JOSEPH H. HUNT
Assistant Attorney General

MICHELLE R. BENNETT
Assistant Branch Director

ANDREW M. BERNIE (DC Bar No. 995376)
R. CHARLIE MERRITT (VA Bar No. 89400)
Trial Attorneys
U.S. Department of Justice
Civil Division, Federal Programs Branch
1100 L Street NW
Washington, DC 20005
Tel.: (202) 616-8488
Fax: (202) 616-8470
andrew.m.bernie@usdoj.gov
robert.c.merritt@usdoj.gov

Attorneys for Defendants

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

STATE OF OREGON et al.,

Plaintiffs,

v.

ALEX M. AZAR II et al.,

Defendants.

AND

AMERICAN MEDICAL ASSOCIATION et al.,

Plaintiffs,

v.

ALEX M. AZAR II et al.,

Defendants.

Consolidated Civil Action Nos.
6:19-cv-00317-MC (Lead Case)
6:19-cv-00318-MC

DEFENDANTS' MOTION FOR A STAY OF THE COURT'S PRELIMINARY INJUNCTION PENDING APPEAL

EXPEDITED HEARING REQUESTED

LOCAL RULE 7-1 CERTIFICATION

Pursuant to LR 7-1(a), undersigned counsel certifies that he made a good faith effort to confer with counsel for Planned Parenthood, Dr. Ewing, and Ms. Megregian by telephone to resolve the disputed matters addressed in this motion, but was unable to resolve the dispute. Counsel for these Plaintiffs state that they oppose the motion for a stay in its entirety and oppose the request for an expedited hearing. Counsel for these Plaintiffs also state that, unless otherwise ordered by the Court, they will file their opposition to this motion by May 17. As explained further below, Defendants respectfully request a ruling on or before May 10, 2019, at which time Defendants intend to seek relief in the Ninth Circuit.

Undersigned counsel likewise certifies that he made a good faith effort to confer with counsel for Oregon to resolve the disputed matters addressed in this motion, but was unable to resolve the dispute. Counsel for Oregon stated on behalf of Oregon that it opposes the motion for a stay in its entirety, and likewise opposes the request for an expedited hearing. Counsel for Oregon further stated that, although he had not yet had an opportunity to consult with counsel for the remaining State plaintiffs, he believes it is likely that they would share his position on both points.

Undersigned counsel was unable to reach counsel for the American Medical Association or the Oregon Medical Association this evening but, due to the importance of this motion to the government, is filing the motion now.

MOTION FOR STAY OF PRELIMINARY INJUNCTION PENDING APPEAL

Pursuant to Federal Rule of Civil Procedure 62, Defendants respectfully move for a stay pending appeal of the Order Granting Plaintiffs' Motions for Preliminary Injunction, ECF No. 142 (ECF No. 135 in 6:19-cv-00318) (Order), which enjoins Defendants from implementing or

enforcing in any way the Final Rule published on March 4, 2019, *see* Compliance with Statutory Program Integrity Requirements, 84 Fed. Reg. 7714 (Mar. 4, 2019) (Final Rule or Rule), on a nationwide basis. At the very least, Defendants respectfully request that the Court stay the injunction insofar as it applies to those other than Plaintiffs here, and stay the injunction with respect to the provisions of the Rule other than the counseling and referral restrictions and the physical separation requirements. As further detailed below, Defendants also respectfully request that the Court rule on this motion expeditiously and in any event no later than May 10, 2019. This motion is supported by the following memorandum of law, the declaration filed herewith (see Exhibit A), and all previous filings in this action, including but not limited to Defendants' brief in opposition to Plaintiffs' motions for a preliminary injunction (ECF No. 90).

MEMORANDUM OF LAW

The Court should stay its injunction pending appeal because Defendants are likely to succeed on the merits of their appeal and will be irreparably harmed absent a stay.

