

No. 19-35394

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

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

v.

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

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.

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

**PLAINTIFFS-APPELLEES' CONDITIONAL PETITION
FOR INITIAL HEARING EN BANC**

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CORPORATE DISCLOSURE STATEMENT

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

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INTRODUCTION AND RULE 35 STATEMENT

This matter raises urgent questions of extraordinary legal and real-world import for Plaintiffs and millions of low-income patients who rely on Title X for access to quality family planning care. In the midst of briefing the merits appeal of a preliminary injunction properly issued by the district court, a motions panel of this Court published an order that bypassed the regular appeals process and arguably created binding circuit law limiting consideration of these important issues.

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

A motions panel of this Court has short-circuited the appeals process,

publishing an order that cast aside the district courts' findings of fact, ignored applicable law, purported to decide merits issues without full briefing or oral argument, and stayed the preliminary injunctions pending appeal. *See* Dkt. No. 34 (attached as Addendum A ("Add.A")). The order also appeared to rely on new arguments from Defendants' merits brief on the preliminary injunction. *Compare, e.g.,* Add.A19, *with* Dkt. No. 16 at 29-30. But Plaintiffs had not had an opportunity to respond to those arguments as their answering briefs were not due until today. These process failures require immediate correction by the en banc Court to allow a full and fair review of the preliminary injunction under the correct standards. Plaintiffs have sought en banc review of the motions panel's order. *See* Dkt. Nos. 38, 40-1. However, if that decision is not vacated and is considered binding on this Court, initial hearing by a merits panel would likely be futile.¹

The published order makes arguably binding law of two major errors that go to the heart of the merits in this case. *First*, the order cast aside the district court's factual findings on Plaintiffs' irreparable injuries, ignoring the "clear error"

¹ It is unclear whether the motions panel's published order binds the merits panel. *Compare United States v. Houser*, 804 F.2d 565, 568 (9th Cir. 1986) (holding law of the case doctrine does not foreclose "[r]econsideration by a merits panel of a motions panel's decision, during the course of a single appeal") and *Hard v. Burlington N.R.R.*, 870 F.2d 1454, 1458 (9th Cir. 1989) (holding law of the case doctrine does not preclude merits panel from reviewing motions panel's denial of motion to dismiss) *with Lair v. Bullock*, 798 F.3d 736, 747 (9th Cir. 2015) ("[A] motions panel's published opinion binds future panels."). Either way, en banc review will permit this Court to address the merits on a clean slate.

standard of review, and assumed Defendants' unsubstantiated say-so of its own injury. Add.A24-A25. *Second*, the order committed numerous legal errors, departing from binding precedent and statutory requirements and incorrectly casting *Rust v. Sullivan*, 500 U.S. 173 (1991), as having addressed Plaintiffs' claims. Add.A22-A24. *Rust* addressed a 1988 HHS rulemaking based on the law and the record *at that time*, not Plaintiffs' claims on this record and under intervening congressional dictates.

This case presents issues of utmost public importance. In the balance hang the effective functioning of a decades-old network of critical health care providers and the wellbeing of low-income patients across the country. If the panel order's stay is not separately lifted, this Court should grant initial en banc review.²

STATEMENT OF THE CASE

For almost fifty years, the Title X program has provided free or reduced-cost family planning care to needy patients across the country. *See* Pub. L. No. 91-572, 84 Stat. 1504 (1970). The program has been governed by largely unchanged rules and has been one of this country's most successful public health programs: reducing rates of unintended pregnancy with contraceptive access; providing testing and treatment for sexually transmitted infections; screening for breast and

² If the en banc Court vacates the motions panel's order, a merits panel could hear this case in the first instance.

cervical cancer; and conducting pregnancy testing and counseling, including referrals. *See* Add.B7-B9.

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

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

The National Family Planning & Reproductive Health Association (“NFPRHA”), on behalf of its hundreds of Title X-funded members, their

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

The district court concluded that Plaintiffs were likely to succeed on the merits on every claim it considered. Add.B14-B16. It found the Rule likely is arbitrary and capricious, is contrary to the central purpose of Title X, and violates two other laws: (1) an appropriations law that Congress has passed every year from 1996 to the present, requiring that “all pregnancy counseling” in the Title X program “shall be nondirective,” Pub. L. No. 115-245, 132 Stat. 2981, 3070-3071 (2018) (“Nondirective Mandate”); and (2) a provision of the Patient Protection and Affordable Care Act (“ACA”) that prohibits HHS from promulgating “any regulation” that, *inter alia*, “creates any unreasonable barriers to the ability of individuals to obtain appropriate medical care,” “impedes timely access to health care services,” “interferes with communications” between patients and providers, or “violates . . . the ethical standards of health care professionals,” 42 U.S.C. § 18114 (“Section 1554”). Add.B15.

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

The district court also made extensive findings of fact regarding Plaintiffs’ “substantial” irreparable harm, evinced by fifteen declarations. Add.B16-B18. The court found “that upon its effective date, the Final Rule will cause all current NFPRHA member[] grantees, sub-recipients, and their individual Title X clinicians to face a Hobson’s Choice that harms patients as well as the providers”—forced either to provide substandard health care in violation of their professional norms; or to exit the Title X program, “leaving low-income individuals without Title X providers.” Add.B17. Additionally, the court found that “over half of Washington counties would be unserved by a Title X-funded family planning provider,” that Washington 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.” Add. B16. All told, the court found that the Rule will dismantle Title X’s network of providers “knit together over the past 45

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

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

Defendants appealed the district court’s order and moved to stay the injunction pending appeal. On May 31, 2019, Defendants filed their opening merits brief. On June 20, before Plaintiffs’ answering briefs were due, a motions panel granted a stay pending appeal by published per curiam order, which prejudged the preliminary injunction appeal, including by apparent reference to Defendants’ merits brief.

On June 24 and 25, Plaintiffs moved for emergency en banc reconsideration of the panel’s order, which contained numerous legal errors. *See* Dkt. Nos. 37, 40-1. Those requests remain pending.

ARGUMENT

If this Court does not lift the panel's stay order, it should initially hear the merits appeal en banc to correct major errors that potentially curtail merits consideration of this matter of national import.

I. Initial En Banc Review is Warranted because the Motions Panel's Order Improperly Disregarded Extensive Factual Findings on Plaintiffs' Irreparable Harm

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

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

The district court made findings that the Rule will “seriously disrupt or destroy the existing network of Title X providers” nationwide to deprive patients of care, including in “over half of Washington counties.” Add.B16. The district court further found that any Plaintiff providers who stay in Title X will be forced to provide substandard health care. Add.B15-B16.

In disregarding those findings, the panel not only ignored the record evidence on impending departures credited by the district court, but also ignored, *inter alia*, evidence of: why the Rule will force providers to leave (its unethical requirements are contrary to accepted standards of care, including HHS’s own QFP, and its separation requirements are unreasonable and unfeasible); the timing of those departures (immediate and ongoing); the huge gaps the departures will cause in Title X access (over 40 percent of patients will lose their provider overnight); and the persistent nature of those gaps (any new providers, if they exist, will take months or years to establish Title X-funded projects). Add.B16-B18.

The motions panel fleetingly mentioned Plaintiffs’ harm of “financial costs.” Add.A25. But again, the panel ignored the district court’s specific factual findings regarding myriad costs stemming from facility, staff, and systems disruption and duplication that will “drive many Title X providers from the system.” Add.B16. Indeed, the Rule’s physical separation requirements will be impossible for many Plaintiff providers to meet, and the infrastructure spending limits will hamstring

providers that attempt to stay in the Title X program. *See, e.g.*, Dkt. No. 13 at Supp.Add.231-38 (Coleman Decl.).

