NO. 19-35394

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STATE OF WASHINGTON,

Plaintiff-Appellee,

v.

ALEX M. AZAR II, in his official capacity as Secretary of the United States Department of Health and Human Services; and UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Defendants-Appellants.

NATIONAL FAMILY PLANNING & REPRODUCTIVE HEALTH 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. et al.,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

STATE OF WASHINGTON'S PETITION FOR EN BANC REVIEW OF STAY ORDER AND RULE 27-12 MOTION TO EXPEDITE BRIEFING AND DECISION OF EN BANC PETITION

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I. INTRODUCTION

The panel's stay order in this case upends a decades-old status quo, subverts this Court's processes, conflicts with this Court's precedent, and will have disastrous imminent consequences. It must be reconsidered *en banc*.

Three district courts in this circuit correctly granted preliminary injunctions barring the Department of Health and Human Services (HHS) from implementing radical changes in the Title X program, which funds vital health care services for low-income individuals. Each court found that the changes were likely unlawful and would have immediate irreparable consequences for States, healthcare providers, and patients, including leaving most Washington counties with no Title X provider. HHS appealed the injunctions and sought a stay.

The motions panel ordered rushed briefing and never held argument, but then belied any notion of true emergency by waiting nearly a month to issue its published order, until briefing on the preliminary injunction appeal itself is nearly finished. Rather than evaluating the district courts' factual findings for clear error as required by precedent, the panel ignored those findings and substituted its own. It also made extensive, erroneous legal conclusions and invented an unprecedented standard for irreparable injury to the government.

The *en banc* Court must intervene to preserve the proper role of the motions panel, to correct the glaring conflicts between the panel's reasoning and this Court's

precedent, and to prevent imminent harm to Plaintiffs. The Court should grant rehearing *en banc* and dissolve the stay pending *en banc* review.

II. STATEMENT OF THE CASE

Since 1970, Title X[1] has been a critical part of the nation's public health safety net, providing grants to fund high-quality family planning services for low-income individuals. As the sole grantee of Title X funds in Washington, the Washington State Department of Health (DOH) oversees a network of 16 organizations operating 85 clinics statewide, which served over 91,000 patients in 2017. ECF No. 54 at 8; ECF No. 9 at 5–6; ECF No. 11 ¶¶ 14, 33.[2] . Title X funding allows DOH to help low-income patients avoid unintended pregnancy; prevent pregnancy-related health risks; reduce infant mortality; and enhance education, economic stability, and equality. 42 U.S.C. § 300; S. Rep. No. 91-1004, at 9 (1970); ECF No. 9 at 16–17; ECF No. 11 ¶¶ 3, 26, 96. Title X programs also offer pregnancy testing and counseling; testing and treatment for sexually transmitted infections; screening for cancer, high blood pressure, diabetes, and other issues; and referrals for out-of-program care. 42 U.S.C. § 300(a); 42 C.F.R. § 59.5(a); ECF No. 9 at 4; ECF No. 11 ¶ 31.

[1] 42 U.S.C. § 300 *et seq*.
[2] "ECF" citations refer to the Eastern District of Washington docket.

Section 1008 (42 U.S.C. § 300a-6) provides that no Title X funds may be used in "programs where abortion is a method of family planning," but does not restrict grantees from providing abortion care using *non*-Title X funds. For decades, Title X clinics have been able to refer patients for any out-of-program care, and to use the same facilities for Title X programs and abortion services while maintaining financial separation.

Section 1008 thus does not prohibit providers from communicating with patients about abortion. Rather, HHS's longstanding practice and existing regulations require grantees to "[p]rovide a broad range of acceptable and effective medically approved family planning methods" and offer nondirective pregnancy counseling, including requested referrals for abortion. 42 C.F.R. § 59.5(a)(1), (5). *See* 65 Fed. Reg. 41270, 41278 (July 3, 2000). Every year since 1996, Republican and Democratic Congresses have ratified this approach by passing appropriations acts requiring that "all pregnancy counseling" in Title X programs "shall be nondirective"—the "Nondirective Mandate." *See, e.g.*, Pub. L. No. 115-245, Div. B, Tit. II, 132 Stat. 2981, 3070–71 (2018); ECF No. 54 at 12.

