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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

STATE OF CALIFORNIA, by and through ATTORNEY GENERAL XAVIER BECERRA, Plaintiff, **v.** **ALEX AZAR, in his OFFICIAL CAPACITY as SECRETARY of the U.S. DEPARTMENT of HEALTH & HUMAN SERVICES; U.S. DEPARTMENT of HEALTH & HUMAN SERVICES,** Defendants.	3:19-cv-01184-EMC **PLAINTIFF'S OPPOSITION TO MOTION TO STAY AND TO SHORTENING OF TIME** Date: June 13, 2019 Time: 1:30 p.m. Dept: Courtroom 5, 17th Floor Judge: Honorable Edward M. Chen Trial Date: None Set Action Filed: March 4, 2019

INTRODUCTION

Pursuant to the Court's recent order, Plaintiff the State of California respectfully submits this Opposition to Defendants Alex Azar and the U.S. Department of Health and Human Services's motion to stay the Court's order of a preliminary injunction pending appeal to the Ninth Circuit. *See* ECF No. 103, Order Granting in Part and Denying in Part Pls.' Mot. for Prelim. Inj. (Apr. 26, 2019) (hereinafter "Order"). Because Defendants have not demonstrated exigent circumstances, and to allow Plaintiff the opportunity to submit a more detailed opposition, Plaintiff further requests that Defendants' motion to shorten time be denied.

In their motion for a stay of the district court's injunction pending appeal, Defendants seek to relitigate key aspects of Plaintiff's motion for a preliminary injunction. But the Court has already issued a detailed order evaluating Defendants' arguments and concluding that a preliminary injunction is appropriate. The standard for a stay pending appeal mirrors the standard for an injunction, and in asking the Court for a stay, Defendants effectively ask the Court to reverse its April 26 Order. There are no grounds for such relief. The Order is thoroughly reasoned and well supported, and Defendants offer no reason to revisit its conclusions: (1) that Plaintiff is likely to succeed on the merits of several of its claims, that the State of California will suffer irreparable injury if the Final Rule is not enjoined; and (2) that "the balance of hardships and the public interest tip sharply in favor of granting injunctive relief." Order at 3.

Moreover, the Court has held that the Final Rules will incur irreparable harm to the State of California, its public health and public fisc. Granting Defendants' motion would impose those harmful rules on California prior to a decision on the merits. This is not an equitable result.

ARGUMENT

I. Requirements for a Motion to Stay

In the Ninth Circuit, "[t]he standard for evaluating stays pending appeal is similar to that employed by district courts in deciding whether to grant a preliminary injunction." *Lopez v. Heckler*, 713 F.2d 1432, 1435 (9th Cir. 1983). Granting a stay is within the court's discretion, and the party seeking a stay bears the burden of demonstrating "that the circumstances justify an exercise of that discretion." *Washington v. Trump*, 847 F.3d 1151, 1164 (9th Cir. 2017) (quoting

Nken v. Holder, 556 U.S. 418, 433–34 (2009)). In evaluating a request for a stay, the district court's discretion is guided by: (1) whether the moving party has made a showing of likelihood of success on the merits; (2) whether the moving party has made a showing of irreparable injury; (3) whether the non-moving parties will be substantially injured by the issuance of a stay; and (4) where the public interest lies. *Nken*, 556 U.S. at 434 (quoting *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987) (internal quotation marks omitted)). The moving party bears the burden of showing that the circumstances justify the court's exercise of discretion to issue a stay. *Id*. at 433-34.

II. The Balance of Hardships and Public Interest Tip Decisively in Plaintiff's Favor

As the Court has found, the Final Rule, if implemented, "will irreparably harm individual patients and public health in California as a whole" and is "likely to inflict significant public health consequences and costs on the State and frustrate Essential Access's organizational mission." Order at 2:9-18. The Court also held that the Final Rule would also harm California's efforts to advance its public health objections in at least two ways: (1) it would "directly compromise providers' ability to deliver effective care and force them to obstruct and delay patients with pressing medical needs"; and (2) it would "drastically reduce access to the wide array of services provided by Title X projects by driving large numbers of providers out of the program." *Id.* at 15:2-23. These harms will all take place if a stay is granted.

