No. 19-35386

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

STATE OF OREGON et al.,
Plaintiffs-Appellees,

v.

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

AMERICAN MEDICAL ASSOCIATION et al.,
Plaintiffs-Appellees,

v.

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

On Appeal from the United States District Court for the District of Oregon, Nos. 19-cv-317, 19-cv-318 (McShane, J.)

EMERGENCY MOTION OF PLAINTIFFS-APPELLEES AMERICAN MEDICAL ASSOCIATION ET AL. FOR RECONSIDERATION EN BANC OF THE MOTIONS PANEL'S JUNE 20, 2019 PUBLISHED ORDER STAYING THE PRELIMINARY INJUNCTION PENDING APPEAL

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June 24, 2019

CIRCUIT RULE 27-3 CERTIFICATE

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

On June 20, 2019, a motions panel (Leavy, Callahan, Bea, JJ.) issued a published, per curiam order granting Defendants-Appellants' motion for stay pending appeal of three district courts' preliminary injunctions. As set forth below and in Plaintiffs-Appellees' emergency motion for a temporary administrative stay filed on June 20 (Dkt. 59-1), emergency en banc reconsideration of that order is necessary to prevent immediate irreparable harm. The panel's order allows HHS

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

(iii) Notification of parties:

Counsel for Defendants-Appellants were notified of this emergency motion on June 24, 2019, by telephone call, and they subsequently informed counsel for Plaintiffs-Appellees that they oppose it. Counsel will serve counsel for Defendants-Appellants by e-mail with copies of this motion and supporting documents attached.

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

/s/ Alan E. Schoenfeld
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RULE 35 STATEMENT

This matter is appropriate for en banc review because it involves questions of exceptional importance. Fed. R. App. P. 35(b)(1)(B).

This case concerns a regulation that would warp and decimate Title X, an extremely effective reproductive health care program for low-income people. Three district courts in this Circuit and a fourth outside it issued preliminary injunctions against HHS's Rule, preserving the decades-long status quo. Without argument and based on abbreviated briefing, a motions panel of this Court (Leavy, Callahan, Bea, JJ.) issued a published order that disregarded the district courts' unanimous findings and allowed the Rule to be enforced immediately.

The question presented is:

Whether the motions panel erred by staying the preliminary injunctions entered by three district courts, where each court found every factor in the plaintiffs' favor, including that patients, providers, and public health would be irreparably harmed absent an injunction.

INTRODUCTION

For 50 years, Title X has supported vital reproductive health care services for millions of low-income individuals. A Final Rule issued by HHS, however, threatens to undo that progress and decimate the program. Three district courts—on extensive factual records and after thorough briefing and oral argument—found every preliminary-injunction factor to favor preserving the status quo and preliminarily enjoined the Rule. Their findings include that the Rule "will result in less contraceptive services, … less early breast cancer detection, less screening for cervical cancer, less HIV screening, … less testing for sexually transmitted disease," "more unintended pregnancies," and "more women suffering adverse reproductive health symptoms." ER6, ER32. HHS, in contrast, would suffer "no harm" from preserving the longstanding status quo. ER7.

Each district court found that the Rule will cause irreparable harms and that the balance of equities "tips sharply" in favor of an injunction. *E.g.*, ER7. These findings "present … intensely factual questions," *Arc of California v. Douglas*, 757 F.3d 975, 992 (9th Cir. 2014), "reviewed for clear error," *adidas America, Inc. v. Skechers USA, Inc.*, 890 F.3d 747, 753 (9th Cir. 2018).

The motions panel, on abbreviated briefing and without oral argument, disregarded these findings. The panel's analysis of the harms and equities spans little more than a page. Add.24-25. It stated that HHS's "predictions" about the

Rule's effects were entitled to "more deference than Plaintiffs' contrary predictions." Add.25. But all three courts below found that HHS's predictions lacked any support. And they found that the Rule would cause a mass exodus of many long-standing providers—including Planned Parenthood, which provides services to approximately 40% of *all* Title X patients. ER31-33. Nonetheless, the panel held that Plaintiffs' "harms" were "minor" compared to the "irreparable harm" (Add.24) HHS would suffer from maintaining the status quo. That conclusion is fundamentally wrong and upends the controlling standard of review.

