No. 19-35386

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

STATE OF OREGON 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.

AMERICAN MEDICAL 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 District of Oregon, Nos. 19-cv-317, 19-cv-318 (McShane, J.)

EMERGENCY MOTION TO THE EN BANC COURT OF PLAINTIFFS-APPELLEES AMERICAN MEDICAL ASSOCIATION ET AL. FOR A TEMPORARY ADMINISTRATIVE STAY PENDING RESOLUTION OF THE FORTHCOMING EMERGENCY MOTION FOR RECONSIDERATION EN BANC OF THE MOTIONS PANEL'S JUNE 20, 2019 ORDER STAYING THE PRELIMINARY INJUNCTION PENDING APPEAL

PAUL R.Q. WOLFSON
KIMBERLY A. PARKER
ALBINAS J. PRIZGINTAS
JOSHUA M. KOPPEL
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Avenue NW
Washington, DC 20006
(202) 663-6000

ALAN E. SCHOENFELD
WILMER CUTLER PICKERING
HALE AND DORR LLP
7 World Trade Center
250 Greenwich Street
New York, NY 10007
(212) 230-8800
alan.schoenfeld@wilmerhale.com

ADDITIONAL COUNSEL AND REPRESENTATION INFORMATION ON SIGNATURE PAGE

June 20, 2019

CIRCUIT RULE 27-3 CERTIFICATE

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

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

Alan E. Schoenfeld (Alan.Schoenfeld@wilmerhale.com)
WILMER CUTLER PICKERING HALE AND DORR LLP
7 World Trade Center
250 Greenwich Street
New York, NY 10007
(212) 230-8800

Paul R.Q. Wolfson (Paul.Wolfson@wilmerhale.com)
Kimberly A. Parker (Kimberly.Parker@wilmerhale.com)
Albinas J. Prizgintas (Albinas.Prizgintas@wilmerhale.com)
Joshua M. Koppel (Joshua.Koppel@wilmerhale.com)
WILMER CUTLER PICKERING HALE AND DORR LLP
1875 Pennsylvania Avenue NW
Washington, DC 20006
(202) 663-6000

Jeremy D. Sacks (jeremy.sacks@stoel.com)
Per A. Ramfjord (per.ramfjord@stoel.com)
Kennon Scott (kennon.scott@stoel.com)
STOEL RIVES LLP
760 SW Ninth Avenue, Suite 3000
Portland, OR 97205
(503) 224-3380

Brian D. Vandenberg (brian.vandenberg@ama-assn.org
Leonard A. Nelson (leonard.nelson@ama-assn.org)
Erin G. Sutton (erin.sutton@ama-assn.org)
AMERICAN MEDICAL ASSOCIATION
Office of General Counsel
300 N. Wabash Avenue
Chicago, IL 60611
(312) 464-4600

Mark Bonanno (mark@theoma.org)
OREGON MEDICAL ASSOCIATION
General Counsel
11740 SW 68th Parkway, Suite 100
Portland, OR 97223
(503) 619-8117

Helene T. Krasnoff (helene.krasnoff@ppfa.org)
Carrie Y. Flaxman (carrie.flaxman@ppfa.org)
PLANNED PARENTHOOD FEDERATION OF AMERICA, INC.
1110 Vermont Avenue NW, Suite 300
Washington, DC 20005
(202) 973-4800

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

Robert Charles Merritt, III (Robert.C.Merritt@usdoj.gov)
Katherine Twomey Allen (Katherine.T.Allen@usdoj.gov)
Andrew Marshall Bernie (Andrew.M.Bernie@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 more fully below, an immediate temporary administrative stay of a published per curiam order of the motions panel (Leavy, Callahan, Bea, JJ.) issued today, June 20, granting Defendants' motion for a stay pending appeal of the district court's preliminary injunction is necessary to prevent irreparable harm and allow Plaintiffs to seek en banc review of that order. The motions panel's order allows the Department of Health and Human Services ("HHS") to impose

drastic changes on an extremely successful, nearly 50-year-old program that has operated under basically one set of rules since inception through a new regulation that is contrary to federal law, is arbitrary and capricious, and requires health care professionals to violate principles of medical ethics. If the Rule is enforced, it will decimate the program, causing irreparable harm to Plaintiffs, their members and affiliates, their patients, and the public health.

(iii) Notification of parties:

Counsel for Defendants were notified of this emergency motion on June 20, 2019, by telephone call, and they subsequently informed counsel for Plaintiffs that Defendants oppose Plaintiffs' emergency motion.

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

(iv) The relief sought in this motion is not available in the district court. All grounds advanced in support of this motion were submitted to the district court in Plaintiffs' Motion for Preliminary Injunction, which the district court granted.

/s/ Alan E. Schoenfeld
ALAN E. SCHOENFELD

INTRODUCTION

The motions panel's stay order—which will allow an HHS Rule that makes sweeping and devastating changes to the Title X program to take effect—should be administratively stayed immediately. A stay is necessary to preserve the longstanding status quo and to allow Plaintiffs to seek emergency en banc consideration of that order. Without a stay, Plaintiffs will immediately suffer irreparable harm—among other things, their expulsion from a vital public health program under which they have provided services for nearly *half a century*. Plaintiffs' patients will suffer severe consequences as well. The availability of Title X services is certain to contract dramatically if Plaintiffs—who now serve an estimated 40% of all individuals under the program—are forced out. Moreover, *any* physician who might choose to provide care under Title X would run a substantial likelihood of being forced to violate prevailing ethical standards in doing so. Under these extraordinary circumstances, a temporary stay is warranted.

Congress established the Title X program in 1970 to ensure that all people, especially individuals with low incomes, have access to comprehensive family-planning care. As the district court recognized, "[t]he current regulations have been in place for nearly 50 years and have an excellent track record." Add.B31. But HHS's Rule would warp and decimate the program. Indeed, the district court below—and three other district courts—found that the Rule, by forcing a vast

swath of providers out of the program, would cause irreparable harm to patients, providers, and public health. Among other grave consequences, the Rule would "result in … less early breast cancer detection, less screening for cervical cancer, less HIV testing, … less testing for sexually transmitted disease," "more unintended pregnancies," and "more women suffering adverse reproductive health symptoms." Add.B3; Add.B29. In contrast, the district court found that HHS would suffer "no harm" from preserving the longstanding status quo pending final judgment. Add.B4. The court further held that the Rule likely violates two federal laws and is likely arbitrary and capricious in numerous respects.

Despite this compelling record, on June 20, a motions panel of this Court (Leavy, Callahan, and Bea, JJ.) granted HHS's motion for a stay of the injunction pending appeal. Add.A1-A25. It did so on extremely abbreviated stay-briefing and in the middle of briefing the merits appeal—specifically, *after* the government filed its opening merits brief but *before* Plaintiffs filed theirs (due in a week). Absent a stay, Plaintiffs will have to leave the program altogether, at risk of devastating harm to their patients—many of whom will have no other provider that can offer them the same services. Thus, because Plaintiffs and their patients will be irreparably injured if HHS enforces the Rule, Plaintiffs hereby move for an emergency administrative stay of the motions panel's order pending consideration and decision on the forthcoming motion for reconsideration en banc, which

Plaintiffs intend to file by June 24, 2019, unless otherwise ordered by the Court. Plaintiffs respectfully request that the temporary stay issue today.

BACKGROUND

1. For nearly 50 years, the Title X program has provided free or reduced-cost family-planning services to low-income Americans. The program supports vital reproductive health care services, including contraception, testing and referral for sexually transmitted infections ("STIs"), breast and cervical cancer screening, and pregnancy testing and counseling, including referrals. Under regulations that have been largely unchanged since the statute's enactment, the Title X program has been one of the most successful public health programs in our nation's history, significantly reducing the rates of unintended pregnancy and abortion, and yielding vast benefits for sexual and reproductive health.

The federal government has now received the green light—on extremely abbreviated and expedited briefing—to impose a radical change of course. On March 4, 2019, under the guise of "program integrity," HHS issued a Rule that would harm patients and providers, politicize the practice of medicine and the delivery of health care, and compel medical professionals to violate fundamental tenets of their professional ethics by withholding relevant information from patients needing to make a decision about their health care.

In particular, the Rule's "Gag Requirement" would compel health care providers in the Title X program, when offering pregnancy counseling, to *direct* pregnant women *away from* abortion and *toward* continuing a pregnancy to term—regardless of what a patient actually wants or needs, and even if the patient states that she wants information about abortion. 84 Fed. Reg. 7,714 7,788-7,789 (Mar. 4, 2019) (42 C.F.R. §§ 59.5(a)(5), 59.14). And the Rule's "Separation Requirement" mandates separate facilities, personnel, workstations, and medical records for any Title X grantee that engages in certain "prohibited activities"—virtually anything having to do with abortion. *Id.* at 7,789 (42 C.F.R. § 59.15). Thus, a Title X project must completely separate itself not only from anyone who *provides* abortions with non-Title X funds, but also anyone who makes *referrals* for abortions or does anything HHS might think "encourage[s], promote[s], or advocate[s]" for abortion. *Id.* at 7,788, 7,789.

2. Immediately after the Rule was issued, Plaintiffs filed suit and then promptly moved for a preliminary injunction. The district court—as well as three other district courts—granted a preliminary injunction to preserve the status quo. Add.B1-32; *Washington v. Azar*, 2019 WL 1868362 (E.D. Wash. Apr. 25, 2019); *California v. Azar*, 2019 WL 1877392 (N.D. Cal. Apr. 26, 2019); *Mayor & City Council of Baltimore v. Azar*, 2019 WL 2298808 (D. Md. May 30, 2019).

The district court found it likely that the Rule violates two laws—an appropriations law requiring that "all pregnancy counseling" provided with Title X funds "shall be nondirective," Pub. L. No. 115-245, 132 Stat. 2981, 3070-3071 (2018) ("Nondirective Mandate"), and a provision of the Affordable Care Act prohibiting HHS from promulgating "any regulation" that, among other things, "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. Add.B15-24.

