS in 2019 decided to adopt a Rule that contradicted its own factual  
4 findings in its 2000 rulemaking and in HHS’s 2014 clinical standards for family  
5 planning (the “QFP”)—both of which specified that (a) pregnancy testing and  
6 counseling is a necessary family planning service; (b) pregnancy counseling must  
7 respond to patient values and needs, not provider preferences; (c) pregnancy  
8 counseling includes referral at patient request; and (d) referral of all pregnant  
9 patients for prenatal care is not appropriate. *See* NFPRHA Mot. at 11-30  
10 (including citations therein). In its 2019 rulemaking, the agency failed to address  
11 these prior HHS factual findings and failed to even attempt to explain why,  
12 inconsistently, the Rule now deems pregnancy testing and counseling an optional  
13 service; lets providers determine the scope of that counseling, regardless of patient  
14 preferences; bars abortion referrals even when patients request them; and  
15 inaccurately deems referral to prenatal care “medically necessary” for all. *Id.*

16 Likewise, after HHS in 2000 found a similar (though less onerous) physical  
17 separation scheme from 1988 of “little relevance” to Title X and “unenforceable”  
18 —with ambiguities and line-drawing difficulties that the agency in 2000 found  
19 unlikely ever to be resolved—the agency in 2019 ignored those factual findings.  
20 After HHS had encouraged grantees and their providers to build enduring  
21 programs under the 2000 regulations and related compliance guidance, the agency  
22 in 2019 ignored that reliance within the Title X network. HHS simply jettisoned  
23

1 these historical facts underlying and engendered by its 2000 rulemaking.

2 NFPRHA Mot. at 3-6, 36-54.

3 In doing so, HHS attempted to skip over its own explicit learning after 1988,  
4 and to turn the clock all the way back to 1988 without providing a “detailed  
5 justification” for abandoning the agency’s *more recent* factual findings and  
6 decades-long program reliance. HHS attempted this same sleight-of-hand in the  
7 religious refusals rulemaking and litigation, but the courts there correctly rejected  
8 HHS’s bid to reenact 2008 regulations without substantively addressing *later* HHS  
9 factual findings that had caused the agency to rescind the 2008 regulations in 2011.  
10 *See New York v. HHS*, No. 1:19-cv-04676, 2019 WL 5781789 at \*45-50 (S.D.N.Y.  
11 Nov. 6, 2019); *Washington v. Azar II*, 2019 WL 6219541 at \*11. It is not enough  
12 to acknowledge a policy change and offer purported explanations that *never*  
13 *contend with* the agency’s previously operative factual findings and its program’s  
14 longstanding reliance. *Cf.* HHS Opp. at 17 (arguing that the agency “need not”  
15 address the factual underpinnings of its prior policy).<sup>2</sup> As *Encino* teaches,  
16 conclusory statements about a now-favored statutory interpretation are not reason  
17 enough to abandon an agency’s own, contrary factual findings. 136 S. Ct. at 2126-  
18 27. When the “agency ignores or countermands its earlier factual findings without  
19

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21 <sup>2</sup> HHS falsely asserts that its rulemaking considered “reliance interests,” HHS Opp.  
22 at 24, when that topic is nowhere discussed in the rulemaking; HHS’s briefs offer  
23 no support for this bald contention. *See also* NFPRHA Mot. at 37-41.

1 reasoned explanation for doing so,” it violates the APA. *Azar II*, 2019 WL  
2 6219541 at \*2.

3 **B. Agency Rulemaking Must Be Rooted in Available Facts, Must**  
4 **Rationally Present Both Costs and Benefits, and Must Be Cogently**  
5 **Explained; It Cannot Simply Be Declared Regardless of Evidence**

6 In addition to the above, Defendants ignore and fail to satisfy numerous  
7 other fundamental legal requirements for agency rulemaking. For example:

8 1. Though Defendants nod toward the Supreme Court’s *State Farm*  
9 decision, HHS Opp. at 15, they nowhere mention or attempt to address its principle  
10 that agencies act arbitrarily if they offer an explanation “that runs counter to the  
11 evidence before the agency.” *State Farm*, 463 U.S. at 43. As Plaintiffs have  
12 already shown, HHS’s rulemaking explanations conflict over and over again with  
13 the record evidence. NFPRHA Mot. at 18-72.

14 2. Likewise, agency decision-making cannot rest on “sheer speculation.”  
15 *Sorenson Commc’ns Inc. v. FCC*, 755 F.3d 702, 708-09 (D.C. Cir. 2014). Just as  
16 the FCC had not explained its \$75 number in *Sorenson* and thus violated the APA,  
17 it is undisputed here that HHS’s Title X rulemaking had no substantiation for the  
18 implausibly low dollar cost that HHS plucked out of thin air and relied upon for  
19 physical separation, despite the ready availability of cost information in the record  
20 and elsewhere. NFPRHA Mot. at 43-47. HHS’s further, implausible speculation  
21 that Title X providers might have spare facilities available, *see* HHS Opp. at 27-28,  
22 does nothing to ground HHS’s cost assessment in evidence, as required. *See Ctr.*  
23 *for Biological Diversity v. Zinke*, 900 F.3d 1053, 1067-68 (9th Cir. 2018).

1           3. Nor can an agency employ unbalanced decision-making, accepting and  
2 exaggerating hypotheses it favors, while rejecting countervailing evidence; in other  
3 words, the agency cannot put a thumb on the scale in assessing advantages and  
4 disadvantages. *See, e.g., Azar II*, 2019 WL at \*12 (finding that HHS’s internally  
5 inconsistent treatment of anecdotal evidence regarding impacts on religious  
6 believers versus impacts on other groups rendered its rulemaking arbitrary and  
7 capricious). Yet HHS throughout the Title X rulemaking put a thumb on the scale:  
8 It prioritized and was especially solicitous of protecting unidentified, *hypothetical*  
9 *future providers* with conscience objections, for example, but ascribed zero cost to  
10 the Rule’s harms on existing *Title X patients*, through the Rule’s forced rejection of  
11 patient needs and requests, contradiction of patient beliefs, ending or moving of  
12 patients’ Title X access points, severing their trusted patient-clinician relationships,  
13 diminishing patients’ contraceptive choices, etc. NFPRHA Mot. at 18-72.

