

No. 19-1614

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

MAYOR AND CITY COUNCIL OF BALTIMORE,
Plaintiff-Appellee,

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 MARYLAND

**APPELLANTS' RESPONSE TO APPELLEE'S EMERGENCY MOTION
FOR RECONSIDERATION EN BANC**

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INTRODUCTION

Baltimore asks this Court to discard not only the decision of the motions panel, but effectively the Supreme Court's decision in *Rust v. Sullivan*, 500 U.S. 173 (1991), as well. As Baltimore does not dispute, the regulations challenged here are materially indistinguishable from—if not less restrictive than—the ones that the Supreme Court upheld in *Rust*. The City nevertheless contends that a district court can effectively overrule that decision through a preliminary injunction and that the government must wait until the conclusion of a potentially lengthy appeal process to implement a policy the Supreme Court has already sanctioned.

The motions panel correctly rejected that position, and Baltimore fails to show why this Court should take extraordinary measures to address regulations essentially identical to ones the Supreme Court has already upheld. Mere disagreement with the panel's decision is no basis for leapfrogging the orderly resolution of an expedited appeal on the merits, and in any event, Baltimore's disagreement is unfounded. Congress did not amend Title X—much less abrogate a high-profile Supreme Court decision—*sub silentio* through a clause in an appropriations rider or a mousehole in the Affordable Care Act (ACA). And Baltimore's predicted harms do not outweigh injuries to the government already identified by the Supreme Court. In all events, nothing supports enjoining parts of the Rule never found unlawful or applications of the Rule to those who never challenged it.

BACKGROUND

1.a. In 1970, Congress enacted Title X of the Public Health Service Act to create a limited grant program for certain types of family planning services. *See* Pub. L. No. 91-572, 84 Stat. 1504 (1970). Title X authorizes the Secretary to make grants and enter into contracts with public or private nonprofit entities “to assist in the establishment and operation of voluntary family planning projects which shall offer a broad range of acceptable and effective family planning methods and services” in accordance with regulations promulgated by the Secretary. 42 U.S.C. § 300(a); *see id.* § 300a-4(a). Section 1008, unchanged since its enactment, provides that “[n]one of the funds appropriated under this subchapter shall be used in programs where abortion is a method of family planning.” *Id.* § 300a-6.

b. In 1988, HHS issued regulations materially indistinguishable from the challenged portions of the Rule. Concluding that “counseling and referral for abortion are prohibited by section 1008,” 53 Fed. Reg. 2922, 2923 (Feb. 2, 1988), HHS forbade Title X projects from providing counseling or referrals for, or otherwise encouraging or promoting, abortion as a method of family planning, *id.* at 2945 (§§ 59.8, 59.10). To prevent programs from evading these restrictions by steering patients toward abortion, the regulations placed limitations on the list of medical providers that a program must offer pregnant patients as part of a required referral for prenatal care. *See id.* (§ 59.8(a)(3)). To maintain program integrity, the regulations also required that grantees keep their Title X funded projects “physically and financially separate” from all

prohibited abortion-related activities. *Id.* (§ 59.9). *Rust* upheld these regulations, holding that they were authorized by Title X, not arbitrary and capricious, and consistent with the Constitution. 500 U.S. at 183-203.

In 1993, President Clinton and HHS suspended the 1988 regulations. 58 Fed. Reg. 7455 (Jan. 22, 1993); 58 Fed. Reg. 7462 (Feb. 5, 1993) (interim rule). HHS finalized a new rule in 2000, which required grantees to provide nondirective counseling concerning abortion and abortion referrals upon request, and eliminated the physical-separation requirement. *See* 65 Fed. Reg. 41,270, 41,279 (July 3, 2000). HHS acknowledged that the 1988 regulations were a “permissible interpretation of the statute,” but adopted the new rule based on “experience.” *Id.* at 41,271, 41,277.

c. In 2019, HHS adopted a rule that, as relevant here, is materially indistinguishable from the 1988 regulations upheld in *Rust*. 84 Fed. Reg. 7714, 7759 (Mar. 4, 2019). To implement § 1008, the Rule, like the 1988 regulations, prohibits Title X projects from providing referrals for, and from engaging in activities that otherwise encourage or promote, abortion as a method of family planning. *Id.* at 7788-90 (§§ 59.5(a)(5), 59.14(a), 59.16(a)). As HHS explained, “[i]f a Title X project refers for, encourages, promotes, advocates, supports, or assists with, abortion as a method of family planning, it is a program ‘where abortion is a method of family planning’ and the Title X statute prohibits Title X funding for that project.” *Id.* at 7759. To prevent evasion of these requirements, the Rule, like the 1988 regulations, imposes certain restrictions on the list of providers that may be given in conjunction with a required

referral for prenatal care for pregnant women. *See id.* at 7789 (§ 59.14(c)(2)). The Rule is less restrictive than the 1988 regulations, however, in that it allows, but does not require, nondirective pregnancy counseling, *id.* (§ 59.14(b)(1)(i)), which may include the neutral presentation of information about abortion, provided it does not encourage or promote abortion as a method of family planning, *see id.* (§ 59.14(e)(5)); *see also id.* at 7745-46.

Also like the 1988 regulations, the Rule requires that Title X projects be physically separate from abortion-related activities conducted outside the grant program. 84 Fed. Reg. at 7789 (§ 59.15). In addition, the Rule contains a number of provisions that have nothing to do with abortion, such as a requirement that Title X projects comply with state and local laws that mandate notification or reporting of sexual abuse, *id.* at 7790 (§ 59.17). The Rule was scheduled to take effect on May 3, 2019, but grantees had until March 4, 2020, to comply with the physical-separation requirement. *Id.* at 7714.

