No. 19-35386

IN THE 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 Secretary of the United States Department of Health and Human Services; UNITED STATES DEPARTMENT 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 Secretary of the United States Department of Health and Human Services; UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, et al.,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

EMERGENCY MOTION OF PLAINTIFF STATES FOR RECONSIDERATION EN BANC OF THE MOTIONS PANEL'S JUNE 20, 2019 PUBLISHED ORDER STAYING THE PRELIMINARY INJUNCTION PENDING APPEAL AND FOR AN ADMINISTRATIVE STAY OF THE MOTIONS PANEL'S ORDER PENDING RESOLUTION OF THIS MOTION FOR EN BANC REVIEW

ELLEN F. ROSENBLUM
Attorney General
State of Oregon
BENJAMIN GUTMAN
Solicitor General
JONA J. MAUKONEN
Senior Assistant Attorney General
1162 Court Street NE
Salem, Oregon 97301-4096
benjamin.gutman@doj.state.or.us
Telephone: (503) 378-4402

LETITIA JAMES
Attorney General
State of New York
BARBARA D. UNDERWOOD
Solicitor General
ANISHA S. DASGUPTA
Deputy Solicitor General
JUDITH N. VALE
Senior Assistant Solicitor General
New York State Office of the Attorney General
23rd Floor, 28 Liberty Street
New York, NY 10005

CIRCUIT RULE 27-3 CERTIFICATE

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

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

Benjamin Gutman (benjamin.gutman@doj.state.or.us)
Jona J. Maukonen (jona.j.maukonen@doj.state.or.us)
ELLEN F. ROSENBLUM
Attorney General, State of Oregon
1162 Court Street NE
Salem, Oregon 97301-4096
(503) 378-4402

Barbara D. Underwood (barbara.underwood@ag.ny.gov)
Anisha S. Dasgupta (anisha.dasgupta@ag.ny.gov)
Judith N. Vale (judith.vale@ag.ny.gov)
LETITIA JAMES
Attorney General, State of New York
28 Liberty Street, 23rd Floor
New York, NY 10005

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:

On June 20, a motions panel (Leavy, Callahan, Bea, JJ.) issued an extraordinary published order that uses a stay motion to upend the status quo

that has governed a nationwide family-planning and public-health program for nearly fifty years. En banc reconsideration of this stay order is needed to restore the status quo and prevent irreparable harm to plaintiffs here—20 States and the District of Columbia—as well as their residents and the public health. For the same reasons, an emergency administrative stay pending resolution of this motion for reconsideration is also warranted. Notification of parties:

Counsel for Defendants-Appellants were notified of this emergency motion on June 25, 2019, by telephone call, and subsequently stated that they oppose it. Plaintiffs-Appellees will serve counsel for Defendants-Appellants by e-mail with copies of this motion and supporting documents attached.

(iii) Plaintiffs-Appellees seek emergency en banc relief and an emergency administrative stay pending resolution of their motion for en banc reconsideration 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/ Benjamin Gutman
Benjamin Gutman

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INTRODUCTION AND RULE 35 STATEMENT

The States of Oregon, New York, Colorado, Connecticut, Delaware, Hawaii, Illinois, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New Mexico, North Carolina, Pennsylvania, Rhode Island, Vermont, Virginia, and Wisconsin, and the District of Columbia, brought this suit to challenge a new federal regulation that drastically changes the rules applicable to the Title X program. After the district court (McShane, J.) granted a preliminary injunction to preserve the status quo, a motions panel (Leavy, Callahan, Bea, JJ.) issued an extraordinary published order granting a stay that upends Title X and will cause more unwanted pregnancies, more abortions, and less disease screening. En banc reconsideration of this stay order is warranted to address questions of exceptional importance to the States, their residents, and public health. Fed. R. App. P. 35(b)(1)(B). And an administrative stay pending the resolution of this motion for en banc reconsideration is necessary to halt the irreparable harm already being caused to plaintiffs and their citizens.