14           Defendants’ brief has no answer on any of the above three legal standards.  
15 HHS’s failure to satisfy even one is alone sufficient to establish that its rulemaking  
16 was arbitrary and capricious. Here, the agency has ignored and violated all of  
17 them, as set forth more extensively in Plaintiffs’ initial motion papers.<sup>3</sup>

18  
19  
20 <sup>3</sup> Defendants also err as a matter of law in claiming that NFPRHA’s members are  
21 “in no position to object” to what the Rule allows others to do. HHS Opp. at 32  
22 n.10. In the context of a competitive grant program, current and future  
23 competitors—including hundreds of NFPRHA’s members here—have standing to  
complain when the agency changes the program’s terms, seeks to increase

1           4. In addition, Defendants’ brief fails to address *National Lifeline Assoc. v.*  
2 *FCC*, 921 F.3d 1102 (D.C. Cir. 2019), and its explanation of why, within a federal  
3 social service program dependent on non-federal providers for its success,  
4 providers’ business models, willingness to participate under the proffered federal  
5 terms, and reliance are “important aspect[s] of the problem” necessary for an  
6 agency to rationally consider. 921 F.3d at 1111-15 (quoting *State Farm*, 463 U.S.  
7 at 43). Plaintiffs cited the *National Lifeline* case multiple times in their motion, yet  
8 Defendants persist in dismissing Title X providers’ and other knowledgeable  
9 commenters’ real-world concerns about providers’ inability to continue in the  
10 program under the Rule as “threats” and as unprecedented considerations. HHS  
11 Opp. at 20. *National Lifeline* underscores they are not. Rather, the exhaustive  
12 documentation of (a) the pressures that would drive existing providers away from  
13 Title X—including conflicts with professional standards (as articulated, for  
14 example, by the QFP and by relevant medical associations), and the Rule’s high  
15 financial and reputational costs—and (b) specific providers poised to leave the  
16 Title X network constituted important record evidence that the agency had an  
17 obligation to address in a reasoned rather than a dismissive way, *cf.* HHS Opp. at  
18 20. It is not enough, as HHS did here, to rely on speculative new “incentives”  
19 when the record evidence contradicted the agency’s professed hope for sufficient  
20

21 competition by others, and “tilts the playing field for parties that were already  
22 competing.” *Planned Parenthood of Greater Wash. and Idaho v. HHS*, No. 18-  
23 35920, 2020 WL 111800 at \*5 (9th Cir. Jan. 10, 2020).

1 future providers and nationwide client service. *National Lifeline*, 921 F.3d at 111-  
2 15; *see also* NFPRHA Mot. at 15-50.

3 \* \* \*

4 In sum, the legal standards that govern agency rulemaking did not give HHS  
5 *carte blanche* to declare what Defendants now call “predictive judgments,” HHS  
6 Opp. at 2, 23, 28, no matter how far those departed from the agency’s own prior  
7 findings of fact, the current administrative record, an evenhanded assessment of  
8 costs and benefits, and the realities of accomplishing Title X’s overall health care  
9 purpose. *See also* NFPRHA Mot. at 1-72. Contrary to Defendants’ misstatements  
10 about Plaintiffs’ claims to enforce these legal standards, Plaintiffs do not attempt to  
11 take the place of the agency, or to convince the Court to do so, or to engage in  
12 abstract policy arguments. HHS Opp. at 2, 15, 18. Plaintiffs, as their claims make  
13 plain, instead seek to enforce the essential process requirements of valid  
14 administrative agency decision-making. These process requirements are critical  
15 APA safeguards, including for patients, clinicians, and the public health, that  
16 constrain HHS’s rulemaking but were repeatedly violated here.

17 **C. Agency Decision-Making Is Evaluated as of the Time and on the Record**  
18 **Upon Which It Was Made; Here, the Record Foretold Massive Provider**  
19 **Departures and Severe Disruption, Yet HHS Ignored That Evidence**

20 Remarkably, Defendants’ opposition brief persists in urging a reality today  
21 that the Court can plainly see is not true. Back in its rulemaking, HHS claimed  
22 that the Rule would “lead to an increase in the number of health care providers  
23 who apply and receive funding under the Title X program, thus decreasing” gaps in  
service. 84 FR 7780; HHS Opp. at 21. Defendants now argue counterfactually to

1 this Court that “those predictions have been borne out” by “subsequent events,”  
2 HHS Opp. at 21-22, even though the Rule—as shown by Defendants’ own  
3 published provider directories—has in its first six months *diminished the number*  
4 *of Title X providers by the hundreds* and led to not a single new grantee, but rather  
5 to *statewide gaps* in five states and other new, major holes in the program’s  
6 supposedly nationwide coverage. *See* NFPRHA Mot. at 24-35.

7       Even more importantly—because this rulemaking must be judged as of the  
8 time it occurred—the administrative record before HHS when it adopted the Rule  
9 repeatedly documented that such widespread provider departures *would* occur as  
10 soon as it took effect, yet HHS erroneously disregarded that evidence. *See*  
11 NFPRHA Mot. at 20-26, 41-48. HHS tried to find cover for ignoring that evidence  
12 by asserting that it could not precisely anticipate the exact number of provider  
13 losses. *See* HHS Opp. at 22 (quoting 84 FR 7782). But when a serious negative  
14 impact is clear from the administrative record, an agency cannot ignore that fact  
15 because its exact quantity may be imprecise. NFPRHA Mot. at 48; *Pub. Citizen v.*  
16 *Fed. Motor Carrier Safety Admin.*, 374 F.3d 1209, 1219 (D.C. Cir. 2004)  
17 (uncertain magnitude is “no justification for disregarding the effect”); *Stewart v.*  
18 *Azar*, 366 F. Supp. 3d 125, 138 (D.D.C. 2019) (rejecting HHS action that failed to  
19 provided reasoned response to “undoubtedly substantial” Medicaid coverage  
20 losses); *see also New York v. HHS*, 2019 WL 5781789 at \*51 (“HHS’s meager and  
21 non-committal responses are manifestly inadequate to the problems squarely  
22 before the agency”). In promulgating the Rule, HHS violated this well-established  
23 requirement for reasoned decision-making and completely dismissed the

1 impending serious harms from provider departures and network disruption,  
2 contrary to the record evidence. NFPRHA Mot. at 20-26, 41-48.