The district court further found it likely that Plaintiffs would prevail in demonstrating that the Rule is arbitrary and capricious because HHS failed adequately to consider several relevant factors, including the public-health impact of forcing existing Title X providers out of the program and the ethical obligations of health care professionals. Add.B24-29.

The district court also found that Plaintiffs would suffer irreparable harm if the Rule went into effect, that the government would suffer no harm from an injunction, and that the public interest tips sharply in favor of an injunction because the Rule could irreparably harm public health. Add.B4; B29-31.

3. HHS appealed the district court's order granting a preliminary injunction. HHS also moved to stay the injunction pending appeal (Dkt. 15),

which was fully briefed on May 24. In the meantime, on May 31, HHS filed its opening merits brief and Plaintiffs' answering brief is due in a week, on June 28.

Today, however, the motions panel granted a stay pending appeal by a published per curiam order. Contrary to the district court's findings, the panel concluded that HHS would suffer irreparable harm from an injunction that merely preserves the longstanding status quo, whereas "[t]he harms that Plaintiffs would likely suffer"—harms the district court found were extensive, grave, and unrebutted—were "comparatively minor." Add.A24.

The panel did not address Plaintiffs' request for a temporary administrative stay so that Plaintiffs could seek en banc review of the motions panel's decision.

Absent a further stay, if the Rule is enforced, Plaintiffs will imminently be forced to leave the Title X program.

ARGUMENT

1. An immediate administrative stay of the motions panel's order is necessary because enforcement of the Rule, even for a short time, will irreparably harm Plaintiffs, their patients, and the public health. Above all, the Rule, if enforced, will imminently force large numbers of Title X providers out of the program and will leave many of their patients without access to Title X services.

The Gag Requirement's prohibition on providing full information about abortion—including referrals—to women who need and want that information

violates the American Medical Association's Code of Ethics, as well as the ethical standards of numerous other organizations of medical professionals, *see, e.g.*, AMA, Code of Medical Ethics §§ 2.1.1(b), 2.1.3 (2016); Add.B24-26, and is contrary to Planned Parenthood's core mission of providing high-quality, honest care to its patients. Accordingly, if the Gag Requirement is in effect, many providers, including all Planned Parenthood affiliates, will be forced to leave the program rather than comply with those unethical requirements. *See, e.g.*, Add.B28. Once that exodus has taken effect, it is highly uncertain whether those providers could later resume participation, even if the district court's injunction is subsequently restored.

The effect on Plaintiffs' patients will be dire. Planned Parenthood alone provides care to an estimated 40% of *all* Title X patients—approximately 1.5 million people nationwide. *See, e.g.*, Add.B28. In many areas where Planned Parenthood provides services, there are no other safety-net providers of reproductive health care, or none that can absorb all of the patients that Planned Parenthood currently serves. *See, e.g.*, *id.* Without access to subsidized care under Title X, patients are likely to ration care they cannot afford or go without. And, again, all physicians who render Title X services will be forced to consider whether they are willing to provide those services in an unethical manner.

Moreover, if Planned Parenthood is forced from the program, it is not only Title X patients who will suffer. Without Title X funds, Planned Parenthood affiliates will have to close health centers or reduce services and lay off clinicians and staff. Other patients who rely on Planned Parenthood—including those on Medicaid or private insurance—will have no other place to receive those services, or will face long delays in doing so. It is no speculation to conclude—as the district court did, and as three other district courts did—that devastating harms to public health will follow. For example, one expert commenter (and a declarant here) explained that, when Planned Parenthood was forced to close a clinic in rural Indiana due to cuts to public-health funding, there was a huge spike in the spread of HIV in the area. Thus, as the district court found, the Rule "will increase not only unintended (and riskier) pregnancies, but abortions as well," and will "result in less testing, increased STIs, and more women suffering adverse reproductive health symptoms." Add.B29 (citations omitted). Such harms to Plaintiffs' patients are irreparable and warrant the emergency relief sought. *See Rodde v. Bonta*, 357 F.3d 988, 999 (9th Cir. 2004).

Conversely, the government has suffered no harm from the preliminary injunctions—nor could it from an administrative stay of the motions panel's order staying those injunctions. Before the motions panel, HHS cited only the generic harms of being unable to enforce a regulation and administrative uncertainty

inherent in any preliminary injunction. *See* Dkt. 15 at 16-17. The motions panel's decision simply echoes these generic harms—"allow[ing] taxpayer dollars to be spent in a manner that [HHS] has concluded violates the law," "predictable administrative costs" of delaying implementation, and "significant uncertainty in the Title X program." Add.A24. But the preliminary injunction only preserves the status quo that has been in effect for nearly 50 years. That HHS did not seek emergency consideration of its stay motion confirms that temporarily preserving the district court's preliminary injunction would not cause HHS irreparable injury.

2. A temporary administrative stay is also warranted because the Court is likely to grant reconsideration en banc. This proceeding involves questions of exceptional importance: on the line is the dismantling of the Title X program and the health of the patients who rely on that program—40% of whom rely on Planned Parenthood for care.

En banc review is also necessary to correct manifest errors of law, which Plaintiffs' forthcoming motion for reconsideration en banc will explain in greater detail. As an example, the motions panel held that the Rule does not violate the Nondirective Mandate because the Rule "require[s] that any pregnancy counseling" provided by Title X projects "shall be nondirective." Add.A18. But that conclusion ignores the provisions of the Rule, which prohibit a Title X project from counseling only on abortion even when that is all the patient seeks, and

permits a Title X project to omit any counseling on abortion, thus giving patients the impression that abortion is not a legal or medically appropriate option. *See* 84 Fed. Reg. at 7,747. The Rule further requires directive pregnancy counseling by requiring Title X projects to provide pregnant patients referrals for prenatal care and prohibiting them from providing referrals for abortion—thus steering patients toward a particular course of treatment. *Id.* at 7,788-7,789 (42 C.F.R. §§ 59.5(a)(5), 59.14(a)-(b)). The motions panel reasoned that "counseling" does not include referral. But this ruling is contrary to Congress's expressed understanding of the term "counseling" elsewhere, *see* 42 U.S.C. § 254c-6(a)(1), as well as HHS's own interpretation of that term in the Rule, *see* 84 Fed. Reg. at 7,730 ("[N]ondirective pregnancy counseling can include counseling on adoption, and corresponding referrals to adoption agencies."). It also makes a mockery of the statute by permitting Title X projects to do through referrals exactly what Congress expressed an intent to prohibit: steering patients toward a particular pregnancy option.

The motions panel also misconstrued 42 U.S.C. § 18114, holding that it imposes no restraint on HHS's regulation of government funding programs. But that statute expressly applies to "*any* regulation" issued by HHS, 42 U.S.C. § 18114 (emphasis added), and there can be no doubt that compared to the prior regulations, the Rule imposes unreasonable barriers to care, impedes timely access

to care, and interferes with patient-provider communications. Reconsideration is warranted to correct these and other errors of law.

CONCLUSION

The Court should grant an immediate temporary administrative stay of the motions panel's order—keeping the district court's preliminary injunction in effect—pending consideration of Plaintiffs' motion for en banc reconsideration of that order, which Plaintiffs intend to file by June 24, 2019.

June 20, 2019

Respectfully submitted.

/s/ Alan E. Schoenfeld

JEREMY D. SACKS
PER A. RAMFJORD
KENNON SCOTT
STOEL RIVES LLP
760 SW Ninth Avenue, Suite 3000
Portland, OR 97205
Tel.: (503) 224-3380
Fax: (503) 220-2480
jeremy.sacks@stoel.com
per.ramfjord@stoel.com
kennon.scott@stoel.com
Counsel for All Plaintiffs

BRIAN D. VANDENBERG
LEONARD A. NELSON
ERIN G. SUTTON
AMERICAN MEDICAL ASSOCIATION
Office of General Counsel
300 N. Wabash Avenue
Chicago, IL 60611
brian.vandenberg@ama-assn.org
leonard.nelson@ama-assn.org
erin.sutton@ama-assn.org
Counsel for American Medical Association and Oregon Medical Association

Mark Bonanno
OREGON MEDICAL ASSOCIATION
General Counsel
11740 SW 68th Parkway, Suite 100
Portland, OR 97223
mark@theoma.org
Counsel for American Medical Association and Oregon Medical Association

ALAN E. SCHOENFELD
WILMER CUTLER PICKERING
HALE AND DORR LLP
7 World Trade Center
250 Greenwich Street
New York, NY 10007
Tel.: (212) 230-8800
Fax: (212) 230-8888
alan.schoenfeld@wilmerhale.com
Counsel for Planned Parenthood Federation of America, Inc., Planned Parenthood of Southwestern Oregon, Planned Parenthood Columbia Willamette, Thomas N. Ewing, M.D., and Michele P. Megregian, C.N.M.

PAUL R.Q. WOLFSON
KIMBERLY A. PARKER
ALBINAS J. PRIZGINTAS
JOSHUA M. KOPPEL
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Avenue NW
Washington, DC 20006
Tel.: (202) 663-6000
Fax: (202) 663-6363
paul.wolfson@wilmerhale.com
kimberly.parker@wilmerhale.com
albinas.prizgintas@wilmerhale.com
joshua.koppel@wilmerhale.com
Counsel for Planned Parenthood Federation of America, Inc., Planned Parenthood of Southwestern Oregon, Planned Parenthood Columbia Willamette, Thomas N. Ewing, M.D., and Michele P. Megregian, C.N.M.

