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.)

PETITION OF PLAINTIFFS-APPELLEES AMERICAN MEDICAL ASSOCIATION, OREGON MEDICAL ASSOCIATION, PLANNED PARENTHOOD FEDERATION OF AMERICA, INC., PLANNED PARENTHOOD OF SOUTHWESTERN OREGON, PLANNED PARENTHOOD COLUMBIA WILLAMETTE, THOMAS N. EWING, M.D., AND MICHELE P. MEGREGIAN, C.N.M. FOR INITIAL HEARING EN BANC

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INTRODUCTION AND RULE 35 STATEMENT

This case is of exceptional importance to millions of Americans who receive critical and often life-saving reproductive health care under the Title X program. For 50 years, Title X has helped reduce unintended-pregnancy and abortion rates to "historic lows," and has provided low-income individuals millions of screenings for cancer, sexually transmitted infections ("STIs"), and HIV. ER8. A final rule issued by HHS, however, threatens to undo that progress and decimate the program. *See* 84 Fed. Reg. 7,714 (Mar. 4, 2019) ("Rule").

The Rule would require, among other things, that Title X providers withhold information about abortion from pregnant patients, even if a patient asks for that information and if an abortion is in her best medical interest. Because that requirement violates fundamental principles of medical ethics, the Rule would force many providers out of the Title X program. In particular, Planned Parenthood—which serves approximately 40% of all Title X patients—would be compelled to withdraw from the program if the Rule takes effect.

The Rule is contrary to law. Congress has required that all pregnancy counseling provided by Title X projects be nondirective—but the Rule requires Title X projects to steer patients away from abortion and toward carrying a pregnancy to term. And Congress has forbidden HHS from promulgating any regulation that would create unreasonable barriers to care, impede timely access to

care, interfere with patient-provider communications, or violate principles of medical ethics—but the Rule would do all of those things. The Rule is also arbitrary and capricious. In particular, HHS disregarded the devastating public-health consequences of the Rule, which will force providers out of the program.

Shortly after HHS issued the Rule, 21 states filed suit. So did the American Medical Association, Planned Parenthood, and the National Family Planning & Reproductive Health Association (which represents the majority of Title X providers), among others. In three different courts in this Circuit, those plaintiffs provided evidence of the devastating consequences of the Rule for themselves, Title X patients, and public health generally.

All the district courts (as well as one in Maryland) granted preliminary injunctions, unanimously concluding the Rule is likely unlawful and the balance of equities tips sharply in favor of an injunction. But a motions panel—on only abbreviated briefing and without oral argument—issued a published decision staying the injunctions in this Circuit, rejecting three district courts' findings, and endorsing virtually all of the government's arguments.

Plaintiffs have moved for en banc reconsideration of the motions panel's stay decision. But if that decision remains in effect and is considered binding by this Court, initial hearing by a merits panel would likely be futile. Because this case involves emergent questions of exceptional importance about a long-standing

and successful program that affects the health of millions, initial hearing by the en banc Court would be appropriate.[1]

This appeal warrants initial en banc consideration because it involves questions of exceptional importance: whether the district court properly enjoined a Rule that violates two federal laws and is arbitrary and capricious, and that would cause devastating, irreparable harm to Plaintiffs, their patients, and public health.

BACKGROUND

A. Title X

Title X supports vital reproductive health care services for millions of low-income Americans. 42 U.S.C. §300 *et seq.*; *see, e.g.*, ER7-8. Grants to reproductive health care providers make possible a broad range of family-planning services, including contraception, testing and treatment for STIs and HIV, breast and cervical cancer screening, and pregnancy testing and counseling, including referrals. *E.g.*, ER179-180. Plaintiffs are leading health care organizations and professionals that have participated in the Title X program for decades. *See, e.g.*, SER11; ER38. Planned Parenthood alone serves approximately 40% of *all* patients who receive care under Title X—an estimated 1.5 million individuals. *See* ER33; SER3.

[1] If the en banc Court vacates the motions panel's decision, this case could be heard in the first instance by a merits panel.

