No. 19-35386(L)

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STATE OF OREGON, et al.,

Plaintiffs-Appellees,

v.

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

Defendants-Appellants.

AMERICAN MEDICAL ASSOCIATION, et al.,

Plaintiffs-Appellees,

v.

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

Defendants-Appellants.

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

REPLY IN SUPPORT OF MOTION FOR STAY PENDING APPEAL

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INTRODUCTION AND SUMMARY

Plaintiffs' responses only underscore how extraordinary this injunction is. Like the district court, plaintiffs accept that in *Rust v. Sullivan*, 500 U.S. 173 (1991), the Supreme Court upheld regulations materially indistinguishable from the ones challenged here. Plaintiffs nevertheless contend that a single district court can effectively overrule that decision through a nationwide injunction and that the government must wait until the conclusion of a potentially lengthy appeal process to implement a policy that the Supreme Court has already sanctioned.

Nothing in plaintiffs' responses justifies this state of affairs. Congress did not amend Title X—much less abrogate a high-profile Supreme Court decision—*sub silentio* through a clause in an appropriations rider or a mousehole in the ACA. Nor did HHS behave irrationally in explaining its disagreements with plaintiffs or in making reasonable predictions using its expertise. And plaintiffs' predicted harms do not outweigh injuries to the government that the Supreme Court has already identified—namely, the inability to enforce laws or to prevent taxpayer dollars from promoting abortion. In all events, nothing supports enjoining aspects of the Rule that plaintiffs concede are lawful or applications of the Rule to those who have never challenged it.

ARGUMENT

I. The Government Is Likely To Succeed On The Merits

As previously explained, the Supreme Court held that materially indistinguishable regulations are within HHS's statutory authority and not arbitrary and capricious. *See*

Rust, 500 U.S. at 183-92. Although plaintiffs contend that the presumption against implied repeals is inapplicable here, their responses confirm that they believe "two new laws … prohibit the Final Rule," even though the materially identical 1988 regulations "w[ere] not contrary to law as it existed at that time." AMA.Opp.15. And plaintiffs' theory that Congress overturned a high-profile Supreme Court decision in an appropriations rider and an obscure provision of the ACA cannot be squared with the fact that Congress does not hide elephants in mouseholes, a problem they barely address. *See* AMA.Opp.16.

A. Title X authorizes the Rule's restrictions on referrals and counseling. If a program refers patients for, or otherwise promotes, encourages, or advocates abortion as a method of family planning, then the program is one "where abortion is a method of family planning" and thus is excluded from funding by § 1008. 84 Fed. Reg. 7714, 7759 (Mar. 4, 2019). Plaintiffs' suggestion that § 1008 merely "prohibits Title X funds from being used to provide abortions" is plainly incorrect. AMA.Opp. 4. Indeed, even the preamble to HHS's 2000 regulations concluded that this is "not … the better reading." 65 Fed. Reg. 41,270, 41,272 (July 3, 2000). That is unsurprising, as *Rust* recognized that Congress intended "that federal funds not be used to 'promote or advocate' abortion as a 'method of family planning." 500 U.S. at 195 n.4.

All of this remains true notwithstanding a subsequent appropriations rider providing that Title X funds "shall not be expended for abortions" and that "all pregnancy counseling shall be nondirective." Pub. L. No. 115-245, div. B, tit. II, 132

Stat. 2981, 3070-71 (2018). That rider reinforces § 1008 by further ensuring that pregnancy counseling is not used to "direct" women *towards* abortion.