In light of the Supreme Court's decision in *Rust v. Sullivan*, 500 U.S. 173 (1991), Defendants are likely to ultimately succeed on the merits. The balance of harms also weighs in Defendants' favor. If the Court's injunction remains in place, it would require HHS to expend hundreds of millions of dollars in taxpayer funds in a manner that the agency has concluded is contrary to Congress's express prohibition on the use of Title X funds in programs where abortion is a method of family planning. The injunction applies nationwide, including in thirteen States that have expressly supported the Rule. And the Court's order precludes HHS from enforcing the *entire* Rule, including provisions Plaintiffs did not challenge and others that the Court's opinion did not address, contrary to the Rule's express severability statement.

Leaving the injunction in place pending appeal will also negatively affect Title X grantees and the agency's ability to administer the Title X program. For instance, grantees may not take needed steps to comply with the March 4, 2020 deadline for physical separation, even though that deadline will remain in effect if the Rule is ultimately upheld—which, again, is likely in light of *Rust*. Moreover, without a stay, grantees will be uncertain as to which regulations will apply when requesting continuations of their Title X grants, and the agency will be unable to effectively evaluate those applications, given the uncertainty surrounding the Rule.

In contrast, Plaintiffs will not be harmed by a stay. Although the Court found that Plaintiffs and the public would be irreparably harmed absent injunctive relief, the basis for that judgment largely consisted of Plaintiffs' *own opinions* that the Rule requires them to violate their own views of medical ethics. Plaintiffs are entitled to their views on this subject. But HHS thoroughly explained *its* view that the Rule was consistent with principles of medical ethics, and that view is both logical and consistent with decades of legal precedent and numerous federal conscience statutes. That is all the Administrative Procedure Act (APA) requires. The remaining harms identified by the Court rest on a chain of alleged events that are speculative and not sufficiently imminent to require preliminary injunctive relief.

For these reasons, this Court should grant Defendants' motion for a stay of the preliminary injunction pending appeal. At the very least, Defendants respectfully request that the Court stay the injunction insofar as it applies to those other than Plaintiffs here, and stay the injunction with respect to the provisions of the Rule other than the counseling and referral restrictions and the physical separation requirements.

In any event, Defendants respectfully request that the Court rule on this motion expeditiously. If upon reviewing this motion the Court does not believe Defendants have met the

requirements for a stay, Defendants request that the Court summarily deny the motion without awaiting a response from Plaintiffs. Otherwise, the Government respectfully asks that the Court rule on the motion no later than May 10, 2019, at which time Defendants intend to seek relief in the Ninth Circuit.

ARGUMENT

A party may obtain a stay pending appeal if it shows both a probability of success on the merits and irreparable injury. *Golden Gate Rest. Ass'n v. City and Cnty. of San Francisco*, 512 F.3d 1112, 1115 (9th Cir. 2008). That standard is met here because Defendants are likely to succeed on the merits, and will be irreparably injured absent a stay.

I. DEFENDANTS ARE LIKELY TO PREVAIL ON THE MERITS

Defendants respectfully submit that, notwithstanding the Court's Order, the government is likely to succeed on the merits of its appeal. As Defendants explained in their Opposition to Plaintiffs' Motions for a Preliminary Injunction and at oral argument, *Rust v. Sullivan*, 500 U.S. 173 (1991), controls the key legal questions at issue in this litigation, and therefore Plaintiffs have no realistic likelihood of prevailing. ECF No. 90 (PI Opp.) at 10-16. The 1988 regulations upheld in *Rust* were materially identical to—and, if anything, *more* restrictive than—the conditions on federal funding contained in the Final Rule. Indeed, Plaintiffs have never seriously contended otherwise and the Court's Order did not dispute this. *See* Order at 12 (characterizing the "rules in *Rust*" as "remarkably similar" to the Rule here). The Court also acknowledged that "many of the arguments put forward by Plaintiffs are ones the Supreme Court previously rejected." *Id.*

The Court nonetheless faulted Defendants for their reliance on *Rust*, noting that Defendants "cited *Rust* on 168 occasions." Order at 12. But that is because *Rust* is directly on point. It is unusual to have a case where the Supreme Court has already upheld a materially identical version

of the regulation under review—under a statute that Congress has not changed since the Supreme Court's decision. The Court itself noted that "[a]t first blush, one could be persuaded that *Rust* controls the outcome here." *Id.* Respectfully, the Court's ultimate conclusions to the contrary are unlikely to withstand appellate review.