Helene T. Krasnoff
Carrie Y. Flaxman
PLANNED PARENTHOOD
FEDERATION OF AMERICA, INC.
1110 Vermont Avenue, NW, Suite 300
Washington, D.C. 20005
Tel.: (202) 973-4800
Fax: (202) 296-3480
helene.krasnoff@ppfa.org
carrie.flaxman@ppfa.org
Counsel for Planned Parenthood Federation of America, Inc., Planned Parenthood of Southwestern Oregon, Planned Parenthood Columbia Willamette, Thomas N. Ewing, M.D., and Michele P. Megregian, C.N.M.

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Ninth Circuit Rules 27-1 and 32-3 because it contains 2,344 words, exclusive of the exempted portions of the brief. The brief has been prepared in proportionally spaced typeface using Microsoft Word 2016 in 14 point Times New Roman font.

/s/ Alan E. Schoenfeld
ALAN E. SCHOENFELD

June 20, 2019

CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of June 20, 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/ Alan E. Schoenfeld
ALAN E. SCHOENFELD

ADDENDUM

TABLE OF CONTENTS

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*,	No. 19-15974 D.C. No. 3:19-cv-01184-EMC
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.*	

ESSENTIAL ACCESS HEALTH, INC.; MELISSA MARSHALL, M.D., *Plaintiffs-Appellees*,	No. 19-15979 D.C. No. 3:19-cv-01195-EMC
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.*	

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*,	No. 19-35394
	D.C. Nos. 1:19-cv-03040-SAB 1:19-cv-03045-SAB
v.	ORDER ON MOTIONS FOR STAY PENDING APPEAL
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.*	

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

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

STATE OF OREGON et al.,

Plaintiffs,

v.

ALEX M. AZAR II et al.

Defendants,

and

AMERICAN MEDICAL ASSOCIATION, et al.,

Plaintiffs,

v.

ALEX M. AZAR II et al.,

Defendants.

6:19-cv-00317-MC (Lead Case)
6:19-cv-00318-MC (Trailing Case)

OPINION AND ORDER

MCSHANE, Judge:

Plaintiffs in these consolidated actions are 20 states, the District of Columbia, the American Medical Association, the Oregon Medical Association, the Planned Parenthood Federation and their local affiliates, and individual medical providers. They seek to enjoin the

United States Department of Health and Human Services, the Office of Population Affairs, and their respective leadership (collectively, the "Defendants" or "HHS") from implementing certain rules (the "Final Rule") that would alter the family planning program established by Title X of the Public Health Service Act, 42 U.S.C. § 300 *et seq*. The Final Rule was issued by HHS on March 4, 2019, and its effective date is May 3, 2019.

At the heart of their claims, Plaintiffs allege that the Final Rule is antithetical to public health and is a fundamental shift in policy away from Title X's emphasis on nondirective and voluntary family planning between low-income patients and their medical providers. Indeed, the rule would, among other things, dramatically limit medical professionals from discussing abortion options with their patients and completely prohibit them from referring patients seeking an abortion to a qualified provider (the "Gag Rule"). It would also require Title X providers to physically and financially divorce health services funded under Title X from abortion services funded from sources other than Title X (the "Separation Requirement").

At best, the Final Rule is a solution in search of a problem. At worst, it is a ham-fisted approach to health policy that recklessly disregards the health outcomes of women, families, and communities. In the guise of "program integrity," the Gag Rule prevents doctors from behaving like informed professionals. It prevents counselors from providing comprehensive counseling. It prevents low-income women from making an informed and independent medical decision. At the heart of this rule is the arrogant assumption that government is better suited to direct the health care of women than their medical providers. At a time in our history where government is assessing how we can improve and lower the costs of medical care to all Americans, the Final Rule would create a class of women who are barred from receiving care consistent with accepted and established professional medical standards. On top of that, the Separation Requirement

would create such a financial strain on Title X providers that, ironically, it would create a geographic vacuum in family planning that experts warn would lead to substantially more unintended pregnancies and, correspondingly, more abortions.

The harms outlined in the record before me, should the Final Rule be implemented, are extensive and are not rebutted by the government. A review of the scores of declarations from public health policy experts, medical organizations, doctors, and Title X providers lead to the inescapable conclusion that the Final Rule will result in negative health outcomes for low income women and communities. It will result in less contraceptive services, more unintended pregnancies, less early breast cancer detection, less screening for cervical cancer, less HIV screening, and less testing for sexually transmitted disease. HHS's response to these negative health outcomes is one of silence and indifference. Rather than providing contradictory data to support any positive health outcomes, they rationalize that the Final Rule "will ensure compliance with, and implementation of, the statutory requirement that none of the funds appropriated for Title X may be used in programs where abortion is a method of family planning." At the same time, despite the nearly fifty-year history of Title X, they cannot point to one instance where Title X funds have been misapplied under past or current rules.

Without revealing what evidence, if any, helped shape its opinions, HHS essentially says, "trust us, this will work out fine." But dramatic changes to the only federal program providing family planning services to millions of clients in marginalized communities requires something more than a mere hunch. The dearth of evidence and lack of transparency in HHS's rulemaking is particularly concerning as HHS earlier concluded that there was "no evidence that [the Gag Rule] can and will work operationally on a national basis in the Title X program." 65 Fed. Reg. at 41,271.

Should the Final Rule go into effect in mere days, the risk of irreparable damage to the health of women and communities is grave. In contrast, keeping the current regulations in place—regulations that "have been used by the program for virtually its entire history," *id.*, and have provided critical medical services for at-risk communities—poses no harm to Defendants.

As discussed below, Plaintiffs are likely to succeed on the merits of their claim that the Final Rule is contrary to law. Additionally, Plaintiffs raise serious questions going to the merits of their claims that the Final Rule is arbitrary and capricious. Plaintiffs have demonstrated the likelihood of "irreparable harm" and that the balance of equities tips sharply in their favor. Plaintiffs' Motions for a Preliminary Injunction are GRANTED.

FACTUAL BACKGROUND

Congress enacted the Title X program, known as the "Population Research and Voluntary Planning Program," in 1970 as part of the Public Health Services Act. Its mission is to provide grants to public and non-profit organizations "to assist in the establishment and operation of voluntary family planning projects which shall offer a broad range of acceptable and effective family planning methods and services (including natural family planning methods, infertility services, and services for adolescents)." 42 U.S.C. § 300(a). Title X targets low income families and individuals and provides family planning services at low or no cost. The stated purpose of Title X is to promote positive birth outcomes and healthy families by allowing individuals to decide the number and the spacing of their children.

Congress authorized HHS to promulgate regulations to effectuate Title X's mission, largely through the award of grants to providers of family planning services to low income individuals. 42 U.S.C. § 300a-4. Title X grants are administered by the Office of the Assistant Secretary for Health through the Office of Population Affairs. The statute and regulations of

Title X require that 90 percent of congressional appropriations be used for clinical family planning purposes. Title X funds a broad array of family planning services: contraceptive services, information, and education; natural family planning and education; infertility services; services to adolescents; HIV and sexually transmitted disease screening and referral; breast and cervical cancer screenings; and pregnancy testing.

By all accounts, for nearly 50 years, the Title X program has been a great success in meeting its stated goals. According to HHS's 2017 Summary, the program served over 4 million family planning clients at 3,858 service sites through 6.6 million family planning encounters. Those served are largely from vulnerable populations who would not otherwise have access to health care. Title X clinics provided over 2 million Chlamydia tests, 2.5 million Gonorrhea tests, 2 million HIV tests, and over 700,000 syphilis tests. Title X providers conducted Pap screening on nearly 650,000 clients and breast exams on 878,492 women. *See* Title X Family Planning Annual Report 2017 Summary, www.hhs.gov/opa/title-x-family-planning/fp-annual-report/fpar-2017 (last visited April 25, 2019). By regularly providing millions of patients with contraceptive services, the Title X program has significantly reduced the rates of unintended pregnancy and abortion. In fact, unintended pregnancies and abortions are now at historic lows, in large part due to Title X. Kost Decl. ¶¶ 7, 35, ECF No. 53; Brindis Decl. ¶ 26, ECF No. 52; Lawrence B. Finer & Mia R. Zolna, *Declines in Unintended Pregnancy in the United States, 2008-2011*, 374 New Eng. J. Med. 843, 850 (2016) (noting unintended pregnancy rate in United States dropped to a 30-year low in 2011).

At issue in this case is the agency's interpretation of the congressional mandate found in the final sentence of Title X known as "Section 1008." 42 U.S.C. § 300a-6. This mandate requires that "None of the funds appropriated under this title shall be used in programs where

abortion is a method of family planning." 42 U.S.C. § 300a-6. Historically, HHS has taken the position that medical professionals may provide neutral and factual information, even concerning abortion, as a part of pregnancy counseling. The agency squared such counseling with Section 1008 because "the provision of neutral and factual information about abortion is not considered to promote or encourage abortion as a method of family planning." 65 Fed. Reg. at 41,271. HHS generally allowed the medical professional's objective professional judgment, aided by the patient's particular needs, to drive pregnancy counseling. Earlier rules also allowed abortion referrals.

The Final Rule deviates sharply from the historical interpretation of Section 1008. HHS used the same justification—that the Final Rule will ensure compliance with Section 1008's requirement that no Title X funds "shall be used in programs where abortion is a method of family planning"—in 1988 when it promulgated similar rules. Those rules, like the Final Rule at issue here, prohibited abortion referrals and required strict financial and physical separation between Title X projects and services prohibited by Title X.

