Jeffrey T. Sprung, WSBA #23607
Kristin Beneski, WSBA #45478
Paul M. Crisalli, WSBA #40681
Assistant Attorneys General
ROBERT W. FERGUSON
ATTORNEY GENERAL
Washington Attorney General's Office
800 Fifth Avenue, Suite 2000
Seattle, WA 98104
(206) 464-7744

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON
AT YAKIMA

STATE OF WASHINGTON,

Plaintiff,

v.

ALEX M. AZAR II, et al.,

Defendants.

NATIONAL FAMILY PLANNING & REPRODUCTIVE HEALTH ASSOCIATION, et al.,

Plaintiffs,

v.

ALEX M. AZAR II, et al.,

Defendants.

NO. 1:19-cv-3040-SAB

STATE OF WASHINGTON'S OPPOSITION TO DEFENDANTS' MOTION TO STAY PRELIMINARY INJUNCTION PENDING APPEAL

May 23, 2019
Without Oral Argument

I. INTRODUCTION

Defendants' motion to stay the preliminary injunction pending appeal (ECF No. 58) (Motion to Stay) seeks extraordinary relief subject to a high standard, but amounts to little more than a motion for reconsideration of the Court's April 25, 2019 Order (ECF No. 54) (PI Order). Defendants cannot carry their heavy burden by recycling the same arguments they made in opposing the preliminary injunction: that *Rust v. Sullivan* controls despite intervening changes in the law; that the balance of harms weighs in *their* favor; and that *they* will be irreparably harmed absent a stay. These arguments lack merit for the same reasons that have already been briefed at length and addressed by the Court.

Defendants also add new arguments that leaving the injunction in place pending appeal will cause "confusion" and "uncertainty," leaving grantees potentially unprepared for regulatory changes if and when the Final Rule is permitted to go into effect. Any harm caused by such "confusion" is not "imminent" and is far outweighed by the harm that would be caused if the status quo were disrupted by suddenly lifting the injunction. Defendants fail to meet their extraordinarily heavy burden, and their Motion to Stay should be denied.

II. BACKGROUND

On March 4, 2019, HHS published the Final Rule at issue here, which was set to go into effect on May 3. On March 5, Washington filed its complaint (ECF No. 1), and later its case was consolidated with NFPRHA's (ECF No. 8). Per the parties' agreement and the Court's order, Washington and the NFPRHA

ATTORNEY GENERAL OF WASHINGTON
800 Fifth Avenue. Suite 2000
Seattle, WA 98104-3188
(206) 464-7744

Plaintiffs filed 45-page motions for preliminary injunction with numerous supporting declarations (ECF Nos. 9–26); Defendants filed a 67-page consolidated response (ECF No. 44); and Plaintiffs filed 30-page replies (ECF Nos. 51–52). On April 25, 2019, the Court held an approximately three-hour hearing, granted the motions by bench ruling, preliminarily enjoined Defendants from implementing or enforcing the Final Rule, and issued the PI Order.

In the PI Order, the Court systematically addressed the parties' arguments and found that Plaintiffs had "met their burden of showing that all four factors tip in their favor[.]" PI Order at 14. First, the Court found that Plaintiffs were likely to succeed on the merits for multiple distinct reasons, including that the Final Rule violates Title X, the Nondirective Mandate, and section 1554 of the ACA, and that it is arbitrary and capricious. *Id.* at 14–16. Next, the Court found that Plaintiffs had established a likelihood of irreparable harm absent injunctive relief for at least four distinct reasons backed by "substantial evidence," whereas Defendants' response was "dismissive, speculative, and not based on any evidence presented in the record before this Court." *Id.* at 16–18. Finally, the Court found that the "balance of equities and the public interest strongly favors a preliminary injunction" because there is "no public interest in the perpetration of unlawful agency action" and "no hurry for the Final Rule to become effective," whereas there is "substantial equity and public interest in continuing the existing structure and network of health care providers . . . while the legality of the new Final Rule is reviewed and decided by the Court." *Id.* at 18.

ATTORNEY GENERAL OF WASHINGTON
800 Fifth Avenue. Suite 2000
Seattle, WA 98104-3188
(206) 464-7744

On May 3, 2019, Defendants appealed (ECF No. 57) and filed the instant Motion to Stay (ECF No. 58). On May 13, 2019, Defendants also moved to stay in the Ninth Circuit. *Washington v. Azar*, No. 19-35394, Dkt. Entry No. 9 (Mot. for Stay Pending Appeal) (9th Cir. May 13, 2019). In that motion, which is currently pending, Defendants challenge the Ninth Circuit's "sliding scale" standard for applying the *Winter* factors despite its binding effect in this Circuit, with an apparent eye toward the Supreme Court, and also assert that this Court had not properly applied the current Ninth Circuit standard. *Id*. at 8–9 & n.2.