The panel's legal conclusions are also largely unexplained—and wrong. And the panel appeared to rely on HHS's merits brief, to which Plaintiffs have not yet had an opportunity to respond.[1] It even relied on arguments HHS has never made. *See* Add.18-19 nn.2-3.

The panel noted that "a merits panel of this court" is "set to hear the cases on an expedited basis." Add.25. That undermines the panel's order. As the Supreme Court underscored just three days ago, there is danger in deciding consequential questions without appropriate adversarial testing. *See Knick v. Township of Scott, Pa.*, __ S. Ct. __, 2019 WL 2552486, at *9 (2019). There was no reason to short-

[1] *Compare* HHS Br. 29 (May 31, 2019) ("[W]hen Congress wants pregnancy options to be treated on an 'equal basis,' it knows how to say so."), *with* Add.19 ("When Congress wants specific pregnancy options to be given equal treatment, it knows how to say so *explicitly*.").

circuit this process when full briefing will be complete by July 19. That is especially so here, in a case with serious consequences, and where the preliminary injunctions simply preserve the way Title X has worked for the past half century.

The stay is extraordinary and its consequences are grave. In such circumstances, en banc review and vacatur are warranted. *See Garza v. Hargan*, 874 F.3d 735, 736 (D.C. Cir. 2017) (per curiam) (granting rehearing en banc, vacating stay order, and holding that HHS failed to meet "the stringent requirements for a stay pending appeal"), *vacated on other grounds*, 138 S. Ct. 1790 (2018); *Feldman v. Arizona Sec. of State's Office*, 843 F.3d 366, 367 (9th Cir. 2016) (granting reconsideration en banc).

BACKGROUND

A. Title X

Title X supports vital reproductive health care services for millions of low-income individuals. *E.g.*, ER7-8. Plaintiffs are leading health care organizations and professionals. They have participated in Title X for decades (*see, e.g.*, SER11; ER38), and Planned Parenthood alone serves approximately 40% of *all* patients who receive care under Title X—an estimated 1.5 million individuals (*see* ER33; SER3).

Section 1008 of Title X provides that no program funds "shall be used in programs where abortion is a method of family planning." 42 U.S.C. §300a-6.

HHS's regulations have thus long prohibited Title X projects from providing abortions, and have required Title X grantees who provide abortions outside the Title X project to keep such activities "separate and distinct from Title X project activities." 65 Fed. Reg. 41,281, 41,282 (July 3, 2000). Since the program's inception, however, Title X care has been delivered by reproductive health care providers who—*outside* the program with *non*-Title X funds—also provide abortion services, and providers have long been authorized to use common facilities, staff, and health records systems for Title X projects and any "[n]on-Title X abortion activities." *Id.*

Moreover, as HHS has made clear for virtually the entire history of the program, §1008 does not prevent Title X providers from communicating with their patients about abortion. *See* ER9; 65 Fed. Reg. 41,270, 41,271-41,272 (July 3, 2000). Thus, Title X regulations have long required that providers offer pregnant women the opportunity to receive nondirective counseling on *all* of their medical options, including abortion. *See* 65 Fed. Reg. at 41,270. That long-settled agency view is grounded in fundamental medical ethics. *See, e.g.*, *id.*; ER49-50; ER39-40.