Since 1970, Title X has funded vital family-planning and reproductive healthcare services for low-income patients. A Final Rule issued on March 4, 2019, by the Department of Health and Human Services (HHS) will reverse the rules that have applied to grantees for decades and decimate the Title X program by forcing providers to violate medical ethics and prevailing standards

of medical care, or else leave the program. To preserve the status quo and prevent irreparable harm to the States, patients, and public health, the district court—after briefing, argument, and an evidentiary hearing—preliminarily enjoined the Final Rule.

A motions panel of this court, based on limited briefing and without oral argument, issued a published order staying the injunction and allowing the Final Rule's sweeping new regulatory scheme to take effect immediately. The panel ignored the district court's well-supported factual findings that the Rule will force many grantees to exit the Title X program, leaving patients with little or no access to critical healthcare. Staying the injunction and allowing HHS to impose the Final Rule immediately was entirely unnecessary when a merits panel will soon address defendants' expedited appeal from the preliminary injunction. En banc reconsideration is warranted because the stay order departs from normal appellate procedures and undermines the purpose of a stay pending appeal: to preserve the status quo until a merits panel can rule.

En banc reconsideration is also warranted because the stay rests on fundamental legal errors. For example, although Congress has required *all* Title X pregnancy counseling to be nondirective ("the Nondirective Mandate"), the Final Rule requires that only *some* pregnancy counseling must be nondirective.

The motions panel misunderstood either the Final Rule or the Nondirective Mandate in concluding that the Rule comports with the Mandate.

BACKGROUND

A. Title X

Since 1970, Title X has funded grants to States and other entities to provide family-planning services and reproductive healthcare to patients who have low incomes, live in rural communities, or face other barriers to accessing medical care.

1. The 1981 Guidelines

Section 1008 of Title X precludes grants from being "used in programs where abortion is a method of family planning." 42 U.S.C. § 300a-6. For nearly fifty years, HHS has recognized that § 1008 allows nondirective pregnancy counseling of the type required by established standards of medical care and medical ethics. Such nondirective counseling requires giving appropriate referrals and factual information about prenatal care and delivery, adoption, and abortion in a neutral manner—without steering a patient toward a particular option.

HHS formally adopted this well-established meaning of nondirective counseling in 1981, issuing written guidelines requiring all Title X grantees to offer nondirective counseling, including referrals, to pregnant patients. U.S. Department of Health & Human Services, Program Guidelines for Project

Grants for Family Planning Services 13 (1981) ("1981 Guidelines"). As HHS explained at that time, nondirective counseling comports with § 1008 because factual discussion of all pregnancy options does not fund abortions or promote abortion as a method of family planning. *See National Family Planning & Reproductive Health Assoc., Inc. v. Sullivan* ("*NFPRHA*"), 979 F.2d 227, 229 (D.C. Cir. 1992).

2. The 1988 Regulations

In 1988, HHS reversed course and prohibited Title X projects from providing any counseling about abortion, including referrals. 53 Fed. Reg. 2922, 2954 (1988). The 1988 regulations further required that Title X programs be physically separated from any abortion-related activities. *Id.* at 2945.

The Supreme Court upheld the 1988 regulations in *Rust v. Sullivan*, 500 U.S. 172 (1991), concluding that § 1008 was ambiguous because Congress had not spoken "directly to the issues of counseling, referral, advocacy, or program integrity." *Id.* at 184. The Court also concluded that the regulations were sufficiently supported by the administrative record presented then, including two reports that HHS claimed expressed concerns about potential confusion among Title X grantees about how to comply with § 1008. *Id.* at 187–89. The regulations never went fully into effect because of additional litigation. *See NFPRHA*, 979 F.2d at 241.

In 1993, HHS revoked the 1988 regulations, reinstated the 1981 Guidelines, and removed the physical-separation requirements. 58 Fed. Reg. 7464–01 (1993).