Plaintiffs do not dispute that the failure to refer a patient for abortion does not direct a patient to do anything. Instead, they argue that when considered *in combination* with a separate requirement that pregnant patients be referred for prenatal health care, the provisions regarding referrals are directive. *See* States.Opp.11; AMA.Opp.12. But the prenatal-referral requirement does not itself direct a decision about abortion—it merely refers women for care that is necessary while they are pregnant. And the Rule permits providers to explain that abortion is outside the scope of the program, and that if a patient wants to seek an abortion she can find information about that elsewhere, but in the meantime, they can provide her with a list of providers who can offer her care while she is pregnant. Providers could even include an express disclaimer that the prenatal-care referral is a general requirement and should not be taken as directing the patient's ultimate decision about her pregnancy. And even if the required prenatal-care referral were directive, that would be no basis for invalidating the prohibition on abortion referrals. The provisions are contained in different subsections (§§ 59.16(a), 59.16(b)(1)), and HHS explained that the provisions of the Rule are severable. 84 Fed. Reg. at 7725.

Plaintiffs also erroneously contend that "nondirective counseling" clearly requires "nondirective referrals." The phrase "nondirective counseling" does not speak to the issue of referrals, much less require abortion referrals. As explained, HHS and

Congress have repeatedly used the terms "counseling" and "referral" as distinct in the Title X context. *See* Mot.10-12. Plaintiffs provide no defense of the district court's erroneous interpretation of 42 U.S.C. § 254c-6(a)(1), and they offer little response to Congress's separate use of the terms in its failed attempt to overturn *Rust*. Moreover, the materials cited by plaintiffs—including the 2000 regulations, the 1981 HHS guidance, and the CDC recommendations—frequently use the terms separately. *See* States.Opp. 12; AMA.Opp. 12-13. Indeed, if counseling clearly included referrals, then none of these materials would have needed to discuss referrals at all. At most, the few instances plaintiffs identify as implying that counseling may include referrals suggest that the term "nondirective counseling" is ambiguous and thus cannot supply the "clear and manifest" intent necessary to overcome the presumption against implied repeals. *See* Mot.9. Instead, the Court should defer to HHS's reasonable interpretation.

Finally, plaintiffs defend the district court's erroneous conclusion that the preamble's guidance on what constitutes permissible nondirective counseling is directive. *See* States.Opp.13-14; AMA.Opp.13. But the preamble confirms that providers cannot use nondirective counseling to steer patients toward any decision on abortion. *See* 84 Fed. Reg. at 7716. Indeed, consistent with Title X's focus on preconception family planning, the Rule permits programs to decline to provide any pregnancy counseling, which plainly does not contravene the requirement that "all pregnancy counseling shall be nondirective." In all events, plaintiffs have no standing

to complain about—and are certainly not irreparably harmed by—what the Rule "allows" *other* providers to do. States.Opp.13.

B. The district court erroneously held that the physical-separation requirement likely violates ACA § 1554. Add.23. Plaintiffs waived the argument by failing to raise it before HHS, and the argument fails on the merits because the physical-separation requirement merely limits what the government chooses to fund and thus does not "create[] any unreasonable barriers" to obtaining, nor "impede[] timely access" to, health care. 42 U.S.C. § 18114; *see* Mot.12-13. Plaintiffs offer no answer to *Rust*'s distinction between impeding abortion and choosing not to subsidize it, including the Supreme Court's point that, under the 1988 regulations, "Title X clients are in no worse position than if Congress had never enacted Title X," *Rust*, 500 U.S. at 196-98, 200-03. That *reasoning* disposes of this claim, whether it is packaged as a constitutional or statutory one.[1]

C. The Rule is not arbitrary and capricious. Although plaintiffs insist that HHS failed to consider that the Rule requires providers to violate medical ethics, HHS expressly considered and responded to comments arguing just that. *See* 84 Fed. Reg. at 7724, 7748. The district court discussed HHS's response at page 7724 of the preamble, but, like plaintiffs, ignored HHS's more fulsome explanation at 7748. *See* Add.27.

[1] Plaintiffs also contend that the prohibition on abortion referrals violates § 1554, *see* AMA.Opp. 13-15; States.Opp.14-16, but that argument neither was the basis of the preliminary injunction nor escapes the basic problem with their reading of the ACA.