Under the one brief exception, in 1988, HHS issued a rule that prohibited Title X projects from counseling their patients about abortion or referring them to abortion providers. 53 Fed. Reg. 2,922, 2,945 (Feb. 2, 1988). HHS also required Title X grantees to "physically" separate Title X services from abortion-related

services. *Id.* at 2,940, 2,945. The Supreme Court upheld the 1988 rule in *Rust v. Sullivan*, holding that §1008 was "ambiguous" and the rule was a "plausible" construction of the statute. 500 U.S. 173, 184 (1991).

HHS never fully implemented the 1988 rule, however, given "widespread concerns that [the rule] would interfere with the doctor-patient relationship." *National Family Planning & Reproductive Health Ass'n v. Sullivan*, 979 F.2d 227, 230 (D.C. Cir. 1992). The rule was suspended in 1993 and rescinded in 2000. 65 Fed. Reg. at 41,270.

Since *Rust*, Congress has acted to ensure that Title X providers may continue to give their pregnant patients all relevant information. First, since 1996, Congress has mandated in annual appropriations acts that "all pregnancy counseling" provided with Title X funds "shall be nondirective." *E.g.*, Pub. L. No. 115-245, 132 Stat. 2981, 3070-3071 (2018) ("Nondirective Mandate"). Second, Congress restricted HHS's rulemaking authority in §1554 of the Affordable Care Act, declaring:

> 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.

42 U.S.C. §18114.

B. 2019 Rule

The Rule, issued on March 4 with a 60-day effective date, contains two central components: the Gag and Separation Requirements. *See* 84 Fed. Reg. 7,714 (Mar. 4, 2019).

The Gag Requirement restricts information Title X providers may give their pregnant patients. Although there are numerous flaws with it, Plaintiffs focus on the two main features addressed by the motions panel. First, the Gag Requirement *bans* providers from referring their pregnant patients to abortion providers—even when that is the patient's expressed wish; but it *mandates* referrals for prenatal care—even when the patient has no such interest. 84 Fed. Reg. at 7,788-7,789. Second, even when a patient specifically seeks information about abortion *only*, practitioners must disregard that decision, and if they provide information about abortion, must also counsel the patient about other options she does not want. *Id.* at 7,747.

The Rule cited no evidence of misuse of Title X funds over the past 50 years. Nonetheless, through the Separation Requirement, it mandates separate facilities, personnel, workstations, and medical records for any Title X grantee that

engages in "prohibited activities"—virtually anything concerning abortion. 84 Fed. Reg. at 7,789. Thus, Title X providers must separate themselves not only from anyone who provides abortions outside the Title X program, but also anyone who makes referrals for abortions or does anything HHS might think "encourage[s], promote[s], or advocate[s]" for abortion. *Id.* at 7,788, 7,789.

C. District Court Proceedings

1. The district court preliminarily enjoined the Rule on April 19.

The court concluded that Plaintiffs are "likely to succeed on the merits of their claim that the Final Rule is contrary to law." ER7. The court rejected HHS's principal argument that the Rule must be upheld under *Rust*. The Nondirective Mandate and §1554 of the ACA, the court explained, change the governing law while "liv[ing] in harmony" with §1008 of Title X. ER17-18.

The court then held that the Gag Requirement "is the very definition of directive counseling," in violation of the Nondirective Mandate. ER21. The court also held that both the Gag and Separation Requirements likely violate §1554 of the ACA. ER26-27, ER29 n.8.

The court further found that Plaintiffs demonstrated "a likelihood of success on the merits of their claim[] that the Final Rule is … arbitrary and capricious." ER32. HHS failed adequately to consider that "the Final Rule appears to force medical providers to either drop out of the program or violate their codes of

professional ethics" (ER27) and "failed to adequately account for the impact the Final Rule will have on women, particularly women in rural areas" (ER31).

The court then found that Plaintiffs, patients, and public health would be irreparably harmed absent an injunction. ER32-33. The Rule will force large numbers of Title X providers to leave the program. ER33. "Planned Parenthood's absence" alone "would create a vacuum for family planning services" that other safety-net clinics would be unable to fill. ER31. Serious health consequences would result. ER31-32. Moreover, "the risk of irreparable damage to the health of women and communities is grave," whereas preserving the status quo "poses no harm to Defendants." ER7. Thus, the balance of equities "tips sharply" in favor of an injunction. ER33.