3. The Nondirective Mandate

Starting in 1996, Congress enacted appropriations statutes every year requiring that "all pregnancy counseling" in Title X programs "shall be nondirective" (Nondirective Mandate).[1] The legislative history and context of the Nondirective Mandate make clear that Congress understood nondirective pregnancy counseling to have the meaning reflected in prevailing medical standards of care and adopted by the 1981 Guidelines.

After *Rust*, Congress twice passed legislation—ultimately vetoed—clarifying that § 1008 had always permitted nondirective counseling, including referrals, about all legal pregnancy options.[2] Legislators explained that nondirective counseling includes referrals—as the 1981 Guidelines had previously required. *See* H.R. Rep. 102-204 (1991) (1981 Guidelines "enumerated such [nondirective] options counseling to include information and referral").

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[1] *See, e.g.*, Department of Health and Human Services Appropriations Act, 1996, Pub L. No. 104-134, 110 Stat. 1321-221 (1996).

[2] *See* H.R. 2707, 102d Cong., § 514 (1992) (reported in Senate); S. 323, 102d Cong. (1992).

Congress adopted this same understanding of nondirective pregnancy counseling in the Nondirective Mandate. Congress enacted the Mandate to preserve then-current "law and policy with respect to Title X recipients and abortion funding, counseling, and lobbying," 141 Cong. Rec. H8252 (1995). As § 1008 required, the appropriations statute reiterated that Title X funds "shall not be expended for abortions." *Id.* at H8249. And as required by the 1981 Guidelines—which were then back in place—the appropriations statute made "clear that all counseling must be nondirective"; i.e., all counseling must "lay out the legal options" available to pregnant patients. *Id*. at H8250.

In 2000, HHS promulgated regulations implementing the Nondirective Mandate and formally adopting the nondirective counseling rules set forth in the 1981 Guidelines. 65 Fed. Reg. 41,270–01 (2000). The 2000 regulations also provide that while grantees must financially separate their Title X programs from abortion-related services funded by non-Title X funds, physical separation is not required. *Id.* at 41,275–76.

4. The Affordable Care Act (ACA)

In 2010, Congress enacted § 1554 of the ACA to further protect patients' ability to receive medical information and services that are ethically and medically necessary. Section 1554 broadly prohibits HHS from promulgating "any regulation" that creates "unreasonable barriers" to obtaining appropriate

medical care; impedes "timely access" to such care; interferes with patient-provider communications "regarding a full range of treatment options"; restricts providers from disclosing "all relevant information to patients making health care decisions"; or violates providers' ethical standards. 42 U.S.C. § 18114.

B. The Final Rule

In March 2019, HHS published the Final Rule at issue here. Despite the Nondirective Mandate, the Final Rule allows Title X grantees to give patients *directive* pregnancy counseling that discusses prenatal care and adoption while omitting any information about abortion. 84 Fed. Reg. 7724, 7733, 7744–46. The Final Rule also places asymmetric burdens on abortion-related information by requiring that any counseling about abortion include counseling about another pregnancy option, prohibiting referrals for abortion, and mandating referrals for prenatal care—all regardless of the patient's expressed wishes. *Id.* at 7744–49, 7789–90.

The Final Rule further requires Title X-funded care to be physically separated from activities prohibited by the Final Rule, including referrals for abortion: i.e., entirely separate facilities, separate personnel and workstations, and separate healthcare records. *Id.*

C. The Preliminary Injunction

Immediately after HHS adopted the Final Rule, plaintiffs here—20 States and the District of Columbia—challenged the Final Rule and moved for a preliminary injunction.

The district court preliminarily enjoined the Rule's implementation. First, the court found that plaintiff States, their residents, and the public health will be irreparably harmed absent a preliminary injunction. (ER32–34.) The court explained that by forcing state and private grantees to violate established standards of medical care, the Rule will compel grantees to exit the program. (ER33.) That devastation of Title X will reduce access to healthcare and family-planning services, decrease testing for sexually transmitted infections and cancer, and increase unintended pregnancies and abortions—imposing significant costs on the States and the public health of their most vulnerable residents. (ER33.)