III. ARGUMENT

A. Defendants Cannot Meet the High Standard for a Stay Pending Appeal of a Preliminary Injunction

Defendants do not acknowledge the burden they must carry,[1] which is heavy for two independent reasons: they request the extraordinary remedy of a stay pending appeal, and they seek to stay a preliminary injunction.

A stay pending appeal is an "intrusion into the ordinary processes of administration and judicial review" and "is not a matter of right, even if irreparable injury might otherwise result." *Nken v. Holder*, 556 U.S. 418, 433

---

[1] Defendants rely on outdated case law. Mot. to Stay at 3 (citing *Golden Gate Rest. Ass'n v. City & Cty. of San Francisco*, 512 F.3d 1112 (9th Cir. 2008). Case law permitting a stay on the mere "possibility" of irreparable injury has been overruled. *Leiva-Perez v. Holder*, 640 F.3d 962, 968 (9th Cir. 2011).

ATTORNEY GENERAL OF WASHINGTON
800 Fifth Avenue. Suite 2000
Seattle, WA 98104-3188
(206) 464-7744

(2009) (citations omitted); *E. Bay Sanctuary Covenant v. Trump*, 909 F.3d 1219, 1245 (9th Cir. 2018); *see also Ruckelhaus v. Monsanto Co.*, 463 U.S. 1315, 1316 (1983) (Blackmun, J., in chambers) (a stay pending appeal is available "only under extraordinary circumstances"). Rather, a stay is an "exercise of judicial discretion," and the party seeking it must show that the circumstances justify an exercise of that discretion. *Nken*, 556 U.S. at 433–34; *E. Bay Sanctuary*, 909 F.3d at 1245. Defendants' burden "is a heavy one," Wright & Miller, *Federal Practice & Procedure* § 2904 (3d ed.). Courts consider the following four factors:

> (1) whether the stay applicant has made a ***strong showing*** that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.

E. Bay Sanctuary, 909 F.3d at 1246 (quoting *Nken*, 556 U.S. at 433–34) (emphasis added). The first and second factors are "critical," and the "mere possibility" of success on the merits or irreparable harm does not satisfy them. *Id.*; *contra* Mot. to Stay at 3. Defendants' already demanding burden to show they are likely to succeed on the merits is elevated even higher by the "limited and deferential" abuse-of-discretion standard of review for preliminary injunctions. *Cmty. House, Inc. v. City of Boise*, 490 F.3d 1041, 1047 (9th Cir. 2007); *see also Sports Form, Inc. v. United Press Int'l, Inc.*, 686 F.2d 750, 752 (9th Cir. 1982).

B. Defendants Have Not—and Cannot—Make a "Strong Showing" That They Are Likely to Succeed on the Merits

Defendants take issue with the Court's well-grounded ruling that Plaintiffs

are likely to succeed on the merits, but they offer nothing that was not already briefed and argued on the motions for preliminary injunction. This is underscored by Defendants' repeated citation to their own brief in opposition to those motions. *See generally* Mot. to Stay at 4–9. Defendants also assert that the Court did not "engag[e] with" *Rust v. Sullivan*, *id.* at 4, 8, but the Court's ruling—like Plaintiffs' arguments—was based on grounds not controlled by *Rust*, including post-*Rust* statutes establishing requirements for the Title X program and limiting HHS's rulemaking authority, and on HHS's reversal of position "without proper consideration" of important factors and evidence, and HHS's apparent failure to consider "the record made in 2018–19." PI Order at 14–16.

Defendants' meritless arguments do not warrant another point-by-point response here, since they have already been covered at length. Each merits issue Defendants raise was addressed in the briefing and at oral argument, was before the Court when it issued the preliminary injunction, and helps to establish Washington's likelihood of success on the merits. *See, e.g.*, WA Mot. (ECF No. 9) at 23–26, 33–38, NFPRHA Mot. (ECF No. 18) at 24–28, 37–40, Transcript of April 25, 2019 hearing at 35:1–37:1, 41:13–42:20, 46:8–47:15, Inst. Policy Integrity *Amicus* Brief (ECF No. 38-1) (unnecessary and unreasonable increases in cost of compliance; co-location of services); WA Mot. at 23–26, 29–34, NFPRHA Mot. at 16–20, 24–25, 28–29, 33–34, 37–38, ACOG *Amicus* Brief (ECF No. 34-1) (inconsistency with ethical, comprehensive, and evidence-based health care); WA Mot. at 20–22, NFPRHA Mot. at 10–15, WA Reply (ECF No.