1. The Court concluded that the counseling and referral restrictions violated a one-line rider Congress began adding to appropriations bills in 1996 providing that "all pregnancy counseling shall be nondirective" (the nondirective provision). But the nondirective provision addresses *counseling* alone, which is distinct from *referrals*, as confirmed by, among other things, dictionary definitions, the text of Congress's *failed* 1992 attempt to overrule *Rust*, and longstanding agency usage of the terms. PI Opp. at 17-22. It is particularly anomalous to conclude that "pregnancy counseling" *within* the Title X program necessarily encompasses referrals *outside* the Title X program for something that Congress has expressly *prohibited* within the Title X program. Indeed, even the 2000 rule (promulgated four years after the nondirective provision was first promulgated) concluded that the 1988 regulations remained a permissible construction of the Title X statute.[1] If it were obvious that the nondirective provision had implicitly repealed *Rust*'s holding that prohibiting abortion referrals was permissible under section 1008—because the term "counseling" includes "referral"—then presumably the Secretary would have said as much then.

[1] When the Secretary promulgated the 2000 regulations, she acknowledged that the 1988 regulations remained a "permissible interpretation of the statute," 65 Fed. Reg. at 41,277, and explained that her adoption of the 2000 regulations was based on "experience" rather than statutory interpretation, *id.* at 41,271. At that time, however, the nondirective provision had been in effect for several years, and the Secretary discussed its existence in the preamble to the 2000 regulations. *See id.* at 41,273 ("[T]he [Title X] program's four most recent appropriations . . . required that pregnancy counseling in the Title X program be 'nondirective.'"). And as previously noted, the 2000 regulations—like the 1993 guidance before them—repeatedly use the terms "counseling" and referral" to address distinct phases of the process Title X providers had to offer. *See* PI Opp. at 21.

In all events, a doctor's *refusal* to provide a patient with a referral for an abortion does not *direct* her to do anything. Referrals for prenatal care are also neither counseling nor directive—rather, such care is always medically necessary for women during pregnancy, even for those who later obtain an abortion. *See* PI Opp. at 39-40.

Concluding otherwise, the Court pointed to language in the Rule directing that "Title X projects should not use nondirective pregnancy counseling, or referrals made for prenatal care or adoption during such counseling, as an indirect means of encouraging or promoting abortion as a method of family planning," 84 Fed. Reg. at 7747, and a federal statute that discusses developing and implementing training programs for "providing adoption information and referrals to pregnant women on an equal basis with all other courses of action included in nondirective counseling to pregnant women." 42 U.S.C. § 254c-6(a)(l). But the language from the Rule does not suggest that referrals generally—let alone referrals for abortion as a method of family planning—are necessarily part of nondirective pregnancy counseling. Nor does section 254c-6(a)(1). This statute if anything shows that when Congress wants to ensure that nondirective pregnancy counseling (when offered) includes discussion of a specific option, it knows how to do so. Indeed, under the Court's analysis of the nondirective provision, it is far from clear that section 254c-6(a)(1) has any independent force.

The Court also characterized as directive the Rule's requirement that abortion must not be the only option presented during counseling and requiring discussion of the possible risks and side effects of each option discussed. Order at 17. But as HHS has previously explained, discussing multiple options with a patient and presenting the risks and side effects of each option is the paradigm of nondirective counseling. PI Opp. at 24. As HHS noted, its approach "is designed to

assist the patient in making a free and informed decision," presenting each option in a "factual, objective, and unbiased manner." 84 Fed. Reg. at 7747.