3 Now, HHS compounds its errors by claiming that “subsequent events” are  
4 properly part of the Court’s examination of a rulemaking process under the APA.  
5 HHS Opp. at 22 n.6. It is settled law, however, that “agency action must be  
6 examined by scrutinizing the administrative record at the time the agency made its  
7 decision,” and Defendants here claim none of the limited exceptions to that record  
8 rule. *Asarco, Inc. v. EPA*, 616 F.2d 1153, 1159 (9th Cir. 1980); *see also Lands*  
9 *Council v. Powell*, 395 F.3d 1019, 1029 (9th Cir. 2005) (general rule that “courts  
10 reviewing an agency decision are limited to the administrative record”); *State*  
11 *Farm*, 463 U.S. at 51-57 (agency decision-making “must explain the evidence  
12 which is available” then and support its decision-making on the facts found and the  
13 choices made when it acted). Therefore, none of HHS’s “subsequent events” or  
14 counterfactual assertions about the current size, composition, or coverage of the  
15 Title X network can save HHS’s unreasoned decision-making in March 2019.<sup>4</sup>

16 \_\_\_\_\_  
17 <sup>4</sup> As “subsequent events,” HHS focuses on law suits brought by Obria and Vita  
18 Nuova, supposedly evidencing more Title X providers as a result of the Rule.  
19 HHS Opp. at 21. Obria, however, became a grantee under the 2000 regulations  
20 before the Rule took effect, and its limited Title X participation in California is  
21 hugely overshadowed by the much more widespread provider departures there  
22 caused by the Rule. *See* NFPRHA Mot. at 34-35. And as HHS itself emphasized  
23 in Vita Nuova’s law suit, that entity may have no employees, has never applied for



## II. Defendants' Efforts to Distract from the Rulemaking's Arbitrariness Fail

In addition to the legal errors discussed above, HHS's opposition brief consists of other, diversionary tangents that fail to meet Plaintiffs' arguments. Defendants mischaracterize Plaintiffs' arbitrary and capricious arguments, or pull one small part of an argument out of context, to attack various straw men. But Defendants never attempt to show, much less succeed in showing, factual grounding in the record and reasoned, non-conclusory explanations for the Title X rulemaking decisions challenged here. Plaintiffs briefly correct examples of Defendants' misdirection below, and refer the Court back to Plaintiffs' earlier briefing for their full showing of all of the failures in HHS's 2019 rulemaking process, *see* NFPRHA Mot. at 1-72; WA Mot. at 15-34.

*First*, HHS's opposition brief tries to deflect the agency's unexplained rejection of numerous prior HHS *factual findings*, and thus failure to comply with *Encino*, *Fox Television*, and *Kake*, by arguing as if Plaintiffs' claim were that HHS had failed to acknowledge its changes in regulatory text or in *legal* interpretations. *See* HHS Opp. at 16-18, 24. Plaintiffs have been explicit, however, that unaddressed contrary factual findings and reliance are one of the central ways in which HHS's decision-making was unreasoned. NFPRHA Mot. at 11-18, 36-42. Reverting to a discussion of HHS's legal assertions in no way addresses the

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HHS funds, and has not even pled facts "demonstrating that Vita Nuova would be a qualified applicant (or subrecipient) for Title X funds." *Vita Nuova, Inc. v. Azar*, No. 4:19-cv-00532 (N.D. Tex), HHS Motion to Dismiss, ECF No. 17 at 2, 14, 16.

1 contrary factual findings and decades-long reliance associated with the agency’s  
2 prior positions, and just further exposes the arbitrariness of HHS’s 2019 actions.

3       *Second*, this case is not *Rust v. Sullivan*, 500 U.S. 173 (1991). Plaintiffs’  
4 arbitrary and capricious claims are not controlled by *Rust*, nor can HHS justify its  
5 2019 rulemaking by pointing to *Rust*’s characterizations of the Title X program  
6 back in 1988 or 1991. Since *Rust*, Congress has made it clear that pregnancy  
7 counseling *is* a Title X service, and that the program is *not* an exclusively  
8 “preconception” one, *cf.* HHS Opp. at 19. In addition, not only has Congress  
9 annually since 1996 made clear that pregnancy counseling falls within the Title X  
10 program, but HHS itself published guidance, at the same time as its 2000  
11 regulations, to provide additional clarity to grantees on how to handle abortion-  
12 related activities. 65 FR 41281-82. Whereas HHS and *Rust* had relied on  
13 government reports from the 1980s citing a need then for clearer “operational  
14 guidance,” *Rust*, 500 U.S. at 187, HHS’s 2019 rulemaking failed to substantiate  
15 any confusion or even “potential for confusion” today, HHS Opp. at 23. The  
16 agency cannot support today’s rulemaking—with its different pregnancy  
17 counseling scheme, different physical separation factors, new infrastructure  
18 spending constraints and grant-making criteria, and many additional restrictions  
19 not attempted in 1988—by citing decision-making upheld in *Rust* three decades  
20 ago. *See Ctr. for Biological Diversity v. Nat’l Highway Traffic Safety Admin.*, 538  
21 F.3d 1172, 1198 (9th Cir. 2008) (“What was a reasonable balancing ... twenty  
22 years ago may not be a reasonable balancing” in agency rulemaking today.).  
23

1           *Third*, HHS’s passing dismissal of “medical ethics” in the rulemaking in no  
2 way provided a reasoned response to the medical ethical objections and the  
3 massive evidence of imminent provider departures in the 2019 administrative  
4 record. *Cf.* HHS Opp. at 18-20. To begin with, HHS’s rulemaking (like its  
5 litigation argument) does not attempt to counter the record evidence on the  
6 substance of providers’ medical ethical obligations at all. Instead, HHS merely  
7 sidesteps to sources *outside* medical ethics, such as legal protections for conscience  
8 or “the outcome in *Rust*.” HHS Opp. at 18-20; *see also* 84 FR 7748. It is not a  
9 reasoned response to a serious rulemaking concern to change the subject or  
10 respond in *non sequiturs*.