2.a. Nearly forty days after the Secretary issued the Rule, Baltimore filed suit. The City argued, *inter alia*, that the Rule's referral and counseling restrictions violate an appropriations rider and that parts of the Rule contravene § 1554 of the ACA. The district court issued a preliminary injunction, enjoining enforcement of the entire Rule throughout Maryland.

b. A motions panel of this Court issued an order, staying the preliminary injunctions pending appeal, over the dissent of Judge Thacker. The Court also granted a motion to expedite the appeal and set argument for September 18.

In addition, a unanimous motions panel of the Ninth Circuit issued an order staying three other preliminary injunctions against the enforcement of the Rule, two of them nationwide. Add.1-25. The Ninth Circuit subsequently ordered those cases to be reheard en banc and instructed that the motions panel's order not be given precedential effect. Add.26-28. The en banc panel later clarified, however, that the Ninth Circuit had not vacated its stay order, as well as denied the plaintiffs' motions for an administrative stay of the stay order. Add.31. Accordingly, the Ninth Circuit's stay order "remains in effect." *Id.* Maryland therefore is now the only place where the Rule is not in effect.¹

c. Baltimore filed an emergency motion for en banc reconsideration of the panel's stay order. On July 9, this Court granted leave for the government to respond.

ARGUMENT

I. Baltimore Cannot Meet The Standard For Reconsideration En Banc

This Court should deny Baltimore's extraordinary request while this expedited appeal proceeds. "As the Supreme Court has instructed, 'En banc courts are the

¹ A fifth district court recently denied a similar request for a nationwide preliminary injunction against enforcement of the Rule. *See Family Planning Ass'n of Maine v. HHS*, No. 19-cv-100, 2019 WL 2866832 (D. Me. July 3, 2019).

exception, not the rule. They are convened only when extraordinary circumstances exist that call for authoritative consideration and decision by those charged with the administration and development of the law of the circuit.” *Garza v. Hargan*, 874 F.3d 735, 756 n.6 (D.C. Cir. 2017) (Kavanaugh, J., dissenting) (quoting *United States v. American-Foreign S.S. Corp.*, 363 U.S. 685, 689 (1960)), *vacated sub nom. Azar v. Garza*, 138 S. Ct. 1790 (2018).

Baltimore has not met this standard. The City does not identify any instance in which this Court has reconsidered en banc an order staying a preliminary injunction pending appeal, and we are aware of none.² Nor does Baltimore seriously contend that the panel’s ruling conflicts with a decision from either another circuit or the Supreme Court, or that en banc intervention is necessary to shape the development of the law in this Court. *See* Fed. R. App. P. 35(b)(1). At most, Baltimore argues (Mot. 5-6) that the panel “demonstrably misapplied” the four-factor test used to evaluate stays pending appeal that the Supreme Court established in *Nken v. Holder*, 556 U.S. 418 (2009). *See id.* at 434 (directing courts to consider: (1) the applicant’s likelihood of success on the merits; (2) whether the applicant will suffer irreparable injury; (3) the balance of

² Baltimore’s reliance (Mot.3) on *Gilliam v. Foster*, 61 F.3d 1070, 1073 (4th Cir. 1995), is misplaced. There, the en banc Court issued a temporary restraining order (over dissents) of a state criminal proceeding until the conclusion of federal habeas corpus proceedings, after a panel had denied the same relief. *See also Foster v. Gilliam*, 515 U.S. 1301, 1302 (1995) (Rehnquist, C.J., in chambers) (describing the en banc court’s rationale for “enjoining the continuation of a state criminal trial that had already begun” as “debatable”).

hardships to other parties interested in the proceeding; and (4) the public interest). But in claiming (Mot.5-6) that the panel should not have found that the government would be irreparably harmed in the absence of a stay, Baltimore merely disagrees with the panel's analysis of one of the four factors. Even if the City were correct about the panel's analysis of that factor, the misapplication of a single factor to the particular facts at issue here would not represent the sort of meaningful conflict of law necessary to justify en banc review. Regardless, all four factors weigh in favor of a stay, consistent with and well supported by pertinent case law, including *Nken*.

Baltimore separately claims the extraordinary step of en banc reconsideration is necessary given the stay order's effects. Mot.14-16. But the City's dire warnings about the panel's stay order are unpersuasive. The current state of affairs is materially indistinguishable from—if not more tolerable from the City's perspective than—the status quo in the wake of the Supreme Court's decision in *Rust*. Baltimore has not shown why returning to a less restrictive state of affairs than one sanctioned by the Supreme Court necessitates extraordinary action by this Court.

En banc consideration is particularly inappropriate because it is not clear that the panel's stay is presently harming Baltimore at all. As described in its Motion (at 9), Baltimore continues to provide Title X services to its residents in compliance with the Rule, and neither Baltimore nor the State of Maryland (the grantee to which Baltimore is a sub-grantee) has withdrawn from the Title X program. Moreover, Baltimore fails to mention a recently enacted Maryland state law that appears to shield the City from

any adverse effects in the event that the State of Maryland were to withdraw from the Title X program. *See* Md. Code Ann., Health-Gen. § 13-3402 (2019) (If Maryland does not accept “Title X program funds” because Title X “[d]oes not require family planning providers to provide a broad range of acceptable and effective medically approved family planning methods and services,” the Governor is directed to replace the Title X federal funds with “State funds at the same level of total funds provided to the Program in the immediately preceding fiscal year.”).

Reconsideration en banc of the stay pending appeal would be inappropriate for the additional reason that the expedited appeal will be fully briefed and argued by September 18 and presumably resolved by a merits panel soon thereafter, with an opportunity to rehear any merits decision en banc then, if necessary. En banc intervention now would short-circuit that process, leaving any remaining merits-panel proceedings to be litigated in the shadow of that ruling.

II. The Government Is Likely To Prevail On The Merits

In light of the Supreme Court’s holding in *Rust* upholding materially indistinguishable regulations, the Government is likely to prevail on its challenge to the district court’s preliminary injunction. Baltimore’s theory that Congress amended § 1008 and abrogated a high-profile Supreme Court decision in an appropriations rider

and an obscure provision of the ACA cannot be squared with either the presumption against implied repeals or the fact that Congress does not hide elephants in mouseholes.