Even if there were some doubt about the language of the nondirective provision standing alone, Defendants respectfully submit that the Court's opinion gave insufficient weight to the many legal principles counseling against interpreting that provision expansively. As Defendants explained in their Opposition and at argument, no less than six canons of interpretation militate strongly against Plaintiffs' argument: (1) the presumption against implied repeals; (2) the presumption that Congress does not silently abrogate the Supreme Court's interpretation of a statute; (3) the "very strong" presumption that appropriations riders do not substantively change existing law; (4) the presumption that specific statutory language prevails over more general language; (5) the presumption that Congress does not "hide elephants in mouseholes"; and (6) the presumption that Congress does not silently enact language that has earlier been discarded. PI Opp. at 18-19, 22-23, 26, 29. The Court brushed aside the first two canons, reasoning that they did not apply because *Rust* found section 1008 ambiguous. Order at 14. But these two principles do not turn on such a formalistic distinction; rather, they rest on the commonsense point that, if Congress intends to alter the permissible scope of a statute *as interpreted by the Supreme Court*, one would expect it to either actually amend *that statute* or otherwise make its intention clear. And the Court acknowledged that, although Congress "may amend substantive law in an appropriations statute," it must signal that intent "clearly." Order at 16 (quotation marks omitted). For the reasons stated above and in Defendants' opposition brief, the non-directive provision is anything but "clear" on this subject. Indeed, particularly given the controversial nature of this subject, the *Rust* decision, and the failed 1992 legislation, it is implausible to suggest that Congress silently supplanted *Rust* in an appropriations rider just four years later. PI Opp. at 22-23. For these

reasons as well as those stated in Defendants' opposition brief and at argument, Defendants are likely to prevail in their appeal of the Court's conclusions concerning the nondirective provision.

2. The Court also concluded that the physical separation requirements violate section 1554 of the Affordable Care Act (ACA). Order at 22-24. As a threshold matter, Defendants again note that this is a remarkable conclusion given that HHS received more than 500,000 comments on the proposed rule—many from highly sophisticated entities, including Plaintiffs—and as best anyone, including the Plaintiffs, can tell, not one even invoked this provision, much less argued that it precluded the proposed rule. This failure waives any challenge based on section 1554, as the waiver doctrine applies fully to statutory interpretation claims not brought to an agency's attention. PI Opp. at 25-26. The Court stated that it was "skeptical that an agency may defend an action challenging the scope of the agency's authority solely with an argument that the plaintiff waived any such challenge." Order at 22. But even assuming without conceding that the waiver doctrine does not apply to challenges to the scope of the agency's authority, no one disputes that HHS has authority to enact regulations under section 1008. Plaintiffs' challenge—a garden-variety assertion of a conflict between the agency's regulation and a separate statute that was not the basis for the Rule—fits comfortably within the established principle that statutory interpretation claims can be waived.

The Court also contended that there was no waiver because "multiple commenters objected under each prong of the statute." Order at 22. To the extent the Court intended to suggest that commenters actually "objected" in the sense of consciously invoking the statute, this is not correct. The comments cited by Plaintiffs on which the Court relied consist entirely of generalities, and Plaintiffs do not assert (and could not plausibly assert) that any comments they cite *even intended* to argue that the proposed rule would violate section 1554. It is wholly inconsistent with the

waiver doctrine to contend that commenters sufficiently "raised" an issue of which they were not actually aware, or fault the agency for not "correcting" a supposed error that no commenter actually thought of during the rulemaking process.