11           In addition, the many comments submitted to HHS from the very authorities  
12 that wrote and interpret the ethical codes for physicians, physician assistants,  
13 nurses, and social workers in this country unanimously contradicted HHS’s bare  
14 conclusion that medical ethical concerns under the Rule were “misplaced,” HHS  
15 Opp. at 18; *see also* 84 FR 7748. HHS’s bald “disagree[ment]” with such  
16 significant record evidence, without engaging with its substance or pointing to any  
17 contrary medical ethical interpretations, was arbitrary and capricious. 84 FR 7748;  
18 *see* NFPRHA Mot. at 20-24; *State Farm*, 463 U.S. at 43.

19           Furthermore, the 2019 record evidence from medical authorities,  
20 government officials, academics, providers, and others demonstrating that the Rule  
21 would drive many organizations and clinicians away from Title X care did not rest  
22 solely on medical ethical conflicts, *cf.* HHS Opp. at 18, 20, though those were  
23 certainly one part of the avalanche of evidence. Commenters also made clear that,

1 e.g., the QFP’s principles, other clinical practice standards from leading authorities  
2 that HHS itself had endorsed, and clinicians’ bedrock aim not to rebuff patient  
3 questions and undermine trust all conflicted with the Rule and would drive large  
4 numbers of providers away and discourage new ones. *See* NFPRHA Mot. at 13-  
5 27, 36-48. Regardless of whether HHS acknowledged or agreed with the ethical  
6 conflicts, the record was abundantly clear that immediate, widespread provider  
7 departures—including all Planned Parenthood sites—would follow if the Rule’s  
8 pregnancy counseling restrictions took effect. *Id.* at 25-26. Yet HHS irrationally  
9 attributed no network disruption or negative impact on patient care to the Rule.

10 *Fourth*, HHS does not get a pass from the APA’s reasoned decision-making  
11 standards by claiming it “weigh[ed] costs and benefits” or acted “sensibly.” HHS  
12 Opp. at 23. As Plaintiffs have already explained at length, any “weighing” is  
13 arbitrary when the agency has put a thumb on the scale and claimed benefits and  
14 costs starkly different than the record evidence supports, as here. HHS’s process  
15 did not at all resemble the FCC’s in *Consumer Electronics Ass’n v. FCC*, 347 F.3d  
16 291 (D.C. Cir. 2003), though HHS tries to find shelter in that case, HHS Opp. at  
17 18, 23. In *Consumer Electronics*, the FCC had specific data (“substantial  
18 evidence”) documenting a problem, and rested its assessment of costs to respond to  
19 that problem on its own long-term data gathering and on specific comments with  
20 dollar values. The court found that the FCC’s analysis had “adequately estimated  
21 the long-term costs.” 347 F.3d at 300-303. In stark contrast here, HHS identified  
22 no evidence of a present problem that needed to be addressed; relied on randomly  
23 chosen dollar numbers (not record evidence) for the financial cost of compliance;

1 did not even consider large categories of obvious costs, including for providers and  
2 patients; failed to consult its own historical records of Title X budgets and  
3 operating costs; ignored its own QFP and its own previous factual findings; and  
4 discounted direct evidence of impending provider departures—all while  
5 hypothesizing various benefits of the Rule that lacked any evidentiary support  
6 (e.g., “more clients being served, gaps in service being closed, and improved client  
7 care,” HHS Opp. at 25). *See* NFPRHA Mot. at 2-54. This is precisely the kind of  
8 faulty “weighing” or “judgment” process that must be set aside under the APA,  
9 because it does not reflect reasoned agency decision-making rooted in record fact.

10 Likewise, simply urging in litigation that a Rule’s arbitrary line-drawing and  
11 internal inconsistencies are “sensible,” *see, e.g.*, HHS Opp. at 23, 35, cannot make  
12 up for the agency’s complete failure to acknowledge and rationally explain  
13 consequential distinctions in the rulemaking. *See Crickton v. Thomas*, 579 F.3d  
14 978, 987 (9th Cir. 2009) (courts may not accept counsel’s “post hoc  
15 rationalizations” for agency action). This rulemaking process was arbitrary and  
16 unreasoned, for example, in deciding to restrict what the Rule calls “nondirective”  
17 pregnancy counseling to only the most highly trained clinicians, Section  
18 59.14(b)(1)(i), while placing no limit on who might advise pregnant patients about  
19 “maintaining the health of the ... unborn child,” Section 59.14(b)(1)(iv). Both  
20 discussions involve counseling “concerning a medical condition (pregnancy),”  
21 HHS Opp. at 23, yet the Rule treats them differently without explanation. HHS’s  
22 definition for those costly, highly trained clinicians (“APPs”) is also arbitrary.  
23 That definition was not included in the proposed rulemaking, conflicted with

1 HHS’s own classification of Title X clinicians’ practice areas in the Family  
2 Planning Annual Reports (“FPARs”), and required a graduate degree, above and  
3 beyond full licensing requirements for clinicians’ scope of practice—with no  
4 justification in the rulemaking for restricting nondirective pregnancy counseling to  
5 such a very limited group. *See* NFPRHA Mot. at 27-29.