Second, the court determined that defendants would suffer no irreparable harm from maintaining the status quo pending judicial review. The court emphasized that the current regulations' requirements for nondirective counseling and financial (but not physical) separation of Title X funds have governed the Title X program "for nearly 50 years and have an excellent track record." (ER34.)

Third, the district court determined that plaintiffs are likely to succeed on the merits of their Administrative Procedure Act (APA) claims. The court concluded that the Final Rule likely contravenes the Nondirective Mandate. (ER18–19.) The court also determined that the physical-separation requirements likely contravene § 1554 by disrupting Title X projects and thus creating unreasonable barriers to patients obtaining healthcare. (ER26–27.) The court emphasized that *Rust* did not control because both statutes were enacted after *Rust*.

The court identified serious questions regarding whether the Final Rule is arbitrary and capricious. For example, the court concluded that the Rule requires Title X providers to violate established standards of medical care and ethics, and that HHS's contrary assertions lacked any evidentiary support or rational explanation. (ER27–31.) And the court concluded that HHS had arbitrarily failed to consider the enormous costs and public-health harms that will result from the Final Rule. (ER31–33.)

D. The Motions Panel's Published Stay Order

On June 20, based on limited expedited briefing and without oral argument, a motions panel of this Court (Leavy, Callahan, Bea, JJ.) issued a published opinion granting defendants' motion to stay the preliminary injunction, thereby allowing HHS to implement the Final Rule immediately.

The stay allows HHS to upend the status quo that has governed Title X for decades, although a merits panel of this Court will soon address defendants' already-expedited appeal from the preliminary injunction.

By this motion, the plaintiff States—like the plaintiffs in three other cases consolidated on appeal—seek en banc reconsideration of the stay order.[3]

ARGUMENT

I. The Stay Order Improperly Upends the Status Quo to the Irreparable Detriment of the States and Public Health

The Court should issue an emergency administrative stay of the motion panel's order, and grant en banc reconsideration, to prevent the motions panel's irregular stay order from upending the normal course of appellate proceedings, disrupting the rules that have successfully governed Title X for decades, and irreparably harming the plaintiff States, their residents, and public health.

The purpose of a stay pending appeal is to preserve the status quo pending resolution of an appeal by a merits panel. *See Nken v. Holder*, 556 U.S. 418, 429 (2009). But the motions panel's stay allows HHS to replace the rules HHS has maintained for nearly fifty years with a new regulatory regime. Moreover, the motions panel did so through the highly unusual process of issuing a published stay order based on limited stay briefing and defendants'

[3] The State of Maryland is currently covered by a separate injunction issued by a district court in a different case.

arguments in their opening brief—to which plaintiffs have not yet had an opportunity to respond.[4] The motions panel issued a stay although defendants' appeal from the preliminary injunction has already been expedited for consideration by a merits panel (Add.25), thereby dramatically reducing any need for an interim stay.

An emergency stay of the motions panel order and en banc reconsideration of this order is thus warranted to restore the status quo until the merits panel can review the preliminary injunction based on full and fair briefing. Such relief is critical here because the motion panel's upending of the status quo is already causing irreparable harm to States and public health across the nation. State and private Title X providers are being forced to leave the program and curtail services because they cannot comply with the new Rule without violating standards of medical care and ethics. (SSER65; AMA Mot. 11–12.) The resulting irreparable harms to public health—including more unintended pregnancies, more abortions, and less cancer and HIV testing—are falling especially hard on patients who live in low-income and rural communities that rely heavily on Title X providers. Vermont residents, for example, will lose their entire Title X program if the stay order is not lifted.

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[4] *Compare* HHS Br. 29 (May 31, 2009), *with* Add.19.