Numerous Title X grantees and doctors impacted by the 1988 rule challenged the regulations alleging, as relevant here, that the Gag Rule and Separation Requirement were not authorized by Title X and thus were arbitrary and capricious. The Supreme Court ultimately upheld the 1988 rules. The Court examined Section 1008's prohibition on using Title X funds "in programs where abortion is a method of family planning." The Court, like every other court to examine the statutory language and legislative history of Section 1008, found the statute ambiguous. "If a statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute. The Secretary's construction of Title X may not be disturbed as an abuse of discretion if it

reflects a plausible construction of the plain language of the statue and does not otherwise conflict with Congress' expressed intent." *Rust, v. Sullivan*, 500 U.S. 173, 184 (1991) (internal quotations and citation omitted). The fact that the 1988 rules represented a "sharp break with prior interpretations" by HHS did not mean the new rules were invalid, because "the agency, to engage in informed rulemaking, must consider varying interpretations and the wisdom of its policy on a continuing basis.'" *Id.* at 185 (quoting *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 862 (1984)). In rejecting Plaintiffs' arguments challenging the Gag Rule, Justice Rehnquist concluded HHS adequately justified the change from prior policy:

> The Secretary explained that the regulations are a result of his determination, in the wake of the critical reports of the General Accounting Office (GAO) and the Office of the Inspector General (OIG), that prior policy failed to implement properly the statute and that it was necessary to provide 'clear and operational guidance' to grantees about how to preserve the distinction between Title X programs and abortion as a method of family planning.' 53 Fed. Reg. 2923-2924 (1988). He also determined that the new regulations are more in keeping with the original intent of the statute, are justified by client experience under the prior policy, and are supported by a shift in attitude against the 'elimination of unborn children by abortion.' We believe that these justifications are sufficient to support the Secretary's revised approach. Having concluded that the plain language and legislative history are ambiguous as to Congress' intent in enacting Title X, we must defer to the Secretary's permissible construction of the statute.

Id. at 173.

As for the Separation Requirement, the Court found that "the program integrity requirements are based on a permissible construction of the statute and are not inconsistent with congressional intent." *Id.* at 188. Once again, the Secretary adequately justified his reasoning:

> Indeed, if one thing is clear from the legislative history, it is that Congress intended that Title X funds be kept separate and distinct from abortion-related activities. It is undisputed that Title X was intended to provide primarily prepregnancy preventative services. Certainly the Secretary's interpretation of the statute that separate facilities are necessary, especially in light of the express prohibition of § 1008, cannot be judged unreasonable. Accordingly, we defer to

> the Secretary's reasoned determination that the program integrity requirements are necessary to implement the prohibition.

Id. at 190.

Although the Court allowed the 1988 rules to stand, HHS never implemented those regulations on a national scale. 65 Fed. Reg. at 41,271. And, in 1993, HHS suspended the 1988 regulations, finding them to be "an inappropriate implementation of the Title X statute." 58 Fed. Reg. at 7464.

In 1996 (five years after the Supreme Court's decision in *Rust*), Congress clarified that its prohibition on Title X abortion funding did not prohibit the nondirective counseling of pregnant women. To the contrary, Congress mandated that "all pregnancy counseling shall be nondirective" with respect to Title X. Omnibus Consolidated Rescissions and Appropriations Act, 1996, Pub. L. No. 104-134, Title II, 110 Stat. 1321 (1996). This congressional mandate has appeared in every subsequent Title X appropriations statute from 1996 until present. *See* Department of Defense and Labor, Health and Human Services, and Education Appropriations Act, 2019 and Continuing Appropriations Act, 2019, Pub. Law. No 115-245, Title II, 132 Stat. 2981, 3070-71 (September 28, 2018).

In 2000, HHS issued new Title X rules that remain in effect to this day. The 2000 regulations officially revoked the 1988 rules that were validated by the *Rust* court but never implemented by HHS. The agency concluded that the Gag Rule from the 1988 rules "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." 65 Fed. Reg. at 41,270. The 2000 rules required the provider to offer the pregnant woman the

opportunity to be "provided information and counseling regarding each of the following options: (A) Prenatal care and delivery; (B) Infant care, foster care, or adoption; and (C) Pregnancy termination. 65 Fed. Reg. at 41,279. Regarding nondirective counseling, the 2000 rules provided:

> If requested to provide such information and counseling, provide neutral, factual information and nondirective counseling on each of the options, and referral upon request, except with respect to any option(s) about which the pregnant woman indicates she does not wish to receive such information and counseling.

Id.

Nondirective counseling meant the grantee "may not steer or direct clients toward selecting any option, including abortion[.]" *Id.* at 41,273. Referrals for abortion were once again allowed, provided the client requested such a referral. *Id.* at 41,274. Finally, HHS determined that financial separation, rather than financial and physical separation, was sufficient to abide by Section 1008.

Ten years after HHS implemented the 2000 regulations still in place today, Congress spoke again on the matter. In passing the Affordable Care Act in 2010, Congress once again limited the rulemaking authority of HHS. There, Congress expressly prohibited HHS from promulgating 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.

Given the above context, I turn to the Final Rule at issue here. HHS published the Final Rule in the Federal Register on June 1, 2018. During the 60-day public comment period, HHS

received more than 500,000 comments. Certain revisions were made to the proposed rule and HHS published the Final Rule in the Federal Register on March 4, 2019.[1] The rule has an implementation date of May 3, 2019.

As expressed by HHS in its executive summary, the purpose of the Final Rule, as it relates to Section 1008, is "to ensure compliance with, and enhance implementation of, the statutory requirement that none of the funds appropriated for Title X may be used in programs where abortion is a method of family planning." 84 Fed. Reg. at 7717. For purposes of this litigation, Plaintiffs' claims center on two aspects of the final rule that they refer respectively to as: (1) The Gag Rule; and (2) The Separation Requirement.

Turning first to the Gag Rule, the Final Rule provides that a "Title X project may not perform, promote, refer for, or support abortion as a method of family planning, nor take any other affirmative action to assist a patient to secure such an abortion." 84 Fed. Reg. at 7788-89 (to be codified at 42 C.F.R. § 59.14). Without doubt, the Final Rule limits the provider's options when presented with a pregnant woman.

First, once a patient is identified as pregnant, "she shall be referred to a health care provider for medically necessary prenatal health care." 84 Fed. Reg. at 7789 (to be codified at 42 C.F.R. § 59.14). This referral for prenatal health care is mandatory. Next, the provider may, but is not required to, "provide the following counseling and/or information to her:"

(i) Nondirective pregnancy counseling, when provided by physicians or advanced practice providers;
(ii) A list of licensed, qualified, comprehensive primary health care providers (including providers of prenatal care);
(iii) Referral to social services or adoption agencies; and/or

[1] Plaintiffs filed their complaints the following day, on March 5, 2019. Due to the closely-approaching implementation date, the court set an expedited briefing schedule and, just days ago, heard oral arguments.

(iv) Information about maintaining the health of the mother and unborn child during pregnancy.

Id.

If the provider chooses to provide a list of comprehensive health care providers, the list "may be limited to those that do not provide abortion, or may include licensed, qualified, comprehensive primary health care providers (including providers of prenatal care), some, but not the majority, of which also provide abortion as part of their comprehensive health care services. Neither the list nor project staff may identify which providers on the list perform abortions." *Id.*

Plaintiffs also challenge the Final Rule's Separation Requirement. The Separation Requirement provides that any "Title X project must be organized so that it is physically and financially separate . . . from activities which are prohibited [in the Final Rule]." 84 Fed. Reg. at 7789 (to be codified at 42 C.F.R. § 59.15). According to HHS, complete physical and financial separation between a Title X program and any activities falling outside of Title X is necessary to: (1) comply with Section 1008; (2) eliminate the "significant risk for public confusion" over whether Title X funds are allocated for abortion-related purposes; and (3) "address the concern that Title X resources could facilitate the development of, and ongoing use of, infrastructure for non-Title X activities." 84 Fed. Reg. at 7715.

Plaintiffs ask the court to issue a nationwide preliminary injunction restraining HHS from implementing the Final Rule. Absent an injunction, the Final Rule goes into effect in four days, on May 3, 2019.

STANDARDS

A plaintiff seeking a preliminary injunction must establish: (1) likelihood of success on the merits; (2) irreparable harm in the absence of preliminary relief; (3) the balance of equities tips in his favor; and (4) an injunction is in the public interest. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). When, as here, the government is a party, the last two factors merge. *Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1092 (9th Cir. 2014). When there are "serious questions going to the merits," a court may still issue a preliminary injunction when "the balance of hardships tips sharply in the plaintiff's favor," and the other two factors are met. *All. for the Wild Rockies v. Pena*, 865 F.3d 1211, 1217 (9th Cir. 2017) (quoting *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011)). The court's decision on a motion for a preliminary injunction is not a ruling on the merits. *See Sierra On-Line, Inc. v. Phoenix Software, Inc.*, 739 F.2d 1415, 1422 (9th Cir. 1984).

DISCUSSION

Under the APA, a court's review of an agency decision should be searching but narrow, and the reviewing court should take care not to substitute its judgment for that of the agency. *Oregon Wild v. United States*, 107 F. Supp. 3d 1102, 1109 (D. Or. 2015) (citing *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971)). Under this review, the court "shall hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706.

As noted, many of the arguments put forward by Plaintiffs are ones the Supreme Court previously rejected when considering the (remarkably similar) rules in *Rust*. At first blush, one could be persuaded that *Rust* controls the outcome here. In fact, most of HHS's arguments—specifically in its written response, where it cited *Rust* on 168 occasions—simply point to *Rust* as

evidence the Final Rule is a lawful exercise of agency discretion. *See Defs.' Opp'n,* 17; ECF No. 83 ("*Rust's* on-point statutory holding—and the remarkable overlap between Plaintiffs' arguments and the ones *Rust* rejected—disposes of the claim that the materially indistinguishable Rule is unlawful.").

HHS would seemingly have the court believe *Rust* concluded the Gag Rule and Separation Requirement were required interpretations of Section 1008. But *Rust* contains no such holding. *Rust* merely held that in light of the ambiguous nature behind Congress's intent in enacting Title X generally, and Section 1008 specifically, HHS's interpretation of Section 1008 was not unreasonable:

> The broad language of Title X plainly allows the Secretary's construction of the statute. By its own terms, § 1008 prohibits the use of Title X funds "in programs were abortion is a method of family planning." Title X does not define the term "method of family planning," nor does it enumerate what types of medical and counseling services are entitled to Title X funding. Based on the broad directives provided by Congress in Title X in general and § 108 in particular, we are unable to say that the Secretary's construction of the prohibition in § 1008 to require a ban on counseling, referral, and advocacy within the Title X project is impermissible.