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

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

The order also relied on the erroneous notion that the preliminary injunction causes "taxpayer dollars" to "fund or subsidize abortions." Add.A24. But Title X

funds have never been “used in programs where abortion is a method of family planning.” 42 U.S.C. § 300a-6. All Title X funds are spent only on Title X projects’, *inter alia*, rent, staff, and services; no federal funds are used to “subsidize abortion[],” even when multiple types of health care providers share buildings. The district court found “no evidence . . . that Title X,” including Section 1008, “is being violated or ignored,” Add.B16, and there is no harm stemming from any misuse of taxpayer funds. The panel did not find any clear error in the district court’s determinations or offer support for its contrary holding.

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

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

Rust held that Section 1008 was “ambiguous” at that time, and that Title X did “not speak directly to the issues of counseling, referral, [or] advocacy” about abortion. 500 U.S. at 184. As of 1991, Congress had not “enumerate[d] what types of medical and counseling services are entitled to Title X funding.” *Id.* Moreover, HHS premised its 1988 rulemaking and its defense of those rules in the

Supreme Court on Title X having the “limited function of funding *pre*-pregnancy family planning services.” 1990 WL 10012655 (“*Rust* Resp. Br.”), at *6. HHS said that, “the project must direct [a pregnant] client to a prenatal care facility *that, unlike a Title X project, can provide pregnancy counseling* and obstetric or other pregnancy-related care.” *Id.* (emphasis added).

But since *Rust* was decided, Congress has made clear that pregnancy counseling *does* fall within the scope of Title X services and declared that it must always be nondirective. *See, e.g.*, Pub. L. No. 115-245, 132 Stat. at 3070-3071. These mandates from Congress, passed every year since 1996, must be read with the Title X statute to assess whether the 2019 Rule is contrary to law and/or arbitrary and capricious. *See Vance v. Hegstrom*, 793 F.2d 1018, 1022 (9th Cir. 1986).³ Now, pregnancy counseling explicitly falls within Title X care—though it did not at the time of *Rust*. A court must examine the 2018-2019 record and the 2019 Rule, which is different from and more damaging than the 1988 rule, against this newer congressional mandate, as well as the intervening ACA provisions.

2. The motions panel wrongly held that HHS is likely to succeed on its challenge to the district court’s preliminary injunction and committed a string of

³ “[S]ubsequent acts can shape or focus [a statute’s] meanings.” *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 143 (2000). The “implications of a statute may be altered by the implications of a later statute” and applying the collective result is a “classic judicial task”—not implied repeal. *United States v. Fausto*, 484 U.S. 439, 453 (1988).

legal errors in considering Plaintiffs' claims that the Rule is contrary to law because it violates the Nondirective Mandate, the ACA, and Title X's central purpose.

Taking each in turn, the panel's order wrongly concluded that the Rule is consistent with the statutory command that "all pregnancy counseling" must be "nondirective." Add.A16-A19. Contrary to HHS's own definition of "nondirective," the Rule improperly allows for the "presentation of options" that "suggest[s] or advis[es] one option over another," 84 Fed. Reg. at 7716, i.e., carrying the pregnancy to term over abortion. The panel ignored that the Rule permits pregnancy counseling that omits discussion of abortion and requires that patients who only seek counseling on abortion receive counseling regarding continuing the pregnancy. *Id.* at 7747.

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

adoption “information and referrals” in “nondirective counseling to pregnant women”).

The motions panel wrongly read the IAAA to contradict Plaintiffs’ claim when it, in fact, supports it. The only way to treat adoption on “an equal basis with all other courses of action” is to offer patients both information and referral on prenatal care and on abortion, equally with offering information and referral on adoption. As a district court recognized, the IAAA and the Nondirective Mandate “appear to be the only instances in which Congress has used the term ‘nondirective counseling.’” *See California*, 2019 WL 1877392, at *16. “Congress’ use of the identical term ‘nondirective counseling’ should be read consistently across” the IAAA and appropriations rider “to include referrals as part of counseling.” *Id.* (citing *Dir., OWCP v. Newport News Shipbldg. & Dry Dock Co.*, 514 U.S. 122, 130 (1995) (holding that, in interpreting an ambiguous statutory phrase, “[i]t is particularly illuminating to compare” two different statutes employing the “virtually identical” phrase)).

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

The order committed further legal error in holding that Plaintiffs likely waived any challenge that the Rule violates Section 1554. It used an out-of-circuit decision, *see* Add.A20 (citing *Koretov v. Vilsack*, 707 F.3d 394, 398 (D.C. Cir. 2013) (per curiam)), not *this* Court’s standard. As the district court properly held, that does not require that the claim be stated in “precise legal terms;” it must simply be raised with “sufficient clarity to allow the decision maker to understand and rule on the issue raised.” *Nat’l Parks & Conservation Ass’n v. Bureau of Land Mgmt.*, 606 F.3d 1058, 1065 (9th Cir. 2010).

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

Lastly, with respect to Plaintiffs’ likelihood of success in showing that the Rule violates the purpose of Title X, the motions panel erred in holding that the argument is “foreclosed . . . by the Supreme Court’s contrary finding in *Rust*.” Add.A24 n.5. In so concluding, the motions panel ignored the fact that Plaintiffs’

claims were *not litigated* in *Rust*. Plaintiffs here argue—and the district court found them likely to show—that the Rule would “so rip apart the Title X program, drive away its providers, and reduce low-income patients’ access to quality family planning care that it cannot be squared with” Congress’s purpose in establishing and annually funding Title X. Dkt. No. 13 at 14.

3. The motions panel also erred in rejecting the district court’s holding that the Rule is likely arbitrary and capricious. Unlike the motions panel, the district court properly applied Supreme Court precedent and considered Plaintiffs’ detailed showings based on the record before HHS. Add.A22-A24.

The panel’s order incorrectly ignored the well-established *State Farm* factors and the district court’s correct application of those factors to the rulemaking record, i.e., that the “Department failed to consider important factors, acted counter to and in disregard of the evidence in the administrative record and offered no reasoned analysis based on the record.” Add.B15-B16.

The order committed further legal error by ignoring well-established case law requiring agencies to provide “good reasons” for changed policy and to consider “serious reliance interests” engendered by the previous policy. *See, e.g., Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125-26 (2016). As Plaintiffs argued and the district court held, Plaintiffs are likely to succeed because

the Rule, without sufficient justification, abandons decades-old standards on which Title X grantees and subrecipients have relied. *See* Add.B15.

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

CONCLUSION

For the foregoing reasons, if the Court does not lift the motions panel’s order, it should initially hear the appeal of the district court’s preliminary injunction en banc.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Ninth Circuit Rules 35(b) because it contains 3,900 words, exclusive of the exempted portions of the brief. The brief has been prepared in a format, type face, and type style that comply with Fed. R. App. 32(a)(4)-(6). As permitted by Federal Rule of Appellate Procedure 32(a)(7)(C), the undersigned has relied upon the word-count feature of this word-processing system in preparing this certificate.

/s/ Fiona Kaye
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June 28, 2019

CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of June 2019, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF system. Counsel for all parties to the case are registered CM/ECF users and will be served by the appellate CM/ECF system. I have also separately served counsel for Defendants by e-mail.

/s/ Fiona Kaye
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ADDENDUM

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ADDENDUM A

FOR PUBLICATION

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

STATE OF CALIFORNIA, by
and through Attorney General
Xavier Becerra,
Plaintiff-Appellee,

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 prenatal care provider, and may also provide women with a list of other providers (which may not be composed of more abortion providers than non-abortion providers). *See id.* at 7789. Notably, however, the Final Rule is less restrictive than the 1988 regulations: it allows (but does not require) the neutral presentation of abortion information during nondirective pregnancy counseling in Title X programs. *Id.* The Final Rule also revives the 1988 regulations' physical-separation requirement, imposes limits on which medical professionals can provide pregnancy counseling, clarifies the previous requirement that family planning methods be "medically approved," and creates a requirement that providers encourage family participation in decisions. *Id.* at 7789.

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

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

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

ANALYSIS

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

I.

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

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

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

II.

