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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON
AT YAKIMA

STATE OF WASHINGTON,

Plaintiff,

v.

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

Defendants.

Nos. 1:19-cv-3040-SAB; 1:19-cv-3045-SAB

MOTION TO STAY PRELIMINARY INJUNCTION PENDING APPEAL

May 10, 2019
Without Oral Argument

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

Plaintiffs,

v.

ALEX M. AZAR II, in his official capacity as United States Secretary of Health and Human Services, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, DIANE FOLEY, M.D., in her official capacity as Deputy Assistant Secretary for Population Affairs, and OFFICE OF POPULATION AFFAIRS,

Defendants.

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INTRODUCTION

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. 54, entered on April 25, 2019, 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.

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. That decision is dispositive of the key legal issues in this case: restricting abortion referrals, and requiring physical and financial separation of projects and abortion services.

The balance of harms also weighs heavily in Defendants' favor. If the injunction is not stayed pending appeal, the government and the public will be seriously harmed through the expenditure of millions of dollars in taxpayer funds contrary to Congress's directive that Title X funds shall not be used for programs where abortion is a method of family planning. In addition, leaving the injunction in place pending appeal will negatively affect Title X grantees and the agency's ability to administer the Title X program. For instance, grantees will not know whether they need to take steps to comply with the March 4, 2020 deadline for physical separation, and will not be able to receive HHS guidance on that issue, even though that deadline will remain in effect if the Rule is

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ultimately upheld—which, again, is likely in light of *Rust*. Moreover, without a stay, grantees will be uncertain as to which regulations will govern when applying for continuations of their Title X grants, and the agency will be unable to effectively evaluate those applications, given the uncertainty surrounding the Rule. The Court's Order compounds the harm to Defendants and the public by enjoining the Rule in its entirety, even though Plaintiffs did not touch on many aspects of the Rule in their motion.

In contrast, Plaintiffs will not be harmed by a stay. Plaintiffs' alleged harms either do not affect them directly or rest on a chain of alleged events that are not sufficiently imminent or certain to require preliminary injunctive relief. Any costs of complying with the Rule, moreover, also do not justify an injunction, given that the Rule merely sets conditions on the receipt of federal grant money.

Because Defendants have made a strong showing that they are likely to succeed on the merits and because the balance of harms tips sharply in their favor, this Court should grant Defendants' motion for a stay of the preliminary injunction pending appeal. 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

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on the motion before May 10, 2019, at which time Defendants intend to seek relief in the Ninth Circuit.

ARGUMENT

In light of the weighty issues presented in this case that must be resolved on appeal, Defendants respectfully seek a stay of the preliminary injunction entered in this case pending appeal. To determine whether to grant a stay pending appeal, courts employ "two interrelated legal tests that represent the outer reaches of a single continuum." *Golden Gate Rest. Ass'n v. City and Cnty. of San Francisco*, 512 F.3d 1112, 1115 (9th Cir. 2008). "At one end of the continuum, the moving party is required to show both a probability of success on the merits and the possibility of irreparable injury." *Id*. "At the other end of the continuum, the moving party must demonstrate that serious legal questions are raised and that the balance of hardships tips sharply in its favor." *Id*. at 1116. Both factors weigh in Defendants' favor here, because Defendants are likely to succeed on the merits, and because the balance of harms tips decidedly in favor of a stay.

I. DEFENDANTS ARE LIKELY TO PREVAIL ON THE MERITS

The government respectfully submits 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, the United States Supreme Court's decision in *Rust v. Sullivan*, 500 U.S. 173 (1991), controls the key legal questions at issue in

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this litigation, and therefore Plaintiffs have no realistic likelihood of prevailing. *Rust* upheld restrictions on abortion referrals, and requirements for physical and financial separation from abortion services, within the Title X program. The 1988 regulations upheld in *Rust* were materially identical to—and *more* restrictive than—the conditions on federal funding contained in the Final Rule. *See* Defs.' PI Opp'n at 12-17. The Court, however, does not discuss *Rust* at all in the "Analysis" portion of its Order, *see* Order at 14-18—nor does the Court provide any explanation elsewhere in the Order why *Rust* is not fatal to Plaintiffs' claims.