Rust, 500 U.S. at 184.

Additionally, the Court clarified that "[a]t no time did Congress directly address the issues of abortion counseling, referral, or advocacy." *Id.* at 185. Given the lack of direction from Congress, and considering HHS provided ample justification for its reasoning in revising the rules, the Court deferred to the agency's "permissible construction of the statute." *Id.* at 187.

Two significant facts, however, separate this case from *Rust.* First, Congress has consistently mandated since 1996 that "that all pregnancy counseling shall be nondirective" with respect to Title X. Omnibus Consolidated Rescissions and Appropriations Act, 1996 Pub. L. No. 104-134, Title II, 110 Stat. 1321, 1321-22 (1996). Second, the 2010 limitations Congress

included in the Affordable Care Act significantly limit HHS's rulemaking authority. Therefore, HHS must do more than merely dust off the 30-year old regulations and point to *Rust*.

HHS makes the head-scratching argument that neither of the post-*Rust* laws enacted by Congress can serve as an implied repeal of Section 1008 or overrule *Rust*. HHS argues, "A clear, authoritative judicial holding on the meaning of a particular provision should not be cast in doubt and subjected to challenge whenever a related though not utterly inconsistent provision is adopted in the same statute or even in an affiliated statute." *Defs.' Opp'n*, 19 (quoting *TC Heartland LLC v. Kraft Foods Grp. Brands LLC*, 137 S. Ct. 1514, 1520 (2017)). That premise is certainly correct. But *TC Heartland* involved a statutory term the Supreme Court previously had "definitively and unambiguously held . . . has a particular meaning[.]" 137 S. Ct. at 1520. The Court therefore quite appropriately pointed out that "[T]he modification by implication of the settled construction of an earlier and different section is not favored." *Id.* (quoting *United States v. Madigan*, 300 U.S. 500, 506 (1937)). But the rule regarding implied repeal has no application here, where *Rust* expressly held that the statute in question was ambiguous. Again, *Rust* merely held that because Congress had not spoken on the matter, HHS's Gag Rule and Separation Requirement were reasonable interpretations of Section 1008 at that time. But Congress has since spoken on the matter.

Additionally, I note that absolutely nothing in the appropriations mandate that "all pregnancy counseling shall be nondirective," or the express limitations Congress placed on HHS's rulemaking authority in the ACA, necessarily conflict with Section 1008's requirement that "[n]one of the funds appropriated under this subchapter shall be used in programs where abortion is a method of family planning." HHS's vigor in arguing that the appropriations act and the ACA "cannot repeal Section 1008" or "overrule *Rust*" only demonstrates that the Final Rule

conflicts with both statutes. After all, not all interpretations place the three statutes at odds with one another. The current regulations, which have been in place for nearly five decades, allow Section 1008, the appropriations language, and the ACA restrictions to live in harmony. *Rust* explicitly commented that the plaintiffs' argument that the legislative history behind Title X rendered the 1988 rules contrary to law was, in fact, one permissible interpretation. *Rust*, 500 U.S. at 189. But because HHS's interpretation was also a permissible interpretation, deference to the agency's reasonable interpretation carried the day. *Id.* ("While petitioner's interpretation of the legislative history may be a permissible one, it is by no means the only one, and it is certainly not the one found by the Secretary."). The question now is whether, given the two new statutes, HHS's 30-year-old rules remain "one permissible interpretation."

I turn first to the Final Rule's Gag Rule. As noted, the Final Rule prohibits referrals for abortions. HHS argues that although "all pregnancy counseling shall be nondirective," Congress said nothing about referrals. This argument appears a stretch. First, HHS includes referrals within pregnancy counseling in the Final Rule. For example, in its guidance for nondirective pregnancy counseling, the agency states, "Title X projects should not use nondirective pregnancy counseling, *or referrals made for prenatal care or adoption during such counseling*, as an indirect means of encouraging or promoting abortion as a method of family planning." 84 Fed. Reg. at 7747 (emphasis added). The above guidance aligns with Congress's thoughts on referrals. Congress, in ordering HHS to make grants available to assist "*in providing* adoption information and *referrals* to pregnant women on an equal basis *with all other courses of action included in nondirective counseling* to pregnant women," clearly included referrals in nondirective counseling. 42 U.S.C. § 254c-6(a)(1) (emphasis added).

Although common sense, the agency's own guidance, and Congress's statutory language indicate pregnancy counseling includes referrals, a different outcome would not save the Final Rule from violating the requirement that all pregnancy counseling be nondirective. Regardless of the referral process (discussed further below), the Final Rule blatantly requires that any pregnancy counseling for abortion be directive. For the Final Rule, this is a problem, as it is well established that Congress "may amend substantive law in an appropriations statute, as long as it does so clearly." *Robertson v. Seattle Audobon* Soc'y, 503 U.S. 429, 441 (1992). Congress is quite clear on its thoughts regarding pregnancy counseling: "all pregnancy counseling shall be nondirective."

Although the Final Rule does not define "nondirective counseling," it provides guidance on the term. The agency describes "nondirective counseling" as:

> the meaningful presentation of options where the physician or advanced practice provider (APP) is not suggesting or advising one option over another. . . . Nondirective counseling does not mean that the counselor is uninvolved in the process or that counseling and education offer no guidance, but instead that clients take an active role in processing their experiences and identifying the direction of the interaction. In nondirective counseling, the Title X physicians and APPs promote the client's self-awareness and empower the client to be informed about a range of options, consistent with the client's expressed need and with the statutory and regulatory requirements governing the Title X program. *In addition, the Title X provider may provide a list of licensed, qualified, comprehensive primary health care providers (including providers of prenatal care), some (but not the majority) of which may provide abortion in addition to comprehensive primary care."*[2]

84 Fed. Reg. at 7716 (internal quotations, citation, and footnote omitted) (emphasis added).

Examining the Final Rule's requirement for abortion counseling confirms it is anything but nondirective. After confirming that the provider need not provide any pregnancy counseling

[2] The emphasized portion, concerning a type of referral, which appears in the Final Rule's section on guidance for what "Nondirective pregnancy counseling is," is yet another example that the agency (along with all of the expert opinions submitted in the record) views referrals as simply one portion of the entire counseling process.

at all, the Final Rule outlines what counseling is permissible should the provider decide to offer such counseling:

> Nondirective counseling is designed to assist the patient in making a free and informed decision. *In nondirective counseling, abortion must not be the only option presented by physicians or APPs;* otherwise the counseling would violate the Congressional directive that all pregnancy counseling be nondirective, but also the prohibitions in this rule on encouraging, advocating, or supporting abortion as a method of family planning, which the Department prohibits in order to implement, among other provisions, section 1008. Each option discussed in such counseling must be presented in a nondirective manner. This involves presenting the options in a factual, objective, and unbiased manner and (consistent with the other Title X requirements and restrictions) offering factual resources that are objective, rather than presenting the options in a subjective or coercive manner. *Physicians or APPs should discuss the possible risks and side effects to both mother and unborn child of any pregnancy option presented,* consistent with the obligation of health care providers to provide patients with accurate information to inform their health care decisions.

84 Fed. Reg. at 7747 (emphasis added).

Like nearly every other aspect of the Final Rule, the agency creates one set of rules for abortion, and a separate set of rules for everything else. Back in 1988, this was a permissible interpretation of the then lone congressional requirement that no Title X funds "be used in programs where abortion is a method of family planning." But when implementing a rule in 2019, HHS must comply not only with Section 1008, but also with Congress's requirement that "all pregnancy counseling be nondirective." HHS's mistake, here and throughout the Final Rule, assumes that Section 1008 trumps Congress's other mandates. But as noted above, the statutes are not irreconcilable.

For all pregnancy counseling not involving abortion, the Final Rule allows "the clients [to] take an active role in processing their experiences and identifying the direction of the interaction . . . [while allowing the providers to] promote the client's self-awareness and empower the client to be informed about a range of options, *consistent with the client's*

expressed need[.]" 84 Fed. Reg. at 7716 (emphasis added). This is not the case, however, if the empowered client wishes to exercise abortion in that range of options. During abortion counseling, the medical professional no longer provides neutral, factual information "consistent with the client's expressed need[.]" Fed. Reg. at 7716. Instead, the provider must provide counseling regarding some other option the client has no use for, even when it is not requested by the client or even medically relevant.[3] The Gag Rule is the very definition of directive counseling. It makes no difference that HHS labels this process "nondirective counseling," or that HHS states such requirements are necessary to avoid, according to HHS's own interpretation, "the prohibitions in this rule on encouraging, advocating, or supporting abortion as a method of family planning [under Section 1008]." 84 Fed. Reg. at 7747. It is clear that while giving lip service to the requirement that all pregnancy counseling be nondirective, HHS never sought to actually interpret that mandate in coordination with Section 1008. As the Gag Rule is not "in accordance with the law," it violates the APA. 5 U.S.C. § 706(2)(A).

As odd as the pregnancy counseling process is, it pales in comparison to the Final Rule's requirements for abortion referrals. One would expect to find such a process not in a federal program serving millions of clients, but in a Kafka novel. As described above, if a woman seeks to have a legal abortion and requests a referral from her Title X provider, the Final Rule requires a referral for prenatal care. That is, the provider is mandated to refuse to provide the referral the client wants, and instead provide a referral the client neither needs nor requested. *See* 84 Fed. Reg. 7789 (to be codified at 42. C.F.R. § 59.14(b)) (requiring that after the client is "verified as

[3] For some reason—and the Court struggles here with finding any rational relationship to any medical purpose—the Final Rule allows, and in fact encourages, that the provider "should discuss the possible risks and side effects to both mother and unborn child of any pregnancy option presented[.]" 84 Fed. Reg. at 7747. In other words, the Final Rule encourages the provider to counsel a woman who has chosen to proceed with a legal abortion on the possible risks and side effects to the fetus.

pregnant, she shall be referred to a health care provider for medically necessary prenatal health care").