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

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

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

Notwithstanding any other provision of this Act, the Secretary of Health and Human Services shall not promulgate any regulation that—

- (1) creates any unreasonable barriers to the ability of individuals to obtain appropriate medical care;
- (2) impedes timely access to health care services;
- (3) interferes with communications regarding a full range of treatment options between the patient and the provider;

(4) restricts the ability of health care providers to provide full disclosure of all relevant information to patients making health care decisions;

(5) violates the principles of informed consent and the ethical standards of health care professionals; or

(6) limits the availability of health care treatment for the full duration of a patient's medical needs.

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

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

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

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

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

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

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

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

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

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

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

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

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

HHS’s treatment of counseling and referral as distinct concepts is a reasonable interpretation of the applicable statutes.

³ But as discussed above, to the extent there is any ambiguity as to whether the appropriation rider’s nondirective mandate means that Title X grantees must be allowed to provide referrals to abortion providers on an equal basis with non-abortion providers, we would defer to HHS’s reasonable interpretation under *Chevron* that referral to non-abortion providers is consistent with the provision of nondirective pregnancy counseling.

relying on § 1554 is waived because Plaintiffs concede that HHS was not put on notice of this specific challenge during the public comment period, such that HHS did not have an “opportunity to consider the issue.” *Portland Gen. Elec. Co. v. Bonneville Power Admin.*, 501 F.3d 1009, 1024 (9th Cir. 2007) (“The waiver rule protects the agency’s prerogative to apply its expertise, to correct its own errors, and to create a record for our review.”). Although some commenters stated that the proposed Final Rule was contrary to the ACA *generally*, and still others used generic language similar to that contained in § 1554, preservation of a challenge requires that the “specific argument” must “be raised before the agency, not merely the same general legal issue.” *Koretoff v. Vilsack*, 707 F.3d 394, 398 (D.C. Cir. 2013) (per curiam). Although “agencies are required to ensure that they have authority to issue a particular regulation,” they “have no obligation to anticipate every conceivable argument about why they might lack such statutory authority.” *Id.* at 398.

But even if this challenge were preserved, it seems likely that § 1554 does not affect § 1008’s prohibition on *funding* programs where abortion is a method of family planning. Section 1554 prohibits “creat[ing] any unreasonable barriers to the ability of individuals to obtain appropriate medical care,” “imped[ing] timely access to health care services,” “interfer[ing] with communications regarding a full range of treatment options between the patient and the provider,” “restrict[ing] the ability of health care providers to provide full disclosure of all relevant information to patients making health care decisions,” “violat[ing] the principles of informed consent and the ethical standards of health care professionals,” and “limit[ing] the availability of health care treatment for the full duration of a patient’s medical needs.” 42 U.S.C. § 18114. But as the Supreme Court noted in *Rust*, there is a clear distinction between affirmatively impeding

or interfering with something, and refusing to subsidize it. *Rust*, 500 U.S. at 200–01. In holding that the 1988 regulations did not violate the Fifth Amendment, the Supreme Court reasoned that “[t]he Government has no constitutional duty to subsidize an activity merely because the activity is constitutionally protected,” and that the Government “may validly choose to fund childbirth over abortion and implement that judgment by the allocation of public funds for medical services relating to childbirth but not to those relating to abortion.” *Id.* at 201. The Government’s “decision to fund childbirth but not abortion places no governmental obstacle in the path of a woman who chooses to terminate her pregnancy, but rather, by means of unequal subsidization of abortion and other medical services, encourages alternative activity deemed in the public interest.” *Id.* (internal quotations and citations omitted). Indeed, the Supreme Court has recognized that “[t]he difficulty that a woman encounters when a Title X project does not provide abortion counseling or referral leaves her in no different position than she would have been if the Government had not enacted Title X.” *Id.* at 202. *Rust*’s reasoning is equally applicable to counter the district courts’ conclusions that the Final Rule is invalidated by § 1554. Title X is a limited grant program focused on providing pre-pregnancy family planning services—it does not fund medical care for pregnant women. The Final Rule can reasonably be viewed as a choice to subsidize certain medical services and not others.⁴

⁴ The preamble to § 1554 also suggests that this section was not intended to restrict HHS interpretations of provisions outside the ACA. If Congress intended § 1554 to have sweeping effects on all HHS regulations, even those unrelated to the ACA, it would have stated that § 1554 applies “notwithstanding any other provision of law,” rather than

III.

The district courts also held that the Final Rule likely violates the Administrative Procedure Act (APA)'s prohibition on "arbitrary and capricious" regulations. 5 U.S.C. § 706(2)(A). "'Arbitrary and capricious' review under the APA focuses on the reasonableness of an agency's decision-making process." *CHW W. Bay v. Thompson*, 246 F.3d 1218, 1223 (9th Cir. 2001) (emphasis in original). But "[t]he scope of review under the 'arbitrary and capricious' standard is narrow and a court is not to substitute its judgment for that of the agency." *Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). We think that is precisely what the district courts did.

To find that the Final Rule's enactment was arbitrary and capricious, the district courts generally ignored HHS's explanations, reasoning, and predictions whenever they disagreed with the policy conclusions that flowed therefrom.

For example, with respect to the physical separation requirement, the district courts ignored HHS's reasoning for its re-imposition of that requirement (which was approved by *Rust*): that physical separation would ensure that Title X funds are not used to subsidize abortions via co-location of Title X programs in abortion clinics. *See* 84 Fed. Reg. at 7763–68. HHS's reasoning included citation to data suggesting "that abortions are increasingly performed at sites that focus primarily on contraceptive and family

"[n]otwithstanding any other provision of this Act." *See, e.g., Andreiu v. Ashcroft*, 253 F.3d 477, 482 (9th Cir. 2001) (holding that the phrase "notwithstanding any other provision of law" in 8 U.S.C. § 1252(f)(2) meant that the provision "trumps any contrary provision elsewhere in the law").

planning services—sites that could be recipients of Title X funds.” *Id.* at 7765. Similarly, the district courts ignored HHS’s primary reasoning for prohibiting abortion counseling and referrals: that such restrictions are required by HHS’s reasonable reading of § 1008 (again, approved by *Rust*). *Id.* at 7746–47. Further, the district courts ignored HHS’s consideration of the effects that the Final Rule would likely have on the number of Title X providers, and credited Plaintiffs’ speculation that the Final Rule would “decimate” the Title X provider network, rather than HHS’s prediction—based on evidence cited in the administrative record—“that honoring statutory protections of conscience in Title X may increase the number of providers in the program,” by attracting new providers who were previously deterred from participating in the program by the former requirement to provide abortion referrals. *See id.* at 7780. Such predictive judgments “are entitled to particularly deferential review.” *Trout Unlimited v. Lohn*, 559 F.3d 946, 959 (9th Cir. 2009). With respect to the Final Rule’s definition of “advanced practice provider,” and its provision on whether family planning methods must be “medically approved,” HHS reasoned that these provisions would clarify subjects that had caused confusion in the past. 84 Fed. Reg. at 7727–28, 32. Although the district courts insist that HHS failed to consider that the Final Rule requires providers to violate medical ethics, HHS did consider and respond to comments arguing just that. *See id.* at 7724, 7748. HHS similarly considered the costs of compliance with the Final Rule. *Id.* at 7780.

In light of the narrow permissible scope of the district court’s review of HHS’s reasoning under the arbitrary and capricious standard, we conclude that HHS is likely to prevail on its argument that the district court erred in

concluding that the Final Rule's enactment violated the APA.⁵

IV.

The remaining factors also favor a stay pending appeal. HHS and the public at large are likely to suffer irreparable harm in the absence of a stay, which are comparatively greater than the harms Plaintiffs are likely to suffer.

Absent a stay, HHS will be forced to allow taxpayer dollars to be spent in a manner that it has concluded violates the law, as well as the Government's important policy interest (recognized by Congress in § 1008) in ensuring that taxpayer dollars do not go to fund or subsidize abortions. As the Supreme Court held in *Rust*, "the government may 'make a value judgment favoring childbirth over abortion, and . . . implement that judgment by the allocation of public funds,'" and by "declining to 'promote or encourage abortion.'" *Rust*, 500 U.S. at 193. Additionally, forcing HHS to wait until the conclusion of a potentially lengthy appeals process to implement the Final Rule will necessarily result in predictable administrative costs, and will beget significant uncertainty in the Title X program.