ATTORNEY GENERAL OF WASHINGTON
800 Fifth Avenue. Suite 2000
Seattle, WA 98104-3188
(206) 464-7744

52) at 6–10, NFPRHA Reply (ECF No. 51) at 2–7 (violation of Nondirective Mandate); WA Mot. at 22–25, NFPRHA Mot. at 16–18, 28–29, WA Reply at 10–14, NFPRHA Reply at 9–12 (violation of section 1554; non-waiver); WA Mot. at 25–27, NFPRHA Mot. at 15–16, 27, 29–40, WA Reply at 14, NFPRHA Reply at 8, 19–23 (violation of Title X); WA Mot. at 27–28, 32–34, NFPRHA Mot. at 22–24, WA Reply at 21–22, NFPRHA Reply at 12, 16–17 (reversal of agency positions); WA Mot. at 32–39, NFPRHA Mot. at 18–20, 24–40, WA Reply at 15–26, NFPRHA Reply at 15–21, Inst. Policy Integrity *Amicus* Brief (disregard of record; failure to consider important factors); WA Mot. at 29–34; NFPRHA Mot. at 17–20, 24–25, 37–40, WA Reply at 19–20, 23–24, NPFRHA Reply at 12–15 (failure to consider medical professionals' input); WA Mot. at 18, 29–39, NPFRHA Mot. at 18–20, 24–31, 33, 36–40, WA Reply at 24–26, NFPRHA Reply at 14–15, 18–19 (failure to consider economic and non-economic consequences); WA Mot. at 38, NFPRHA Mot. at 22–23, Transcript at 86:16–88:3 (no evidence of improper use of funds). For the reasons detailed throughout Plaintiffs' reply briefs, *Rust* does not control. *See* WA Reply at 2–6; *see generally* WA Reply, NFPRHA Reply.

Defendants also argue for the first time that Title X is "limited to providing 'preconception services,' " which purportedly justifies the physical separation of "post-conception counseling and referrals" and "post-conception abortions[.]" Mot. to Stay at 6. Defendants did not make that argument previously, and it is contradicted by the Final Rule's mandatory referrals to *post-conception* prenatal

care and its permissive provisions for *post-conception* counseling. *See also* WA Mot. at 38 n.110 (requiring physical separation of some, but not all, out-of-program care and services is arbitrary).

C. Defendants Fail to Show Irreparable Harm Pending Appeal, While Staying the Injunction Would Harm Plaintiffs and the Public

Defendants' assertion that they will be irreparably harmed absent a stay is, once again, premised on their erroneous claim that *Rust* "specifically allowed" HHS to promulgate the Final Rule (Mot. to Stay at 10–11), despite subsequent developments that render HHS's new interpretation of section 1008 unlawful, and despite HHS's failure to adequately consider *this* rulemaking record. As the Court has already correctly ruled, "[t]here is no public interest in the perpetration of unlawful agency action." PI Order at 18; *see also* WA Mot. at 44–45. Defendants rely solely on *Maryland v. King* (Mot. to Stay at 10), which held that an injunction prohibiting Maryland from effectuating a statute enacted by its state legislature caused the state to suffer "a form of irreparable injury." 567 U.S. 1301 (2012) (citation omitted). That case is inapposite because, here, the injunction does not enjoin a duly enacted statute; it *vindicates* Congress's intent by enjoining the Final Rule, which *violates* several statutes.

Defendants assert that "Plaintiffs will not suffer any imminent injury" if the preliminary injunction were lifted (Mot. to Stay at 14), but they did not seriously contest Washington's evidence that it would be immediately and irreparably harmed by the Final Rule. *See* PI Order at 16–18 (despite "substantial

evidence" of harm in the form of numerous declarations and exhibits thereto, "the Government's response in this case is dismissive, speculative, and not based on any evidence presented in the record before this Court"); WA PI Reply at 1, 26-28. These harms, including the destruction of Washington's Title X program, would occur if the Motion to Stay were granted and the status quo disrupted. *See* WA Mot. at 39–45; NFPRHA Mot. at 40–45. Defendants once again fail to point to any evidence in the record to support their position, and they offer no valid reason for the Court to reconsider its balancing of the equities or evaluation of the irreparable harm the Final Rule would cause if permitted to go into effect.