2. Two other district courts in this Circuit and a third outside it also issued preliminary injunctions. *See Washington v. Azar*, __ F. Supp. 3d __, 2019 WL 1868362, at *9 (E.D. Wash. 2019); *California v. Azar*, __ F. Supp. 3d __, 2019 WL 1877392, at *44 (N.D. Cal. 2019); *Mayor & City Council of Baltimore v. Azar*, 2019 WL 2298808, at *14 (D. Md. May 30, 2019). Each court underscored the strength of the plaintiffs' evidence and the absence of HHS's. The *California* court found, for example, that HHS was "unable to articulate any real harm [it] will suffer" from maintaining the status quo. 2019 WL 1877392, at *1; *accord Washington*, 2019 WL 1868632, at *8-9; *Baltimore*, 2019 WL 2298808, at *13.

D. Motions Panel Proceedings

On May 10, HHS moved this Court for a stay pending appeal. Dkt. 15. That motion was fully briefed on May 24. *See* Dkt. 23; Dkt. 26. HHS then filed its merits brief on May 31. Plaintiffs' answering brief is due this Friday (June 28).

On June 20, the motions panel stayed the three injunctions in this Circuit. Add.25. Plaintiffs immediately filed an emergency motion to the en banc court seeking a temporary administrative stay pending resolution of this emergency motion. Dkt. 59-1. That motion is still pending.

ARGUMENT

The motions panel cast aside the unanimous findings of three district courts and allowed HHS's Rule to be enforced immediately. But HHS came nowhere close to satisfying the stringent standard for a stay on any required element. *See, e.g.*, *East Bay Sanctuary Covenant v. Trump*, 909 F.3d 1219, 1245-1246 (9th Cir. 2018). The district courts' legal conclusions were correct. So too were their unanimous factual findings—which must be upheld absent "clear error," *adidas*, 890 F.3d at 753.

The panel's stay order, issued without argument and on abbreviated briefing, departs from settled principles of appellate review and is wrong in numerous respects. On the merits, HHS relied principally on *Rust*. The district court

correctly rejected that argument. This case is controlled not by *Rust*, but by provisions Congress enacted after *Rust*: the Nondirective Mandate and §1554.

In granting the stay, the panel stated that neither statute impliedly repeals §1008. Add.17. But that is precisely *Plaintiffs'* point, and the district courts agreed: although the Nondirective Mandate and §1554 did alter the law after *Rust*, all three provisions live in harmony, and do not conflict. The Rule presents a straightforward violation of the Nondirective Mandate; it contravenes §1554—a statutory prohibition on *any* HHS regulation that harms patient care in any one of six enumerated ways; and it is arbitrary and capricious.

The panel's cursory treatment of the harms and equities is astonishing. Each district court has found—citing extensive record evidence—that the Rule will cause grave and irreparable harms; that HHS would suffer no harm from an injunction; and that the equities overwhelmingly favor an injunction. Disregarding those findings with almost no analysis, the panel "defer[red]" to HHS's "predictions." Add.25. But HHS's predictions are not based on any evidence—as the district courts unanimously found.

I. THE MOTIONS PANEL INCORRECTLY DISREGARDED UNANIMOUS DISTRICT COURT FINDINGS

In addressing the harms and equities, the district court set forth its findings in detail:

> The harms outlined in the record before me, should the Final Rule be implemented, are extensive and are not rebutted by the government. A review of the scores of declarations from public health policy experts, medical organizations, doctors, and Title X providers lead to the inescapable conclusion that the Final Rule will result in negative health outcomes for low income women and communities. It will result in less contraceptive services, more unintended pregnancies, less early breast cancer detection, less screening for cervical cancer, less HIV screening, and less testing for sexually transmitted disease.