In 2010, Congress enacted Section 1554 of the Patient Protection and Affordable Care Act (PPACA), which provides that HHS "shall not promulgate any regulation that . . . creates unreasonable barriers" for individuals seeking care, "impedes timely access to health care services," "interferes with [patient-provider]

communications," "restricts [a provider's] ability . . . to provide full disclosure of all relevant information to patients making health care decisions," or "violates the principles of informed consent and the ethical standards of health care professionals[.]" 42 U.S.C. § 18114.

On March 4, 2019, HHS published the Final Rule at issue. The Final Rule prohibits Title X providers from offering abortion information and referrals even when patients specifically request them, while requiring providers to give information and referrals for prenatal care even when patients do not want them. 84 Fed. Reg. 7747, 7788–7789 (March 4, 2019). It also requires physical separation of Title X-funded care from abortion services and referrals. *Id*. at 7789. This would mandate, for example, entirely separate facilities, personnel, and even healthcare records if Title X providers even offer certain information about abortion. The Final Rule makes other unprecedented changes, including removing the requirement that Title X services be "medically approved"; requiring that Title X clinics be in close proximity to "comprehensive primary health care services"; vesting HHS with broad discretion to arbitrarily determine grant eligibility; and limiting the uses of Title X funds (even uses expressly contemplated by the statute). ECF No. 9 at 12. The Final Rule was to go into effect on May 3, 2019.

Washington sued immediately, and its case was consolidated with one filed by the National Family Planning and Reproductive Health Association (NFPRHA)

and other plaintiffs. Washington and the NFPRHA plaintiffs moved to preliminarily enjoin the rule. On April 25, the district court held a lengthy hearing and issued a preliminary injunction. ECF No. 54. Citing over a dozen declarations, the court made detailed factual findings of the imminent irreparable harms the Plaintiffs would suffer if the Final Rule took effect, including that "over half of Washington counties would be unserved by a Title X-funded family planning provider," that Washington State would "lose more than $28 million" it could not recoup, and that "rural and uninsured patients" as well as "[s]tudents at Washington colleges and universities will be especially hurt." ECF No. 54 at 16. The court also found that Plaintiffs had "a likely chance of success" on multiple legal claims, including that the Final Rule was arbitrary and capricious, violated section 1554 of the Affordable Care Act, and violated the "Non-Directive Mandate." *Id.* at 14-16.

Two other district courts in this Circuit preliminarily enjoined the Final Rule based on similar factual findings and legal conclusions. *California v. Azar*, No. 19-cv-01184-EMC, 2019 WL 1877392, at *44 (N.D. Cal. Apr. 26, 2019); *Oregon v. Azar*, No. 6:19-cv-00317-MC, 2019 WL 1897475, at *16 (D. Or. Apr. 29, 2019).[3]

HHS appealed and moved to stay all three injunctions. ECF No. 58; *California v. Azar*, Case Nos. 19-15974, 19-15979 (9th Cir.); *Oregon v. Azar*, Case No. 19-

[3] As did the District of Maryland. *Mayor & City Council of Baltimore v. Azar*, CV RDB-19-1103, 2019 WL 2298808, at *1 (D. Md. May 30, 2019).

35386 (9th Cir.). HHS filed its motion in this case on May 13, the State responded on May 23, and HHS replied on May 28. In the meantime, this Court issued a scheduling order dictating that briefing on the preliminary injunction appeal will be complete in mid-July.

On June 20, without hearing argument, the motions panel stayed all three injunctions in a published order. *See* Order on Motions for Stay Pending Appeal (Order), Dkt. 34.

III. ARGUMENT

A. *En Banc* Review Is Warranted Because the Stay Upends the Status Quo and Will Disrupt Exceptionally Important Health Care Services

The motions panel's order allows HHS to enforce new rules that will upend how Title X has operated for nearly 50 years and will—as the district court found—imminently cut access to vital health care services for thousands of low-income people. These are issues of exceptional importance warranting *en banc* review. *See* FRAP 35(a)(2).

Title X is one of the most successful public health programs in our nation's history, providing millions of low-income patients with critical healthcare services. Washington's Title X programs serve tens of thousands of low-income patients annually. ECF No. 11 ¶¶ 14, 20, 33. These programs not only save the State hundreds of millions in health care costs annually by preventing unintended pregnancies and detecting diseases early, but they also provide incalculable benefits to tens of

thousands of Washington residents by reducing morbidity and mortality from sexually transmitted infections and cancer, reducing maternal deaths and adverse maternal and pediatric health outcomes, and allowing low-income people the freedom to decide when and whether to have children. ECF No. 9 at 4–5, 16–17.