(SSER50–52; *see also* SSER11–13 (Planned Parenthood serves more than 90% of Title X patients in Minnesota).)

States that are direct Title X grantees—including Oregon, New York, and Hawai'i—must choose between losing all Title X funding, or allowing violations of medical ethics and incurring costly operational changes. (SSER2–4, 65–66, 93–95); *California v. Azar*, 911 F.3d 558, 581–82 (9th Cir. 2018). For example, structural changes required by the Final Rule will cost Oregon almost $1 million. (SSER66). Moreover, all the plaintiff States will soon incur significantly increased healthcare costs from the gaps in care and negative outcomes created by the Final Rule. (SSER13–14, 81–82, 95–96.)

By dismissing these harms as "minor" and "speculative" (Add.24), the motions panel improperly disregarded the district court's factual findings. The panel ignored plaintiffs' *unrebutted* evidence that allowing the Rule to take effect increases providers' costs while the appeal is pending (Add.25) and eliminates necessary family-planning and healthcare services for millions of low-income individuals before the merits panel has the opportunity to conduct its review (ER5, 31; PSER3).

These severe disruptions and public-health harms are unnecessary, because defendants will not suffer *any* irreparable injury from maintaining the status quo during their already-expedited appeal. The preliminary injunction

simply requires HHS to continue applying the same rules it has maintained since 1981, including when it issued the most recent Title X grants in March 2019. Defendants submitted *no* evidence to the contrary in opposing the preliminary injunction or seeking this extraordinary stay.

II. The Motions Panel Made Key Errors When Evaluating the Merits of Defendants' Appeal

En banc reconsideration and a stay pending such reconsideration are also warranted because the motions panel misapprehended critical points of law and fact in concluding that defendants are likely to succeed on their appeal.

1. The Final Rule is contrary to law.

a. The gag requirements violate the Nondirective Mandate.

The Final Rule flatly violates Congress's mandate that "all pregnancy counseling" in Title X projects "shall be nondirective," 132 Stat. at 3070–71. The motions panel did not explain how the Rule complies with that Mandate. Under long-settled standards of care, nondirective pregnancy counseling requires the neutral presentation of all legal pregnancy options about which the patient inquires, with referrals on request. See *supra*, at 5–6. The Final Rule violates this Nondirective Mandate by (i) allowing providers to omit information about abortion; (ii) requiring providers to force information about non-abortion options upon a patient who does not want such information; and

(iii) prohibiting providers from referring patients for abortion while requiring providers to refer every pregnant patient for prenatal care.

(i) Omitting Abortion Information: The Final Rule allows Title X providers to steer a patient towards prenatal care and adoption by discussing only those options while omitting information about abortion, giving a list of primary care providers that do not offer abortions, and supplying referrals only for prenatal care and adoption—even if the patient has specifically requested abortion-related information. *See* 84 Fed. Reg. at 7745, 7789. Moreover, providers need not disclose that they are withholding abortion-related information.

The motions panel overlooked that "removing an option from the client's consideration necessarily steers her toward the options presented and is a directive form of counseling" contravening the Nondirective Mandate. 65 Fed. Reg. at 41,274; *see, e.g.*, 137 Cong. Rec. 18,453 (counseling impermissibly directive if provider "does not have to give" abortion-related information). Mistakenly regarding counseling as nondirective even if it omits any information about abortion, the motions panel misread the Final Rule as requiring that "such counseling as is given shall be nondirective." (Add.18.) But the failure of the Final Rule to require that all counseling that is given is in fact

nondirective is fatal because Congress required that "*all* pregnancy counseling" in the Title X program must be nondirective. 132 Stat. at 3070–71.

(ii) Asymmetrical Burdens on Abortion Information: The Final Rule forces providers who include abortion-related information in counseling to give patients information about other pregnancy options that the patients do not want—and prevents the patients from receiving abortion-related information that the patients do want. (ER19–21; AMA Mot. 7, 13–14.)