Rather than engaging with the Supreme Court's holdings in *Rust*, the Court provided five reasons, why—in the Court's view—Plaintiffs have made a "colorable claim" that they are likely to succeed on the merits. Order at 14-16. As discussed below and for the reasons Defendants stated in their Opposition and at oral argument, Defendants respectfully submit that none of those five reasons in fact supports a preliminary injunction.

First, the Court found that Plaintiffs had "presented initial facts and argument" to show that the Rule's program integrity requirements "will more likely than not increase their expenses unnecessarily and unreasonably." Order at 14-15. The Court's Order, however, does not explain how an increase in costs violates Title X or any other statutory provision, and, in *Rust*, the Supreme Court upheld identical requirements for financial and physical separation, despite similar arguments that they would unreasonably raise costs for grantees. *See*

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500 U.S. at 187-89. As HHS explained in the preamble to the Rule, the fact that the physical and financial separation requirements may increase the cost of doing business for certain providers only confirms the need for the Rule, because if "the collocation of a Title X clinic with an abortion clinic permits the abortion clinic to achieve economies of scale, [Title X funds] would be supporting abortion as a method of family planning." 84 Fed. Reg. at 7766; *see also* Defs.' PI Opp'n at 38-39. The agency, moreover, adequately considered the financial costs to providers in the preamble to the Rule, undermining any argument that the Rule is arbitrary or capricious. *See* Defs.' PI Opp'n at 48-49.

Second, the Court concluded that Plaintiffs are likely to succeed on the merits of their claims because they "have presented initial facts and argument that the Final Rule gag requirement would be inconsistent with ethical, comprehensive, and evidence-based health care." Order at 15. But the Supreme Court in *Rust* upheld a nearly identical restriction on abortion referrals, and even upheld a ban on abortion counseling that the Rule here does not impose. *See* 500 U.S. at 199. Those restrictions that had the same (or broader) implications with respect to medical ethics and patient care as this Rule, and ethics arguments were raised by the *Rust* litigants. *See, e.g.*, *Planned Parenthood v. Sullivan*, 913 F.2d 1492, 1503 (10th Cir. 1990) ("The canons of ethics of the medical profession require physicians to give patients advice that includes abortion as an alternative to carrying a pregnancy to term when the patient's health condition warrants."), *rev'd by Rust*, 500 U.S. 173; Br. of the American College of

Obstetricians and Gynecologists, et al., at 6, *Rust*, Nos. 89-1391 & 89-1392 (U.S. July 27, 1990) (arguing that the 1988 rule's prohibition on abortion counseling and referrals violated medical ethics). HHS also provided a reasoned explanation supporting its view that the Rule does not create any conflict with medical ethics or appropriate standards of medical care. Therefore, Plaintiffs are unlikely to succeed on their arbitrary and capricious claim on this basis. *See* Defs.' PI Opp'n at 44-45.

Third, the Court found that the Final Rule "violates Title X regulations, the Non-directive Mandates and Section 1554 of the Affordable Care Act and is also arbitrary and capricious." Order at 15. In particular, the Court concluded that "the Final Rule likely violates the central purpose of Title X[.]" *Id.* Yet, the Court's Order provides no analysis of how that could be the case in light of the Supreme Court's decision in *Rust*, which upheld regulations that are materially identical to those presented in this case. Title X's "central purpose," of course, has not changed since *Rust* was decided. *See* Defs.' Opp'n at 35. Title X remains limited to providing "preconception services," and continues to bar funding of a program where abortion is a method of family planning. Therefore HHS may permissibly impose limitations or requirements regarding *post-conception* counseling and referrals, and separation of programs from *post-conception* abortions, consistent with Title X's purpose. *See Rust*, 500 U.S. at 179-80.