As the district court found, the Final Rule will seriously and imminently disrupt Washington's Title X-funded programs. The district court found that "it is not legally or logistically feasible for Washington to continue accepting any Title X funding subject to the Final Rule." ECF No. 54 at 16; ECF No. 11 ¶ 60 (explaining that five Title X providers, operating 35 clinics statewide and serving 89% of the Title X patients in Washington, will be forced to leave the Title X program if the Final Rule goes into effect). As a result, "over half of Washington counties would be unserved by a Title X-funded family planning provider," which will "uniquely impact rural and uninsured patients." ECF No. 54 at 16; ECF No. 11 ¶ 61 (explaining that under Final Rule, 21 of Washington's 39 counties will have no Title X provider, including six of the 10 most populous counties in the State).

As the other requests for *en banc* review already filed amply demonstrate, and as supported by the district court's findings here, the motions panel's stay will have similarly disastrous consequences beyond Washington. Allowing the Rule to take effect will "seriously disrupt or destroy the existing network of Title X providers in both the State of Washington and throughout the entire nation." ECF No. 54 at 16.

It will also put healthcare providers to the "Hobson's Choice" of giving up federal funding for patient services or violating their ethical obligations by denying their patients full access to relevant information. *Id.* at 16-17.

Instead of respecting the trial court's discretion to preserve the status quo during the pendency of this suit, the motions panel, on rushed briefing and without argument, has permitted the Final Rule to take effect immediately, which will have disastrous effects on reproductive healthcare in Washington and nationwide. The continued functioning of Title X is an issue of exceptional importance, warranting *en banc* review.

B. *En Banc* Review Is Warranted Because the Panel's Order Conflicts with Settled Law of This Circuit and Invents a New Standard for Irreparable Injury

The motions panel's order conflicts with longstanding precedent of this Circuit in at least four respects, warranting *en banc* review. *See* FRAP 35(a)(1).

First, for decades this Court has repeatedly held that "[f]actual findings in support of a decision to grant a preliminary injunction are reviewed for clear error." *Int'l Molders' & Allied Workers' Local Union No. 164 v. Nelson*, 799 F.2d 547, 551 (9th Cir. 1986); *Adidas America, Inc. v. Skechers USA, Inc.*, 890 F.3d 747, 753 (9th Cir. 2018). When, as here, a district court has made factual findings about irreparable injury, "'clear error is not demonstrated by pointing to conflicting evidence in the record.'" *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 422 F.3d 782, 795

(9th Cir. 2005) (quoting *United States v. Frank*, 956 F.2d 872, 875 (9th Cir. 1991)). "Rather, '[a]s long as findings are plausible in light of the record viewed in its entirety, a reviewing court may not reverse even if convinced it would have reached a different result.'" *Id.* (quoting *Wardley Int'l Bank, Inc. v. Nasipit Bay Vessel*, 841 F.2d 259, 262 n.1 (9th Cir. 1988)).

Here, the motions panel rejected the district court's conclusion that Plaintiffs would suffer irreparable injury from implementation of the Rule, and instead concluded that any delay in implementing the Final Rule would irreparably injure HHS. Order at 24-25. But in reaching this conclusion, the panel never mentioned any of the factual findings of any of the district courts that granted preliminary relief, much less found any of those findings clearly erroneous. *Id.* The district court's detailed factual findings in this specific case were based on over a dozen declarations, while HHS submitted *no* evidence, and the district court specifically found that HHS's factual claims were "dismissive, speculative, and not based on any evidence presented in the record before this Court." ECF No. 54 at 18. If "'clear error is not demonstrated by pointing to conflicting evidence in the record,'" *Nat'l Wildlife Fed'n*, 422 F.3d at 795 (quoting *Frank*, 956 F.2d at 875), it surely cannot be demonstrated by pointing to *no* evidence in the record.

In discounting Plaintiffs' evidence of harm, the panel did cite and give deference to HHS's baseless "prediction" in the administrative record that the Rule

would increase Title X providers. Order at 25. But neither the panel nor HHS has cited any authority that a district court should defer to an agency's rulemaking prediction about irreparable harm. Indeed, this Court has said that it is an abuse of discretion to "defer[] to agency views concerning the equitable prerequisites for an injunction." *Sierra Forest Legacy v. Sherman*, 646 F.3d 1161, 1186 (9th Cir. 2011). Precedent required the motions panel to review the district court's factual findings for clear error, not to ignore those findings and defer to the Agency's unsubstantiated predictions.