A. Title X authorizes the Rule’s restrictions on referrals and counseling. If a program refers patients for, or otherwise encourages abortion as a method of family planning, then the program is one “where abortion is a method of family planning” and thus is excluded from funding by § 1008. 84 Fed. Reg. at 7759. Baltimore offers no alternative interpretation, and *Rust* recognized that Congress intended “that federal funds not be used to ‘promote or advocate’ abortion as a ‘method of family planning.’” 500 U.S. at 195 n.4.

All this remains true notwithstanding a subsequent appropriations rider providing that Title X funds “shall not be expended for abortions” and that “all pregnancy counseling shall be nondirective.” Pub. L. No. 115-245, div. B, tit. II, 132 Stat. 2981, 3070-71 (2018). Baltimore does not meaningfully dispute that declining to *refer* a patient for abortion neither *counsels* nor *directs* the patient to do anything. Instead, Baltimore argues that when considered *in combination* with a separate requirement that pregnant patients be referred for prenatal health care, the referral provisions become directive. *E.g.*, Mot.10. But the prenatal-referral requirement does not itself direct a decision about abortion—it merely refers patients for care that is necessary while they are pregnant. And the Rule permits providers to explain that abortion is outside the scope of the program, and that if a patient wants to seek an abortion she can find information about that elsewhere, but in the meantime, Title X providers can provide

her with a list of other providers who can offer care while she is pregnant. *See* 84 Fed. Reg. at 7789 (§ 59.14(e)(5)). Providers could even expressly include a disclaimer that the prenatal-care referral is a general requirement and should not be taken as directing the patient's ultimate decision about her pregnancy. And even if the required prenatal-care referral were directive, that would be no basis for invalidating the prohibition on abortion referrals. The provisions are contained in different subsections, *id.* at 7788-89 (§§ 59.14(a), 59.14(b)(1)), which are severable, *id.* at 7725.

In any event, Congress's requirement that "pregnancy counseling" be "nondirective" does not speak to the issue of referrals, much less require referrals for abortion specifically. Baltimore never even acknowledges that both Congress and HHS have used "counseling" and "referrals" as distinct terms in this area (*see* Dkt.No.9 at 10-11), and the failed congressional attempts to eliminate the 1988 regulations only confirm that when Congress seeks to overrule HHS on this issue, it uses "referrals" and "nondirective counseling" separately. *See, e.g.*, H.R. 833, 104th Cong. § 2 (1995) (addressing "nondirective counseling and referrals"); H.R. 392, 102d Cong. § 2 (1991) (addressing "nondirective counseling" and "referrals" in separate provisions). In any event, the few instances Baltimore identifies as implying that counseling may include referrals at most suggest that the term "nondirective counseling" is ambiguous and thus cannot supply the clear intent necessary to overcome the presumption against implied repeals or judicial deference to HHS's reasonable interpretation.

For similar reasons, neither the preamble’s guidance nor the Rule’s counseling provisions violate the appropriations rider. Providing information about “maintaining the health of the mother and unborn child during pregnancy,” 84 Fed. Reg. at 7789 (§ 59.14(b)(1)), does not direct a woman to forgo an abortion, any more than discussing the potential risks of pregnancy to her own health directs her to obtain one. Moreover, the Rule requires that “pregnancy counseling” be “nondirective” (*id.*), and the preamble confirms that providers cannot use nondirective counseling to steer patients toward any decision on abortion. *See id.* at 7716. Indeed, consistent with Title X’s focus on preconception family planning, the Rule permits programs to decline to provide any pregnancy counseling, which plainly does not contravene the requirement that “all pregnancy counseling shall be nondirective.” Nor does that requirement demand that abortion be treated the same as other options: Congress knows how to expressly state that specific options should be given equal treatment. *See* 42 U.S.C. § 254c-6(a)(1). In all events, Baltimore has no standing to complain about—and is certainly not irreparably harmed by—what the Rule permits *others* to do.

B. The Rule likewise does not violate § 1554 of the ACA. This argument is waived because neither Baltimore nor any other commenter raised it during the rulemaking, such that HHS did not have an “opportunity to consider the issue.” *Pleasant Valley Hosp., Inc. v. Shalala*, 32 F.3d 67, 70 (4th Cir. 1994). That omission is unsurprising because the argument is meritless. The Rule merely limits what the government chooses to fund and thus does not, for example, “create[] any unreasonable barriers”

to obtaining health care. 42 U.S.C. § 18114. As *Rust* recognized, there is a clear difference between affirmatively interfering with an activity and declining to subsidize it. 500 U.S. at 200-01. That reasoning disposes of this claim, whether it is packaged as a constitutional or statutory one.

Even if this were a closer question, settled rules of statutory construction would dispose of the plaintiff's claim. If Title X's specific delegation of authority to HHS to adopt the Rule somehow conflicted with the general directives in § 1554, "[i]t is a commonplace of statutory construction that the specific governs the general." *NLRB v. SW Gen., Inc.*, 137 S. Ct. 929, 941 (2017). And more fundamentally, it is implausible that Congress tucked away an implied repeal of Title X's authorization for the Rule (and a silent abrogation of a high-profile Supreme Court precedent) in the mousehole of § 1554. That is particularly true given that § 1554 applies "[n]otwithstanding any other provision of *this Act*," 42 U.S.C. § 18114 (emphasis added), signaling that this provision may implicitly displace otherwise-applicable provisions *in the ACA*. That language does not, however, indicate that Congress meant to implicitly repeal *other, pre-existing statutes* such as § 1008 of the PHSA, especially since the ACA is littered with "notwithstanding" clauses that use the common phrase "notwithstanding any other provision of law." *E.g.*, 42 U.S.C. § 18032(d)(3)(D)(i).

Finally, Baltimore contends (Mot.11) that the physical-separation requirement violates § 1554 by imposing compliance costs, but that argument neither was the basis

of the preliminary injunction nor escapes the basic problems with the City's ACA argument.