Section 1008 of Title X provides that no program funds "shall be used in programs where abortion is a method of family planning." 42 U.S.C. §300a-6. HHS's regulations have thus long prohibited Title X projects from providing abortions, and required Title X grantees who provide abortions outside the Title X project to keep such activities "separate and distinct from Title X project activities." 65 Fed. Reg. 41,281, 41,282 (July 3, 2000). Since the program's inception, however, Title X care has been delivered by reproductive health care providers who—*outside* the program with *non*-Title X funds—also provide abortions, and grantees have long been authorized to use common facilities, staff, and health records systems for Title X projects and any "[n]on-Title X abortion-related activities." *Id.*

Moreover, as HHS has made clear for virtually the entire history of the program, §1008 does not prevent Title X providers from communicating with patients about abortion. *See* ER9; 65 Fed. Reg. 41,270, 41,271-41,272 (July 3, 2000). Thus, Title X regulations have long required that providers offer pregnant women the opportunity to receive nondirective counseling on *all* of their options, including abortion. *See* 65 Fed. Reg. at 41,270. That long-settled agency view comports with medical ethics. *See, e.g.*, *id.*; ER49-50; ER39-40.

In 1988, in a brief exception to this longstanding scheme, HHS issued a rule that prohibited Title X projects from counseling patients about or referring them

for abortion. 53 Fed. Reg. 2,922, 2,945 (Feb. 2, 1988). HHS also required Title X grantees to "physically" separate Title X services from abortion-related services. *Id.* at 2,940, 2,945. The Supreme Court upheld the 1988 rule in *Rust v. Sullivan*, holding that §1008 was "ambiguous" and the rule was a "plausible" construction of the statute. 500 U.S. 173, 184 (1991).

HHS never fully implemented the 1988 rule, however, given "widespread concerns that [the rule] would interfere with the doctor-patient relationship." *National Family Planning & Reproductive Health Ass'n v. Sullivan*, 979 F.2d 227, 230 (D.C. Cir. 1992). The rule was suspended in 1993 and rescinded in 2000. 65 Fed. Reg. at 41,270.

Since *Rust*, Congress has ensured that Title X providers may give their pregnant patients all relevant information. First, since 1996, Congress has mandated in annual appropriations acts that "all pregnancy counseling" provided with Title X funds "shall be nondirective." *E.g.*, Pub. L. No. 115-245, 132 Stat. 2981, 3070-3071 (2018) ("Nondirective Mandate"). Second, Congress restricted HHS's rulemaking authority in §1554 of the Affordable Care Act ("ACA"), providing:

> Notwithstanding any other provision of this Act, the Secretary of Health and Human Services shall not promulgate any regulation that—
>
> (1) creates any unreasonable barriers to the ability of individuals to obtain appropriate medical care; (2) impedes timely access to health

> care services; (3) interferes with communications regarding a full range of treatment options between the patient and the provider; (4) restricts the ability of health care providers to provide full disclosure of all relevant information to patients making health care decisions; (5) violates the principles of informed consent and the ethical standards of health care professionals; or (6) limits the availability of health care treatment for the full duration of a patient's medical needs.

42 U.S.C. §18114.

B. 2019 Rule

The Rule, issued on March 4, contains two central components: the Gag and Separation Requirements.

The Gag Requirement restricts information Title X providers may give their pregnant patients. First, Title X projects are *banned* from referring patients for abortion—even when that is the patient's expressed wish—and *required* to refer them for prenatal care—even when the patient has no interest in continuing her pregnancy. 84 Fed. Reg. at 7,788-7,789. Second, even when a patient seeks information about abortion *only*, practitioners must disregard that decision, and if they provide information about abortion, must also counsel the patient about other options she does not want. *Id.* at 7,747. Because the Gag Requirement is contrary to medical ethics, it will force many providers to leave the program.

The Separation Requirement also makes it effectively impossible for many providers to participate in Title X. It requires any Title X grantee that engages in "prohibited activities"—including providing referrals for abortion—with *non*-Title

X funds to use separate facilities, personnel, workstations, and medical records for its Title X project. 84 Fed. Reg. at 7,789. HHS cited no evidence of misuse of Title X funds to support this Requirement, but its cost would be exorbitant and, for many providers, prohibitive.

C. Prior Proceedings

1. On April 19, the district court preliminarily enjoined the Rule. It concluded that Plaintiffs are "likely to succeed on the merits of their claim that the Final Rule is contrary to law." ER7. The court explained that the Gag Requirement compels Title X projects to steer patients toward continuing a pregnancy to term and away from abortion in contravention of the Nondirective Mandate. ER18-23. Furthermore, the court held, the Rule likely creates unreasonable barriers to care and impedes timely access to care in contravention of §1554 of the ACA. ER26-27. The court rejected HHS's argument that the Rule must be upheld under *Rust*, explaining that the Nondirective Mandate and ACA changed the governing law. ER16-18. The court further found that the Rule is likely arbitrary and capricious because HHS failed adequately to consider that "the Final Rule appears to force medical providers to either drop out of the program or violate their codes of professional ethics," ER27, and "failed to adequately account for the impact the Final Rule will have on women, particularly women in rural areas," ER31.

