No. 19-35386

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 the Secretary 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 the Secretary of Health and Human Services, et al.,
Defendants-Appellants.

On Appeal from the United States District Court for the District of Oregon, Nos. 19-cv-317, 19-cv-318 (McShane, J.)

EMERGENCY MOTION TO THE EN BANC COURT OF PLAINTIFFS-APPELLEES AMERICAN MEDICAL ASSOCIATION ET AL. FOR A TEMPORARY ADMINISTRATIVE STAY PENDING RESOLUTION OF THE FORTHCOMING EMERGENCY MOTION FOR RECONSIDERATION EN BANC OF THE MOTIONS PANEL'S JUNE 20, 2019 ORDER STAYING THE PRELIMINARY INJUNCTION PENDING APPEAL

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June 20, 2019

CIRCUIT RULE 27-3 CERTIFICATE

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(ii) The nature of the emergency is as follows:

As set forth more fully below, an immediate temporary administrative stay of a published per curiam order of the motions panel (Leavy, Callahan, Bea, JJ.) issued today, June 20, granting Defendants' motion for a stay pending appeal of the district court's preliminary injunction is necessary to prevent irreparable harm and allow Plaintiffs to seek en banc review of that order. The motions panel's order allows the Department of Health and Human Services ("HHS") to impose

drastic changes on an extremely successful, nearly 50-year-old program that has operated under basically one set of rules since inception through a new regulation that is contrary to federal law, is arbitrary and capricious, and requires health care professionals to violate principles of medical ethics. If the Rule is enforced, it will decimate the program, causing irreparable harm to Plaintiffs, their members and affiliates, their patients, and the public health.

(iii) Notification of parties:

Counsel for Defendants were notified of this emergency motion on June 20, 2019, by telephone call, and they subsequently informed counsel for Plaintiffs that Defendants oppose Plaintiffs' emergency motion.

Counsel for Plaintiffs will serve counsel for Defendants by e-mail with copies of this motion and supporting documents attached.

(iv) The relief sought in this motion is not available in the district court. All grounds advanced in support of this motion were submitted to the district court in Plaintiffs' Motion for Preliminary Injunction, which the district court granted.

/s/ Alan E. Schoenfeld
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INTRODUCTION

The motions panel's stay order—which will allow an HHS Rule that makes sweeping and devastating changes to the Title X program to take effect—should be administratively stayed immediately. A stay is necessary to preserve the longstanding status quo and to allow Plaintiffs to seek emergency en banc consideration of that order. Without a stay, Plaintiffs will immediately suffer irreparable harm—among other things, their expulsion from a vital public health program under which they have provided services for nearly *half a century*. Plaintiffs' patients will suffer severe consequences as well. The availability of Title X services is certain to contract dramatically if Plaintiffs—who now serve an estimated 40% of all individuals under the program—are forced out. Moreover, *any* physician who might choose to provide care under Title X would run a substantial likelihood of being forced to violate prevailing ethical standards in doing so. Under these extraordinary circumstances, a temporary stay is warranted.

Congress established the Title X program in 1970 to ensure that all people, especially individuals with low incomes, have access to comprehensive family-planning care. As the district court recognized, "[t]he current regulations have been in place for nearly 50 years and have an excellent track record." Add.B31. But HHS's Rule would warp and decimate the program. Indeed, the district court below—and three other district courts—found that the Rule, by forcing a vast

swath of providers out of the program, would cause irreparable harm to patients, providers, and public health. Among other grave consequences, the Rule would "result in … less early breast cancer detection, less screening for cervical cancer, less HIV testing, … less testing for sexually transmitted disease," "more unintended pregnancies," and "more women suffering adverse reproductive health symptoms." Add.B3; Add.B29. In contrast, the district court found that HHS would suffer "no harm" from preserving the longstanding status quo pending final judgment. Add.B4. The court further held that the Rule likely violates two federal laws and is likely arbitrary and capricious in numerous respects.