The motions panel mistakenly assumed that "requiring clinics to provide information on some options but not others"—i.e., to present information in a selective way—is nondirective counseling that Congress, HHS, and medical associations have long prohibited. *See*, *e.g.*, *supra*, at 3–6. Contrary to the panel's view, directive counseling does not require a provider to "affirmatively endorse one option over another" (Add.19).

(iii) Directive Referrals: The Final Rule further violates the Nondirective Mandate by requiring Title X providers to refer *every* pregnant patient for prenatal care and prohibiting providers from referring *any* pregnant patient for an abortion, regardless of the patient's wishes. 84 Fed. Reg. at 7788–7789. The motions panel erroneously accepted defendants' assertion that nondirective counseling excludes referrals (Add.18–19), but referrals have long been an

integral part of pregnancy counseling—and Congress understood this when enacting the Nondirective Mandate.

Beginning with the 1981 Guidelines, HHS adopted the settled medical understanding that pregnancy counseling includes referrals on request. See *supra* at 3–6. Congress was aware of that settled understanding and of HHS's position when enacting the Nondirective Mandate. *See e.g.*, 102 H. Rep. 240 (1991) (1981 Guidelines required "nondirective options counseling" and "enumerated such options counseling to include information and referral"). Accordingly, the Nondirective Mandate should be read to incorporate the long-established understanding of HHS and the medical community. *See McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337, 342 (1991).[5]

The motions panel's bald assertion that neither Congress nor HHS understood referrals to be part of nondirective counseling is further belied by HHS's current view. As the district court correctly observed (and the motions panel mistakenly ignored), the Final Rule states that "Title X projects should not use nondirective pregnancy counseling, *or referrals* made for prenatal care or adoption *during such counseling*" to encourage or promote abortion as a

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[5] *See also* 137 Cong Rec. at 18,453 (failing to provide referrals for abortion does not ensure that each patient "receives nondirective counseling"); *1991 Reauthorization Hr'g*, at 10 (Representative Porter) (during nondirective counseling "[h]onest information is given, referral provided").

method of family planning. 84 Fed. Reg. at 7747 (emphasis added). And it states that "nondirective pregnancy *counseling can include* counseling on adoption, and corresponding *referrals* to adoption agencies." *Id.* at 7730 (emphasis added).

b. The gag and separation requirements violate § 1554.

As the district court properly concluded (ER23–26), the Final Rule's separation requirements likely contravene § 1554 of the ACA by imposing "unreasonable barriers" to patients' ability to obtain appropriate medical care and impeding "timely access to health care services," 42 U.S.C. § 18114(1)-(2). The motions panel overlooked the extent to which the Rule impedes timely access to abortion, interferes with patient-provider communications, and requires providers to violate ethical standards. 42 U.S.C. § 18114(3)-(5).

Contrary to the motions panel's assertion, plaintiffs did not waive their § 1554 claim. Commenters raised the "specific argument[s]" raised by plaintiffs here, *Koretoff v. Vilsack*, 707 F.3d 394, 398 (D.C. Cir. 2013) (per curiam), by identifying each substantive way in which the Final Rule contradicts § 1554. *See California v. Azar*, 2019 WL 1877392, at *20 (N.D. Cal. Apr. 26, 2019) (collecting comments). Indeed, HHS acknowledged comments "objecting that the Final Rule created barriers to patients' access to care, interfered with provider-patient communications, and violated principles of medical ethics." *Id.*

at *21. HHS thus had ample "opportunity to consider the issue[s]," *Portland Gen. Elec. Co. v. Bonneville Power Admin.*, 501 F.3d 1009, 1024 (9th Cir. 2007), and commenters were not required to cite to § 1554. *See Idaho Sporting Cong. v. Rittenhouse*, 305 F.3d 957, 966 (9th Cir. 2002).