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With respect to the so-called "Non-directive Mandate," there is no conflict between the requirement that "all pregnancy counseling shall be nondirective" and the requirement in the Rule that all pregnant patients receive referrals for prenatal care. Again, as the Supreme Court recognized in *Rust*, HHS may properly require referrals for prenatal care and prohibit referrals for abortion as a method of family planning. *See* 500 U.S. at 179-80, 187. As Defendants explained in their Opposition, nothing in the appropriations rider requiring pregnancy *counseling* to be nondirective conflicts with the Rule's requirement that Title X projects *refer* for prenatal care. Referrals for prenatal care are neither counseling nor directive—rather, such care is always medically necessary for women during pregnancy, even for those who later obtain an abortion. *See* Defs.' PI Opp'n at 19-28.

Nor does the Rule conflict with section 1554 of the Affordable Care Act for the reasons that Defendants explained in their Opposition. *See id* at 28-34. Besides being waived, because neither Plaintiffs nor anyone else raised any potential conflict with section 1554 in their comments on the proposed rule, *see id.* at 28-29, Plaintiffs' arguments regarding section 1554 are unlikely to succeed. Section 1554 does not limit the Secretary's authority—if at all—outside of the context of the Affordable Care Act. *See id.* at 31-32. And even if it did, 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

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broad and open-ended subsections. *See id*. at 32-33. 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.

Fourth, the Court noted that Plaintiffs and amici "presented facts and argument" that the Rule is arbitrary and capricious "because it reverses long-standing positions of the Department without proper consideration of sound medical opinions and the economic and non-economic consequences." Order at 15. Yet *Rust* and the interpretation it upheld also has a long pedigree, and the Supreme Court was clear in *Rust* and subsequent decisions that an agency is entitled to deference even when its new policy represents a "sharp break" with prior interpretations, and that the agency must only justify the change with a "reasoned analysis." 500 U.S. at 186-87; *see also Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016); *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). Here, there are no conflicting factual findings or serious reliance interests that required any heightened standard for explaining a policy change. But even if such heightened standard did apply, the record HHS developed through the rulemaking process and HHS's reasoned analysis of the issues involved—including "medical opinion and the economic and non-economic consequences" of the Rule, Order at 15—is more than sufficient to meet HHS's obligations under the Administrative Procedure Act.

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Finally, the Court noted that "Plaintiffs have presented facts and argument that the Department failed to consider important factors, acted counter to and in disregard of the evidence in the administrative record and offered no reasoned analysis based on the record." Order at 15-16. Plaintiffs are incorrect. HHS provided a thorough analysis of the problems with the 2000 regulations, justifying the change and adequately explaining the need to impose the separation, counseling, and referral provisions. *See* Defs.' Opp'n at 38-53. To the degree the Court believes HHS should have considered additional empirical evidence, nothing more is required than that the agency considers the Rule more in keeping with the purpose of section 1008 of the Public Health Service Act than the 2000 regulations. *See Rust*, 500 U.S. at 187. The agency, however, *did* consider new evidence in the record, which only underscored the need for the new Rule. *See* Defs.' Opp'n at 38-40. HHS, therefore, did not "rel[y] on the record made 30 years ago," as the Court's Order states. Order at 16. HHS considered how best to fulfill Congress's intent in section 1008, as well as the record as a whole, and used its expertise to come to a reasoned interpretation that has already been blessed by the Supreme Court.

***

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.

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II. THE BALANCE OF HARMS WEIGHS STRONGLY IN FAVOR OF A STAY

Defendants are also entitled to a stay of this Court's Order because the balance of harms weighs strongly in their favor. 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 (1) the Supreme Court specifically allowed HHS to restrict abortion referrals and require separation of abortions from Title X programs in *Rust*, and HHS is being denied the authority the Supreme Court confirmed it has; and (2) unless the injunction is stayed, millions of dollars in taxpayer funds will be spent unlawfully under HHS's interpretation of Title X. 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.") (attached as Exhibit A). Moreover, as Plaintiffs do not dispute, without a stay the grant funding will go to projects that refer for abortion as a method of family planning, and that operate without physical

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separation from their performance of abortions. As set forth in the Rule, the agency now interprets the provision of such funding as violating section 1008's prohibition on the use of Title X funds 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 for 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.