Defendants' attempts to suggest that the balance of hardships tilt in the opposite direction (see Mot. 10-12) are meritless. Defendants argue that "the federal government […] suffers harm in the form of irreparable injury" any time it is enjoined "'from effectuating statutes enacted by representatives of its people.'" Mot. at 10 (quoting *Maryland v. King*, 567 U.S. 1301 (2012)). But the Court's order does not enjoin a statute enacted by Congress. Rather, the Court enjoined enforcement of an agency rule change that the Court found likely to be contrary to federal statutes. Indeed, Defendants' argument, if adopted, would mean that the public-interest factor would always weigh in favor of the federal government on any motion for a preliminary injunction or stay of such an injunction pending appeal. That is not the law. Courts regularly grant preliminary injunctions against the federal government, and regularly deny requests to stay injunctions pending appeal. *See, e.g.*, *California v. Azar*, 911 F.3d 558, 581-582 (9th Cir. 2018)

(affirming ruling that public interest tipped in favor of granting preliminary injunction against the federal government); *Washington*, 847 F.3d 1151 (denying government's motion to stay injunction pending appeal). Defendants had an opportunity to present evidence of harm in opposing the motion for a preliminary injunction and chose not to do so; the declaration submitted in support of their motion for a stay says that Title X grants continue to be spent in accordance with the 2000 regulations. *See* Johnson Decl. ¶ 3; PI Order at 2:18-20 ("Defendants are unable to articulate any real harm they will suffer if the Final Rule is preliminarily enjoined during the pendency of this action."). The supposedly "unlawful" expenditures are exactly the same types of Title X grants that HHS has been authorizing for decades, and that this federal administration has authorized for the past two years; the Court should give no credence to the claim that they now constitute irreparable harm or that the public interest weighs in favor of a stay. *See Hawaii v. Trump*, 878 F.3d 662, 700 (9th Cir. 2017) ("It is axiomatic that the President must exercise his executive powers lawfully. When there are serious concerns that the President has not done so, the public interest is best served by 'curtailing unlawful executive action.' ") (quoting *Texas v. United States*, 809 F.3d 134, 187 (5th Cir. 2015)).

Defendants also argue that they and Title X grantees will be harmed if the injunction is not stayed pending appeal "because the injunction will cause confusion as to what will ultimately be required of grantees and, accordingly, grantees and subrecipients may fail to comply with deadlines"—due in part to Defendants' refusal to toll implementation of the Final Rule's separations requirements—and because "the injunction would cause significant uncertainty as to how HHS may administer the Title X program and/or allocate funds going forward." Mot. at 11:10-12. First, there is no current uncertainty with respect to "how" HHS should conduct its business; it must abide by the three separate injunctions currently in effect, unless and until those injunctions are lifted. Any further claims of harm are speculative and could easily be avoided by Defendants extending deadlines by a reasonable period of time if the Court's injunction were ultimately vacated. Second, any negative consequences described by Defendants pale in comparison to the extraordinarily disruptive effect on grantees, sub-recipients, and patients that will result if the preliminary injunction is stayed. *See* Order at 14-20. Indeed, the interests of

Title X grantees were so threatened by the Final Rule that they have sought (and obtained) multiple preliminary injunctions, including Essential Access' related case in California, Planned Parenthood in Oregon, and the National Family Planning & Reproductive Health Association in Washington.

Defendants also claim that "[m]any aspects of the Rule are not at issue in this litigation," and ask the Court, in the alternative, to stay only those provisions. They specifically identify three such provisions, relating to increased requirements for documentation relating to general oversight and compliance with state laws regarding abuse or trafficking of minors. *See* Mot. at 12; Johnson Decl. ¶¶ 8-10. To the extent Defendants are concerned about documenting Title X grantees' compliance with the rest of the Final Rule, this concern is moot in light of the fact that the Court has found that all major substantive aspects of the Final Rule likely violate federal law. Nothing in the evidence supporting Defendants' motion for a stay shows that current Title X grantees are currently failing to abide by state law regarding abuse or trafficking of minors, or any other law apart from the Final Rule, and there is no reason to think that Defendants cannot exercise adequate oversight of Title X grantees according to the policies and procedures already in place. *See, e.g.,* Rabinovitz Decl. ¶¶ 16-20. Defendants have not met their burden to show that the Court should revise its preliminary injunction order.