Second, the panel found that HHS would suffer irreparable harm by being required to continue applying (for the limited time while this expedited appeal is pending) an interpretation of law that it has held for nearly 50 years and that has never been found incorrect by a court. Order at 24 ("Absent a stay, HHS will be forced to allow taxpayer dollars to be spent in a manner that *it has concluded* violates the law.") (emphasis added). Unsurprisingly, the panel provides no citation for the notion that this qualifies as an irreparable harm, because countless cases show that this is insufficient to demonstrate irreparable injury. If the government could show irreparable injury simply by claiming that it has concluded (absent any court ruling) that its own longstanding policy violates the law, courts would never be able to enjoin policy changes where the government cited legal risk as the rationale for the change. Yet courts enjoin such changes regularly. *See, e.g.*, *Regents of the Univ. of*

Cal. v. U.S. Dep't of Homeland Sec., 908 F.3d 476, 500 (9th Cir. 2018) (affirming injunction against termination of DACA program despite agency's "belief that DACA was unlawful"); *Batalla Vidal v. Nielsen*, 279 F. Supp. 3d 401, 429 (E.D.N.Y. 2018) (enjoining DACA cancellation even though government "believed [DACA] to be unconstitutional and unlawful"). [4]

Third, in concluding that "[t]he harms that Plaintiffs would likely suffer if a stay is granted are comparatively minor," Order at 24, the panel ignored that this Court has repeatedly found similar harms substantial and irreparable. *E.g., California v. Azar*, 911 F.3d 558, 571, 581 (9th Cir. 2018) (irreparable harm based on "women losing employer-sponsored contraceptive coverage, which will then result in economic harm to the states"); *Regents of Univ. of Cal. v. U.S. Dep't of Homeland Sec.*, 279 F. Supp. 3d 1011, 1033, 1046 (N.D. Cal.), *aff'd*, 908 F.3d 476 (9th Cir. 2018) (irreparable harm based on loss of tax revenues and detrimental impact on health and safety).

[4] The panel simply asserted an irreparable harm of being required to apply an interpretation of law that the agency has concluded is wrong, without citation to any authority. Order at 24. HHS at least attempts to provide authority for this proposition, but its reliance on *Maryland v. King*, 567 U.S. 1301 (2012) (Roberts, C.J., in chambers) is unavailing. In *King*, the Court held that an injunction prohibiting Maryland from effectuating a statute enacted by its state legislature caused irreparable injury. *Id.* at 1301. The unprecedented ruling here, by contrast, concerns an agency interpretation of a law that represents a break from prior agency interpretations and which conflicts with judicial and Congressional interpretations of the law.

Finally, the panel ignored the fundamental tenet that a prior ruling that a statute is ambiguous does not determine the statute's meaning in light of subsequent changes in law. *See generally, e.g.*, *United States v. Pepe*, 895 F.3d 679, 686 (9th Cir. 2018) (holding that subsequent changes in law can make prior opinion interpreting statute no longer binding).

The nature and length of this motion do not allow for a full discussion of the merits. But a core error that runs throughout the panel's order is its repeated invocation of *Rust v. Sullivan*, 500 U.S. 173 (1991), as dispositive. *E.g.,* Order at 14, 21, 24. In *Rust*, the Court held that HHS's 1988 regulations, which included a gag rule and physical separation requirements, reflected one "permissible construction" of Section 1008, in light of that statute's ambiguity. 500 U.S. at 184, 187; ECF No. 54 at 10 n.4. *Rust* did not hold that this was the only interpretation, nor did it invalidate the prior (and subsequent, existing) interpretation allowing abortion referrals as part of nondirective pregnancy counseling, while keeping abortion services financially separate. *Id.*

Since *Rust*, however, intervening changes in law have narrowed the reasonable interpretations of Section 1008. Since 1996, Congress has included a mandate in every HHS appropriations bill requiring that "all pregnancy counseling shall be nondirective." Order at 14–15 (quoting 132 Stat. 2981, 3070–71 (2018)). And in 2010, Congress prohibited HHS from adopting any regulation that interferes

with patient-provider communications, violates principles of medical ethics, or impedes patients' access to medical information and care. Order at 15-16 (quoting Pub. L. No. 111–148, Title I, § 1554 (42 U.S.C. § 18114)). Contrary to the panel's conclusion, the Final Rule's various restrictions and requirements on pregnancy counseling within the Title X program violate these provisions by, among other things, requiring patients to receive unwanted information about medical options they are not considering, permitting the withholding of medically indicated information, and imposing untenable physical separation requirements that will drive providers out of Title X programs.