ER6; *accord* ER31-34. The Rule, the court further found, would cause a mass exodus of many longstanding providers—including Plaintiffs who provide services to approximately 40% of *all* Title X patients. ER31-33. And the Rule would have a particularly pernicious effect on low-income women "who have no interactions with health care providers outside of a Title X provider." ER31-32.

HHS provided no evidence to the contrary; rather, it just "baldly assert[ed]" that these harms would not occur. ER32. Moreover, the court found that HHS would suffer "no harm" from an injunction that preserves the way the program has worked for "'virtually its entire history.'" ER7.

Those findings were correct. In all events, they were not clearly erroneous—the standard of review that the panel did not mention. Rather, the panel found "irreparable harm" to HHS based only on the generic harms that HHS invoked: "allow[ing] taxpayer dollars to be spent in a manner that [HHS] has concluded violates the law," "administrative costs," and "significant uncertainty in

the Title X program." Add.24. Those claimed harms are refuted by undisputed facts.

Title X has operated under the "current regulations … for nearly 50 years," which "have an excellent track record." ER34. Moreover, HHS "cannot point to once instance where Title X funds have been misapplied." ER6. Finally, HHS cannot be heard to complain about purported harms from operating under the longstanding regulations. On April 1, 2019—after it issued the Rule—HHS awarded a new round of three-year competitive grants and distributed funds under those *very same regulations*. HHS.Add.34 (Dkt. 15).

HHS bore a heavy burden in seeking to stay the district courts' injunctions pending appeal, and the three district courts' factual findings deserved much greater respect from the motions panel. But the panel disregarded those findings and in doing so departed from the proper scope of appellate review. Given the harmful consequences of allowing the Rule to take effect—consequences amply documented by the district courts—that deviation warrants en banc reconsideration.

II. THE MOTIONS PANEL'S LEGAL CONCLUSIONS WERE ERRONEOUS

A. The Rule Violates The Nondirective Mandate

The Gag Requirement *bans* providers from referring pregnant patients to abortion providers—even when that is the patient's expressed wish; but it

mandates referrals for prenatal care—even when the patient has no such interest. Moreover, even when a patient specifically seeks information about abortion *only*, practitioners must disregard that patient decision. If a practitioner provides any information about abortion in response to the patient's request, they must *also* counsel the patient about other options she *does not want*. *Supra* p.7. Thus, the Rule directs pregnant patients away from abortion and toward continuing a pregnancy to term—"the very definition of directive counseling" (ER21) and a straightforward violation of the Nondirective Mandate.

The motions panel erred in concluding otherwise. It stated that the Nondirective Mandate does not require that "nondirective counseling be given in every case," but rather that "such counseling as is given shall be nondirective." Add.17-18. But the panel never explained why that matters. Rather, the panel simply proceeded to state: "The Final Rule is therefore not in conflict with the appropriations rider's nondirective pregnancy counseling mandate." *Id.* That conclusion is unexplained. It also ignores the operation of the Rule. Counseling about options against patients' wishes, as the Rule requires, is directive. *See* ER21; ER41-42. HHS previously acknowledged just that. *See* 65 Fed. Reg. at 41,273.

The panel also blessed the Rule's "referral" provisions. Add.18-19. The panel concluded that "providing a referral is not 'counseling.'" Add.18. But that

narrow view of counseling is wrong. *See* ER18-19; *accord, e.g.*, *California*, 2019 WL 1877392, at *16. Congress and HHS have both characterized referrals as part of counseling. *See* 42 U.S.C. §254c-6(a)(1); 84 Fed. Reg. at 7,730, 7,733-7,734. That is also how medical professionals understand the term. *See, e.g.*, ER53. Indeed, HHS's own evidence-based recommendations for "Pregnancy Testing and Counseling" state: "[pregnancy] test results should be presented to the client, followed by a discussion of options and appropriate referrals." CDC & OPA, *Providing Quality Family Planning Services* 13-14 (Apr. 25, 2014), https://www.cdc.gov/mmwr/pdf/rr/rr6304.pdf. Finally, it is implausible "that Congress would so adamantly require that all pregnancy counseling be nondirective, only to later allow the provider to refer a woman seeking an abortion to an adoption agency." ER22 n.4.[2]