In any event, the Rule does not conflict with section 1554 of the ACA for the reasons Defendants' explained in their Opposition. PI Opp. at 26-29. Section 1554 does not limit the Secretary's authority—if at all—outside of the context of the ACA. *Id.* at 28. Holding otherwise, the Court cited *Cisneros v. Alpine Ridge Grp.*, 508 U.S. 10, 18 (1993) for the proposition that "'notwithstanding' language indicates the drafter intended 'to supersede all other laws' and that a 'clearer statement is difficult to imagine.'" Order at 23. Respectfully, this is a misreading of both *Cisneros* itself—which concluded that a provision specifying application "[n]otwithstanding any other provisions of this Contract" overrode other language in *that contract*—and the cases cited in *Cisneros* (which dealt with provisions applying "notwithstanding any other provision of law"). *See, e.g.*, *Liberty Maritime Corp. v. United States*, 928 F.2d 413, 416 (D.C. Cir. 1991). That is markedly different than interpreting a provision that applies only "notwithstanding" the ACA, to apply notwithstanding the entire United States Code (particularly since, as Defendants noted, the ACA is replete with provisions that, unlike section 1554, actually do apply "notwithstanding any other provision of law," PI Opp. at 28).

And even if section 1554 did apply outside the ACA, it is implausible that Congress intended either (a) to quietly repeal portions of *Rust* through section 1554, or (b) to restrain the Secretary's authority to condition the receipt of federal grant money using section 1554's extremely broad and open-ended subsections. PI Opp. at 26-27. Put differently, any limitations on health care are not caused by the Rule, which simply sets conditions on federal funds. The Rule leaves women with the same access to medical services as they would have had if Congress had

never enacted Title X at all. For these reasons and those previously expressed by Defendants in their opposition brief and at argument, Defendants are likely to succeed in their appeal on this issue.

3. The Court concluded that there were "serious questions going to the merits of their claims that the Final Rule is arbitrary and capricious," principally based on the views of the AMA that the Rule violates medical ethics. Order at 24-28. But for reasons Defendants previously explained, *Rust* forecloses this conclusion. PI Opp. at 31-32. If HHS can permissibly read section 1008 as prohibiting referrals for abortion as a method of family planning within the Title X program and as requiring physical separation—as *Rust* held it could and HHS has now done—it simply cannot be arbitrary and capricious for the agency to prescribe what it believes the best reading of the law *requires*. *See* *New York v. Sullivan*, 889 F.2d 401, 410 (2d Cir. 1989) ("We need say very little to dispose of appellant's contention that the regulations are arbitrary and capricious, as that test is functionally equivalent to the reasonableness test of *Chevron*."), *aff'd sub nom.* *Rust v. Sullivan*, 500 U.S. 173 (1991); *Arent v. Shalala*, 70 F.3d 610, 616 (D.C. Cir. 1995) (citing *Rust* as an example of a situation in which "what is permissible under *Chevron* is also reasonable under *State Farm*").[2]

In any event, it is not true that HHS "brushe[d] aside" concerns about medical ethics, or explained its conclusions "in a generic and conclusory fashion." Order at 26. The agency amply justified its conclusion that the requirements of the Rule are consistent with medical ethics

[2] Relatedly, the Court characterized the Rule as "a solution in search of a problem." Order at 2. But there is no dispute that Title X clinics are referring patients for abortions and collocating their Title X services with their abortion-related ones—that is why Plaintiffs have brought this lawsuit. Respectfully, this and related assertions in the Court's opinion are just different ways of phrasing the Court's rejection of HHS's conclusion that the Title X statute prohibits those activities. These conclusions are thus not a separate basis for enjoining the Rule.