Amazingly, the Final Rule allows the provider, at its whim, to refer the woman not to an abortion clinic, but to an adoption agency. *Id.* § 59.14(b)(1)(iii).[4] Or, the provider may provide a list of primary care providers, none of whom actually perform abortions. *Id.* § 59.14(c)(2). The rule also allows the counselor to provide "[i]nformation about maintaining the health of the . . . unborn child during pregnancy." *Id.* § 59.14(b)(1)(iv).

Possibly, the woman might be lucky enough to live near a Title X provider who—in accordance with the professional ethical obligations of medical providers—agrees to refer a woman seeking an abortion to an actual abortion clinic. Even then, the woman is not much closer to actually receiving a proper referral. One would think the provider could simply say, "We do not perform abortions. Title X does not allow Title X funds to be used to perform abortions. But here is a referral to an independent medical provider, who receives no Title X funds, who will help you." But the Final Rule does not allow that. Instead, after referring the woman to a provider of prenatal care (as is mandatory), the provider may provide "[a] list of licensed, qualified, comprehensive primary health care providers (including providers of prenatal care)[.]" *Id.* § 59.14(b)(1)(ii). If the sympathetic counselor provides this list, HHS allows the list to include some providers "which also provide abortion as part of their comprehensive health care services." *Id.* § 59.14(c)(ii). However, in what one imagines would come as a shock to this poor woman, the list is prohibited from including a majority of providers who actually provide abortion services. *Id.* At this point, the woman is staring at multiple names on a list. As is usual

[4] It is difficult to comprehend that Congress would so adamantly require that all pregnancy counseling be nondirective, only to later allow the provider to refer a woman seeking an abortion to an adoption agency.

in the medical setting, she might ask the provider, whom she trusts, for a single recommendation. At this point, the provider may only say, "I'm sorry, I cannot help you." In the agency's zeal to limit any abortions, even legal abortions provided outside the Title X program, the Final Rule states, "Neither the list nor project staff may identify which providers on the list perform abortions." *Id.*

The Gag Rule is remarkable in striving to make professional health care providers deaf and dumb when counseling a client who wishes to have a legal abortion or is even considering the possibility. The rule handcuffs providers by restricting their responses in such situations to providing their patient with a list of primary care physicians who can assist with their pregnancy without identifying the ones who might perform an abortion. Again, the response is required to be, "I can't help you with that or discuss it. Here is a list of doctors who can assist you with your pre-natal care despite the fact that you are not seeking such care. Some of the providers on this list—but in no case more than half— may provide abortions services, but I can't tell you which ones might. Have a nice day."[5] This is madness. Plaintiffs have shown what is reflected in the sophistry of the Final Rule itself—that they are likely to succeed on their claim that the Gag Rule is contrary to law. I turn now to the Separation Requirement.

As noted, the Separation Requirement requires physical and financial separation of Title X services and those services prohibited under the Final Rule. 84 Fed. Reg. at 7789 (to be codified at 42 C.F.R. § 59.15). Separation is required not only if the provider itself performs abortions, but when the provider performs any activities that, in HHS's view, "promote . . . or support abortion as a method of family planning[.]" *Id.* at 7788-89 (to be codified at 42 C.F.R. §

[5] This is as silly as it is insulting. I cannot imagine visiting my urologist's office to request a vasectomy, only to be given a list of fertility clinics. I would think that my doctor had gone mad.

59.14). In short, any activity prohibited by the Gag Rule must have no connection, physically or financially, from activities allowed under the Final Rule. *See id.* at 7789 (to be codified at 42 C.F.R. § 59.15 (requiring separation of activities prohibited under Section 1008 as well as 42 C.F.R. §§ 59.13, 59.14, 59.16)).

To ensure that a Title X grantee is in compliance with the Separation Requirement, the Final Rule allows the agency to consider the following facts and circumstances:

> (a) The existence of separate, accurate accounting records;
> (b) The degree of separation from facilities (e.g. treatment, consultation, examination and waiting rooms, office entrances and exits, shared phone numbers, email addresses, educational services, and websites) in which prohibited activities occur and the extent of such prohibited activities;
> (c) The existence of separate personnel, electronic or paper-based health care records, and workstations; and
> (d) The extent to which signs and other forms of identification of the Title X project are present, and signs and material referencing or promoting abortion are absent.

Id. at 7789 (to be codified at 42 C.F.R. § 59.15)

In explaining its reasoning for adding physical separation in addition to the previous requirement of financial separation, the agency does not once mention consideration of any limitations Congress imposed under the ACA. Instead, the agency focuses solely on Section 1008 and *Rust*. *Id.* at 7763-7767.

As noted, Congress passed the Affordable Care Act in 2010. The ACA spoke directly to HHS, prohibiting it from promulgating 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.

HHS first argues that Plaintiffs waived any ACA-based challenge to the Final Rule. First, the court is skeptical that an agency may defend an action challenging the scope of the agency's authority solely with an argument that the plaintiff waived any such challenge. *See Sierra Club v. Pruitt*, 293 F. Supp. 3d 1050, 1061 (N.D. Cal. 2018) (noting "the waiver rule does not apply to preclude argument where the scope of the agency's power to act is concerned."). HHS's waiver argument relies on the premise that, so long as no one specifically challenges the agency's authority during the notice and comment period, the agency has the freedom to act in blatant violation of its Congressional authorization.

Regardless, I conclude Plaintiffs have not waived any challenge based on the ACA. Waiver does not apply "if an agency has had the opportunity to consider the issue." *Portland Gen. Elec. Co. v. Bonneville Power Admin.*, 501 F.3d 1009, 1024 (9th Cir. 2007). This is true even if a third party, as opposed to the plaintiffs, put the agency on notice by providing the agency the opportunity to correct its error. *Id.* Here, while not specifically pointing to 42 U.S.C. § 18114, multiple commenters objected under each prong of the statute. *See* AMA Reply, 11-12 n.3; ECF No. 119 (meticulously matching specific comments to each prong of 42 U.S.C. § 18114); *see also* States' Reply, 9 n.7; ECF No. 121 (same).

HHS's other arguments regarding why Section 18114 does not apply to Title X are unpersuasive. HHS argues that had Congress wanted to limit Title X, it would have listed the title in Section 18114. HHS also argues the restrictions are somehow "overbroad" or "open-ended." Simply because Congress specifically sought to limit the general scope of HHS's rulemaking abilities, however, does not somehow render the limitations invalid. *See Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) ("It is axiomatic that an administrative

agency's power to promulgate legislative regulations is limited to the authority delegated by Congress."). That regulations issued by HHS 30 years ago might clash with limitations Congress later placed on HHS does not mean HHS may ignore the newer restrictions.

That Congress intended in Section 18114 to limit HHS's rulemaking authority appears clear. Before delineating the six new restrictions, Congress stated, "Notwithstanding any other provision of this Act, the Secretary of Health and Human Services *shall not promulgate any regulation that . . .*." 42 U.S.C. § 18114. The Final Rule, of course, is a regulation promulgated by HHS. The agency argues the language, "Notwithstanding any other provision of this Act," means Congress meant the limitations to apply only to regulations the ACA authorized HHS to implement. I disagree. That language merely indicates that the specific limitations in Section 18114 override any conflicting provisions of the ACA. *See Field v. Napolitano*, 663 F.3d 505, 511 (1st Cir. 2011) (noting that statute's use of "'Notwithstanding any other provision of law' 'clearly signals the drafter's intention that the provisions of 'notwithstanding' section override conflicting provisions of any other section'") (quoting *Cisneros v. Alpine Ridge Grp.*, 508 U.S. 10, 18 (1993)). The Supreme Court agrees that "notwithstanding" language indicates the drafter intended "to supersede all other laws" and that a "clearer statement is difficult to imagine." *Cisneros*, 508 U.S. at 18 (citation omitted).

I conclude Plaintiffs have demonstrated the limitations in Section 18114 likely apply to the Final Rule. The first and second limitations prohibit HHS from implementing any regulation that: "(1) creates any unreasonable barriers to the ability of individuals to obtain appropriate medical care; [or] (2) impedes timely access to health care services[.]" 42 U.S.C. § 18114. At this stage, there is at least a strong argument to be made that the Separation Requirement creates unreasonable barriers to Title X clients obtaining appropriate medical care and impedes their

timely access to such care. To ensure compliance with the rule, HHS encourages Title X providers to maintain one set of offices for Title X services and physically separate offices for any service prohibited by the Gag Rule. 84 Fed. Reg. at 7789. The provider should ensure the offices do not share entrances or exits, waiting rooms, or even websites. *Id.* The provider must ensure the separate offices maintain "[t]he existence of separate personnel, electronic or paper-based health care record, and workstations[.]" *Id.* Although the declarations indicate the financial burdens will severely strain already tight budgets, I also am mindful of the fact that many of the rules underlying the Separation Requirement would impinge on the ability of providers to engage in nondirective counseling, in contrast with the congressional mandate.