6 *Fifth*, Defendants cannot isolate small pieces of Plaintiffs’ larger arguments  
7 or HHS’s approach to try to shift the focus away from the fundamental  
8 irrationalities that thoroughly infected HHS’s rulemaking. HHS, for example,  
9 discusses the possibility of grantee questions to program officers about physical  
10 separation. HHS Opp. at 25-26. But that in no way alters the full picture of a  
11 rulemaking replete with arbitrariness: HHS in 2019 resurrected a “physical  
12 separation” model that it had concluded in 2000 was “unworkable,” of “little  
13 relevance” to Title X, not “likely ever to result in an enforceable compliance  
14 policy” consistent with the cost-effective delivery of family planning services, and  
15 “ambiguous,” with inherent “practical difficulties of line-drawing in this area.”  
16 NFPRHA Mot. at 36-37 (quoting 65 FR 41276-82). HHS did not in 2019 explain  
17 its rejection of those earlier factual findings. Instead, HHS in 2019 added physical  
18 separation factors that it had in 1988 decided to exclude as explicit factors, based  
19 on their excessive cost. NFPRHA Mot. at 41-42 (citing 53 FR 2938-41, 2945).  
20 HHS in 2019 also added unprecedented restrictions on Title X project  
21 infrastructure spending, even as it noted such support had historically been  
22 “essential” for Title X’s effective functioning. NFPRHA Mot. at 37-42. In  
23 promulgating all these new requirements, HHS failed to provide any reasoned

1 estimate of the many costs of compliance for providers and patients (e.g., ignoring  
2 85% of Title X sites' separation costs, though the Rule requires all sites to separate  
3 from abortion-related activities); by contrast, the rulemaking offered irrational  
4 assertions of benefits, unsupported by record evidence. NFPRHA Mot. at 43-54.

5 HHS did offer grantees the possibility of raising questions with program  
6 officers about "ways" or "plan[s]" to comply with physical separation, HHS Opp.  
7 at 25, but did not (a) even try to factor in grantee and provider implementation  
8 costs associated with such back-and-forth efforts; (b) acknowledge the near  
9 impossibility of such an ad hoc, unpredictable process for Title X grantees  
10 typically dealing with many subrecipients and dozens, in some cases hundreds, of  
11 different sites, all differently situated, where Title X care occurs; or (c) try to  
12 explain how any such inquiries could undo the Rule's "unworkable" scheme—they  
13 could not. NFPRHA Mot. at 36-54. As Plaintiffs have demonstrated, HHS acted  
14 contrary to its own previous factual findings and to the administrative record;  
15 offered inadequate, conclusory explanations or none at all; used a "thumb on the  
16 scale" approach to costs and benefits; and failed to consider important aspects of  
17 the problems raised by physical separation and infrastructure limits. *Id.* The  
18 possibility, post-rulemaking, of grantees asking questions does not remedy any,  
19 much less all, of those failures.

20 Similarly, Defendants' opposition brief questions Plaintiffs' use of Section  
21 59.18(c), HHS Opp. at 35 n.11, to illustrate the Rule's new "layers upon layers of  
22 compliance provisions, where no lack of compliance had been shown" (among  
23 Plaintiffs' many, many other examples). NFPRHA Mot. at 68-72. HHS adopted

1 those new layers without rationally considering the record evidence of the  
2 significant burdens they imposed on Title X providers or their counterproductive  
3 siphoning off of funds and attention from Title X’s family planning health care.  
4 *See id.* Section 59.18(c)—contrary to Defendants’ innocuous description, HHS  
5 Opp. at 35 n.11—commands HHS to *keep adding* compliance requirements even  
6 beyond this rulemaking, stating that the “Department shall put additional  
7 protections in place to prevent possible misuse of federal funds,” without cabining  
8 at all how HHS might impose those additional requirements (to address an  
9 unsubstantiated, non-existent problem). HHS offered no support or explanation for  
10 that 59.18(c) provision during its rulemaking process.

11 More broadly, the Rule’s “compliance” mindset attempts to *inter alia*:  
12 require duplicate physical facilities, electronic systems, and staff in the name of  
13 “physical separation;” limit Title X projects’ infrastructure support; restrict  
14 spending and require its categorization as “direct implementation ... expressly  
15 permitted by this regulation” or “direct services,” which are undefined terms and  
16 apparently not coextensive; require the most costly clinicians (APPs) for  
17 nondirective pregnancy counseling; add voluminous new grantee submissions and  
18 justifications (requiring input not just from all subrecipients but also from all  
19 referral “agencies or individuals” *outside* the Title X project) in every quarterly  
20 report and application; impose a sweeping new application eligibility hurdle; add  
21 federal layers of oversight related to state and local laws; and force more  
22 administrative steps before Title X projects can serve minors. NFPRHA Mot. at 2-  
23 72. As Plaintiffs have explained, HHS prioritized Section 1008 and adding more



1 and more compliance steps, while losing sight of the fact that the *whole of Title X*  
2 defines the agency’s mandate. *Id.*; *see also* HHS Opp. at 14 (attempting to refute  
3 the Rule’s conflict with Title X overall, but focusing solely on its “consisten[cy]  
4 with § 1008”). HHS could not rationally add more and more “compliance”  
5 initiatives based on no showing of need when the record made plain that serious  
6 gaps in and harm to Title X family planning would result. NFPRHA Mot. at 2-72;  
7 *Nat’l Fed’n of Fed. Employees v. McDonald*, 128 F. Supp. 3d 159, 172 (D.D.C.  
8 2015) (agency cannot focus on implementing one statutory phrase to “undermin[e]  
9 the purpose of the statute itself”).

10 *Sixth*, properly seeking judicial review is not “Monday-morning  
11 quarterback[ing].” HHS Opp. at 33. It is the important role of litigation like this to  
12 hold HHS to the APA’s well-established standards for agency rulemaking. Those  
13 standards require a process that, *inter alia*, examines and rationally responds to  
14 well-founded, significant objections in the administrative record, rather than  
15 dismissing them with conclusory or unresponsive assertions, and provides a  
16 reasoned justification for agency line-drawing and inconsistencies, including those  
17 internal to a rulemaking. *See, e.g., State Farm*, 463 U.S. at 41-57 (an agency must  
18 “examine the relevant data” and “cogently explain” its choices in light of the  
19 record facts); *District Hosp. Partners v. Burwell*, 786 F.3d 46, 59 (D.C. Cir. 2015)  
20 (“We have often declined to affirm an agency decision if there are unexplained  
21 inconsistencies in the final rule.”). Otherwise, agency notice-and-comment  
22 rulemaking is a capricious charade and a bare exertion of political power. *See*  
23 *Kake*, 795 F.3d at 971 (Christen, J. and Thomas, C.J., concurring) (regardless of

1 change in administrations, “the law requires that the agency provide a reasoned  
2 explanation,” and courts must entertain and impartially adjudicate such rulemaking  
3 challenges). But here, the agency repeatedly failed to respond to serious record  
4 objections and left numerous internal inconsistencies in the Rule unaddressed.