In addition, *Rust* was decided on a different rulemaking record that did not account for HHS's current Program Requirements (which the Final Rule reversed *sub silentio*, and which the panel never mentioned), modern principles of medical ethics and standards of care, evidence of the extensive harms of the gag and separation requirements (and lack of evidence that their speculative benefits will materialize), or reliance interests developed over several decades. As the district court found, "it seems the Department has relied on the record made 30 years ago, but not the record made in 2018–19," and it "failed to consider important factors," "acted counter to and in disregard of" current evidence and public comments, and "offered no reasoned analysis based on the record." ECF No. 54 at 6, 16 (citing *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S.

29, 42–43 (1983); *Perez v. Mortgage Bankers Ass'n*, __ U.S.__, 135 S.Ct. 1199, 1203 (2015)).

The Court should grant *en banc* review to rectify these conflicts between the motions panel's order and this Court's binding precedent.

C. Expedited Review and Suspending the Stay Pending Review Are Necessary to Avoid Imminent Harm

In light of the extraordinary harms that will begin as soon as HHS starts enforcing the Final Rule as allowed under the stay, this Court should expedite briefing and decision on this petition for rehearing *en banc* and should immediately suspend the stay.[5]

The State has documented above the imminent harms it will face if HHS is allowed to enforce the Final Rule. Title X providers serving 90% of the Title X patients in Washington will flee the program because of unwillingness or inability to comply with the Final Rule's illegal requirements and to violate their ethical obligations to patients. This will lead to immediate, dramatic reductions in access to healthcare for low-income individuals, disruptions to the healthcare network that the State has spent decades building, and increased healthcare expenditures by the State. In short, the lives and health of some of Washington's most vulnerable residents and the structure and integrity of the program designed to serve them are at stake.

[5] Appellants' counsel oppose the request to expedite.

Even if HHS's baseless "prediction" that the Final Rule "may" ultimately increase the number of providers materialized, Order at 23, a vast Title X network like Washington's cannot be dismantled and rebuilt quickly. There is no evidence that new providers could serve the same number of patients as the departing high-volume providers, nor that they could instantly apply for and receive funds, much less equip and staff facilities and bring patients in the door. Thus, disrupting the status quo by enforcing the Final Rule, even briefly, will cause dramatic harms, many of which cannot be undone.

Given the importance and urgency of the issues at stake, the Court should order HHS to respond to this and other petitions for *en banc* review on an expedited basis, and the Court should expedite its process for deciding whether to grant *en banc* review.

While the Court is taking those steps, it should suspend the motions panel's stay order. Doing so is essential to preserve the fruits of a successful rehearing. *Cf. Nken v. Holder*, 556 U.S. 418, 427, 129 S.Ct. 1749 (2009) (recognizing the inherent power of an appellate court "to hold an order in abeyance" while assessing its legality). The stay order will trigger many of the same irreparable consequences that would flow from reversal of the preliminary injunction on the merits. If a panel of this Court had reversed the district courts' preliminary injunction rulings, the panel's decision would be stayed automatically while the State sought *en banc* review. *See*

FRAP 41(b). The State should receive the same relief here given that the same dire consequences are at stake.

IV. CONCLUSION

This Court should grant *en banc* review of the erroneous order staying the preliminary injunction and suspend the order pending the Court's consideration of the petition for reconsideration *en banc*.

RESPECTFULLY SUBMITTED this 25th day of June, 2019.

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Petition for Rehearing En Banc complies with the type-volume limitation of Ninth Circuit Rules 35-4 and 40-1 because it contains 3,688 words. This Petition for Rehearing En Banc complies with the typeface and the type style requirements of Federal Rule of Appellate Procedure 27 because it has been prepared in a proportionally spaced typeface using 14-point font.

/s/ Noah G. Purcell
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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

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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**.