The harms that Plaintiffs would likely suffer if a stay is granted are comparatively minor. The main potential harms that Plaintiffs identify are based on their prediction that implementation of the Final Rule will cause an immediate

⁵ The district court in Washington also briefly stated that the Final Rule was likely invalid because it "violates the central purpose of Title X, which is to equalize access to comprehensive, evidence-based, and voluntary family planning." Washington Preliminary Injunction Order at 15. But this conclusion is foreclosed by the existence of § 1008, and by the Supreme Court's contrary finding in *Rust*.

and steep decline in the number of Title X providers. But these potential harms obviously rely on crediting Plaintiffs' predictions about the effect of implementing the Final Rule, over HHS's predictions that implementation of the final rule will have the *opposite* effect. As described above, we think that HHS's predictions—supported by reasoning and evidence in the record (84 Fed. Reg. at 7780)—is entitled to more deference than Plaintiffs' contrary predictions. While some Title X grantees will certainly incur financial costs associated with complying with the Final Rule if the preliminary injunctions are stayed, we think that harm is minor relative to the harms to the Government described above.

V.

Because HHS and the public interest would be irreparably harmed absent a stay, harms to Plaintiffs from a stay will be comparatively minor, and HHS is likely to prevail in its challenge of the preliminary injunction orders before a merits panel of this court (which is set to hear the cases on an expedited basis), we conclude that a stay of the district courts' preliminary injunction orders pending appeal is proper.

The motion for a stay pending appeal is **GRANTED**.

ADDENDUM B

FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

Apr 25, 2019

SEAN F. MCAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

STATE OF WASHINGTON,

Plaintiff,

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.

No. 1:19-cv-03040-SAB

**ORDER GRANTING
PLAINTIFFS' MOTIONS FOR
PRELIMINARY INJUNCTION**

NATIONAL FAMILY PLANNING &
REPRODUCTIVE HEALTH
ASSOCIATION, FEMINIST WOMEN'S
HEALTH CENTER, DEBORAH OYER,
M.D. and TERESA GALL, F.N.P.,

Plaintiffs,

v.

ALEX M. AZAR II, in his official capacity
as Secretary of the United States

1 Department of Health and Human
2 Services; and UNITED STATES
3 DEPARTMENT OF HEALTH AND
4 HUMAN SERVICES, DIANE FOLEY,
5 M.D., in her official capacity as Deputy
6 Assistance Secretary for Population
7 Affairs, and OFFICE OF POPULATION
8 AFFAIRS,
9 Defendants.
10

11 Before the Court are Plaintiffs’ Motions for Preliminary Injunction, ECF
12 Nos. 9 and 18. A hearing on the motions was held on April 25, 2019. The State of
13 Washington was represented by Jeffrey Sprung, Kristin Beneski and Paul Crisalli.
14 Plaintiffs National Family Planning and Reproductive Health Association, *et al.*,
15 (NFPRHA) were represented by Ruth Harlow, Fiona Kaye, Brigitte Amiri,
16 Elizabeth Deutsch, and Joseph Shaeffer. Defendants were represented by Bradley
17 Humphreys. The Court also received *amicus* briefs from American Academy of
18 Pediatrics, *et al.*; Institute of Policy Integrity; State of Ohio, *et al.*, and Susan B.
19 Anthony List. This Order memorializes the Court’s oral ruling.

20 Introduction

21 Plaintiffs seek to set aside the Office of Population Affairs (OPA),
22 Department of Health and Human Services (“Department”) March 4, 2019 Final
23 Rule that revises the regulations that govern Title X family planning programs. 84
24 Fed. Reg. 77141-01, 2019 WL 1002719 (Mar. 4, 2019). The new regulations were
25 proposed to “clarify grantee responsibilities under Title X, to remove the
26 requirement for nondirective abortion counseling and referral, to prohibit referral
27 for abortion, and to clarify compliance obligations under state and local laws . . .
28 to clarify access to family planning services where an employer exercises a

1 religious and moral objection . . . and to require physical and financial separation
2 to ensure clarity regarding the purpose of Title X and compliance with the
3 statutory program integrity provisions, and to encourage family participation in
4 family planning decisions, as required by Federal law.” *Id.*

5 Plaintiffs contend the Final Rule is in excess of the agency’s statutory
6 authority, is arbitrary and capricious, violates the Administrative Procedures Act,
7 violates Title X requirements, violates congressional Non-directive Mandates,
8 violates Section 1554 of the Patient Protection and Affordable Care Act (“ACA”),
9 and is otherwise unconstitutional.

10 Plaintiffs assert the Final Rule is not designed to further the purposes of
11 Title X, which is to equalize access to comprehensive, evidence-based, voluntary
12 family planning. Rather it is designed to exclude and eliminate health care
13 providers who provide abortion care and referral—which by extension will impede
14 patients’ access to abortion—even when Title X funds are not used to provide
15 abortion care, counseling or referral.

16 Plaintiffs also believe the Final Rule appears to be designed to limit
17 patients’ access to modern, effective, medically approved contraception and family
18 planning health care. Plaintiffs argue the Final Rule was designed by the
19 Department to direct Title X funds to providers who emphasize ineffective and
20 inefficient family planning.

21 Finally, Plaintiffs believe the Final Rule is politically motivated and not
22 based on facts. Instead, it intentionally ignores comprehensive, ethical, and
23 evidence-based health care, and impermissibly interferes with the patient-doctor
24 relationship.

25 Defendants assert the Final Rule adopted by the Secretary is consistent with
26 the Administrative Procedures Act, consistent with Title X, the Non-directive
27
28

1 Mandates, and Section 1554 of the ACA¹, and is otherwise constitutional.

2 Defendants believe the Final Rule is indistinguishable from regulations
3 adopted over 30 years ago, which were held to be valid by the United States
4 Supreme Court in *Rust v. Sullivan*, 500 U.S. 173 (1991). Finally, Defendants argue
5 Plaintiffs have not shown, at this early stage in the litigation, that the Final Rule
6 violates Section 1008 of Title X—in fact, Plaintiffs cannot make that showing—
7 primarily because of *Rust*.

8 At issue in this hearing are Plaintiffs’ Motions for Preliminary Injunction.
9 The Final Rule is scheduled to take effect on May 3, 2019. Plaintiffs seek to
10 preserve the status quo pending a final determination on the merits.

11 **Motion Standard**

12 “A preliminary injunction is a matter of equitable discretion and is ‘an
13 extraordinary remedy that may only be awarded upon a clear showing that a
14 plaintiff is entitled to such relief.’” *California v. Azar*, 911 F.3d 558, 575 (9th Cir.
15 2018) (quoting *Winter v. NRDC*, 555 U.S. 7, 22 (2008)). “A party can obtain a
16 preliminary injunction by showing that (1) it is ‘likely to succeed on the merits,’
17 (2) it is ‘likely to suffer irreparable harm in the absence of preliminary relief,’ (3)
18 ‘the balance of equities tips in [its] favor,’ and (4) ‘an injunction is in the public
19 interest.’” *Disney Enters., Inc. v. VidAngel, Inc.*, 869 F.3d 848, 856 (9th Cir. 2017)
20 (alteration in original) (quoting *Winter*, 555 U.S. at 20). The Ninth Circuit uses a
21 “sliding scale” approach in which the elements are “balanced so that a stronger
22

23 ¹ Defendants also argue Plaintiffs have waived their argument that the Final Rule
24 violates Section 1554 of the ACA by failing to refer to Section 1554 in their
25 comments prior to the Final Rule being published. It is doubtful that an APA claim
26 asserting that an agency exceeded the scope of its authority to act can be waived.
27 Moreover, it appears that during the rule making process the agency was apprised
28 of the substance of the violation.