Despite this compelling record, on June 20, a motions panel of this Court (Leavy, Callahan, and Bea, JJ.) granted HHS's motion for a stay of the injunction pending appeal. Add.A1-A25. It did so on extremely abbreviated stay-briefing and in the middle of briefing the merits appeal—specifically, *after* the government filed its opening merits brief but *before* Plaintiffs filed theirs (due in a week). Absent a stay, Plaintiffs will have to leave the program altogether, at risk of devastating harm to their patients—many of whom will have no other provider that can offer them the same services. Thus, because Plaintiffs and their patients will be irreparably injured if HHS enforces the Rule, Plaintiffs hereby move for an emergency administrative stay of the motions panel's order pending consideration and decision on the forthcoming motion for reconsideration en banc, which

Plaintiffs intend to file by June 24, 2019, unless otherwise ordered by the Court. Plaintiffs respectfully request that the temporary stay issue today.

BACKGROUND

1. For nearly 50 years, the Title X program has provided free or reduced-cost family-planning services to low-income Americans. The program supports vital reproductive health care services, including contraception, testing and referral for sexually transmitted infections ("STIs"), breast and cervical cancer screening, and pregnancy testing and counseling, including referrals. Under regulations that have been largely unchanged since the statute's enactment, the Title X program has been one of the most successful public health programs in our nation's history, significantly reducing the rates of unintended pregnancy and abortion, and yielding vast benefits for sexual and reproductive health.

The federal government has now received the green light—on extremely abbreviated and expedited briefing—to impose a radical change of course. On March 4, 2019, under the guise of "program integrity," HHS issued a Rule that would harm patients and providers, politicize the practice of medicine and the delivery of health care, and compel medical professionals to violate fundamental tenets of their professional ethics by withholding relevant information from patients needing to make a decision about their health care.

In particular, the Rule's "Gag Requirement" would compel health care providers in the Title X program, when offering pregnancy counseling, to *direct* pregnant women *away from* abortion and *toward* continuing a pregnancy to term—regardless of what a patient actually wants or needs, and even if the patient states that she wants information about abortion. 84 Fed. Reg. 7,714 7,788-7,789 (Mar. 4, 2019) (42 C.F.R. §§ 59.5(a)(5), 59.14). And the Rule's "Separation Requirement" mandates separate facilities, personnel, workstations, and medical records for any Title X grantee that engages in certain "prohibited activities"—virtually anything having to do with abortion. *Id.* at 7,789 (42 C.F.R. § 59.15). Thus, a Title X project must completely separate itself not only from anyone who *provides* abortions with non-Title X funds, but also anyone who makes *referrals* for abortions or does anything HHS might think "encourage[s], promote[s], or advocate[s]" for abortion. *Id.* at 7,788, 7,789.

2. Immediately after the Rule was issued, Plaintiffs filed suit and then promptly moved for a preliminary injunction. The district court—as well as three other district courts—granted a preliminary injunction to preserve the status quo. Add.B1-32; *Washington v. Azar*, 2019 WL 1868362 (E.D. Wash. Apr. 25, 2019); *California v. Azar*, 2019 WL 1877392 (N.D. Cal. Apr. 26, 2019); *Mayor & City Council of Baltimore v. Azar*, 2019 WL 2298808 (D. Md. May 30, 2019).

The district court found it likely that the Rule violates two laws—an appropriations law requiring that "all pregnancy counseling" provided with Title X funds "shall be nondirective," Pub. L. No. 115-245, 132 Stat. 2981, 3070-3071 (2018) ("Nondirective Mandate"), and a provision of the Affordable Care Act prohibiting HHS from promulgating "any regulation" that, among other things, "creates any unreasonable barriers to the ability of individuals to obtain appropriate medical care," "impedes timely access to health care services," "interferes with communications" between patients and providers, or "violates … the ethical standards of health care professionals," 42 U.S.C. § 18114. Add.B15-24.