obligations. *See* PI Opp. at 44-45. Noting that "medical ethics obligations require the medical professional to share full and accurate information with the patient, in response to her specific medical condition and circumstance," the agency explained that under the Rule, physicians "may provide nondirective pregnancy counseling to pregnant Title X clients on the patient's pregnancy options, including abortion," and may "discuss the risks and side effects of each option, so long as this counsel in no way promotes or refers for abortion as a method of family planning." 84 Fed. Reg. at 7724. Moreover, the Rule "permits the patient to ask questions and to have those questions answered by a medical professional." *Id*. In short, HHS did not ignore concerns presented by the AMA and other commenters regarding medical ethics obligations; rather, it considered these comments carefully, but ultimately concluded that the Rule is consistent with such obligations. That conclusion is consistent with *Rust*, which upheld a materially-identical version of these counseling and referral restrictions and thus involved the same implications as those raised here. *See* 500 U.S. at 199. HHS also explained how its medical ethics judgment was consistent with multiple Supreme Court decisions and other legal authorities, PI Opp. at 44-45—analysis that the Court's opinion does not meaningfully address.

In reaching its contrary conclusion, the Court's opinion simply substituted AMA's judgment for that of HHS. *See* Order at 25 ("To call the AMA the leading organization regarding medical ethics is practically an understatement. The AMA literally wrote the book on medical ethics."). The Court assigned to Planned Parenthood a similarly elevated role. *Id.* at 28 ("Planned Parenthood's importance to the program is difficult to overstate."). This was error. Although HHS appreciates the perspective provided by the AMA, Planned Parenthood, and other entities, there is no AMA or Planned Parenthood exception to the deferential *State Farm* framework. And nothing in the APA requires an agency to defer to the views of any particular commenter over the

conclusions drawn by the agency itself. Rather, under the APA's deferential standard, it is sufficient that an agency considers significant comments and provides a reasoned response. *Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1203 (2015). HHS did so here, and the APA requires no more.

4. The Court observed that the Rule "could well be arbitrary and capricious" if HHS had failed to respond adequately to comments raised by Planned Parenthood and other providers that they would depart the Title X program if the Rule were to go into effect. Order at 28. But the agency took this factor into account, and responded that it "expects that honoring statutory protections of conscience in Title X may increase the number of providers in the program" because if providers "know they will be protected from discrimination on the basis of conscience with respect to counseling on, or referring for, abortion, they might seek to participate in programs as a subrecipient where they may previously have been deterred from doing so." 84 Fed. Reg. at 7780. This, in turn, may "lead to an increase in the number of health care providers who apply and receive funding under the Title X program, thus decreasing current gaps in family planning services in certain areas of the country." *Id*. The agency also pointed to data showing that a substantial number of medical professionals would limit the scope of their practice if conscience protections were not put in place. *Id.* at 7781 n.139.

More fundamentally, Title X grants are awarded in one year increments, 42 C.F.R. § 59.8(b), and neither Plaintiffs nor the Court cited any authority for the extraordinary proposition that the APA requires an agency administering a *competitive* grant program subject to discretionary funding to catalog future prospective applicants for that program. Indeed, concerns related to some grantees departing from the Title X program were also raised in *Rust*, but the Supreme Court did not permit those grantees to assert what would be tantamount to a veto power over the agency's

reasoned policy judgment in promulgating an extremely similar regulation. *See* Planned Parenthood Amicus Brief at 14 n.45, *Rust* (No. 89-1391), 1990 WL 10012649 ("Since many providers will not accept Title X funds under the unethical restrictions imposed by the regulations, they will be forced to close or drastically curtail services, depriving poor women of their sole source of family planning services.").

For all the reasons above, and for the reasons stated in Defendants' Opposition and at oral argument, Defendants have made a strong showing that they are likely to prevail on the merits.