More fundamentally, plaintiffs' grievance is with the limited nature of the Title X program. In their view, the Rule violates medical ethics because "[e]very patient must receive all information needed to make fully informed decisions about her medical care." States.Opp.19. But that theory directly contravenes the Supreme Court's reasoning in *Rust*. Title X creates a limited program, focused on preconception services, and in that context, the doctor-patient relationship is not "sufficiently all encompassing so as to justify an expectation on the part of the patient of comprehensive medical advice." 500 U.S. at 200. And because Title X "does not provide post conception medical care … a doctor's silence with regard to abortion cannot reasonably be thought to mislead a client into thinking that the doctor does not consider abortion an appropriate option for her." *Id.* Congress's limitations on the program no more violate a physician's ethical responsibilities than her First Amendment rights. Similarly, Congress's enactment of other statutes permitting providers to decline to refer for abortion suggests that Congress disagrees that medical ethics require that all medical providers *must* refer for abortion.

Plaintiffs also fault HHS for its asserted failure to consider the impact on public health of a "mass exodus of providers from the Title X program." AMA.Opp.17. But HHS cannot err in failing to consider consequences of a scenario that it predicts will not happen. As the Department sensibly predicted, withdrawing incumbent providers likely will be replaced by new providers who were previously discouraged from joining the program by the abortion-referral requirement in the 2000 rule, or who will otherwise

be willing to compete for and accept federal funds under the Rule. Unlike the agency decision in *National Lifeline Ass'n v. FCC*, 921 F.3d 1102, 1113 (D.C. Cir. 2019), in which the FCC relied on "no evidence" in predicting that existing providers would provide services in areas that they had previously not served, HHS's prediction was supported by the administrative record. HHS explained that it "expects that honoring statutory protections of conscience in Title X may increase the number of providers in the program," 84 Fed. Reg. at 7780, and it 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. Those predictions have been born out, with new providers emerging as a result of the Rule's new referral provisions. *See Obria Group, Inc. v. HHS*, No. 19-cv-905 (C.D. Cal.) (May 14, 2019) (suit filed by new network of providers to enjoin 2000 regulations). In any event, plaintiffs cite no authority for the extraordinary proposition that an agency administering a competitive grant program must either accede to the wishes of current grantees or identify in advance those entities who will take their place.

Plaintiffs' remaining objections that the Department failed to support various aspects of the Rule, *see* States.Opp.22-23, none of which the district court embraced, are meritless. HHS adequately discussed and supported the need for the physical-separation requirements, the compliance costs, the qualifications for those providing certain counseling, and the elimination of certain confusing language.

II. The Balance Of Harms Supports A Stay

The injunction subjects the government to an ongoing and irreparable harm. The government has a significant interest in enforcing statutes, *see Maryland v. King*, 567 U.S. 1301 (2012) (Roberts, C.J., in chambers), particularly when the Supreme Court has already upheld its construction of a statute that plaintiffs seeks to enjoin. The government also has a weighty interest in declining to promote abortion through taxpayer funds, *see, e.g.*, *Rust*, 500 U.S. at 192-93, particularly when the Supreme Court has already (1) upheld HHS's judgment that certain activities would do so (in violation of law); and (2) sanctioned the remedial steps HHS proposes to ensure that taxpayer dollars are not being used for that purpose. Indeed, plaintiffs' asserted harms—the closure of certain clinics and curtailment of lawful Title X services—confirm that, under the 2000 regulations, Title X funds are being used to support abortion.

On the other hand, plaintiffs' asserted harms to public health are speculative and cannot overcome the government's significant interests. The threatened public-health consequences depend on crediting plaintiffs' speculation of curtailed Title X services, rather than HHS's expert prediction that services will be *expanded* under the Rule.