The court then found that Plaintiffs, patients, and public health would be irreparably harmed absent an injunction. ER32-33. The Rule will force large numbers of Title X providers to leave the program. ER33. "Planned Parenthood's absence" alone "would create a vacuum for family planning services" that other safety-net clinics would be unable to fill. ER31. And whereas "the risk of irreparable damage to the health of women and communities is grave," preserving the status quo "poses no harm to Defendants." ER7.

2. Two other district courts in this Circuit and a third outside it also issued preliminary injunctions. *See Washington v. Azar*, 376 F. Supp. 3d 1119, 1132 (E.D. Wash. 2019); *California v. Azar*, __ F. Supp. 3d __, 2019 WL 1877392, at *44 (N.D. Cal. 2019); *Mayor & City Council of Baltimore v. Azar*, 2019 WL 2298808, at *14 (D. Md. May 30, 2019).

3. On June 20, 2019, a motions panel (Leavy, Callahan, Bea, JJ.) issued a published decision staying the three injunctions in this Circuit. Dkt. 58. Without oral argument, the panel sustained virtually all of the government's arguments (and some the government had not made), and set aside three district courts' findings. The panel concluded that HHS was likely to succeed on its challenge to the preliminary injunctions, relying on *Rust* and dismissing Plaintiffs' arguments that the Rule violates the Nondirective Mandate and §1554 and that HHS failed to consider the Rule's drastic public-health consequences. *Id.* at 13-24.

Regarding irreparable harm and the balance of the equities, the motions panel credited HHS's speculation, discounting the district courts' factual findings, made on an extensive record, that the Rule would result in a mass exodus of many longstanding providers and thereby disrupt access to care for patients. Dkt. 58 at 24-25.

On June 24, Plaintiffs filed an emergency motion for en banc reconsideration of the motions panel's stay order. Dkt. 61. That motion remains pending.

ARGUMENT

I. THIS CASE PRESENTS EXCEPTIONAL CIRCUMSTANCES WARRANTING INITIAL HEARING BY THE EN BANC COURT

The grave consequences of the Rule, along with the highly unusual posture of this case, warrant en banc consideration. Every year, Title X grantees provide critical reproductive care to approximately four million Americans, many of whom have no other access to health care. ER8. As the district court found, the Rule would decimate the Title X program. By requiring Title X providers to violate medical ethics and incur the tremendous costs of physically separating their Title X projects from other services, the Rule would force many providers out of the program—including Planned Parenthood, which serves approximately 40% of Title X patients. The district court found that the Rule "will result in negative health outcomes for low income women and communities" and "will result in less

contraceptive services, more unintended pregnancies, less early breast cancer detection, less screening for cervical cancer, less HIV screening, and less testing for sexually transmitted disease." ER6. The court therefore entered a preliminary injunction that preserves the status quo, keeping the program running the same as it has for nearly 50 years. That this case concerns a preliminary injunction that keeps at bay a Rule that would result in a public-health crisis is enough to warrant en banc consideration of this case.

Initial en banc consideration is further warranted by the extraordinary posture of this case. A motions panel—on abbreviated briefing and without oral argument—issued a published stay decision agreeing with the government on virtually all points, rejecting Plaintiffs' claims on the merits and the district court's findings on the harms the Rule would impose. The motions panel also appeared to adopt arguments made for the first time in HHS's *merits* brief, to which Plaintiffs had not yet had an opportunity to respond. *Compare* HHS Br. 29 (May 31, 2019) (arguing that the Nondirective Mandate does not require that all pregnancy options be treated equally), *with* Dkt. 58 at 19. The panel's rulings disregard the appropriate standard of review, misinterpret the law, and ignore the extensive record evidence. Plaintiffs have moved for en banc reconsideration of that decision. But if the motions panel's published decision is not vacated, a merits

panel may consider itself bound by it. In that event, initial hearing en banc is warranted to enable efficient disposition of the case.