Defendants allege several types of harm for the first time in their Motion to Stay. These purported harms are minimal compared to the extensive harms Washington and its residents will suffer if the injunction were suddenly lifted. *See* PI Order at 16–18. First, Defendants argue that "leaving the injunction in place pending appeal" will "cause confusion" and leave grantees unprepared for regulatory changes because HHS "intends to enforce" the Final Rule's provisions immediately if they are permitted to go into effect. Mot. to Stay at 1, 11–12. But many providers will be forced out of Title X *immediately* if the Final Rule goes into effect. *See* PI Order at 16; WA Mot. at 13–16, 40–41. Even assuming that some grantees who can remain in the program "may not take steps necessary to comply" by the targeted deadline, this is an issue of HHS's own making, and "self-inflicted wounds are not irreparable injury." *Stuller, Inc. v. Steak N Shake Enters., Inc.*, 695 F.3d 676, 679 (7th Cir. 2012). Defendants offer no reason why

ATTORNEY GENERAL OF WASHINGTON
800 Fifth Avenue. Suite 2000
Seattle, WA 98104-3188
(206) 464-7744

HHS could not adjust compliance deadlines if and when the Final Rule goes into effect. Moreover, nothing stops grantees from preparing for the possibility that the Final Rule may go into effect at some point; but in the meantime, the injunction enables them to continue serving the public interest by providing care and services pursuant to Title X and longstanding regulations and standards of care. *See* PI Order at 18 ("[T]here is substantial equity and public interest in continuing the existing structure and network of health care providers . . . while the legality of the new Final Rule is reviewed and decided by the Court.").

Next, Defendants express concern that grantees will be harmed in light of uncertainty about which regulations will govern during the grant period. Mot. to Stay at 12–13. But grantees have been dealing with such uncertainty ever since HHS announced its intent to promulgate new regulations—and temporarily staying the preliminary injunction will only create chaos because it will disrupt the status quo. *See Boardman v. Pac. Seafood Grp.*, 822 F.3d 1011, 1024 (9th Cir. 2016) ("The purpose of a preliminary injunction is to preserve the status quo ante litem pending a determination of the action on the merits."). Title X grantees always operate with *some* level of uncertainty, and their receipt of funds is conditioned on compliance with *any* effective Title X regulations. *See* Harris Decl., Ex. 1 (ECF No. 11-1) at 2, 3 ("In accepting this award, the grantee stipulates that the award and any activities thereunder are subject to all provisions of 42 CFR part 59 subpart A currently in effect *or implemented during the period of the grant*.") (emphasis added). Further, it is unclear why or how the

preliminary injunction "prevents [HHS's] effective administration of the Title X program" (Mot. to Stay at 12–13 (citing Johnson Decl. ¶ 6)); HHS regularly conducts compliance oversight and monitoring, and postponing compliance guidance on the Final Rule does not create any "present or imminent risk of likely irreparable harm." *Ctr. for Food Safety v. Vilsack*, 636 F.3d 1166, 1174 (9th Cir. 2011) (emphasis added) (quoting *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 160 (2010)). If HHS did not "devote resources to training on the new Rule" prior to the planned effective date of May 3, 2019, Johnson Decl. ¶ 7, it is unclear how the preliminary injunction creates any additional burden.

Nor are Defendants harmed by the preliminary injunction's applicability to all provisions of the Final Rule, which is both appropriate and necessary. *See* Mot. to Stay at 13–14; *see* WA Reply at 28–29; NFPRHA Reply at 28–30. HHS already has plenty of data about existing grantees and cannot demonstrate that its ability to plan and provide oversight is appreciably harmed by its current inability to enforce section 59.5(13) of the Final Rule. *See* Johnson Decl. ¶ 8. And grantees already have independent obligations to comply with any applicable state reporting and notification laws, a central subject of section 59.17 of the Final Rule. *See* Johnson Decl. ¶ 9; Harris Decl., Ex. 1 at 1 ("[N]o provider under Title X . . . shall be exempt from any State law requiring notification for the reporting of child abuse, child molestation, sexual abuse, rape, or incest.").

IV. CONCLUSION

The State of Washington requests that the Motion to Stay be denied.

ATTORNEY GENERAL OF WASHINGTON
800 Fifth Avenue. Suite 2000
Seattle, WA 98104-3188
(206) 464-7744

DATED this 17th day of May, 2019.

ROBERT W. FERGUSON
Attorney General

/s/ Kristin Beneski
JEFFREY T. SPRUNG, WSBA #23607
KRISTIN BENESKI, WSBA #45478
PAUL M. CRISALLI, WSBA #40681
Assistant Attorneys General
800 Fifth Avenue, Suite 2000
Seattle, WA 98014
(206) 464-7744
JeffS2@atg.wa.gov
KristinB1@atg.wa.gov
PaulC1@atg.wa.gov
Attorneys for Plaintiff State of Washington

DECLARATION OF SERVICE

I hereby declare that on this day I caused the foregoing document to be electronically filed with the Clerk of the Court using the Court's CM/ECF System which will serve a copy of this document upon all counsel of record.

DATED this 17th day of May, 2019, at Seattle, Washington.

/s/ Kristin Beneski
KRISTIN BENESKI, WSBA # 45478
Assistant Attorney General

ATTORNEY GENERAL OF WASHINGTON
800 Fifth Avenue. Suite 2000
Seattle, WA 98104-3188
(206) 464-7744