The panel then stated that, "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.'" Add.19. Echoing a new argument made in

[2] The motions panel stated: "[T]o the extent there is any ambiguity, …. [a]pplying *Chevron* deference, we would conclude that HHS's treatment of counseling and referral as distinct concepts is a reasonable interpretation of the applicable statutes." Add.18-19 n.2. That conclusion was erroneous; HHS has never invoked *Chevron* deference, and its own Rule treats referrals as part of counseling.

HHS's merits brief, the panel distinguished "nondirective counseling" from "equal treatment." *Id.*; *see supra* n.1.

That misses the point. The Nondirective Mandate's principle is *patient*-directed care—where the patient "identif[ies] the direction of the interaction." 84 Fed. Reg. at 7,716. But the Rule bans providers from giving patients who *want* an abortion information about how to obtain one, and requires that those patients be counseled on other options they do not want. Ironically, HHS elsewhere acknowledges that the selective provision of information is directive, and states that if abortion were "the only option presented[,] … the counseling would violate … the Congressional directive that all pregnancy counseling be nondirective." *Id.* at 7,747. HHS cannot have it both ways. Under the Rule's terms, the selective presentation of information—withholding the abortion referral that the patient *seeks*—violates the Nondirective Mandate.[3]

B. The Rule Violates §1554 Of The ACA

The district court held that Plaintiffs are likely to prevail on their claim that the Rule violates §1554. *See* ER23-27, ER29 n.8. The motions panel disagreed, making two principal points. Both are incorrect.

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[3] Invoking *Chevron* and advancing another argument never made by HHS, the panel said it would defer to "HHS's reasonable interpretation … that referral to non-abortion providers is consistent with the provision of nondirective pregnancy counseling." Add.19 n.3.

The panel stated that §1554 "likely" does not apply here because HHS's Rule concerns a "*funding* program[]." Add.20. That is contrary to the plain text; §1554 applies to "any regulation" issued by HHS. The panel also stated that it "seems likely" that Plaintiffs' waived their §1554 challenge. But Plaintiffs and numerous commenters put HHS on notice of the challenge by "object[ing] under each prong of the statute." ER25; *accord California*, 2019 WL 1877392, at *20-21. Moreover, HHS understood those comments in §1554's terms, recognizing, for example, that "commenters assert that proposed changes could reduce access to services" and "violate[] ethical standards." 84 Fed. Reg. at 7,722, 7,758. There was no waiver.

C. The Rule Is Arbitrary And Capricious

The district court found that Plaintiffs "demonstrated a likelihood of success on the merits of their claims that the Final Rule is … arbitrary and capricious." ER30-32. Far from "ignor[ing] HHS's explanations, reasoning, and predictions" (Add.22), the court evaluated HHS's explanations and correctly concluded that they were unsupported.

The motions panel's conclusions to the contrary are at odds with the record. For example, the panel faulted the district court for "ignor[ing] HHS's consideration of the effects that the Final Rule would likely have on the number of Title X providers, and credit[ing] Plaintiffs' speculation that the Final Rule would

'decimate' the Title X provider network." Add.23. But it is HHS's unsupported claims that are speculative. *See* ER31-32; *supra* pp.12-13. HHS stated, without evidence, that the Rule "may increase the number of providers in the program." 84 Fed. Reg. at 7,780. Agency predictions, however, "'must be based on some logic and evidence, not sheer speculation.'" *Sorenson Commc'ns Inc. v. FCC*, 755 F.3d 702, 708 (D.C. Cir. 2014).