5 For example, HHS removed the agency’s long-standing focus on “medically  
6 approved” contraceptive methods, contrary to the QFP’s principles and to HHS’s  
7 own, effective enforcement of that “medically approved” phrase in the Title X  
8 program for two decades. NFPRHA Mot. at 57-59. The Rule endorses Title X  
9 providers offering only one method of family planning to patients (so long as just  
10 one site in a project that spans an entire state or other large geographic area offers  
11 some other methods), contrary again to HHS’s own 2014 QFP recommendations.  
12 *Id.* And the Rule newly invites into the Title X program providers that have a  
13 religious *objection* to almost all contraceptive methods. *Id.* When confronted with  
14 a chorus of warnings from ACOG, the AMA, the APHA and other leading health  
15 care experts that HHS was harmfully lowering the bar and undermining the care  
16 available to millions of vulnerable patients, *id.*, HHS responded only with  
17 conclusory assertions that never confronted these provisions’ collective negative  
18 impact on access to effective contraceptives—the original motivating purpose  
19 behind Title X.<sup>5</sup> NFPRHA Mot. at 2, 57-59; *see generally* *Washington v. Azar II*,

20  
21 <sup>5</sup> Contrary to Defendants’ argument, Plaintiffs complaint about HHS’s rulemaking  
22 decisions (including its removal of “medically approved”) is not with Congress,  
23 HHS Opp. at 31; it is with HHS’s arbitrary and harmful misuse of the agency’s

1 2019 WL 6219541 at \*12 (it “seems elementary that increasing the number of  
2 medical professionals who would deny care based on religious or moral objections  
3 would not increase access to care; instead, access to care will deteriorate”).

4 Similarly, the record comments and HHS’s own drafting in the rulemaking  
5 made apparent that there were internal inconsistencies with no reasoned basis in:

- 6 • Section 59.5(a)(12) giving the conflicting and confusing commands of  
7 “must” and “should” in the text of that one provision;
- 8 • Section 59.5(a)(12) blocking Title X sites not in “close proximity to”  
9 primary health care providers, even as HHS said it aimed to expand  
10 Title X care via the Rule;
- 11 • HHS’s inconsistent rulemaking statements that Title X would not  
12 subsidize collocated (non-Title X) primary care, but somehow *would*  
subsidize collocated (non-Title X) abortion-related care;<sup>6</sup>

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13 powers. Agencies possess rulemaking powers to fill in details and implement  
14 congressional programs in order to further those programs’ aims. But HHS here  
15 irrationally contradicted its own expert findings about proper clinical practices and  
16 enabling patients’ ready access to modern, effective contraceptives to *undermine*  
17 rather than further the program that Congress created.

18  
19 <sup>6</sup> Defendants add more confusion and inconsistency by now arguing as if  
20 collocated (non-Title X) pregnancy counseling by primary care providers,  
21 including abortion referral upon request, could occur “onsite *at a Title X project*”  
22 yet still somehow be “kept separate” and compliant with physical separation. HHS  
23 Opp. at 30 n.8 (emphasis added).

- 1 • Section 59.7(b) imposing an elaborate, non-objective eligibility  
2 requirement for applicants, contrary to the Title X statute’s eligibility  
3 provisions and to HHS’s general grant-making regulations and  
4 procedures; Defendants wrongly claim that “[n]one” of this  
5 “complexity is new in this Rule,” HHS Opp. at 33;
- 6 • Section 59.7(c) requiring some applicants to compete on their “ability  
7 to procure a broad range of diverse subrecipients,” including  
8 nontraditional providers, while other applicants need not do so;
- 9 • Section 59.2(1) imposing a more exacting obligation on Title X  
10 projects to press adolescents who seek to qualify for free care based  
11 on their own, limited financial resources to involve their families,  
12 while a less exacting standard, *see* Section 59.5(a)(14), applies to  
13 those adolescents who can otherwise pay for care; and
- 14 • Section 59.2(2) giving women who happen to work for employers  
15 with “conscience” objections to contraceptives a unique offset to their  
16 income *not* given to other Title X patients, for purposes of calculating  
17 eligibility for free or reduced-fee Title X services.

18 NFPRHA Mot. at 54-72. HHS arbitrarily proceeded to finalize the Rule without  
19 resolving or justifying *any* of these internal inconsistencies. *Id.*; *see also*  
20 *Lilliputian Systems, Inc. v. Pipeline & Hazardous Materials Safety Admin.*, 741  
21 F.3d 1309, 1313 (D.C. Cir. 2014) (“As a general matter, an agency cannot treat  
22 similarly situated entities differently unless it ‘support[s] th[e] disparate treatment  
23 with a reasoned explanation and substantial evidence in the record.’”) (alteration in  
original) (citation omitted). These irrationalities that HHS decided to leave  
unresolved in the Rule, despite commenters’ confusion and objections, *see*  
NFPRHA Mot. at 54-72, highlight the agency’s single-minded determination to  
push through a rulemaking that on so many levels would constrain and confuse,  
rather than advance, Title X care.