The motions panel further erred (Add.20–21) in concluding that Congress's decision to constitute Title X as a funding statute exempted the Final Rule from § 1554. Section 1554's broad application to "any regulation" promulgated by HHS encompasses regulations issued under funding statues and is not limited to HHS regulations issued under only the ACA (Add.20–21).

c. *Rust* does not control.

The motions panel's repeated reliance on *Rust* (Add.11, Add.21–22) misunderstands the relevant legal framework because that 1991 decision did not—and could not—address either the Nondirective Mandate, enacted in 1996, or the ACA, enacted in 2010. (*See* ER16–17.) *Rust* concluded that § 1008's prohibition on providing "abortion [as] a method of family planning" was ambiguous under then-existing statutes, noting that Congress had not addressed "the issues of abortion counseling, referral, or advocacy." 500 U.S. at 185. Since then, the Nondirective Mandate has clarified that nondirective counseling is allowed by § 1008 and required by HHS's appropriations statutes.

The Mandate did not impliedly repeal § 1008, which continues to prohibit providers from using Title X funds for abortions. Likewise, the ACA limited HHS's discretion to enact certain regulations without repealing § 1008. The three statutes can live in harmony under plaintiffs' interpretation. *See National Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 662 (2007).

2. The Final Rule is arbitrary and capricious.

The motions panel made further legal and factual errors in overriding the district courts' well-founded conclusion that there are serious questions whether the Final Rule is arbitrary and capricious.

As the AMA Motion explains (at 17–19), the Rule's requirements will force many Title X providers to leave the program. HHS speculated—with no support—that this mass exodus will not "have a significant impact on access to services," 84 Fed. Reg. at 7782, or that new providers will materialize to fill the resulting gaps, *id.* at 7780.[6] "[C]onclusory statements" do not constitute reasoned decision-making. *Getty v. Fed Savs. & Loan Ins. Corp.*, 805 F.2d 1050, 1057 (D.C. Cir. 1986).

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[6] The current nondirective counseling requirements provide no plausible reason for providers not joining the Title X program, as HHS was not enforcing the 2000 regulations against providers or applicants with religious or moral objections to abortion. *See* 84 Fed. Reg. 23,170, 23,191 n.64.

The Final Rule's separation requirements were not needed to ensure that grantees do not use Title X funds for improper purposes. *See* 84 Fed. Reg. at 7763–68. HHS identified no evidence that grantees are improperly using Title X funds or are confused about proper separation procedures. Rather, the record demonstrates that HHS and grantees maintain robust monitoring and auditing procedures that amply protect program integrity. (NYDOH Comment 15, 18–19, 24–26; WA/OR/VT/MA AGs Comment 15–19). Unlike in *Rust*, HHS possessed decades of evidence demonstrating that Title X funds are not being used for impermissible purposes. HHS's contrary assertion in the Final Rule "runs counter to the evidence before" it. *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Auto Ins. Co.*, 463 U.S. 29, 43 (1983).

Finally, the motions panel improperly ignored that complying with physical-separation requirements is cost-prohibitive for many providers. (WA/OR/VT/MA AGs Comment 23–24; NYDOH Comment 18–19). The cost estimates that HHS "considered" (Add.23) lacked any factual basis. HHS estimated—without identifying any support—that the separation requirements would cost providers $20,000 to $40,000. 84 Fed. Reg. at 7781–82. The administrative record, however, shows that many providers' expenditures will approach $625,000—more than fifteen times the highest figure HHS cited. (PPFA Comment 30–31). The lack of any rationale for HHS's cost figures

violates the APA and further distinguishes this case from *Rust*, which was decided based on a different, now-outdated record.

CONCLUSION

The Court should grant plaintiffs' motion for reconsideration en banc and vacate the motions panel's stay order. The Court should also issue an administrative stay of the motions panel's order pending resolution of this motion for reconsideration.