III. The Remaining Factors Favor A Stay

A. The government and the public will suffer irreparable injury if the district court's preliminary injunction is not stayed, and Baltimore's alleged harms from a stay are outweighed by these injuries. Baltimore attempts to resist this conclusion by stating that the panel's one-page order "clearly and demonstrably failed to require" the government to show irreparable harm. Mot.16. But as the Ninth Circuit recognized, the harm to the government and to the public is evident, Add.24, and the panel here correctly determined that a stay was warranted. *See Nken*, 556 U.S. at 433.

Denying a stay will force HHS to maintain, and disburse taxpayer dollars in furtherance of, a policy that it has concluded violates § 1008 and therefore implicates the government's weighty interest in avoiding the risk that federal funds will be used to promote or encourage abortion. *See, e.g., Rust*, 500 U.S. at 192-93. The district court gave no explanation for why HHS (and the public) should sustain this ongoing irreparable harm, beyond the court's own disagreement on the merits. In addition, denying a stay will impose significant administrative burdens on the agency and uncertainty for the Title X program more generally.

B. The need to avoid these harms significantly outweighs any of Baltimore's asserted injuries. Even on Baltimore's view of the merits, the City's alleged injuries are overstated and speculative. Baltimore's contention that the Rule will cause a void in

the provision of family-planning services depends on the speculation that (1) the City and all of its subgrantees will leave the program permanently rather than comply with the Rule;³ and (2) no other family-planning providers will meet the Rule's requirements. After exercising its expert judgment, HHS instead determined that the Rule may expand the pool of Title X providers to "fill [any] gaps." *See* 84 Fed. Reg. at 7756. The agency's expert, predictive judgment merits greater weight than Baltimore's speculation. *See Ohio Valley Emtl. Coal. v. Aracoma Coal Co.*, 556 F.3d 177, 201 (4th Cir. 2009) ("In matters involving complex predictions based on special expertise, 'a reviewing court must generally be at its most deferential.'").

In all events, Baltimore's alleged injuries are predicated on its view of the merits. If § 1008 prohibits—or at least authorizes HHS to prohibit—Baltimore's use of taxpayer dollars to refer for abortions or cross-subsidize its abortion-related facilities, then these objections fail. Contrary to Baltimore's suggestions (*e.g.*, Mot.5-9), the panel did not ignore the district court's determinations of harm or invent a new legal standard, but necessarily found that these asserted harms were predicated on an erroneous view of the merits and were outweighed by the significant injuries to the public from enjoining the Rule. *Cf.* Pet.Add.4-5 (Thacker, J., dissenting) (reaching the opposite conclusion on the balance of the equities).

³ In fact, the City's motion argues (Mot.9) that Baltimore is suffering immediate harm from the stay order by a reduction in Title X services, suggesting that Baltimore is currently complying with the Rule and has not withdrawn from the program.

IV. The Court Should At Least Preserve The Stay Of The Injunction's Overbroad Scope

Even if the Court were to reconsider the panel's stay order en banc, Article III and equitable principles would require it to maintain the panel's stay insofar as the injunction is "broader than necessary to afford full relief" to Baltimore. *Virginia Soc'y for Human Life, Inc. v. FEC*, 263 F.3d 379, 393 (4th Cir. 2001). The statewide injunction here is unnecessary to cure Baltimore's alleged injuries, as demonstrated by the fact that each court to enjoin the 1988 regulations in the lead-up to *Rust* limited its relief to the parties before it.

At most, the district court insisted that a broader injunction was necessary because a "[l]oss of funding in neighboring states will put pressure on Baltimore's health system, as mobile patients come from neighboring communities to make use of Baltimore's resources." Pet.Add.36-37. But an injunction tracking Maryland's boundaries cannot be tailored to redress that (speculative) injury, as it includes providers on the other side of the State. And even assuming that Baltimore had produced sufficient evidence of harm related to "neighboring communities," it would still be an abuse of discretion to issue a statewide injunction on that basis. Here, the balance of equities tips decisively in the government's favor, as it makes little sense to enjoin the Rule statewide to address entirely theoretical harm related to other communities, especially when no such entity has brought suit on its own behalf.

This Court also should preserve the stay insofar as the injunction prohibits enforcement of the entire Rule. The preamble provides for severability, 84 Fed. Reg. at 7725, and the district court failed to adequately explain why its holdings required invalidating every portion of the Rule, including those that have nothing to do with abortion.

CONCLUSION

This Court should deny Baltimore's motion.

Respectfully submitted,

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JULY 2019

**CERTIFICATE OF COMPLIANCE WITH
FEDERAL RULE OF APPELLATE PROCEDURE 32(a)**

I hereby certify that this brief complies with the requirements of Federal Rule of Appellate Procedure 32(a)(5) and (6) because it has been prepared in 14-point Garamond, a proportionally spaced font.

I further certify that this brief complies with this Court's order because it contains 3,897 words, according to the count of Microsoft Word.

s/ Jaynie Lilley
Jaynie Lilley

CERTIFICATE OF SERVICE

I hereby certify that on July 12, 2019, I filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system. All participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

s/ Jaynie Lilley
JAYNIE LILLEY

ADDENDUM

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FOR PUBLICATION

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

STATE OF CALIFORNIA, by
and through Attorney General
Xavier Becerra,
Plaintiff-Appellee,

v.

ALEX M. AZAR II, in his
Official Capacity as Secretary
of the U.S. Department of
Health & Human Services;
U.S. DEPARTMENT OF
HEALTH & HUMAN SERVICES,
Defendants-Appellants.

No. 19-15974

D.C. No.
3:19-cv-01184-EMC

ESSENTIAL ACCESS HEALTH,
INC.; MELISSA MARSHALL,
M.D.,

Plaintiffs-Appellees,

v.