Even assuming, however, that the ACA does not apply to the Final Rule, or that the Separation Requirement does not create impermissible barriers to client care, Plaintiffs have demonstrated, at worst, serious questions going to the merits of their claims that the Final Rule is arbitrary and capricious. "Normally, an agency rule would be 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 produce of agency expertise." *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

Based on the record currently before the Court, the Final Rule appears to force medical providers to either drop out of the program or violate their codes of professional ethics. James L. Madara, MD, is a Medical Doctor, the Chief Executive Officer and Executive Vice President of the AMA, and an adjunct professor of pathology at Northwestern University. Madara Decl. ¶ 1; ECF No. 49. The AMA "is the largest professional association of physicians, residents, and

medical students in the United States." *Id.* ¶ 5. To call the AMA the leading organization regarding medical ethics is practically an understatement. The AMA literally wrote the book on medical ethics. "The AMA has published the *Code of Medical Ethics of the American Medical Association* since 1847. This was the first modern national medical ethics code in the world and continues to be the most comprehensive and well respected code for physicians, world-wide." *Id.* ¶ 13. Dr. Madara outlines several troubling aspects of the Final Rule:[6]

> 17. "Except in emergency situations in which a patient is incapable of making an informed decision, withholding information without the patient's knowledge or consent is ethically unacceptable." *Code of Medical Ethics* Opinion 2.1.3. *Withholding Information from Patients*.
>
> 18. Therefore, patients have the right "to receive information from their physicians and to have the opportunity to discuss the benefits, risks, and costs of appropriate treatment alternatives… [P]atients should be able to expect that their physicians will provide guidance about what they consider the optimal course of action for the patient based on the physician's objective professional judgment." *Code of Medical Ethics* Opinion 1.1.3. *Patient Rights*. Further, patients have a right to "expect that their physician will cooperate in coordinating medically indicated care with other health care professionals[.]" *Id.* Finally, physicians should "[h]onor a patient's request not to receive certain medical information." *Code of Medical Ethics* Opinion 2.1.3. *Withholding Information from Patients*.
>
> 19. Physicians are ethically obligated to "[b]ase the decision or recommendation [to consult or refer] on the patient's medical needs, as they would for any treatment recommendation, and consult or refer the patient to only health care professionals who have appropriate knowledge and skills and are licensed to provide the services needed." *Code of Medical Ethics* Opinion 1.2.3. *Consultation, Referral, & Second Opinions*.
>
> 20. Within the treating relationship, the "physician must be sensitive to the imbalance of power in the patient-physician relationship, as well as to the patient's vulnerability[, and] must not allow differences with the patient or family about political matters to interfere with the delivery of professional care." *Code of Medical Ethics* Opinion 2.3.4. *Political Communications*.

[6] Dr. Madara alerted HHS to the AMA's concerns during the Final Rule's notice and comment period. Madara Decl. ¶ 3 (citing July 31, 2018 letter—available at http://www.regulations.gov/document?D=HHS-OS-2018-0008-179739—from AMA to HHS).

Madara Decl. (ellipses and alterations in original).

Dr. Madera concludes that "the Final Rule would require doctors to violate each of these fundamental ethical and professional norms."[7] Madara Decl. ¶ 21. In examining the Final Rule, it is readily apparent how Dr. Madera reached his conclusion. The Final Rule, by requiring a referral for prenatal care to a woman seeking an abortion, and by requiring that the patient receive unnecessary counseling in addition to abortion counseling, mandates that providers provide medical information that patient does not need and, almost certainly, does not request. Those requirements also prohibit the physician from basing the counseling or referral on the patient's actual medical needs. By requiring that any list provided for an abortion referral contain some providers who do not perform abortions, and by prohibiting physicians from identifying the abortion providers, the Final Rule "is an instruction to physicians to intentionally mislead patients, which, if followed, is an instruction for physicians to directly violate the *Code of Medical Ethics*[.]"[8] Madera Decl. ¶ 25 (citing Opinions 1.1.1, 1.1.3, 1.2.3, 2.1.3, and 2.3.4).

As the Final Rule contradicts this persuasive evidence from the leading expert on medical ethics, HHS must have a plausible explanation outlining its rationale for rejecting the evidence and reaching a different conclusion. *Motor Vehicle Manufacturers Ass'n*, 463 U.S. at 43. Once again, however, HHS's justifications are lacking. HHS simply brushes aside any concerns and, in a generic and conclusory fashion, asserts the Final Rule violates no ethical obligations. As HHS's response to comments is relatively brief, and demonstrates the agency never addressed,

[7] Although this opinion only references Dr. Madera's declaration, Plaintiffs presented numerous expert opinions, each essentially arriving at the same conclusion reached by Dr. Madera. Other than relying on the Final Rule itself and *Rust*, HHS provided no evidence in rebuttal.
[8] Should the ACA in fact apply to the Final Rule, the objections noted by Dr. Madera indicate the Gag Rule likely violates each of the six limitations Congress imposed on HHS's rulemaking authority.

and does not appear to have even considered, the specific objections noted above, I include HHS's entire explanation:

> The Department disagrees with commenters contending the proposed rule, to the extent it is finalized here, infringes on the legal, ethical, or professional obligations of medical professionals. Rather, the Department believes that the final rule adequately accommodates medical professionals and their ethical obligations while maintaining the integrity of the Title X program. In general, medical ethics obligations require the medical professional to share full and accurate information with the patient, in response to her specific medical condition and circumstance. Under the terms of this final rule, a physician or APP may provide nondirective pregnancy counseling to pregnant Title X clients on the patient's pregnancy options, including abortion. Although this occurs in a postconception setting, Congress recognizes and permits pregnancy counseling within the Title X program, so long as such counseling is nondirective. The permissive nature of this nondirective pregnancy counseling affords the physician or APP the ability to discuss the risks and side effects of each option, so long as this counsel in no way promotes or refers for abortion as a method of family planning. It permits the patient to ask questions and to have those questions answered by a medical professional. Within the limits of the Title X statue and this final rule, the physician or APP is required to refer for medical emergencies and for conditions for which non-Title X care is medically necessary for the health and safety of the mother or child.

84 Fed. Reg. at 7724.

Although acknowledging that medical ethics "require the medical professional to share full and accurate information with the patient, in response to her specific medical condition and circumstance," the agency nowhere squares that requirement with the Final Rule's requirement that all abortion counseling provide information not in fact specific to the patient's medical needs. Despite acknowledging providers must share accurate information with the patient, HHS requires any referral for abortion contain, at minimum, an equal amount of information that is of no use to the pregnant woman. That HHS appears to have failed to seriously consider persuasive evidence that the Final Rule would force providers to violate their ethical obligations suggests that the rule is arbitrary and capricious. *See Tesoro Alaska Petroleum Co. v. F.E.R.C.*, 234 F.3d

1286, 1294 (D.C. Cir. 2000) ("The Commission's failure to respond meaningfully to the evidence renders its decisions arbitrary and capricious. Unless an agency answers objections that on their face appear legitimate, its decision can hardly be said to be reasoned.").

The Final Rule could well be arbitrary and capricious in other aspects as well. Plaintiffs argue HHS failed to adequately account for the impact the Final Rule will have on women, particularly women in rural areas. Because the Final Rule forces providers to choose between violating ethical obligations or leaving the Title X program, many providers, including Planned Parenthood, informed HHS during the notice and comment period that if HHS implemented the proposed regulation, the providers would exit the program. Planned Parenthood serves approximately 40% of all Title X patients. Custer Decl. ¶ 8. Planned Parenthood's importance to the program is difficult to overstate. "Rural and sparsely populated areas will be harmed most. In those areas, Planned Parenthood is often the only safety-net reproductive health care provider available to patients seeking publicly funded services. In more than half of the counties were Planned Parenthood health centers were located in 2015 (238 of 415), Planned Parenthood served at least half of the women by obtaining publicly supported contraceptive services from a safety-net health center. In nearly 10% of the rural counties (38 of 415), Planned Parenthood was the only safety-net family planning center." *Id.* ¶ 37 (internal footnotes omitted). Planned Parenthood's absence would create a vacuum for family planning services. "Other safety-net clinics that are not forced from Title X will not be able to pick up the slack and provide care to the 1.6 million women, men, and adolescents who today receive vital family planning services from Planned parenthood health centers that participate in the Title X program." *Id.* ¶ 54.

The elimination of Title X providers would be detrimental to the public health. Many women, but especially low-income women, have no interactions with health care providers

outside of a Title X provider. Brandis Decl. ¶ 18. The Final Rule will increase not only unintended (and riskier) pregnancies, *id.* ¶ 23, but abortions as well, *id.* ¶ 26. Reduced access to Title X health centers will result in less testing, increased STIs, and more women suffering adverse reproductive health symptoms. *Id.* ¶ 29.

One would imagine HHS relied on studies and research to determine the impact on women's health should a provider of nearly half of all Title X services withdraw from the program. If HHS in fact relied on something, it is not shown in this record. In fact, HHS does not acknowledge the Title X program stands to be cut in half on May 3, 2019. Instead, HHS baldly asserts that "these final rules will contribute to more clients being served, gaps in service being closed, and improved client care . . . ." 84 Fed. Reg. at 7723. HHS anticipates new providers will step forward, providers who earlier stayed away from the program due to abortion-related concerns. But HHS fails to show its work. There is no transparency and no way to find out what, if anything, HHS based its assumptions on. The record is devoid of comments from potential providers ready, willing, and able to fill the 1.6 million woman gap in coverage left by Planned Parenthood's exit. Again, when HHS issued the above findings, it knew that, should it implement the Final Rule, it would lose the provider of nearly half of all Title X services within two months. It could be that HHS relied on some internal reports or studies. But on this record, HHS's unsupported conclusions appear to run "counter to the evidence before the agency." *State Farm*, 463 U.S. at 43.