III. Defendants Fail to Show Likelihood of Success on the Merits

Defendants have also failed to meet the necessary "strong showing" of likelihood of success on the merits of their claim. *See Washington*, 847 F.3d at 1164 (a stay pending appeal requires a "strong showing" of likely success on the merits and a likelihood of irreparable injury absent a stay, plus consideration of injury to other parties and the public interest).

Defendants take issue with the Court's findings that the Final Rule likely violates Congress' non-directive counseling mandate as well as Section 1554 of the Affordable Care Act. In doing so, Defendants do not raise any argument that they did not already present to the Court in opposing Plaintiff's motion for a preliminary injunction. Furthermore, Defendant ignore that two other district courts looked at the same legal issues and came to the same conclusions. *Oregon v. Azar*, No. 6:19-CV-00317-MC, 2019 WL 1897475, at *2 (D. Or. Apr. 29, 2019);

Washington v. Azar, No. 1:19-CV-03040-SAB, 2019 WL 1868362, at *9 (E.D. Wash. Apr. 25, 2019).

Nor have Defendants shown a likelihood to succeed on Plaintiff's claim that the Final Rule violates the Administrative Procedure Act because it is arbitrary and capricious. California and Essential Health Access' motions and supporting documentation make it abundantly clear that Defendants failed to calculate costs and benefits of the Final Rule adequately. *See, e.g.*, Order at 68-73 (finding that Defendants did not adequately weigh costs to patient health); ECF No. 39, Rich Decl. Ex. M, pp. 31-32 (explaining costs of compliance). Defendants' complaint that current Title X clinicians provide referrals for abortion to women who request them—in accordance with HHS's own long-term regulations and guidance—does not raise credible "program integrity" concerns. And Defendants' motion offers no further evidence or analysis showing a reasoned basis for the Final Rule's exclusion of trained practitioners who lack graduate degrees from the provision of options counseling, or its removal of the requirement that Title X projects provide "medically approved" contraceptive methods. *See* Order at 64 (noting the Final Rule's "complete absence of justification" for limiting the provision of nondirective pregnancy counseling to those with advanced degrees), 65-66 (finding that Final Rule's removal of the requirement that family planning methods be "medically approved" ran counter to the evidence before the agency).

IV. Defendants' Motion to Shorten Time is Arbitrary and Deprives Plaintiff of a Meaningful Opportunity to Respond

In the accompanying motion to shorten time, Defendants arbitrarily demand that the Court issue a ruling on their motion for a stay by May 10, 2019. There is no reason for the Court to act so quickly; indeed, Defendants' motion for a stay in a related case will not be heard until May 23, 2019. *See* Order Denying Defs.' Mot. to Expedite, *Washington v. Azar*, No. 1:19-CV-03040-SAB, Dkt. No. 66 (E.D. Wash. May 7, 2019).

Defendants have not demonstrated any need for such urgent action. The Court issued its Order on April 26, 2019, and yet Defendants waited to file their request for a stay until May 6, after the date for implementation of the Final Rule had passed. Defendants' delay belies the

claim that "every day" without a stay is a matter of crucial importance to the federal government. They offer no rationale for their demand that the Court issue an order by May 10, specifically. Indeed, Defendants offer no rationale to support their motion to shorten time that is any different from the arguments raised in opposition to the motion for a preliminary injunction, which this Court denied. The supposed exigency is further undermined by fact that the administration waited eighteen months before seeking public input on the proposed rule on June 1, 2018. Federal Rule of Appellate Procedure 8(a)(1) requires appellants seeking a stay of a preliminary injunction to first request relief from the district court; imposing an arbitrary and urgent deadline on this Court undermines this rule.

Plaintiff respectfully requests additional time in order to prepare a more detailed brief in opposition to Defendants' motion for a stay. In light of Plaintiff's counsel's significant, time-sensitive obligations in other matters over the next two weeks, the usual two weeks' time allowed under the Local Rules to file an opposition is needed in order to prepare a complete response to this brief. Rich Decl. ¶ 3.

CONCLUSION

For the reasons described above, in addition to all evidence and argument previously set forth in Plaintiff's motion for a preliminary injunction and accepted in this Court's Order, Plaintiff requests that the Court deny Defendants' motions for a stay and to shorten time for adjudication.

Dated: May 8, 2019

Respectfully Submitted,

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