1           *Finally*, the harmful, arbitrary aspects of this Rule are not “minor quibbles”  
2 to the Title X providers and patients subjected to them. HHS Opp. at 29 n.7, 34.  
3 The Rule, for example, forces clinicians to document specific efforts to convince  
4 adolescents to involve their family members in Title X care, including when the  
5 family has threatened the patient with violence or eviction, unless abuse has  
6 already occurred and an abuse complaint has already been filed with state  
7 authorities. NFPRHA Mot. at 66-67. This draconian provision exceeds statutory  
8 requirements, interferes with clinicians’ exercise of their training and experience,  
9 and destroys provider-patient trust in a program where Congress specifically  
10 identified adolescents as one of the targeted recipients of its vital, confidential  
11 services. *Id.* Likewise, administrative and regulatory burdens that commenters  
12 explained would diminish Title X care, diminish all kinds of referral resources for  
13 Title X patients, and divert Title X funds away from the program’s public purpose  
14 are not “quibbles” but central regulatory concerns that HHS failed to address in a  
15 reasoned way. *Id.* at 68-72. None are isolated regulatory failures. Instead,  
16 Plaintiffs have shown an arbitrary rulemaking process at every turn, where  
17 “prejudice is obvious” from HHS’s unreasoned decisions large and small. *See*  
18 *Washington v. Azar II*, 2019 WL 6219541 at \*2.

### 19 **III. The Court Should Vacate the Rule in Full Without Any Delay**

#### 20 **A. Vacatur of the Rule Is the Remedy the APA Requires in This Case**

21           Defendants erroneously call vacatur an “extreme remedy” and in a footnote  
22 dispute its application to this case, but offer no legal argument or other support for  
23 that contention. HHS Opp. at 45 n.12. Vacatur is in fact “the presumptive remedy

1 when a court finds an agency’s decision unlawful under the Administrative  
2 Procedure Act.” *AquAlliance v. U.S. Bureau of Reclamation*, 312 F. Supp. 3d 878,  
3 880 (E.D. Cal. 2018); accord *Klamath-Siskiyou Wildlands Ctr. v. Nat’l Oceanic &*  
4 *Atmospheric Admin. Nat’l Marine Fisheries Serv.*, 109 F. Supp. 3d 1238, 1239  
5 (N.D. Cal. 2015) (“[v]acatur is the standard remedy for unlawful agency decisions”  
6 in the Ninth Circuit); see also *Camp v. Pitts*, 411 U.S. 138, 143 (1973) (“If [the  
7 agency’s action] is not sustainable on the administrative record made, then the  
8 [agency’s] decision must be vacated.”); *W.C. v. Bowen*, 807 F.2d 1502, 1505 (9th  
9 Cir. 1987) (“An agency rule which violates the APA is void.”).

10 This “follows from the text of the APA itself.” *New York v. HHS*, 2019 WL  
11 5781789 at \*68. If this Court finds HHS’s rulemaking “arbitrary, capricious, an  
12 abuse of discretion, or otherwise not in accordance with law,” the Court “shall hold  
13 unlawful *and set aside*” the Rule. 5 U.S.C. § 706(2)(A) (emphasis added). That  
14 proper final judgment in an APA challenge is separate from considerations that  
15 might apply to preliminary injunctions, though Defendants’ footnote tries to merge  
16 the two contexts. HHS Opp. at 45 n.12.<sup>7</sup> Ordinary vacatur is the correct final  
17 remedy here to set aside this improper rulemaking.

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20 <sup>7</sup> Defendants’ footnote does not request remand without vacatur, much less try to  
21 establish the stringent predicates for that rare remedy. See *Wood v. Burwell*, 837  
22 F.3d 969, 976 (9th Cir. 2016) (“remand without vacatur is a remedy used sparingly  
23 in this circuit”).

## B. Trying to Limit a Remedy to Plaintiffs or to Salvage Bits Is Improper

HHS's suggestion, in passing, that vacatur of its rulemaking should "extend only to the Plaintiffs" has no basis in law. HHS Opp. at 45 n.12. Courts have repeatedly "foreclosed this audacious argument." *New York v. HHS*, 2019 WL 5781789 at \*71. When an agency has violated the APA, the harm does not lie merely with the plaintiff; instead, the plaintiff has shown that "the agency has breached the plaintiff's (and the public's) entitlement to non-arbitrary decision making." *See Make the Rd. N.Y. v. McAleenan*, 405 F. Supp. 3d 1, 72 (D.D.C. 2019). "Consequently, to provide the relief that any APA plaintiff is entitled to receive for establishing that an agency's rule is procedurally invalid, the rule must be invalidated" for all. *Id.*

Similarly, Defendants argue that the Court should limit vacatur to "specific provisions of the Rule," despite the arbitrariness that infects HHS's entire undertaking here and without attempting to identify any isolated provisions that HHS contends could remain. HHS Opp. at 45 n.12. Plaintiffs show arbitrariness in this rulemaking as a whole. NFPRHA Mot. at 10-11, 68-72. Moreover, as in the refusal regulations case, the APA violations here are so "numerous, fundamental, and far-reaching" as to expose the lack of APA integrity in this "rulemaking venture itself." *New York v. HHS*, 2019 WL 5781789 at \*69.

Any attempt to "leave standing isolated shards of the Rule that have not been found specifically infirm would ignore the big picture: that the rulemaking exercise here was sufficiently shot through with glaring legal defects as to not justify a search for survivors." *Id.* Such an endeavor would inevitably "undercut the whole

1 structure of” this highly interconnected, multi-part Rule. *See Flores v. Barr*, 407  
2 F. Supp. 3d 909, 931 (C.D. Cal. 2019) (refusing to require those governed by  
3 remnants to “to parse through pieces of regulations disembodied from their  
4 animating purpose”); *see also Humane Soc’y of United States v. Zinke*, 865 F.3d  
5 585, 614 (D.C. Cir. 2017) (when there are “major shortcomings that go to the heart  
6 of the” agency’s actions and those deficiencies played a “serious and pervading  
7 role... in the agency’s decisionmaking,” vacatur of the entire rule is appropriate).