II. HHS AND THE PUBLIC WILL BE IRREPARABLY INJURED ABSENT A STAY

Both HHS and the public at large (and particularly Title X grantees) will be irreparably harmed if the Court's preliminary injunction is not stayed. The federal government, of course, suffers harm in the form of irreparable injury if it "is enjoined by a court from effectuating statutes enacted by representatives of its people." *Maryland v. King*, 567 U.S. 1301 (2012) (Roberts, C.J., in chambers) (citation omitted). Here, that harm is particularly acute because—unless the injunction is stayed—millions of dollars in taxpayer funds will be spent unlawfully. As David Johnson, Operations and Management Officer for the Office of Population Affairs, explains in the attached declaration, on April 1, 2019, HHS awarded nearly $256 million dollars for fiscal year 2019, with the expectation that all of those grant funds would be spent before March 31, 2020. *See* Declaration of David Johnson ¶ 3 ("Johnson Decl."). The agency, moreover, currently interprets the 2000 regulations—which will remain in effect if the Court's preliminary injunction is not stayed—to violate section 1008's prohibition on the use of Title X funds in programs where abortion is a method of family planning. *See, e.g.*, 84 Fed. Reg. at 7745; *see also* 42 U.S.C. § 300a-6. Therefore, without a stay, and so long as Title X grantees may continue to refer patients for abortions, federal funds will be expended in violation of the prohibition on the use of Title X funds

in programs where abortion is a method of family planning. That unlawful expenditure of federal money causes serious harm to the government and the public and is alone sufficient to justify a stay of the Court's Order. Similarly, as *Rust* and other cases recognize, the government has an interest in not funding abortion as a method of family planning—even independent of section 1008—that will be harmed if the injunction is not stayed pending appeal.

The government and Title X grantees will also be harmed if the injunction is not stayed because the injunction will cause confusion as to what will ultimately be required of grantees and, accordingly, some grantees may fail to comply with deadlines necessary to maintain Title X funding and/or receive further funding going forward. To be clear, Defendants believe that the Rule is lawful and that they are likely to succeed on the merits in this litigation. Accordingly, and assuming HHS does ultimately prevail, the agency intends to enforce the Rule's March 4, 2020 deadline for physical separation, without any tolling for the time that the Rule is enjoined, in order to prevent federal funds from being expended contrary to HHS's interpretation of section 1008. *See* Johnson Decl. ¶ 4. Given that fact—and that, in the absence of stay of the injunction, grantees may not take steps to comply with the separation requirements—many grantees will likely be unable to achieve physical separation before the March 4, 2020 deadline, and therefore may not be entitled to retain funding or receive future funding if Defendants ultimately prevail on the merits. *Id.* Indeed, there is no guarantee that, in the absence of a stay, there will be enough (or any) time for grantees to comply with the Rule before Defendants would begin enforcing the physical separation requirement. *Id.*

The government and grantees will also be harmed in the absence of a stay because the injunction would cause significant uncertainty as to how HHS may administer the Title X program and/or allocate funds going forward. Title X grantees typically receive awards for a one-year

period with the opportunity to apply to renew their Title X project through non-competitive continuation awards for an additional two years. *Id.* ¶ 5. Put differently, Title X projects often encompass three years of funding, though grantees must apply to receive funding for each year separately. If the injunction is not stayed, uncertainty as to which regulations will apply will hinder the continuation award process. For instance, absent an injunction, HHS intended to offer guidance for continuation awards on October 1, 2019 and otherwise instruct grantees on how to comply with the new Rule through a controlled rollout. *Id.* ¶¶ 5-7. However, if HHS remains enjoined from implementing the Rule, agency staff cannot instruct grantees on compliance or effectively consider continuation applications without knowing which set of regulations to apply. *Id.* And, unless the injunction is stayed, applicants may write continuation applications under the assumption that the 2000 regulations will apply, *id.* ¶ 5, even though those regulations would no longer be in effect if Defendants prevail at a later stage of this litigation or on appeal. Keeping the injunction in place, therefore, would harm the government—because it prevents the effective administration of the Title X program—as well as grantees, who may hinder their own chances of receiving continuation awards under the assumption that the Rule will never go into effect.

