No. 19-35394

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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

v.

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

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

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

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CIRCUIT RULE 27-3 CERTIFICATE

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

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

(iii) Notification of parties:

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

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

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

/s/ Fiona Kaye
FIONA KAYE

CORPORATE DISCLOSURE STATEMENT

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

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INTRODUCTION AND RULE 35 STATEMENT

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

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

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

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

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

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

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

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

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

STATEMENT OF THE CASE

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

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

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

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

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

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

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

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

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

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

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

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

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

ARGUMENT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

June 24, 2019

Respectfully submitted,

/s/ Fiona Kaye

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CERTIFICATE OF COMPLIANCE

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

/s/ Fiona Kaye
FIONA KAYE

June 24, 2019

CERTIFICATE OF SERVICE

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

/s/ Fiona Kaye
FIONA KAYE