**ORDER GRANTING PLAINTIFFS’ MOTIONS FOR PRELIMINARY
INJUNCTION ~ 4**

1 showing of one element may offset a weaker showing of another.” *Hernandez v.*
2 *Sessions*, 872 F.3d 976, 990 (9th Cir. 2017) (quotation omitted). When the
3 government is a party, the last two factors merge. *Drakes Bay Oyster Co. v. Jewell*,
4 747 F.3d 1073, 1092 (9th Cir. 2014). This means that when the government is a
5 party, the court considers the balance of equities and the public interest together.
6 *Azar*, 911 F.3d at 575. “[B]alancing the equities is not an exact science.” *Id.*
7 (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 609 (1952)
8 (Frankfurter, J., concurring) (“Balancing the equities . . . is lawyers’ jargon for
9 choosing between conflicting public interests”)).

10 Likelihood of success on the merits is the most important factor; if a movant
11 fails to meet this threshold inquiry, the court need not consider the other factors.
12 *Disney*, 869 F.3d at 856 (citation omitted). A plaintiff seeking preliminary relief
13 must “demonstrate that irreparable injury is likely in the absence of an injunction.”
14 *Winter*, 555 U.S. at 22. The analysis focuses on irreparability, “irrespective of the
15 magnitude of the injury.” *Simula, Inc. v. Autoliv, Inc.*, 175 F.3d 716, 725 (9th Cir.
16 1999). Economic harm is not normally considered irreparable. *L.A. Mem’l*
17 *Coliseum Comm’n v. Nat’l Football League*, 634 F.2d 1197, 1202 (9th Cir. 1980).

18 “[I]njunctive relief should be no more burdensome to the defendant than
19 necessary to provide complete relief to the plaintiffs’ before the Court.” *L.A.*
20 *Haven Hospice, Inc. v. Sebelius*, 638 F.3d 644, 664 (9th Cir. 2011) (quoting
21 *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979). This is particularly true where
22 there is no class certification. *See Easyriders Freedom F.I.G.H.T. v. Hannigan*, 92
23 F.3d 1486, 1501 (9th Cir. 1996) (“[I]njunctive relief generally should be limited to
24 apply only to named plaintiffs where there is no class certification.”); *Meinhold v.*
25 *U.S. Dep’t of Defense*, 34 F.3d 1469, 1480 (9th Cir.1994) (district court erred in
26 enjoining the defendant from improperly applying a regulation to all military
27 personnel (citing *Califano*, 442 U.S. at 702)).

1 That being said, there is no bar against nationwide relief in the district
2 courts or courts of appeal, even if the case was not certified as a class action, if
3 such broad relief is necessary to give prevailing parties the relief to which they are
4 entitled. *Bresgal v. Brock*, 843 F.2d 1163, 1170–71 (9th Cir. 1987).

5 **Federal Administrative Agency Rule-Making**

6 Federal administrative agencies are required to engage in “reasoned
7 decisionmaking.” *Michigan v. E.P.A.*, ___ U.S. ___, 135 S.Ct. 2699 (2015). “Not
8 only must an agency’s decreed result be within the scope of its lawful authority,
9 but the process by which it reaches that result must be logical and rational.” *Id.*
10 (quoting *Allentown Mack Sales & Service, Inc. v. NLRB*, 522 U.S. 359, 374
11 (1998)).

12 **Administrative Procedures Act**

13 The Administrative Procedure Act “sets forth the full extent of judicial
14 authority to review executive agency action for procedural correctness.” *FCC v.*
15 *Fox Television Stations, Inc.*, 556 U.S. 502, 513 (2009). Under the arbitrary and
16 capricious standard contained in the APA, a reviewing court may not set aside an
17 agency rule that is rational, based on consideration of the relevant factors and
18 within the scope of the authority delegated to the agency by the statute. *Motor*
19 *Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42
20 (1983). “The scope of review under the ‘arbitrary and capricious’ standard is
21 narrow and a court is not to substitute its judgment for that of the agency.
22 Nevertheless, the agency must examine the relevant data and articulate a
23 satisfactory explanation for its action including a rational connection between the
24 facts found and the choice made.” *Id.* at 43. (quotation omitted). An agency rule is
25 arbitrary and capricious “if the agency has relied on factors which Congress has
26 not intended it to consider, entirely failed to consider an important aspect of the
27 problem, offered an explanation for its decision that runs counter to the evidence
28 before the agency, or is so implausible that it could not be ascribed to a difference

1 in view or the product of agency expertise.” *Id.*

2 An agency must consider and respond to significant comments received
3 during the period for public comment. *Perez v. Mortgage Bankers Ass’n*, ___
4 U.S. ___, 135 S.Ct. 1199, 1203 (2015). The public interest is served by compliance
5 with the APA. *Azar*, 911 F.3d at 581. “The APA creates a statutory scheme for
6 informal or notice-and-comment rulemaking reflecting a judgment by Congress
7 that the public interest is served by a careful and open review of proposed
8 administrative rules and regulations.” *Alcaraz v. Block*, 746 F.2d 593, 610 (9th
9 Cir. 1984) (internal quotation marks and citation omitted). “It does not matter that
10 notice and comment could have changed the substantive result; the public interest
11 is served from proper process itself.” *Azar*, 911 F.3d at 581.

12 **History of Title X**

13 “*No American woman should be denied access to family planning assistance*
14 *because of her economic condition.*”²

15 In 1970, Congress created the Title X program³ to address low-income
16 individuals’ lack of equal access to the same family planning services, including
17 modern, effective medical contraceptive methods such as “the Pill,” available to
18 those with greater economic resources. NFPRHA, *et al.* Complaint, 1:19-cv-3045-
19 SAB, ECF No. 1, ¶4. Title X monetary grants support family planning projects
20 that offer a broad range of acceptable and effective family planning methods and
21 services to patients on a voluntary basis, 42 U.S.C. § 300(a), creating a nationwide
22 of Title X health care providers. *Id.* at ¶5. Title X gives those with incomes below
23 or near the federal poverty level free or low-cost access to clinical professional,
24

25 ² President Nixon, *Special Message to the Congress on Problems of Population*
26 *Growth* (July 18, 1969).

27 ³ Title X became law as part of the “Family Planning Services and Population
28 Research Act of 1970.” Pub. L. No. 91-572, 84 Stat. 1504 (1970).

1 contraceptive methods and devices, and testing and counseling services related to
2 reproductive health, including pregnancy testing and counseling. *Id.* Over almost
3 five decades, Title X funding has built and sustained a national network of family
4 planning health centers that delivers high-quality care. *Id.* at ¶41. It has enabled
5 millions of low-income patients to prevent unintended pregnancies and protect
6 their reproductive health. *Id.* Approximately 90 federal grants, totaling
7 approximately \$260 million, for Title X projects now fund more than 1000
8 provider organizations across all the states and in the U.S. territories, with more
9 than 3800 health centers offering Title X care. *Id.* at ¶6, ¶52. In 2017, the Title X
10 program served more than four million patients. *Id.*

11 Washington’s Department of Health (“DOH”) Family Planning Program is
12 the sole grantee of Title X funds in Washington State. Decl. of Cynthia Harris,
13 ECF No. 11 at ¶14. It provides leadership and oversight to its Family Planning
14 Network of 16 subrecipients offering Title X services at 85 service sites. *Id.* at ¶4.
15 The Family Planning Program collaborates with other programs in the DOH, other
16 state agencies, subrecipient network organizations, and other family planning,
17 primary health care, and social service organizations to ensure that Title X
18 services are available statewide on issues related to women’s health, adolescent
19 health, family planning, sexually transmitted infection (STI) and Human
20 Immunodeficiency Virus (HIV) prevention and treatment, intimate partner
21 violence, and unintended pregnancy. *Id.*

22 NFPRHA represents more than 850 health care organizations in all 50
23 states, the District of Columbia and the U.S. territories, as well as individual
24 professional members with ties to family planning care. ECF No. 19 at ¶5.
25 NFPRHA currently has more than 65 Title X grantee members and almost 700
26 Title X subrecipient members. These NFPRHA member organizations operate or
27 fund a network of more than 3,500 health centers that provide family planning
28 services to more than 3.7 million Title X patients each year. *Id.* at ¶7.