Respectfully submitted,

ELLEN F. ROSENBLUM
Attorney General
State of Oregon

/s/ Benjamin Gutman
BENJAMIN GUTMAN
Solicitor General
JONA J. Maukonen
Senior Assistant Attorney General

LETITIA JAMES
Attorney General
State of New York
BARBARA D. UNDERWOOD
Solicitor General
ANISHA S. DASGUPTA
Deputy Solicitor General

/s/ Judith N. Vale
JUDITH N. VALE
Senior Assistant Solicitor General

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 PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

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

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

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

Plaintiffs-Appellees,

v.

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

Defendants-Appellants.

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

v.

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

No. 19-35394

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

ORDER ON MOTIONS FOR STAY PENDING APPEAL

Filed June 20, 2019

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

Per Curiam Order

SUMMARY*

Civil Rights

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

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

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

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

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

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

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

COUNSEL

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

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

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

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

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

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

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

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

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

ORDER

PER CURIAM:

BACKGROUND

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

> None of the funds appropriated under this subchapter shall be used in programs where abortion is a method of family planning.

42 U.S.C. § 300a-6.

In 1988, the Department of Health and Human Services ("HHS") explained that it "interpreted [§] 1008 . . . as prohibiting Title X projects from in any way promoting or encouraging abortion as a method of family planning," and "as requiring that the Title X program be 'separate and distinct' from any abortion activities of a grantee." 53 Fed. Reg. at 2923. Accordingly, HHS promulgated regulations forbidding Title X grantees from providing counseling or referrals for, or otherwise encouraging, promoting, or advocating abortion as a method of family planning. *Id.* at 2945. To prevent grantees from evading these restrictions, the regulations placed limitations on the list of medical providers that a program must offer patients as part of a required referral for prenatal care. *See id.* Such a list was required to exclude providers whose principal business is the provision of abortions, had to include providers who do not provide abortions, and could not weigh in favor of

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

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

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

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

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

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

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

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

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

ANALYSIS

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

I.

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

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

As a threshold matter, we note that the Final Rule is a reasonable interpretation of § 1008. Congress enacted § 1008 to ensure that "[n]one of the funds appropriated under this subchapter shall be used in programs where abortion is a method of family planning." 42 U.S.C. § 300a-6. If a program promotes, encourages, or advocates abortion as a method of family planning, or if the program refers patients to abortion providers for family planning purposes, then that program is logically one "where abortion is a method of family planning." Accordingly, the Final Rule's prohibitions on advocating, encouraging, or promoting abortion, as well as on referring patients for abortions, are reasonable and in accord with § 1008. Indeed, the Supreme Court has held that § 1008 "plainly allows" such a construction of the statute. *Rust*, 500 U.S. at 184 (upholding as a reasonable interpretation of § 1008 regulations that (1) prohibited abortion referrals and counseling, (2) required referrals for prenatal care, (3) placed restrictions on referral lists, (4) prohibited promoting, encouraging, or advocating abortion, and (5) mandated financial and physical separation of Title X projects from abortion-related activities). The text of § 1008 has not changed.

II.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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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**.

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 4,169 words, excluding the exempted portions of the brief. The brief has been prepared in proportionally spaced typeface using Microsoft Word 2010 in 14 point Times New Roman font.

/s/ Benjamin Gutman

BENJAMIN GUTMAN
Solicitor General
benjamin.gutman@doj.state.or.us

Attorney for State of Oregon

NOTICE OF FILING AND PROOF OF SERVICE

I hereby certify that on June 26, 2019, I directed the Emergency Motion of Plaintiff States for Reconsideration En Banc of the Motions Panel's June 20, 2019 Published Order Staying the Preliminary Injunction Pending Appeal and for an Administrative Stay of the Motions Panel's Order Pending Resolution of this Motion for En Banc Review to be electronically filed with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

/s/ Benjamin Gutman
BENJAMIN GUTMAN
Solicitor General
benjamin.gutman@doj.state.or.us

Attorney for State of Oregon

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