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 ultimately 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 necessary to comply with the

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separation requirements, including to obtain effective guidance from HHS to implement the Rule—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 plan for multiple years of funding, but grantees must apply to receive funding for each year separately. *See* 45 C.F.R. § 59.8. If the injunction is not stayed, uncertainty as to which regulations will apply during the projected grant period will hinder the continuation application and award process. For instance, the Rule modified the application criteria at § 59.7. Absent an injunction, HHS intended to offer guidance for continuation awards on October 1, 2019, and to otherwise instruct grantees on how to apply for funds consistent with the new Rule and how to comply with the new Rule if it receives additional awards. Johnson Decl. ¶¶ 5-7. However, if the Rule continues to be enjoined applicants

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may write continuation applications under the assumption that the 2000 regulations will apply, *id.* ¶ 5, and then either during the application period or during performance of the award, the 2019 regulations could be in effect if Defendants prevail at a later stage of this litigation or on appeal. And because 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.* 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. *See* Order at 18. However, many aspects of the Rule are not at issue in this litigation, including 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. The Court enjoined these ancillary portions of the Rule (and others) even though Plaintiffs did not

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address them in their motions for a preliminary injunction, and despite the agency's clearly 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. Likewise, with respect to the Non-directive Mandate, the injunction's remedy of requiring HHS to allow abortion referrals is unnecessarily broader than simply not enforcing the requirement for prenatal care referrals. 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* Defs.' PI Opp'n at 53-58. In any event, the effects Plaintiffs raise in this litigation were already authorized in HHS's favor by *Rust*.

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, Defendants recognize that the Court may disagree. The Rule, however, would have gone into effect today absent the injunctions from this Court and two others. In

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Defendants' judgment therefore, every day after today that these injunctions remain in place taxpayer funds are being spent for 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.

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Dated: May 3, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 3, 2019, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification to all counsel of record.

/s/ Bradley P. Humphreys
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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON
AT YAKIMA

STATE OF WASHINGTON,

Plaintiff,

v.

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

Defendants.

Nos. 1:19-cv-3040-SAB; 1:19-cv-3045-SAB

[PROPOSED] ORDER RE MOTION FOR EXPEDITED HEARING DATE

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

Plaintiffs,

v.

ALEX M. AZAR II, in his official capacity as United States Secretary of Health and Human Services, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, DIANE FOLEY, M.D., in her official capacity as Deputy Assistant Secretary for Population Affairs, and OFFICE OF POPULATION AFFAIRS,

Defendants.

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[PROPOSED] ORDER

Defendants' motion to expedite the hearing date regarding Defendants' motion to stay preliminary injunction pending appeal is GRANTED.

Based upon Defendants' motion, IT IS ORDERED that the hearing date for Defendants' motion for a stay of the preliminary injunction is expedited and the Court will hear and decide Defendants' motion on or before May 10, 2019.

Dated: _____

_____
Stanley Bastian
U.S. District Court t Judge

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON
AT YAKIMA

STATE OF WASHINGTON, Plaintiff, v. ALEX M. AZAR II, in his official capacity as Secretary of the United States Department of Health and Human Services; and UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, Defendants.	Nos. 1:19-cv-3040-SAB; 1:19-cv-3045-SAB **[PROPOSED] ORDER**

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

Plaintiffs,

v.

ALEX M. AZAR II, in his official capacity as United States Secretary of Health and Human Services, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, DIANE FOLEY, M.D., in her official capacity as Deputy Assistant Secretary for Population Affairs, and OFFICE OF POPULATION AFFAIRS,

Defendants.

[PROPOSED] ORDER

Defendants' motion to expedite the hearing date for Defendants' motion to stay the preliminary injunction pending appeal is GRANTED.

Based upon Defendants' motion, IT IS ORDERED that the hearing date for Defendants' motion for a stay of the preliminary injunction is expedited and the Court will hear and decide Defendants' motion on or before May 10, 2019.

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Defendants.

[PROPOSED] ORDER

Defendants' motion to expedite the hearing date for Defendants' motion to stay the preliminary injunction pending appeal is GRANTED.

Based upon Defendants' motion, IT IS ORDERED that the hearing date for Defendants' motion for a stay of the preliminary injunction is expedited and the Court will hear and decide Defendants' motion on or before May 10, 2019.

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Dated: _____

_____
Stanley A. Bastian
U.S. District Court Judge

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