1 The scope of the care provided by Title X programs is summarized in
2 OPA's current Program Requirements:

3 All Title X-funded projects are required to offer a broad range of
4 acceptable and effective medically (U.S. Food and Drug
5 Administration (FDA)) approved contraceptive methods and related
6 services on a voluntary and confidential basis. Title X services
7 include the delivery of related preventive health services, including
8 patient education and counseling; cervical and breast cancer
9 screening; sexually transmitted disease (STD) and human
10 immunodeficiency virus (HIV) prevention education, testing and
11 referral; and pregnancy diagnosis and counseling.

12 POA, *Program Requirements for Title X Funded Family Planning Projects*,
13 at 5 (Apr. 2014), [https://www.hhs.gov/opa/sites/default/files/Title-X-2014-
14 Program-Requirements.pdf](https://www.hhs.gov/opa/sites/default/files/Title-X-2014-Program-Requirements.pdf) ("Program Requirements"). Title X projects also
15 provide basis infertility services, such as testing and counseling. 1:19-cv-
16 3045-SAB, ECF No. 1, at ¶43.

17 The Title X statute has always provided that "[n]one of the funds
18 appropriated under this subchapter shall be used in programs where abortion
19 is a method of family planning." 42 U.S.C. § 300a-6 ("Section 1008"). The
20 statute authorizes the Secretary to promulgate regulations governing the
21 program. 42 U.S.C. § 300a-4.

22 The Secretary adopted regulations in 1971 and they remained in
23 effect until 1988 when the Secretary adopted final regulations that
24 drastically altered the landscape in which Title X grantees operated. To
25 summarize, the 1988 regulations:

- 26 • Prohibited Title X projects from counseling or referring clients
27 for abortion as a method of family planning;
- 28 • Required grantees to separate their Title X project—physically
and financially—from prohibited abortion-related activities
- Established compliance standards for family planning projects
- Prohibited certain actions that promote, encourage, or advocate

1 abortion as method of family planning, such as using project funds for
2 lobbying for abortion, developing and disseminating materials
3 advocating abortion, or taking legal action to make abortion available
4 as a method of family planning.

5 Those regulations were challenged in federal courts and ultimately upheld
6 by the United States Supreme Court. *See Rust v. Sullivan*, 500 U.S. 173 (1991)⁴.
7 The 1988 rules were never fully implemented due to ongoing litigation and
8 bipartisan concern over its invasion of the medical provider-patient relation. State
9 of Washington, Complaint, ECF No. 1 at ¶30.

10 In 1993, President Clinton suspended the 1988 Regulations by way of
11 a Presidential memorandum to the Department:

12 Title X of the Public Health Services Act [this subchapter] provides
13 Federal funding for family planning clinics to provide services for
14 low-income patients. The Act specifies that Title X funds may not be
15 used for the performance of abortions, but places no restrictions on
16 the ability of clinics that receive Title X funds to provide abortion
17 counseling and referrals or to perform abortions using non-Title X
18 funds. During the first 18 years of the program, medical professionals
19 at Title X clinics provided complete, uncensored information,
20 including nondirective abortion counseling. In February 1988, the
Department of Health and Human Services adopted regulations,
which have become known as the “Gag Rule,” prohibiting Title X
recipients from providing their patients with information, counseling

21 ⁴ In *Rust*, the United States Supreme Court held that (1) the regulations were based
22 on permissible construction of the statute prohibiting the use of Title X funds in
23 programs in which abortion is a method of family planning; (2) the regulations do
24 not violate First Amendment free speech rights of Title X fund recipients, their
25 staffs or their patients by impermissibly imposing viewpoint-discriminatory
26 conditions on government subsidies; and (3) regulations do not violate a woman’s
27 Fifth Amendment right to choose whether to terminate a pregnancy and do not
28 impermissibly infringe on doctor-patient relationship. 500 U.S. at 184-203.

1 or referrals concerning abortion. Subsequent attempts by the Bush
2 Administration to modify the Gag Rule and ensuing litigation have
3 created confusion and uncertainty about the current legal status of the
4 regulations.

5 The Gag Rule endangers women's lives and health by preventing
6 them from receiving complete and accurate medical information and
7 interferes with the doctor-patient relationship by prohibiting
8 information that medical professionals are otherwise ethically and
9 legally required to provide to their patients. Furthermore, the Gag
10 Rule contravenes the clear intent of a majority of the members of both
11 the United States Senate and House of Representatives, which twice
12 passed legislation to block the Gag Rule's enforcement but failed to
13 override Presidential vetoes.

14 For these reasons, you have informed me that you will suspend the
15 Gag Rule pending the promulgation of new regulations in accordance
16 with the "notice and comment" procedures of the Administrative
17 Procedure Act [5 U.S.C.A. §§ 551 et seq., 701 et seq.].

18 "The Title X Gag Rule," Memorandum for the Secretary of Health and
19 Human Services, 1993 WL 366490 (Jan. 22, 1993).

20 New regulations were finalized in 2000, 65 Fed. Reg. 41270 (Jul. 3,
21 2000), *codified at* 42 C.F.R. Pt. 59, and these regulations remain in effect
22 unless and until the new Final Rule is implemented.

23 **Congressional Intent / The Department's Program Requirements**

24 Plaintiffs argue that laws passed by Congress since *Rust* limit the
25 Department's discretion in implementing Title X regulations. These laws include
26 Section 1554 of the ACA and congressional Non-directive Mandates contained in
27 appropriation bills. They also rely on the Department's own program requirements
28 to support their arguments.

29 **1. § 1554 of the ACA**

30 Section 1554 of the ACA states:

31 Notwithstanding any other provision of this Act, the Secretary of Health and
32 Human Services shall not promulgate any regulation that--

- 1 (1) creates any unreasonable barriers to the ability of individuals to obtain
- 2 appropriate medical care;
- 3 (2) impedes timely access to health care services;
- 4 (3) interferes with communications regarding a full range of treatment
- 5 options between the patient and the provider;
- 6 (4) restricts the ability of health care providers to provide full disclosure of
- 7 all relevant information to patients making health care decisions;
- 8 (5) violates the principles of informed consent and the ethical standards of
- 9 health care professionals; or
- 10 (6) limits the availability of health care treatment for the full duration of a
- 11 patient's medical needs.

12 42 U.S.C. § 18114.

13 **2. Appropriations Mandate**

14 With the Non-directive Mandate, Congress has explicitly required every
15 year since 1996 that “all pregnancy counseling [in Title X projects] shall be
16 nondirective.” NFPRHA, *et al.* Complaint, 1:19-cv-3045-SAB, ECF No. 1, at ¶78.
17 Non-directive counseling provides the patient with all options relating to her
18 pregnancy, including abortion. *Id.* at ¶76. Congress has been providing Non-
19 directive Mandates in its appropriations bills for the past 24 years.

20 **3. Department of Health and Human Services Program**

21 **Requirements / Quality Family Planning**

22 Title X grantees are required to follow the Quality Family Planning (QFP)
23 guidelines, issued by the Centers for Disease Control and Prevention and OPA.
24 State of Washington, Complaint, ECF No. 1, at ¶45. This document reflects
25 evidence-based best practices for providing quality family planning services in the
26 United States.⁵ It requires that options counseling should be provided to pregnant

27 ⁵ “Providing Quality Family Planning Services: Recommendations of CDC and the
28 U.S. Office of Population Affairs,” *Morbidity and Mortality Weekly Report* Vol.
62, No. 4 (April 25, 2014), *available at* <https://www.cdc.gov/mmwr/pdf/rr/rr6304.pdf> (last
accessed April 24, 2019) (the QFP).

1 patients as recommended by the American College of Obstetricians and
2 Gynecologists and others, including that patients with unwanted pregnancy should
3 be “fully informed in a balanced manner about all options, including raising the
4 child herself, placing the child for adoption, and abortion.” *Id.* at ¶46.

5 The Department’s Program Requirements require Title X projects to provide
6 nondirective pregnancy counseling. *Id.* at ¶44.