II. THE MOTIONS PANEL'S DECISION IS WRONG ON THE MERITS

En banc consideration is also warranted because the motions panel's decision is legally erroneous and improperly disregards factual findings of three district courts.[2]

A. The Rule Is Contrary To Law

1. The district court correctly held that Plaintiffs are likely to succeed on their claim that the Rule violates the Nondirective Mandate. The Gag Requirement requires Title X providers to refer pregnant patients for prenatal care, and prohibits them from referring for abortion when the patient seeks such a referral. Moreover, if a patient wants information only about abortion, the provider must disregard that request: If the practitioner provides any information about abortion, she must also counsel about other options the patient does not want. The Rule thus requires Title X projects to steer patients toward carrying their pregnancies to term and away from abortion—in violation of the Nondirective Mandate, which *prohibits* counseling that steers a patient's choice.

The motions panel erred in concluding otherwise. Indeed, the panel nowhere addresses the fact that the Rule *requires* Title X projects to counsel

[2] Plaintiffs' answering brief contains a fuller explanation of why the district court's injunction was proper. *See* Dkt. 73.

patients who know they want an abortion on non-abortion options, against the patient's wishes. The panel also reasoned that the Nondirective Mandate—which by its terms is directed at "counseling"—does not prohibit directive *referrals*. Dkt. 58 at 18. But the panel ignored extensive evidence that Congress, HHS, and medical professionals understand "counseling" to *include* referrals. *See, e.g.*, 42 U.S.C. §300ff-33 (providing funding for "counseling (including referrals for care)"); 42 U.S.C. §254c-6(a)(1); 84 Fed. Reg. at 7,730 ("*nondirective pregnancy counseling can include* counseling on adoption, and *corresponding referrals* to adoption agencies" (emphasis added)); ER53 ("Referrals are an integral part of counseling[.]"). The panel also stated that "[n]ondirective counseling does not require equal treatment of all pregnancy options—rather, it just requires that a provider not affirmatively endorse one option over another." Dkt. 58 at 19. But providing referrals for prenatal care while refusing to provide them for abortion *does* affirmatively endorse one option over another.

2. As the district court also held, the Rule likely violates §1554 of the ACA. By dictating what a provider must and must not say to a patient, the Gag Requirement "interferes with communications regarding a *full range of treatment options*" and "restricts the ability of health care providers to provide *full disclosure of all relevant information* to patients making health care decisions." 42 U.S.C. §18114(3), (4) (emphasis added). It also contravenes "the ethical standards of

health care professionals," *id.* §18114(5), by prohibiting Title X projects from providing patients with information about abortion. *See* ER27-29 & n.8.

Further, by prohibiting Title X projects from providing information about how and where pregnant patients can obtain abortion services and requiring complete separation, the Rule will "create[] … unreasonable barriers to … medical care" and "impede[] timely access to health care services." 42 U.S.C. §18114(1), (2); *see* ER29 n.8; ER53; SER72, 119, 120-123, 176-178, 191. The Gag and Separation Requirements will force many Title X providers to leave the program, and in many areas, alternative providers will be unable to absorb all of the patients who would lose access to care due to the Rule. ER31; SER189-190 (many patients went without care after Planned Parenthood was forced out of Texas's family-planning program, despite predictions that other providers would emerge); SER180-185.

The motions panel said that any challenge based on §1554 is "likely" waived. Dkt. 58 at 19-20. But, as the district court found, HHS was on notice of the argument. ER25. The panel also claimed that the Rule does not violate §1554's prohibition on interfering with health care because it merely refuses to subsidize it. Dkt. 58 at 20-21. That conclusion proceeds from the wrong premise—a counterfactual world where Title X does not exist. Congress has enacted Title X. Section 1554 takes the real world as a given and asks whether

HHS's regulation has any statutorily forbidden consequences. That is clear from §1554 text, which prohibits HHS from issuing "any regulation" running afoul of its terms. The Rule violates §1554 because the record evidence shows that patients' access to care would be unreasonably delayed and disrupted compared to the situation in which the Rule had not been promulgated—that is, if the 2000 regulations continued to govern. Similarly, the Rule violates medical ethics whereas the 2000 regulations do not.[3]

B. The Rule Is Arbitrary And Capricious

The district court also correctly concluded that the Rule is likely arbitrary and capricious. HHS failed entirely to consider critical evidence that the Gag Requirement violates established medical ethics, that providers serving more than 40% of Title X patients will be forced out of the program, and that the Separation Requirement imposes enormous costs on already-strained Title X project budgets. In response to this evidence, HHS offered only conclusory statements that the number of Title X providers would, somehow, increase under the Rule. That speculation is no answer to the persuasive record evidence that the Rule will decimate the Title X program. ER32.

[3] The panel's reliance on *Rust*—which rejected an argument that the 1988 rule unconstitutionally burdened a woman's right to abortion—is unavailing. On a constitutional challenge, the appropriate comparator is the situation in which Congress had not enacted Title X at all, because the constitutional question is whether the government, generally, has interfered with the right. But that is not true of the statutory inquiry under §1554.