The D.C. Circuit's recent decision in *National Lifeline Association v. FCC*, 921 F.3d 1102 (D.C. Cir. 2019), is instructive. That case involved the FCC's "fundamental change" to a program for certain low-income individuals (concerning voice and broadband services). *Id.* at 106. The D.C. Circuit held that the FCC's action was arbitrary and capricious because it "evince[d] no consideration of the exodus of … providers from" the program. *Id.* at 1105. The court recognized the principle that the motions panel invoked here (Add.23)—that it must "'give appropriate deference to predictive judgments' by an agency where supported by '[s]ubstantial evidence.'" 921 F.3d at 1113. But it found that principle inapplicable because the agency "summarily" concluded that its action would support the expansion of providers but "referred to no evidence that … providers will make up the gap in services" when other providers were no longer eligible to receive subsidies. *Id.* HHS similarly cited no evidence when it

concluded that the Rule will result in more patients being served, and failed to acknowledge the exodus of Title X providers caused by the Rule.

For these and other reasons Plaintiffs will address in their merits brief, the Rule is not a product of reasoned decisionmaking.

D. *Rust* Does Not Control

As for *Rust*, the panel noted that "the Final Rule is a reasonable interpretation of § 1008." Add.14. But this case is controlled not by *Rust*—which held only that the 1988 rule did not contravene §1008 of Title X as it stood at that time—but by provisions Congress put in place after *Rust*. Those provisions, the Nondirective Mandate and §1554, change the law governing pregnancy counseling and the provider-patient relationship under Title X. ER17-18. And the panel was required to give effect to those later provisions. Harmonizing the three provisions does not raise any issue of implied repeal. *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 143 (2000); *United States v. Fausto*, 484 U.S. 439, 453 (1988). In the Nondirective Mandate and §1554, Congress spoke directly to the subject matter here, and those provisions are controlling.

CONCLUSION

The Court should grant Plaintiffs' motion for reconsideration en banc and vacate the motions panel's stay order.

June 24, 2019

Respectfully submitted.

/s/ Alan E. Schoenfeld

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Ninth Circuit Rules 35-4 and 40-1 because it contains 4,168 words, exclusive of the exempted portions of the brief. The brief has been prepared in proportionally spaced typeface using Microsoft Word 2016 in 14 point Times New Roman font.

/s/ Alan E. Schoenfeld
ALAN E. SCHOENFELD

June 24, 2019

ADDENDUM

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

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

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

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

Plaintiffs-Appellees,

v.

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

Defendants-Appellants.

STATE OF WASHINGTON; NATIONAL FAMILY PLANNING AND REPRODUCTIVE HEALTH ASSOCIATION; FEMINIST WOMEN'S HEALTH CENTER; DEBORAH OYER, M.D.; TERESA GALL, *Plaintiffs-Appellees*, v. ALEX M. AZAR II, in his official capacity as Secretary of the United States Department of Health and Human Services; UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; DIANE FOLEY, MD, in her official capacity as Deputy Assistant Secretary for Population Affairs; OFFICE OF POPULATION AFFAIRS, *Defendants-Appellants.*	No. 19-35394 D.C. Nos. 1:19-cv-03040-SAB 1:19-cv-03045-SAB ORDER ON MOTIONS FOR STAY PENDING APPEAL

Filed June 20, 2019

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

Per Curiam Order

SUMMARY*

Civil Rights

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

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

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

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

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

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

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

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ORDER

PER CURIAM:

BACKGROUND

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

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

42 U.S.C. § 300a-6.

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

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

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

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

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

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

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

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

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

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

ANALYSIS

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

I.

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

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

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

II.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

III.

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

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

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

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

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

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

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

IV.

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

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

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

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

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

V.

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

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

CERTIFICATE OF SERVICE

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

/s/ Alan E. Schoenfeld
ALAN E. SCHOENFELD