ALEX M. AZAR II, Secretary
of U.S. Department of Health
and Human Services; UNITED
STATES DEPARTMENT OF
HEALTH AND HUMAN
SERVICES,

Defendants-Appellants.

No. 19-15979

D.C. No.

3:19-cv-01195-EMC

STATE OF OREGON; STATE OF
NEW YORK; STATE OF
COLORADO; STATE OF
CONNECTICUT; STATE OF
DELAWARE; DISTRICT OF
COLUMBIA; STATE OF
HAWAII; STATE OF ILLINOIS;
STATE OF MARYLAND;
COMMONWEALTH OF
MASSACHUSETTS; STATE OF
MICHIGAN; STATE OF
MINNESOTA; STATE OF
NEVADA; STATE OF NEW
JERSEY; STATE OF NEW
MEXICO; STATE OF NORTH
CAROLINA; COMMONWEALTH
OF PENNSYLVANIA; STATE OF
RHODE ISLAND; STATE OF

No. 19-35386

D.C. Nos.

6:19-cv-00317-MC

6:19-cv-00318-MC

VERMONT; COMMONWEALTH
OF VIRGINIA; STATE OF
WISCONSIN; 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.;
MICHELE P. MEGREGIAN,
C.N.M.,

Plaintiffs-Appellees,

v.

ALEX M. AZAR II; UNITED
STATES DEPARTMENT OF
HEALTH AND HUMAN
SERVICES; DIANE FOLEY;
OFFICE OF POPULATION
AFFAIRS,

Defendants-Appellants.

STATE OF WASHINGTON;
NATIONAL FAMILY PLANNING
AND REPRODUCTIVE HEALTH
ASSOCIATION; FEMINIST
WOMEN'S HEALTH CENTER;
DEBORAH OYER, M.D.;
TERESA GALL,

Plaintiffs-Appellees,

v.

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

No. 19-35394

D.C. Nos.

1:19-cv-03040-SAB

1:19-cv-03045-SAB

ORDER ON MOTIONS
FOR STAY PENDING
APPEAL

Filed June 20, 2019

Before: Edward Leavy, Consuelo M. Callahan,
and Carlos T. Bea, Circuit Judges.

Per Curiam Order

SUMMARY*

Civil Rights

The panel granted the United States Department of Health and Human Services' motion for a stay pending appeal of three preliminary injunction orders issued by district courts in three states which enjoined from going into effect the 2019 revised regulations to Title X of the Public Health Service Act, pertaining to pre-pregnancy family planning services.

In 1970, Congress enacted Title X to create a limited grant program for certain types of pre-pregnancy family planning services. Section 1008 of Title X provides that none on the funds appropriated under the subchapter shall be used in programs where abortion is a method of family planning. In 1988, the Department of Health and Human Service promulgated regulations forbidding Title X grantees from providing counseling or referrals for, or otherwise encouraging, promoting, or advocating abortion as a method of family planning. Several years later, the Department suspended the 1988 regulations and promulgated new Title X regulations, which re-interpreted § 1008 as requiring, among other things, that Title X grantees provide “nondirective” abortion counseling and abortion referrals upon request. In 2019, the Department once again revised its Title X regulations, promulgating regulatory language (the “Final Rule”) that substantially reverted back to the 1988 regulations. A group of state governments and existing

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

Title X grantees challenged the Final Rule in federal court in three states (California, Washington and Oregon), and sought preliminary injunctive relief. The district courts in all three states granted plaintiffs' preliminary injunction motions on nearly identical grounds. The Department appealed and sought to stay the injunctions pending a decision of the merits of its appeals.

The panel first noted that the Final Rule was a reasonable interpretation of § 1008. The panel further stated that the Supreme Court's decision in *Rust v. Sullivan*, 500 U.S. 173 (1991), largely foreclosed any attempt to argue that the Final Rule was not a reasonable interpretation of the text of § 1008. The panel rejected the district courts' conclusions that two intervening laws, a Health and Human Services appropriations rider and an ancillary provision of the Affordable Care Act, Title I § 1554, rendered the Final Rule invalid. The panel concluded that neither law impliedly repealed or amended § 1008. The panel further held that Final Rule's counseling and referral requirements was not in conflict with the appropriations rider's nondirective pregnancy counseling mandate. Finally, the panel held that even if plaintiffs properly preserved their Affordable Care Act challenge, it was likely that § 1554 did not affect § 1008's prohibition on *funding* programs where abortion was a method of family planning.

The panel held that, in light of the narrow permissible scope of the district court's review of the Department's reasoning under the arbitrary and capricious standard, the Department was likely to prevail on its argument that the district court erred in concluding that the Final Rule's enactment violated the Administrative Procedure Act.

The panel held that the remaining factors also favored a stay pending appeal, noting that the Department and the public at large are likely to suffer irreparable harm in the absence of a stay, which were comparatively greater than the harms plaintiffs were likely to suffer.

COUNSEL

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Judith N. Vale, Senior Assistant Solicitor General; Barbara D. Underwood, Solicitor General; Letitia James, Attorney General; Office of the Attorney General, Albany, New York; Benjamin Gutman, Solicitor General; Jona J. Maukonen, Senior Assistant Attorney General; Ellen F. Rosenblum, Attorney General; Office of the Attorney General, Salem, Oregon; Phil Weiser, Attorney General, State of Colorado; William Tong, Attorney General, State of Connecticut;

Kathy Jennings, Attorney General, State of Delaware; Karl A. Racine, Attorney General, District of Columbia; Clare E. Connors, Attorney General, State of Hawaii; Kwame Raoul, Attorney General, State of Illinois; Brian E. Frosh, Attorney General, State of Maryland; Maura Healey, Attorney General, Commonwealth of Massachusetts; Dana Nessel, Attorney General, State of Michigan; Keith Ellison, Attorney General, State of Minnesota; Aaron Ford, Attorney General, State of Nevada; Gurbir Singh Grewal, Attorney General, State of New Jersey; Hector Balderas, Attorney General, State of New Mexico; Josh Stein, Attorney General, State of North Carolina; Josh Shapiro, Attorney General, Commonwealth of Pennsylvania; Peter F. Neronha, Attorney General, State of Rhode Island; T.J. Donovan, Attorney General, State of Vermont; Mark R. Herring, Attorney General, Commonwealth of Virginia; Josh Kaul, Attorney General, State of Wisconsin; for Plaintiffs-Appellees State of Oregon, State of New York, State of Colorado, State of Connecticut, State of Delaware, District of Columbia, State of Hawaii, State of Illinois, State of Maryland, Commonwealth of Massachusetts, State of Michigan, State of Minnesota, State of Nevada, State of New Jersey, State of New Mexico, State of North Carolina, Commonwealth of Pennsylvania, State of Rhode Island, State of Vermont, Commonwealth of Virginia, and State of Wisconsin.