### 8 **C. The Court Has Already Rejected the Request to Stay Proceedings**

9 HHS also tries to avoid vacatur of the Rule by again urging the Court to stay  
10 the district court proceedings while the Ninth Circuit considers preliminary  
11 injunction-related issues. HHS Opp. at 42-44. Defendants have made this request  
12 twice before, and each time the Court has determined that the district court  
13 litigation should continue to move forward. *See* ECF No. 86 (June 14, 2019, order  
14 denying motion to stay proceedings); ECF No. 124 (minutes of November 13,  
15 2019, status conference that maintained summary judgment schedule and noted  
16 that the schedule was determined, *inter alia*, with an eye toward the Rule’s March  
17 4, 2020, implementation date for physical separation).

18 Denial of Defendants’ renewed stay request is even more critical now, on the  
19 eve of the March 4, 2020, deadline. Were physical separation to take effect, its  
20 high costs and strong pressures to either exit the Title X network or unduly limit  
21 existing, effective health care practices would injure NFPRHA members across the  
22 country—along with other Title X grantees, subrecipients, their provider sites, and  
23 their patients. *See* NFPRHA Mot. at 36-50 (including citations to administrative



1 record evidence on the harmful impact of physical separation).<sup>8</sup> A “stay is not a  
2 matter of right” and represents “an intrusion into the ordinary processes of  
3 administration and judicial review.” *Sierra Club v. Trump*, 929 F.3d 670, 687 (9th  
4 Cir. 2019) (internal quotation omitted). The party requesting a stay bears the  
5 burden of convincing the court that circumstances demand it, which is a  
6 particularly high burden when, as here, the opposing party will be harmed. *See*  
7 *Lockyer v. Mirant Corp.*, 398 F.3d 1098, 1112 (9th Cir. 2005) (under such  
8 circumstances, the stay movant must show, among other things, its own “clear case  
9 of inequity or hardship”) (citation omitted). But Defendants here do not offer *any*  
10 alleged harm to HHS from this Court proceeding in the ordinary course to resolve  
11 the cross-motions for summary judgment without delay. *See id.* (“being required  
12 to defend a suit” does not cause the necessary “clear case of inequity or hardship”).  
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<sup>8</sup> Defendants’ description of the parallel California district court actions, HHS Opp.  
at 44, is now outdated; the plaintiffs there are also moving forward with a recently-  
ordered summary judgment briefing schedule to try to avoid the additional harms  
that March 4, 2020, will bring. *See Essential Access Health v. Azar*, No. 3:19-cv-  
1195, ECF No. 130 & 131 (January 15, 2020, scheduling order). The district court  
in Baltimore has also recently held a hearing on the motion for summary judgment  
against the Rule there, focusing on the Baltimore plaintiffs’ arbitrary and  
capricious rulemaking claims. *See Mayor and City Council of Baltimore v. Azar*,  
No. 19-cv-1103 (D. Md.), ECF No. 91 (hearing held January 27, 2020).

1           Importantly, a preliminary injunction appeal affects “the rights of the  
2 parties only until the district court renders judgment on the merits of the case, at  
3 which time the losing party may again appeal.” *Melendres v. Arpaio*, 695 F.3d  
4 990, 1003 (9th Cir. 2012) (quoting *Sports Form, Inc. v. United Press Int’l, Inc.*,  
5 686 F.2d 750, 753 (9th Cir. 1982)). This case is ready for final merits adjudication  
6 in this Court and there should be no delay in that occurring. While Defendants  
7 suggest that the Ninth Circuit might provide “guidance” by addressing the appeal  
8 now before it, HHS Opp. at 44, that appeal is by its very nature preliminary and  
9 cannot obviate the need for this Court to render a substantive, merits ruling.  
10 Indeed, the administrative record was produced after this Court granted the  
11 preliminary injunction and is not part of the pending preliminary injunction appeal.  
12 Thus, the Court will be evaluating whether HHS’s rulemaking is properly  
13 grounded in the record facts and justified by reasoned explanation from those facts  
14 in the first instance. The Court needs no guidance from the Ninth Circuit to  
15 recognize—as Plaintiffs have thoroughly shown on these motions—that HHS  
16 repeatedly acted arbitrarily, without reasoned basis, and contrary to the record  
17 evidence in adopting the Rule. Accordingly, the Rule should promptly be vacated.

#### 18           **D. Defendants Have Offered No Basis to Stay Judgment for Plaintiffs**

19           Finally, Defendants’ suggestions for delay also include the bare request that  
20 if the Court grants summary judgment to Plaintiffs, it should “stay the effect of its  
21 order pending appeal to avoid the need for Defendants to consider seeking  
22 emergency appellate relief.” HHS Opp. at 44. Defendants fail to explain any need  
23 for “emergency appellate relief.” Vacating the Rule would simply reinstate the

1 prior, long-standing Title X regulations under which HHS selected all current Title  
2 X grantees and those grantees agreed to operate. And, as discussed above, a stay is  
3 not a matter of right. Defendants bear the burden of showing that a stay pending  
4 appeal is justified, considering the parties' likelihood of success, the balance of  
5 equities, and the public interest. *Washington v. Trump*, 847 F.3d 1151, 1164 (9th  
6 Cir. 2017) (quoting *Nken v. Holder*, 556 U.S. 418, 433 (2009)). If this Court  
7 grants Plaintiffs summary judgment, however, it will have determined that  
8 *Plaintiffs* succeed on the merits and that HHS has violated its duties to the public in  
9 promulgating this Rule, harming Plaintiffs and others—not Defendants.  
10 Defendants' unsupported anticipatory request for a stay pending appeal should be  
11 denied.

## 12 CONCLUSION

13 For all the reasons set forth here and in Plaintiffs' initial motion papers, the  
14 Court should grant summary judgment to Plaintiffs, deny summary judgment to  
15 Defendants, and immediately vacate the Rule in its entirety.

16  
17 DATED: February 3, 2020

By: /s/ John Midgley

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**DECLARATION OF SERVICE**

I hereby declare that on this day I caused the foregoing document to be electronically filed with the Clerk of the Court using the court’s CM/ECF system, which will serve a copy of this document upon all counsel of record.

Dated: February 3, 2020

/s/ Ruth E. Harlow  
Counsel for NFPRHA Plaintiffs