The district court further found it likely that Plaintiffs would prevail in demonstrating that the Rule is arbitrary and capricious because HHS failed adequately to consider several relevant factors, including the public-health impact of forcing existing Title X providers out of the program and the ethical obligations of health care professionals. Add.B24-29.

The district court also found that Plaintiffs would suffer irreparable harm if the Rule went into effect, that the government would suffer no harm from an injunction, and that the public interest tips sharply in favor of an injunction because the Rule could irreparably harm public health. Add.B4; B29-31.

3. HHS appealed the district court's order granting a preliminary injunction. HHS also moved to stay the injunction pending appeal (Dkt. 15),

which was fully briefed on May 24. In the meantime, on May 31, HHS filed its opening merits brief and Plaintiffs' answering brief is due in a week, on June 28.

Today, however, the motions panel granted a stay pending appeal by a published per curiam order. Contrary to the district court's findings, the panel concluded that HHS would suffer irreparable harm from an injunction that merely preserves the longstanding status quo, whereas "[t]he harms that Plaintiffs would likely suffer"—harms the district court found were extensive, grave, and unrebutted—were "comparatively minor." Add.A24.

The panel did not address Plaintiffs' request for a temporary administrative stay so that Plaintiffs could seek en banc review of the motions panel's decision.

Absent a further stay, if the Rule is enforced, Plaintiffs will imminently be forced to leave the Title X program.

ARGUMENT

1. An immediate administrative stay of the motions panel's order is necessary because enforcement of the Rule, even for a short time, will irreparably harm Plaintiffs, their patients, and the public health. Above all, the Rule, if enforced, will imminently force large numbers of Title X providers out of the program and will leave many of their patients without access to Title X services.

The Gag Requirement's prohibition on providing full information about abortion—including referrals—to women who need and want that information

violates the American Medical Association's Code of Ethics, as well as the ethical standards of numerous other organizations of medical professionals, *see, e.g.*, AMA, Code of Medical Ethics §§ 2.1.1(b), 2.1.3 (2016); Add.B24-26, and is contrary to Planned Parenthood's core mission of providing high-quality, honest care to its patients. Accordingly, if the Gag Requirement is in effect, many providers, including all Planned Parenthood affiliates, will be forced to leave the program rather than comply with those unethical requirements. *See, e.g.*, Add.B28. Once that exodus has taken effect, it is highly uncertain whether those providers could later resume participation, even if the district court's injunction is subsequently restored.

The effect on Plaintiffs' patients will be dire. Planned Parenthood alone provides care to an estimated 40% of *all* Title X patients—approximately 1.5 million people nationwide. *See, e.g.*, Add.B28. In many areas where Planned Parenthood provides services, there are no other safety-net providers of reproductive health care, or none that can absorb all of the patients that Planned Parenthood currently serves. *See, e.g.*, *id.* Without access to subsidized care under Title X, patients are likely to ration care they cannot afford or go without. And, again, all physicians who render Title X services will be forced to consider whether they are willing to provide those services in an unethical manner.

Moreover, if Planned Parenthood is forced from the program, it is not only Title X patients who will suffer. Without Title X funds, Planned Parenthood affiliates will have to close health centers or reduce services and lay off clinicians and staff. Other patients who rely on Planned Parenthood—including those on Medicaid or private insurance—will have no other place to receive those services, or will face long delays in doing so. It is no speculation to conclude—as the district court did, and as three other district courts did—that devastating harms to public health will follow. For example, one expert commenter (and a declarant here) explained that, when Planned Parenthood was forced to close a clinic in rural Indiana due to cuts to public-health funding, there was a huge spike in the spread of HIV in the area. Thus, as the district court found, the Rule "will increase not only unintended (and riskier) pregnancies, but abortions as well," and will "result in less testing, increased STIs, and more women suffering adverse reproductive health symptoms." Add.B29 (citations omitted). Such harms to Plaintiffs' patients are irreparable and warrant the emergency relief sought. *See Rodde v. Bonta*, 357 F.3d 988, 999 (9th Cir. 2004).