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ORDER

PER CURIAM:

BACKGROUND

In 1970, Congress enacted Title X of the Public Health Service Act (“Title X”) to create a limited grant program for certain types of pre-pregnancy family planning services. *See* Pub. L. No. 91-572, 84 Stat. 1504 (1970). Section 1008 of Title X, which has remained unchanged since its enactment, is titled “Prohibition of Abortion,” and provides:

None of the funds appropriated under this subchapter shall be used in programs where abortion is a method of family planning.

42 U.S.C. § 300a-6.

In 1988, the Department of Health and Human Services (“HHS”) explained that it “interpreted [§] 1008 . . . as prohibiting Title X projects from in any way promoting or encouraging abortion as a method of family planning,” and “as requiring that the Title X program be ‘separate and distinct’ from any abortion activities of a grantee.” 53 Fed. Reg. at 2923. Accordingly, HHS promulgated regulations forbidding Title X grantees from providing counseling or referrals for, or otherwise encouraging, promoting, or advocating abortion as a method of family planning. *Id.* at 2945. To prevent grantees from evading these restrictions, the regulations placed limitations on the list of medical providers that a program must offer patients as part of a required referral for prenatal care. *See id.* Such a list was required to exclude providers whose principal business is the provision of abortions, had to include providers who do not provide abortions, and could not weigh in favor of

providers who perform abortions. *Id.* at 2945. The regulations also required grantees to keep their Title X funded projects “physically and financially separate” from all abortion-related services that the grantee might also provide (the “physical-separation” requirement). *Id.*

In 1991, the Supreme Court upheld the 1988 regulations against a challenge in *Rust v. Sullivan*, 500 U.S. 173 (1991). *Rust* held that § 1008 of Title X was ambiguous as to whether grantees could counsel abortion as a family planning option and make referrals to abortion providers. *Id.* at 184. Applying deference under *Chevron, USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842–43 (1984), the Supreme Court found that the 1988 regulations were a permissible interpretation of § 1008. *Id.* at 184–85. The Supreme Court also held that the 1988 regulations were not arbitrary or capricious because the regulations were justified by “reasoned analysis,” that the regulations were consistent with the plain language of Title X, and that they did not violate the First or Fifth Amendments. *Id.* at 198–201.

Several years later (and under a new presidential administration), HHS suspended the 1988 regulations. 58 Fed. Reg. 7455 (1993). HHS finally promulgated new Title X regulations in 2000, which re-interpreted § 1008 as requiring Title X grantees to provide “nondirective”¹ abortion counseling and abortion referrals upon request. 65 Fed. Reg. 41270–79. The 2000 regulations also

¹ Under the 2000 regulations, “nondirective” counseling meant the provision of “factual, neutral information about any option, including abortion, as [medical providers] consider warranted by the circumstances, . . . [without] steer[ing] or direct[ing] clients toward selecting any option.” 65 Fed. Reg. 41270–01.

eliminated the 1988 regulations' physical-separation requirement. *Id.*

In 2019, HHS once again revised its Title X regulations, promulgating regulatory language (the "Final Rule") that substantially reverts back to the 1988 regulations. 84 Fed. Reg. 7714. Under the Final Rule, Title X grantees are prohibited from providing referrals for, and from engaging in activities that otherwise encourage or promote, abortion as a method of family planning. *Id.* at 7788–90. Providers are required to refer pregnant women to a non-abortion prenatal care provider, and may also provide women with a list of other providers (which may not be composed of more abortion providers than non-abortion providers). *See id.* at 7789. Notably, however, the Final Rule is less restrictive than the 1988 regulations: it allows (but does not require) the neutral presentation of abortion information during nondirective pregnancy counseling in Title X programs. *Id.* The Final Rule also revives the 1988 regulations' physical-separation requirement, imposes limits on which medical professionals can provide pregnancy counseling, clarifies the previous requirement that family planning methods be "medically approved," and creates a requirement that providers encourage family participation in decisions. *Id.* at 7789.

The Final Rule was scheduled to take effect on May 3, 2019, although grantees would have until March 4, 2020, to comply with the physical-separation requirement. *Id.* at 7714. But a group of state governments and existing Title X grantees ("Plaintiffs") challenged the Final Rule in federal court in three states (California, Washington, and Oregon), and sought preliminary injunctive relief. The district courts in all three states granted Plaintiffs' preliminary injunction motions on nearly identical grounds. *See Washington v.*

Azar, 19-cv-3040, 2019 WL 1868632 (E.D. Wash. Apr. 25, 2019); *Oregon v. Azar*, 19-cv-317, 2019 WL 1897475 (D. Oregon Apr. 29, 2019); *California v. Azar*, 19-cv-1184, 19-cv-1195, 2019 WL 1877392 (N.D. Cal. Apr. 26, 2019). As a result of the three preliminary injunctions, the Final Rule has not gone into effect.

HHS appealed all three preliminary injunction orders to this court, and filed motions to stay the injunctions pending a decision on the merits of its appeals. Because the three motions for a stay pending appeal present nearly identical issues, we consider all three motions jointly.