III. The District Court's Nationwide Injunction Is Overbroad

At a minimum, this Court should stay the injunction insofar as it is "broader … than necessary to redress the injury shown by the plaintiff[s]." *California v. Azar*, 911 F.3d 558, 584 (9th Cir. 2018). Plaintiffs' arguments in support of the nationwide scope of the injunction misunderstand Article III and equitable limitations on relief. The

States point to the Rule's "impact on public health everywhere, not just in the 21 States that sued," State.Opp.25-26, but the permissible breadth of an injunction depends on what is necessary to address the plaintiff's injury, not the geographic scope of the defendant's policy, *see Gill v. Whitford*, 138 S. Ct. 1916, 1930-31 (2018) (proper remedy in vote-dilution challenge limited to "the voter's district," notwithstanding that alleged gerrymandering was "statewide in nature"). And while the organizational plaintiffs question "how the district court could have crafted a narrower injunction that would provide [them] complete relief," AMA.Opp.23, the courts that issued party-specific injunctions in the lead-up to *Rust* have supplied the answer, *see, e.g.*, *Massachusetts v. Bowen*, 679 F. Supp. 137, 147 (D. Mass. 1988) (issuing party-specific injunction while acknowledging that the plaintiffs before it included "national organizations" that "represent[ed] nearly 75% of Title X recipients … across the country").

Moreover, while an organizational plaintiff may establish associational standing to assert a challenge based on a single member's injuries, AMA.Opp.23-24, that does not mean the same injuries justify relief extending to every one of the organization's members. Associational standing does not excuse plaintiffs from their duty to "demonstrate standing separately for each form of relief sought," *Town of Chester v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1650 (2017), and the same concerns posed by nationwide injunctions counsel against awarding unrestricted relief to organizational plaintiffs, *see California*, 911 F.3d at 583 (recognizing that "nationwide injunctions have detrimental consequences to the development of law," deny "non-parties … the right to litigate in

other forums," and encourage "forum shopping"); *see also City of Chicago v. Sessions*, 888 F.3d 272, 298 (7th Cir. 2018) (Manion, J., concurring in the judgment and dissenting in part) (warning against the risk of a "one-way ratchet" under which any prevailing party can obtain relief on behalf of others, whereas a government victory will not preclude the same potential plaintiffs from raising their own challenges). This Court therefore should stay the injunction insofar as it sweeps beyond the handful of named members the organizational plaintiffs relied upon for standing.

This Court also should stay the injunction insofar as it prohibits enforcement of the entire Rule, even provisions not challenged. The preamble expressly provides for severability, 84 Fed. Reg. at 7725, and the district court offered no reason why its holding requires invalidating portions of the Rule that have nothing to do with abortion, *see, e.g.*, *id.* at 7787 (amending § 59.2 to explain how eligibility for Title X services should be assessed where a woman's insurance does not provide desired contraceptive coverage due to her employer's religious or moral objections); *id.* at 7790 (adding § 59.17 to address compliance with sexual abuse reporting requirements). Likewise, even if the prenatal referral requirement were invalid, that would not justify enjoining the prohibition on abortion referrals. Plaintiffs suggest the government is not entitled to a stay of the injunction even as to provisions that have not been held invalid, States.Opp.24; AMA.Opp.24-25, but the harm caused by prohibiting the enforcement of indisputably valid provisions is self-evident. Similarly, the States' reliance on 5 U.S.C. § 705's provision for the postponement of agency action is at most relevant to those

portions of the Rule actually held invalid. Like the district court, plaintiffs do not identify any rationale for enjoining every aspect of the Rule.

CONCLUSION

This Court should grant the government's motion.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Reply complies with the type-volume limitation of Ninth Circuit Rules 27-1 and 32-3 because it contains 2,600 words. This Motion complies with the typeface and the type style requirements of Federal Rule of Appellate Procedure 27 because this brief has been prepared in a proportionally spaced typeface using Word 14-point Garamond typeface.

s/ Jaynie Lilley
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CERTIFICATE OF SERVICE

I hereby certify that on May 24, 2019, I filed the foregoing motion with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. All participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

/ Jaynie Lilley
JAYNIE LILLEY