7 **Federal Conscience Laws**

8 In the Executive Summary of the Final Rule, the Department indicates that
9 one of the purposes of revising the Title X regulations was to eliminate provisions
10 which are inconsistent with the health care conscience statutory provisions. 84
11 Fed. Reg. 7714, 7716. These provisions include the Church Amendment, the
12 Coats-Snowe Amendment and the Weldon Amendment. *Id.*

13 **1. The Church Amendment**

14 “The Church Amendments, among other things, prohibit certain HHS
15 grantees from discriminating in the employment of, or the extension of staff
16 privileges to, any health care professional because they refused, because of their
17 religious beliefs or moral convictions, to perform or assist in the performance of
18 any lawful sterilization or abortion procedures. The Church Amendments also
19 prohibit individuals from being required to perform or assist in the performance of
20 any health service program or research activity funded in whole or in part under a
21 program administered by the Secretary contrary to their religious beliefs or moral
22 convictions. *See* 42 U.S.C. 300a-7.” 84 Fed. Reg. at 7716, n.7.

23 **2. 1996 Coats-Snowe Amendment**

24 “The Coats-Snowe Amendment bars the federal government and any State
25 or local government that receives federal financial assistance from discriminating
26 against a health care entity, as that term is defined in the Amendment, who refuses,
27 among other things, to provide referrals for induced abortions. *See* 42 U.S.C.
28 238n(a).” 84 Fed. Reg. at 7716, n.8.

3. 2005 Weldon Amendment

“The Weldon Amendment was added to the annual 2005 health spending bill and has been included in subsequent appropriations bills.” 84 Fed. Reg. at 7716, n. 9. “The Weldon Amendment bars the use of appropriated funds on a federal agency or programs, or to a State or local government, if such agency, program, or government subjects any institutional or individual health care entity to discrimination on the basis that the health care entity does not, among other things, refer for abortions.” *Id.*

Analysis

As set forth above, the Ninth Circuit uses a sliding scale approach in determining whether it is appropriate to grant a preliminary injunction. Although Plaintiffs have met their burden of showing that all four factors tip in their favor, the irreparable harm and balance of equities factors tip so strongly in Plaintiffs’ favor that a strong showing of likelihood on the merits was not necessary.

1. Likelihood of Success on the Merits

Plaintiffs have presented reasonable arguments that indicate they are likely to succeed on the merits, thus meeting the threshold inquiry. In so finding, the Court has not concluded that Plaintiffs will definitely prevail on the merits, nor has it concluded that they are more likely going to prevail. The preliminary injunction standard requires neither of these conclusions. *See Azar*, 911 F.3d at 582 (“The purpose of such interim equitable relief is not to conclusively determine the rights of the parties but to balance the equities as the litigation moves forward.”) (quoting *Trump v. Int’l Refugee Assistance Proj.*, ___ U.S. ___, 137 S.Ct. 2080, 2087 (2017)). Rather, it requires a determination that Plaintiff has made a colorable claim—a claim that has merit and a likely chance of success.

First, Plaintiffs have presented initial facts and argument that the separation requirement in the Final Rule forces clinics that provide abortion services to maintain separate facilities and finances for Title X programs will more likely than

1 not increase their expenses unnecessarily and unreasonably.

2 Second, Plaintiffs have presented initial facts and argument that the Final
3 Rule gag requirement would be inconsistent with ethical, comprehensive, and
4 evidence-based health care.

5 Third, Plaintiffs have presented initial facts and argument that the Final
6 Rule violates Title X regulations, the Non-directive Mandates and Section 1554 of
7 the Affordable Care Act and is also arbitrary and capricious.

8 Specifically, Plaintiffs have demonstrated the Final Rule likely violates the
9 central purpose of Title X, which is to equalize access to comprehensive,
10 evidence-based, and voluntary family planning. They have presented facts and
11 argument that the Final Rule violates the Non-directive Mandate because it
12 requires all pregnant patients to receive referrals for pre-natal care, regardless of
13 whether the patient wants to continue the pregnancy, and regardless of the best
14 medical advice and treatment that might be recommended for that patient.

15 They have also presented facts and argument that the Final Rule likely
16 violates Section 1554 of the ACA because the Final Rule creates unreasonable
17 barriers for patients to obtain appropriate medical care; impedes timely access to
18 health care services; interferes with communications regarding a full range of
19 treatment options between the patient and the health care provider, restricts the
20 ability of health care providers to provide full disclosure of all relevant
21 information to patients making health care decisions, and violates the principles of
22 informed consent and the ethical standards of health care professions.

23 Fourth, Plaintiffs, with the help from *Amicus* parties, have presented facts
24 and argument that the Final Rule is arbitrary and capricious because it reverses
25 long-standing positions of the Department without proper consideration of sound
26 medical opinions and the economic and non-economic consequences.

27 Finally, Plaintiffs have presented facts and argument that the Department
28 failed to consider important factors, acted counter to and in disregard of the

1 evidence in the administrative record and offered no reasoned analysis based on
2 the record. Rather, it seems the Department has relied on the record made 30 years
3 ago, but not the record made in 2018-19.

4 **2. Irreparable Harm**

5 Plaintiffs have demonstrated they are likely to suffer irreparable harm in the
6 absence of a preliminary injunction by presenting facts and argument that the Final
7 Rule may or likely will: (1) seriously disrupt or destroy the existing network of
8 Title X providers in both the State of Washington and throughout the entire
9 nation—this network has been carefully knit together over the past 45 years and
10 there is no evidence presented by the Department that Title X is being violated or
11 ignored by this network of providers; (2) impose additional and unnecessary costs
12 on the State of Washington and other states; (3) harm the health of the patients
13 who rely on the existing Title X providers; and (4) drive many Title X providers
14 from the system either because of the increased costs imposed by the new
15 separation requirements or because they cannot or will not comply with the
16 allegedly unprofessional gag rule requirements.

17 Washington State has shown that it is not legally or logistically feasible for
18 Washington to continue accepting any Title X funding subject to the Final Rule.
19 At the minimum, Washington stands to lose more than \$28 million in savings from
20 the loss of federal dollars. It has demonstrated the harmful consequences of the
21 Final Rule will uniquely impact rural and uninsured patients. If the Final Rule is
22 implemented, over half of Washington counties would be unserved by a Title X-
23 funded family planning provider. Students at Washington colleges and universities
24 will be especially hurt by the Final Rule. DOH reports it does not have the funding
25 that would be required to comply with the Final Rule, nor would it be able to
26 comply with the May 3, 2019 deadline.

27 NFPRHA currently has more than 65 Title X grantee members and almost
28 700 Title X sub-recipient members. These NFPRHA member organizations

1 operate or fund a network of more than 3,500 health centers that provide family
2 planning services to more than 3.7 million Title X patients each year. NFPRHA
3 has shown that upon its effective date, the Final Rule will cause all current
4 NFPRHA members grantees, sub-recipients, and their individual Title X clinicians
5 to face a Hobson's Choice that harms patients as well as the providers. Faced with
6 this difficult choice, many NFPRHA members will leave the network once the
7 Final Rule becomes effective, thereby leaving low-income individuals without
8 Title X providers.