Conversely, the government has suffered no harm from the preliminary injunctions—nor could it from an administrative stay of the motions panel's order staying those injunctions. Before the motions panel, HHS cited only the generic harms of being unable to enforce a regulation and administrative uncertainty

inherent in any preliminary injunction. *See* Dkt. 15 at 16-17. The motions panel's decision simply echoes these generic harms—"allow[ing] taxpayer dollars to be spent in a manner that [HHS] has concluded violates the law," "predictable administrative costs" of delaying implementation, and "significant uncertainty in the Title X program." Add.A24. But the preliminary injunction only preserves the status quo that has been in effect for nearly 50 years. That HHS did not seek emergency consideration of its stay motion confirms that temporarily preserving the district court's preliminary injunction would not cause HHS irreparable injury.

2. A temporary administrative stay is also warranted because the Court is likely to grant reconsideration en banc. This proceeding involves questions of exceptional importance: on the line is the dismantling of the Title X program and the health of the patients who rely on that program—40% of whom rely on Planned Parenthood for care.

En banc review is also necessary to correct manifest errors of law, which Plaintiffs' forthcoming motion for reconsideration en banc will explain in greater detail. As an example, the motions panel held that the Rule does not violate the Nondirective Mandate because the Rule "require[s] that any pregnancy counseling" provided by Title X projects "shall be nondirective." Add.A18. But that conclusion ignores the provisions of the Rule, which prohibit a Title X project from counseling only on abortion even when that is all the patient seeks, and

permits a Title X project to omit any counseling on abortion, thus giving patients the impression that abortion is not a legal or medically appropriate option. *See* 84 Fed. Reg. at 7,747. The Rule further requires directive pregnancy counseling by requiring Title X projects to provide pregnant patients referrals for prenatal care and prohibiting them from providing referrals for abortion—thus steering patients toward a particular course of treatment. *Id.* at 7,788-7,789 (42 C.F.R. §§ 59.5(a)(5), 59.14(a)-(b)). The motions panel reasoned that "counseling" does not include referral. But this ruling is contrary to Congress's expressed understanding of the term "counseling" elsewhere, *see* 42 U.S.C. § 254c-6(a)(1), as well as HHS's own interpretation of that term in the Rule, *see* 84 Fed. Reg. at 7,730 ("[N]ondirective pregnancy counseling can include counseling on adoption, and corresponding referrals to adoption agencies."). It also makes a mockery of the statute by permitting Title X projects to do through referrals exactly what Congress expressed an intent to prohibit: steering patients toward a particular pregnancy option.

The motions panel also misconstrued 42 U.S.C. § 18114, holding that it imposes no restraint on HHS's regulation of government funding programs. But that statute expressly applies to "*any* regulation" issued by HHS, 42 U.S.C. § 18114 (emphasis added), and there can be no doubt that compared to the prior regulations, the Rule imposes unreasonable barriers to care, impedes timely access

to care, and interferes with patient-provider communications. Reconsideration is warranted to correct these and other errors of law.

CONCLUSION

The Court should grant an immediate temporary administrative stay of the motions panel's order—keeping the district court's preliminary injunction in effect—pending consideration of Plaintiffs' motion for en banc reconsideration of that order, which Plaintiffs intend to file by June 24, 2019.

June 20, 2019

Respectfully submitted.

/s/ Alan E. Schoenfeld

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Ninth Circuit Rules 27-1 and 32-3 because it contains 2,344 words, exclusive of the exempted portions of the brief. The brief has been prepared in proportionally spaced typeface using Microsoft Word 2016 in 14 point Times New Roman font.

/s/ Alan E. Schoenfeld
ALAN E. SCHOENFELD

June 20, 2019

CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of June 20, 2019, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF system. Counsel for all parties to the case are registered CM/ECF users and will be served by the appellate CM/ECF system. I have also separately served counsel for Defendants by e-mail.

/s/ Alan E. Schoenfeld
ALAN E. SCHOENFELD