The balance of harm also weighs in favor of a stay because of the injunction's overly broad scope. The Court's Order enjoins Defendants from implementing or enforcing any aspect of the Rule on a nationwide basis, notwithstanding the Ninth Circuit's recently expressed concerns regarding overbroad injunctions, *see* *California v. Azar*, 911 F.3d 558 (9th Cir. 2018), and even though thirteen states have supported the Rule in amicus briefs before this Court and elsewhere. *See* Order at 31-32. In addition, many aspects of the Rule are not at issue in this litigation, including, but not limited to, proposed section 59.5(a)(13), which would have allowed the agency to collect information on grantees and subrecipients in order to aid oversight; and proposed section

59.17, which would have required grantees to provide documentation demonstrating compliance with state reporting and notification laws regarding the abuse of minors, as well as the implementation of protocols to ensure minors are aware of ways to resist sexual coercion. *Id.* ¶¶ 8-9. And although Plaintiffs challenged other provisions of the Rule—such as HHS's elimination of the "medically approved" requirement, the new definition of "natural family planning," and the restriction of pregnancy counseling to advanced practice providers—those challenges are meritless and the Court did not address them in its Order. The Court nonetheless enjoined all of these ancillary portions of the Rule despite the agency's clear statement that "[t]o the extent a court may enjoin any part of the rule, the Department intends that other provisions or parts of provisions should remain in effect," 84 Fed. Reg. at 7725. Absent a stay, neither the government nor the public will benefit from these and other aspects of the Rule.

On the other side of the scale, Plaintiffs will not suffer any imminent injury for the reasons explained in Defendants' Opposition and at oral argument. Plaintiffs' predictions of harm depend on a number of uncertain events, and Plaintiffs may simply forego receiving taxpayer funds if it would be too costly on balance to comply with the Rule's requirements. *See* PI Opp. at 55-59.

III. REQUEST FOR AN EXPEDITED RULING ON THIS MOTION

For the reasons stated above, in Defendants' brief in opposition to the preliminary injunction motions, and at oral argument on the motions, Defendants believe that no preliminary injunction should have been issued and that this stay motion should be granted. Given the Court's prior opinion, however, Defendants recognize that the Court may disagree. The Rule, moreover, would have gone into effect today absent the injunctions from this Court and two others. In Defendants' judgment therefore, every day after today that these injunctions remain in place taxpayer funds are being spent in programs where abortion is a method of family planning contrary

to Congress's express directive in section 1008—and the agency is stymied from implementing a judgment that the Supreme Court has expressly held is permissible.

Given these circumstances, Defendants respectfully request that the Court rule on this motion quickly. If the Court, upon reviewing this motion, concludes that a stay is inappropriate, Defendants respectfully ask that the Court summarily deny the motion without awaiting a response from Plaintiffs, so that Defendants can seek relief from the Ninth Circuit without further delay. In any event, Defendants respectfully request a ruling on this motion no later than May 10, 2019, at which time Defendants intend to seek relief in the Ninth Circuit.

CONCLUSION

For the foregoing reasons, and for all the reasons stated in Defendants' Opposition to Plaintiffs' Motions for Preliminary Injunction, the Court should stay its Order Granting Plaintiffs' Motions for Preliminary Injunction pending final resolution of Defendants' appeal. In any event, Defendants respectfully request that the Court rule on this motion as soon as possible, and no later than May 10, 2019.

Dated: May 3, 2019

Respectfully submitted,

JOSEPH H. HUNT
Assistant Attorney General

MICHELLE R. BENNETT
Assistant Branch Director

Andrew M. Bernie
ANDREW M. BERNIE (DC Bar No. 995376)
R. CHARLIE MERRITT (VA Bar No. 89400)
Trial Attorneys
U.S. Department of Justice
Civil Division, Federal Programs Branch
1100 L Street NW
Washington, DC 20005
Tel.: (202) 616-8488
Fax: (202) 616-8470

andrew.m.bernie@usdoj.gov
robert.c.merritt@usdoj.gov

Attorneys for Defendants