9 It is worth noting that Plaintiffs have submitted substantial evidence of
10 harm, including declarations from Karl Eastlund, President and CEO of Planned
11 Parenthood of Greater Washington and North Idaho, ECF No. 10; Cynthia Harris,
12 program manager for the Family Planning Program, Washington DOH, ECF No.
13 11; Anuj Khattar, M.D., primary care physician and reproductive health provider,
14 ECF No. 12; Dr. Judy Kimelman, practitioner at Seattle Obstetrics & Gynecology
15 Group, ECF No. 13; Bob Marsalli, CEO of the Washington Association for
16 Community Health, ECF No. 14; David Schumacher, Director of the Office of
17 Financial Management, State of Washington, ECF No. 15; Dr. Judy Zerzan-Thul,
18 Chief Medical Officer for the Washington State Health Care Authority, ECF No.
19 16; Clare M. Coleman, President and CEO of the National Family Planning &
20 Reproductive Health Association, ECF No. 19; Dr. Kathryn Kost, Acting Vice
21 President of Domestic Research at the Guttmacher Institute, ECF No. 20; Connie
22 Cantrell, Executive Director of the Feminist Women's Health Center, ECF No. 21;
23 Kristin A. Adams, Ph.D, President and CEO of the Indiana Family Health Council,
24 ECF No. 22; J. Elisabeth Kruse, M.S., C.N.M., A.R.N.P, Lead Clinician for Sexual
25 and Reproductive Health and Family Planning at the Public Health Department for
26 Seattle and King County, Washington, ECF No. 23; Tessa Madden, M.D., M.P.H.,
27 Director of the Family Planning Division, Department of Obstetrics and
28 Gynecology, Washington University School of Medicine, ECF No. 24; Heather

1 Maisen, Manager of the Family Planning Program in the Public Health
2 Department for Seattle and King County, Washington, ECF No. 25; and Sarah
3 Prager, M.D., Title X Director of the Feminist Women’s Health Center, ECF No.
4 26.

5 Yet, the Government’s response in this case is dismissive, speculative, and
6 not based on any evidence presented in the record before this Court.

7 **3. Balance of Equities/Public Interest**

8 The balance of equities and the public interest strongly favors a preliminary
9 injunction, which tips the scale sharply in favor of Plaintiffs.

10 There is no public interest in the perpetration of unlawful agency action.
11 Preserving the status quo will not harm the Government and delaying the effective
12 date of the Final Rule will cost it nothing. There is no hurry for the Final Rule to
13 become effective and the effective date of May 3, 2019 is arbitrary and
14 unnecessary.

15 On the other hand, there is substantial equity and public interest in
16 continuing the existing structure and network of health care providers, which
17 carefully balances the Title X, the congressional Non-directive Mandates, and
18 Section 1554 of the Affordable Care Act, while the legality of the new Final Rule
19 is reviewed and decided by the Court.

20 Accordingly, **IT IS HEREBY ORDERED:**

21 1. The State of Washington’s Motion for Preliminary Injunction, ECF
22 No. 9, is **GRANTED**.

23 2. National Family Planning & Reproductive Health Center, *et al.*’s
24 Motion for Preliminary Injunction, ECF No. 18, is **GRANTED**.

25 3. Defendants and their officers, agents, servants, employees, and
26 attorneys, and any person in active concert or participation with them, are
27 **ENJOINED** from implementing or enforcing the Final Rule entitled *Compliance*
28 *with Statutory Program Integrity Requirements*, 84 Fed. Reg. 7714-01 (March 4,

1 2019), in any manner or in any respect, and shall preserve the status quo pursuant
2 to regulations under 42 C.F.R., Pt. 59 in effect as of the date of April 24, 2019,
3 until further order of the Court.

4 4. No bond shall be required pursuant to Fed. R. Civ. P. 65(c).

5 **IT IS SO ORDERED.** The Clerk of Court is directed to enter this Order
6 and forward copies to counsel.

7 **DATED** this 25th day of April 2019.



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A handwritten signature in blue ink that reads "Stanley A. Bastian".

15 Stanley A. Bastian
16 United States District Judge
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FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

Jun 03, 2019

SEAN F. McAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

STATE OF WASHINGTON,

Plaintiff,

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.

No. 1:19-cv-03040-SAB

**ORDER DENYING
DEFENDANTS' MOTION TO
STAY PRELIMINARY
INJUNCTION PENDING
APPEAL**

NATIONAL FAMILY PLANNING &
REPRODUCTIVE HEALTH
ASSOCIATION, FEMINIST WOMEN'S
HEALTH CENTER, DEBORAH OYER,
M.D., and TERESA GALL, F.N.P.,
Plaintiffs,

v.

ALEX M. AZAR II, in his official capacity
as Secretary of the United States

**ORDER DENYING DEFENDANTS' MOTION TO STAY PRELIMINARY
INJUNCTION PENDING APPEAL ~ 1**

1 Department of Health and Human
2 Services; UNITED STATES
3 DEPARTMENT OF HEALTH AND
4 HUMAN SERVICES, DIANE FOLEY,
5 M.D., in her official capacity as Deputy
6 Assistant Secretary for Population Affairs,
7 and OFFICE OF POPULATION
8 AFFAIRS,
9 Defendants.
10

11 Before the Court is Defendant's Motion to Stay Preliminary Injunction
12 Pending Appeal, ECF No. 58. The motion was heard without oral argument.

13 Defendants ask the Court to stay the Court's Order granting Plaintiffs'
14 Motions for Preliminary Injunction, ECF No. 54, entered on April 25, 2019. The
15 Order enjoins Defendants from implementing or enforcing in any way the Final
16 Rule published on March 2019 on a nationwide basis. In essence, Defendants are
17 asking the Court to reconsider its earlier ruling and permit the Final Rule to go
18 into effect. *See Nken v. Holder*, 556 U.S. 418, 428 (2009) ("...a stay operates upon
19 the judicial proceeding itself. It does so either by halting or postponing some
20 portion of the proceeding, or by temporarily divesting an order of
21 enforceability.").

22 Recently, the Ninth Circuit was facing this same issue when a district court
23 issued a TRO and the United States asked it to say the TRO pending appeal. *See*
24 *East Bay Sanctuary Covenant v. Trump*, 909 F.3d 1219 (9th Cir. 2018). There, the
25 Circuit set forth the approach courts should use in determining whether to grant a
26 stay pending appeal:

27 A stay is an 'intrusion into the ordinary processes of administration
28 and judicial review,' and accordingly 'is not a matter of right, even if

**ORDER DENYING DEFENDANTS' MOTION TO STAY PRELIMINARY
INJUNCTION PENDING APPEAL ~ 2**

Add.B21

1 irreparable injury might otherwise result to the appellant.” *Nken*,
2 556 U.S. at 427 (2009) (citations omitted). “It is instead ‘an exercise
3 of judicial discretion,’ and ‘the propriety of its issue is dependent
4 upon the circumstances of the particular case.” *Id.* at 433 (internal
5 alteration omitted) (*quoting Virginian Ry. Co. v. United States*, 272
6 U.S. 658, 672–73 (1926)). “The party requesting a stay bears the
7 burden of showing that the circumstances justify an exercise of that
8 discretion,” and our analysis is guided by four factors:

- 9 (1) whether the stay applicant has made a strong
10 showing that he is likely to succeed on the merits; (2)
11 whether the applicant will be irreparably injured absent
12 a stay; (3) whether issuance of the stay will
13 substantially injure the other parties interested in the
14 proceeding; and (4) where the public interest lies.

Id. at 433–34 (*quoting Hilton v. Braunskill*, 481 U.S. 770, 776
15 (1987)). “The first two factors . . . are the most critical,” and the
16 “mere possibility” of success or irreparable injury is insufficient to
17 satisfy them. *Id.* at 434 (internal quotation marks omitted).

18 *Id.* at 1245-46.

19 The Court considers the final two factors after it concludes an
20 applicant satisfies the first two. *Id.* at 1236.

21 Given that the Court has already considered these factors when it granted
22 Plaintiffs’ Motions for Preliminary Injunction and concluded it is Plaintiffs, not
23 Defendants, that have a likelihood of success on the merits, and Plaintiffs, not
24 Defendants, that would suffer irreparable harm if the preliminary injunction was
25 not granted, the Court finds that Defendants have not met their burden of showing
26 that a stay in this matter would be appropriate.

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1 Accordingly, **IT IS HEREBY ORDERED:**

2 1. Defendant's Motion to Stay Preliminary Injunction Pending Appeal,
3 ECF No. 58, is **DENIED**.

4 **IT IS SO ORDERED.** The Clerk of Court is directed to enter this Order
5 and forward copies to counsel.

6 **DATED** this 3rd day of June 2019.



13 *Stanley A. Bastian*

14 Stanley A. Bastian
15 United States District Judge
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