The motions panel's conclusions to the contrary are at odds with the record. For example, the panel faulted the district court for "ignor[ing] HHS's consideration of the effects that the Final Rule would likely have on the number of Title X providers, and credit[ing] Plaintiffs' speculation that the Final Rule would 'decimate' the Title X provider network." Dkt. 58 at 23. But it is *HHS's* unsupported claims that are speculative. *See* ER31-32. HHS had no evidence for its prediction that the Rule "may increase the number of providers in the program." 84 Fed. Reg. at 7,780. Agency predictions "'must be based on some logic and evidence, not sheer speculation.'" *Sorenson Commc'ns Inc. v. FCC*, 755 F.3d 702, 708 (D.C. Cir. 2014).

The D.C. Circuit's decision in *National Lifeline Association v. FCC*, 921 F.3d 1102 (D.C. Cir. 2019), is instructive. That case involved the FCC's "fundamental change" to a program concerning voice and broadband services for certain low-income individuals. *Id.* at 1106. The D.C. Circuit held that the FCC's action was arbitrary and capricious because it "evince[d] no consideration of the exodus of … providers from" the program. *Id.* at 1105. The court recognized that it must "'give appropriate deference to predictive judgments' by an agency where supported by '[s]ubstantial evidence.'" *Id.* at 1113. But the D.C. Circuit found that principle inapplicable because the agency "summarily" concluded that its action would support the expansion of providers but "referred to no evidence that

… providers will make up the gap in services" when other providers were no longer eligible to receive subsidies. *Id.* Similarly here, HHS cited no evidence that the Rule will result in more patients being served, and disregarded the exodus of Title X providers caused by the Rule.

III. THE MOTIONS PANEL IMPROPERLY DISREGARDED THE DISTRICT COURT'S FINDINGS OF HARM

The most striking of the motions panel's errors is its disregard for the district court's factfinding role. Regarding the harms and equities, the district court stated:

> A review of the scores of declarations from public health policy experts, medical organizations, doctors, and Title X providers lead to the inescapable conclusion that the Final Rule will result in negative health outcomes for low income women and communities. It will result in less contraceptive services, more unintended pregnancies, less early breast cancer detection, less screening for cervical cancer, less HIV screening, and less testing for sexually transmitted disease.

ER6; *accord* ER31-34. The Rule, the court further found, would cause a mass exodus of many longstanding providers. ER31-33. And the Rule would have a particularly pernicious effect on low-income women "who have no interactions with health care providers outside of a Title X provider." ER31-32.

HHS provided no evidence to the contrary. ER32. Moreover, the district court found that HHS would suffer "no harm" from preserving the way the program has worked for "'virtually its entire history.'" ER7. Those findings were correct—and certainly not clearly erroneous—the standard of review unmentioned

by the motions panel. *See adidas America, Inc. v. Skechers USA, Inc.*, 890 F.3d 747, 753, 757 (9th Cir. 2018).

Instead, the motions panel found "irreparable harm" to HHS based only on the generic harms that HHS invoked: "allow[ing] taxpayer dollars to be spent in a manner that [HHS] has concluded violates the law," "administrative costs," and "significant uncertainty in the Title X program." Dkt. 58 at 24. But Title X has operated under the "current regulations … for nearly 50 years," and those regulations "have an excellent track record." ER34. Moreover, HHS "cannot point to one instance where Title X funds have been misapplied." ER6. And preserving the status quo pending a final judgment on the merits only *reduces* programmatic uncertainty.

The motions panel improperly rejected the district court's findings that Plaintiffs would suffer irreparable harm absent a preliminary injunction, that HHS would suffer no harm from an injunction, and that the public interest weighs in favor of an injunction. This Court should not be constrained by the motions panel's errors, and should therefore hear this case en banc.

CONCLUSION

The Court should grant initial hearing en banc and, to ensure the motions panel's decision has no precedential effect pending a hearing en banc, should vacate the stay decision.

Respectfully submitted.

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June 28, 2019

CERTIFICATE OF COMPLIANCE

I hereby certify that this petition complies with the type-volume limitation of Federal Rule of Appellate Procedure 35(b)(2)(A) because it contains 3,898 words, exclusive of any exempted portions of the petition. The petition 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 28, 2019

CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of June, 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.

/s/ Alan E. Schoenfeld
ALAN E. SCHOENFELD