As Plaintiffs have demonstrated a likelihood of success on the merits of their claims that the Final Rule is contrary to law and arbitrary and capricious. I turn next to whether Plaintiffs have shown "that irreparable injury is likely in the absence of an injunction." *California v. Azar*, 911 F.3d 558, 581 (9th Cir. 2018) (quoting *Winter*, 555 U.S. at 22). As HHS failed to introduce

any evidence on this issue, the only evidence before me is that if the Final Rule goes into effect, many Title X providers will exit the program because, amongst other reasons, the Final Rule violates established standards of medical ethics. Notably, Planned Parenthood will exit Title X if the rule is implemented. Kost Decl. ¶ 109; ECF No. 53. Although many other providers state they too will exit the program, Planned Parenthood is of unique importance because its "health centers serve 41% of women who rely on Title X sites for contraceptive care." *Id.* ¶ 110. In Vermont, Planned Parenthood is the lone provider of Title X services. Holmes Decl. ¶¶ 6, 19. In fact, every state plaintiff submitted declarations stating they will lose much, if not all of their current Title X funding should the rule go into effect. States' Br. 35-37. The likely harm to the public health, in the form of an increase in sexually transmitted disease and unexpected pregnancies, is not speculative. Brandis Decl. ¶¶ 31, 47. This harm to the public health will have a detrimental economic impact on the states. The Ninth Circuit has recognized that such economic harm (stemming from likely cuts to birth control), and supported by evidence analogous to the declarations provided here, sufficiently demonstrates a threat of harm to a state's economic interest. *Azar*, 911 F.3d at 571-73. Additionally, the *Azar* court concluded such harm is sufficient to establish a likelihood of irreparable injury. *Id.* at 581 (noting that because the APA permits relief "other than money damages," such economic harm was irreparable) (quoting 5 U.S.C. § 702)).

Additionally, the balance of the equities and the public interest tips sharply in favor of the Plaintiffs. "The public interest is served by compliance with the APA." *Id.* "There is generally no public interest in the perpetuation of unlawful agency action." *League of Women Voters of U.S. v. Newby*, 838 F.3d 1, 12 (D.C. Cir. 2016). There is ample evidence at this stage that the Final Rule is unlawful. The unrebutted evidence demonstrates, at this stage of the proceedings, that the

Final Rule would force medical providers to violate their ethical and professional obligations. Additionally, there is little harm in preserving the status quo. The current regulations have been in place for nearly 50 years and have an excellent track record. With such substantial questions surrounding the legality of the Final Rule, and with the potential for great harm to low-income women in particular should the rule go into effect, these prongs of the preliminary injunction standard tilt quite heavily in Plaintiffs' favor.

The Ninth Circuit recently outlined concerns regarding overbroad injunctions. *See Azar*, 911 F.3d at 583-84 (noting detrimental impact on development of law and effects on non-parties). In crafting an injunction, "[t]he scope of remedy must be no broader and no narrower than necessary to redress the injury show by the plaintiff[s]." *Id.* at 584. Here, Planned Parenthood operates in 48 states. Plaintiff AMA's member physicians practice and reside in every state in the country. Madara Decl. ¶ 7. AMA members (physicians and licensed health care practitioners) provide counseling to pregnant women in the Title X program. *Id.* There is ample evidence regarding the potential harm to the public health of not only the plaintiff states, but the nation. Brandis Decl. ¶¶ 35-37, 45-54. Given that the harm to Plaintiffs would occur in every state, and considering the balance of equities and the fact that Plaintiffs have demonstrated significant likelihood on the merits of their claims that the Final Rule is contrary to law, a nationwide injunction is appropriate.[9]

[9] On Friday, HHS filed a response to a notice filed Thursday regarding an injunction issued by Judge Bastian in the Eastern District of Washington. Judge Bastian entered a nationwide injunction prohibiting HHS from implementing the Final Rule. HHS argues there is no longer any likelihood of imminent harm. I disagree. As I understand it, the order submitted as an exhibit to ECF No. 137 is a preliminary ruling which Judge Bastian intends to follow with a final opinion sometime before May 3, 2019. Additionally, the Court understands Judge Chen in the Northern District of California issued an injunction last Friday restraining HHS from implementing the rule in California. HHS here states it is considering appealing Judge Bastian's injunction, and asks this Court to stay this matter. Specifically, HHS states that "Should the government seek and obtain a stay of the Washington Order, the Plaintiffs could move this Court to lift the stay, at which point the Court would be in a position to rule promptly." ECF No. 138, 3. The Court will allow a full briefing regarding whether a stay is appropriate. At this point, a ruling on the pending motion

CONCLUSION

Plaintiffs' motions for a preliminary injunction are GRANTED in full. Defendants, and their agents and officers, are restrained from implementing or enforcing any portion of the Final Rule detailed in 84 Fed. Reg. 7714-7791 (March 4, 2019) and shall preserve the status quo under the current regulations pending further order from the Court. No bond is required.

IT IS SO ORDERED.

DATED this 29 day of April, 2019.

Michael J. McShane
United States District Judge

is appropriate. Planned Parenthood provides service for nearly half of the entire Title X program. They are a plaintiff in this action, not the action pending before Judge Bastian.

CONSOLIDATED

U.S. District Court
District of Oregon (Eugene (6))
CIVIL DOCKET FOR CASE #: 6:19-cv-00318-MC

American Medical Association et al v. Azar et al
Assigned to: Judge Michael J. McShane
Lead case: 6:19-cv-00317-MC
Member case: (View Member Case)
Case in other court: Ninth Circuit, 19-35386
Cause: 05:702 Administrative Procedure Act

Date Filed: 03/05/2019
Jury Demand: None
Nature of Suit: 899 Other Statutes: Administrative Procedures Act/Review or Appeal of Agency Decision
Jurisdiction: U.S. Government Defendant

Plaintiff

American Medical Association

represented by **Brian D. Vandenberg**
American Medical Association
330 N. Wabash Avenue
Suite 39300
Chicago, IL 60611
312-464-4600
Email: brian.vandenberg@ama-assn.org
LEAD ATTORNEY
PRO HAC VICE
ATTORNEY TO BE NOTICED

Erin G. Sutton
American Medical Association
330 N. Wabash Avenue
Suite 39300
Chicago, IL 60611
312-464-4801
Email: erin.sutton@ama-assn.org
LEAD ATTORNEY
PRO HAC VICE
ATTORNEY TO BE NOTICED

Jeremy D. Sacks
Stoel Rives LLP
760 S.W. Ninth Ave.
Suite 3000
Portland, OR 97205
503-294-3380
Fax: 503-220-2480
Email: jeremy.sacks@stoel.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Leonard A. Nelson
American Medical Association
330 N. Wabash Avenue
Suite 39300
Chicago, IL 60611

		in case 6:19-cv-00317-MC in case 6:19-cv-00318-MC. Answer is due by 6/20/2019. Ordered by Judge Michael J. McShane. Associated Cases: 6:19-cv-00317-MC, 6:19-cv-00318-MC (cp) (Entered: 05/03/2019)
05/03/2019	142	Notice of Appeal to the 9th Circuit *(fee exempt status selected (AUSA))*. Filed by All Defendants. Associated Cases: 6:19-cv-00317-MC, 6:19-cv-00318-MC (Merritt, R.) (Entered: 05/03/2019)
05/03/2019	143	Motion for Stay *of Injunction Pending Appeal*. Expedited Hearing requested. Filed by All Defendants.Associated Cases: 6:19-cv-00317-MC, 6:19-cv-00318-MC (Bernie, Andrew) (Entered: 05/03/2019)
05/03/2019	144	Declaration of David Johnson *in Support of Defendants' Motion for Stay of Injunction Pending Appeal*. Filed by All Defendants. (Related document(s): Motion for Stay(150 in 6:19-cv-00317-MC, 143 in 6:19-cv-00318-MC).)Associated Cases: 6:19-cv-00317-MC, 6:19-cv-00318-MC (Bernie, Andrew) (Entered: 05/03/2019)
05/06/2019		USCA Case Number and Notice confirming Docketing Record on Appeal re Notice of Appeal - Preliminary Injunction 149 (142 in 6:19-cv-00318-MC, 149 in 6:19-cv-00317-MC). **Case Appealed to Ninth Circuit Case Number 19-35386** assigned. Associated Cases: 6:19-cv-00317-MC, 6:19-cv-00318-MC (kf) (Entered: 05/06/2019)
05/06/2019	145	**ORDER:** Defendants ask the Court to stay the nationwide injunction entered last week. In their motion, Defendants specifically request that "If upon reviewing this motion the Court does not believe Defendants have met the requirements for a stay, Defendants request that the Court summarily deny the motion without awaiting a response from Plaintiffs." The Court respectfully disagrees with defendants' position and, in accordance with their request, summarily denies the motion to stay 150 in case 6:19-cv-00317-MC; 143 in case 6:19-cv-00318-MC. without awaiting a response from plaintiffs. Ordered by Judge Michael J. McShane. Associated Cases: 6:19-cv-00317-MC, 6:19-cv-00318-MC (cp) (Entered: 05/06/2019)
05/30/2019	146	Consent Motion for Extension of Time to Answer *or otherwise respond to the complaints*. Filed by All Defendants.Associated Cases: 6:19-cv-00317-MC, 6:19-cv-00318-MC (Bernie, Andrew) (Entered: 05/30/2019)
06/12/2019	147	**ORDER:** Granting Consent Motion for Extension of Time to Answer (162) in case 6:19-cv-00317-MC in case 6:19-cv-00318-MC. Answer is due by 7/19/2019. Ordered by Judge Michael J. McShane. Associated Cases: 6:19-cv-00317-MC, 6:19-cv-00318-MC (cp) (Entered: 06/12/2019)
06/13/2019	148	Notice Filed by All Defendants. (Attachments: # 1 Exhibit)Associated Cases: 6:19-cv-00317-MC, 6:19-cv-00318-MC (Bernie, Andrew) (Entered: 06/13/2019)

PACER Service Center			
Transaction Receipt			
06/20/2019 07:57:32			
PACER Login:	wcphd0009:2559904:0	**Client Code:**	
Description:	Docket Report	**Search Criteria:**	6:19-cv-00318-MC Start date: 1/1/1970 End date: 6/20/2019
Billable Pages:	30	**Cost:**	3.00