ANALYSIS

In ruling on a stay motion, we are guided by 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.” *Nken v. Holder*, 556 U.S. 418, 434 (2009) (internal quotation marks omitted). Although review of a district court’s grant of a preliminary injunction is for abuse of discretion, *Southwest Voter Registration Education Project v. Shelley*, 344 F.3d 914, 918 (9th Cir. 2003), “[a] district court by definition abuses its discretion when it makes an error of law,” *Koon v. United States*, 518 U.S. 81, 100 (1996).

I.

We conclude that the Government is likely to prevail on its challenge to the district courts’ preliminary injunctions based on their findings that the Final Rule is likely invalid as

both contrary to law and arbitrary and capricious under 5 U.S.C. § 706(2)(A).

As a threshold matter, we note that the Final Rule is a reasonable interpretation of § 1008. Congress enacted § 1008 to ensure that “[n]one of the funds appropriated under this subchapter shall be used in programs where abortion is a method of family planning.” 42 U.S.C. § 300a-6. If a program promotes, encourages, or advocates abortion as a method of family planning, or if the program refers patients to abortion providers for family planning purposes, then that program is logically one “where abortion is a method of family planning.” Accordingly, the Final Rule’s prohibitions on advocating, encouraging, or promoting abortion, as well as on referring patients for abortions, are reasonable and in accord with § 1008. Indeed, the Supreme Court has held that § 1008 “plainly allows” such a construction of the statute. *Rust*, 500 U.S. at 184 (upholding as a reasonable interpretation of § 1008 regulations that (1) prohibited abortion referrals and counseling, (2) required referrals for prenatal care, (3) placed restrictions on referral lists, (4) prohibited promoting, encouraging, or advocating abortion, and (5) mandated financial and physical separation of Title X projects from abortion-related activities). The text of § 1008 has not changed.

II.

Because *Rust* largely forecloses any attempt to argue that the Final Rule is not a reasonable interpretation of the text of § 1008, the district courts instead relied on two purportedly intervening laws that they say likely render the Final Rule “not in accordance with law.” 5 U.S.C. § 706(2)(A). The first is an “appropriations rider” that Congress has included in every HHS appropriations act since 1996. The 2018 version states:

For carrying out the program under [T]itle X of the PHS Act to provide for voluntary family planning projects, \$286,479,000: Provided, [t]hat amounts provided to said projects under such title shall not be expended for abortions, *that all pregnancy counseling shall be nondirective*, and that such amounts shall not be expended for any activity (including the publication or distribution of literature) that in any way tends to promote public support or opposition to any legislative proposal or candidate for public office.

132 Stat 2981, 3070–71 (2018) (emphasis added). The second is an ancillary provision of the Affordable Care Act (ACA), located within a subchapter of the law entitled “Miscellaneous Provisions,” which reads:

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.

Pub. L. No. 111-148, title I, § 1554 (42 U.S.C. § 18114) (“§ 1554”).

These two provisions could render the Final Rule “not in accordance with law” only by impliedly repealing or amending § 1008, or by directly contravening the Final Rule’s regulatory provisions.

First, we conclude that neither law impliedly repealed or amended § 1008. *See Nat’l Ass’n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 663 (2007) (“[E]very amendment of a statute effects a partial repeal to the extent that the new statutory command displaces earlier, inconsistent commands.”). “[R]epeals by implication are not favored and will not be presumed unless the intention of the legislature to repeal is clear and manifest.” *Id.* at 662 (internal quotation marks and alterations omitted); *United States v. Madigan*, 300 U.S. 500, 506 (1937) (“[T]he modification by implication of the settled construction of an earlier and different section is not favored.”). Indeed, “[w]e will not infer a statutory repeal unless the later statute expressly contradict[s] the original act or unless such a construction is

absolutely necessary . . . in order that [the] words [of the later statute] shall have any meaning at all.” *Nat’l Ass’n of Home Builders*, 551 U.S. at 662.

Plaintiffs admit that there is no irreconcilable conflict between § 1008 and either the appropriations rider or § 1554 of the ACA. *E.g.*, California State Opposition to Motion for Stay at p. 14; Essential Access Opposition to Motion for Stay at p.14. And we discern no “clear and manifest” intent by Congress to amend or repeal § 1008 via either of these laws—indeed, neither law even refers to § 1008. The appropriations rider mentions abortion only to prohibit appropriated funds from being expended for abortions; and § 1554 of the ACA does not even *mention* abortion.

As neither statute impliedly amended or repealed § 1008, the question is therefore whether the Final Rule is nonetheless “not in accordance with law” because its provisions are incompatible with the appropriations rider or § 1554 of the ACA. 5 U.S.C. § 706(2)(A). We think that HHS is likely to succeed on its challenge to the district courts’ preliminary injunctions because the Final Rule is not contrary to either provision.

The appropriations rider conditions HHS funding on a requirement that no Title X funds be expended on abortion, and that “all pregnancy counseling shall be nondirective.” Pub. L. No. 115-245, div. B, tit. II, 132 Stat 2981, 3070–71 (2018). (The plain text of the rider actually seems to *reinforce* § 1008’s restrictions on funding abortion-related activities.)

The district courts held that the Final Rule’s counseling and referral requirements directly conflicted with the appropriations rider’s “nondirective” mandate. But its mandate is *not* that nondirective counseling be given in

every case. It is that such counseling as is given shall be nondirective. The Final Rule similarly does not require that any pregnancy counseling be given, only that if given, such counseling shall be nondirective (and may include neutrally-presented information about abortion). 84 Fed. Reg. 7716 (“Under the [F]inal [R]ule, the Title X regulations no longer require pregnancy counseling, but permits the use of Title X funds in programs that provide pregnancy counseling, so long as it is nondirective.”). The Final Rule is therefore not in conflict with the appropriations rider’s nondirective pregnancy counseling mandate.

Although the Final Rule *does* require the provision of referrals to non-abortion providers, *id.* at 7788–90, such referrals do not constitute “pregnancy counseling.” First, providing a referral is not “counseling.” HHS has defined “nondirective counseling” as “the meaningful presentation of options where the [medical professional] is not suggesting or advising one option over another,” 84 Fed. Reg. at 7716, whereas a “referral” involves linking a patient to another provider who can give further counseling or treatment, *id.* at 7748. The Final Rule treats referral and counseling as distinct terms, as has Congress and HHS under previous administrations. *See, e.g.*, 42 U.S.C. § 300z-10; 53 Fed. Reg. at 2923; 2928–38 (1988); 65 Fed. Reg. 41272–75 (2000). We therefore conclude that the Final Rule’s referral requirement is not contrary to the appropriations rider’s nondirective pregnancy counseling mandate.²

² But to the extent there is any ambiguity, “when reviewing an agency’s statutory interpretation under the APA’s ‘not in accordance with law’ standard, . . . [we] adhere to the familiar two-step test of *Chevron*.” *Nw. Envtl. Advocates v. U.S. E.P.A.*, 537 F.3d 1006, 1014 (9th Cir. 2008). Applying *Chevron* deference, we would conclude that

But even if referrals are included under the rubric of “pregnancy counseling,” it is not clear that referring a patient to a non-abortion doctor is necessarily “directive.” Nondirective counseling does not require equal treatment of all pregnancy options—rather, it just requires that a provider not affirmatively endorse one option over another. 84 Fed. Reg. at 7716. When Congress wants specific pregnancy options to be given equal treatment, it knows how to say so *explicitly*. For example, Congress has mandated that “adoption information and referrals” shall be provided “on an equal basis with all other courses of action included in nondirective counseling.” 42 U.S.C. § 254c-6(a)(1) (emphasis added). If “nondirective” already meant that all pregnancy options (including adoption) shall be given equal treatment, it would render meaningless Congress’s explicit instruction that adoption be treated on an *equal basis* with other pregnancy options. “[C]ourts avoid a reading that renders some words altogether redundant.” Scalia, Antonin, and Garner, Bryan A., *Reading Law: The Interpretation of Legal Texts* (2012) 176. Congress has enacted no such statutory provision explicitly requiring the equal treatment of abortion in pregnancy counseling and referrals.³

We next consider § 1554 of the ACA. As a threshold matter, it seems likely that any challenge to the Final Rule

HHS’s treatment of counseling and referral as distinct concepts is a reasonable interpretation of the applicable statutes.

³ But as discussed above, to the extent there is any ambiguity as to whether the appropriation rider’s nondirective mandate means that Title X grantees must be allowed to provide referrals to abortion providers on an equal basis with non-abortion providers, we would defer to HHS’s reasonable interpretation under *Chevron* that referral to non-abortion providers is consistent with the provision of nondirective pregnancy counseling.

relying on § 1554 is waived because Plaintiffs concede that HHS was not put on notice of this specific challenge during the public comment period, such that HHS did not have an “opportunity to consider the issue.” *Portland Gen. Elec. Co. v. Bonneville Power Admin.*, 501 F.3d 1009, 1024 (9th Cir. 2007) (“The waiver rule protects the agency’s prerogative to apply its expertise, to correct its own errors, and to create a record for our review.”). Although some commenters stated that the proposed Final Rule was contrary to the ACA *generally*, and still others used generic language similar to that contained in § 1554, preservation of a challenge requires that the “specific argument” must “be raised before the agency, not merely the same general legal issue.” *Koretoff v. Vilsack*, 707 F.3d 394, 398 (D.C. Cir. 2013) (per curiam). Although “agencies are required to ensure that they have authority to issue a particular regulation,” they “have no obligation to anticipate every conceivable argument about why they might lack such statutory authority.” *Id.* at 398.

But even if this challenge were preserved, it seems likely that § 1554 does not affect § 1008’s prohibition on *funding* programs where abortion is a method of family planning. Section 1554 prohibits “creat[ing] any unreasonable barriers to the ability of individuals to obtain appropriate medical care,” “imped[ing] timely access to health care services,” “interfer[ing] with communications regarding a full range of treatment options between the patient and the provider,” “restrict[ing] the ability of health care providers to provide full disclosure of all relevant information to patients making health care decisions,” “violat[ing] the principles of informed consent and the ethical standards of health care professionals,” and “limit[ing] the availability of health care treatment for the full duration of a patient’s medical needs.” 42 U.S.C. § 18114. But as the Supreme Court noted in *Rust*, there is a clear distinction between affirmatively impeding

or interfering with something, and refusing to subsidize it. *Rust*, 500 U.S. at 200–01. In holding that the 1988 regulations did not violate the Fifth Amendment, the Supreme Court reasoned that “[t]he Government has no constitutional duty to subsidize an activity merely because the activity is constitutionally protected,” and that the Government “may validly choose to fund childbirth over abortion and implement that judgment by the allocation of public funds for medical services relating to childbirth but not to those relating to abortion.” *Id.* at 201. The Government’s “decision to fund childbirth but not abortion places no governmental obstacle in the path of a woman who chooses to terminate her pregnancy, but rather, by means of unequal subsidization of abortion and other medical services, encourages alternative activity deemed in the public interest.” *Id.* (internal quotations and citations omitted). Indeed, the Supreme Court has recognized that “[t]he difficulty that a woman encounters when a Title X project does not provide abortion counseling or referral leaves her in no different position than she would have been if the Government had not enacted Title X.” *Id.* at 202. *Rust*’s reasoning is equally applicable to counter the district courts’ conclusions that the Final Rule is invalidated by § 1554. Title X is a limited grant program focused on providing pre-pregnancy family planning services—it does not fund medical care for pregnant women. The Final Rule can reasonably be viewed as a choice to subsidize certain medical services and not others.⁴

⁴ The preamble to § 1554 also suggests that this section was not intended to restrict HHS interpretations of provisions outside the ACA. If Congress intended § 1554 to have sweeping effects on all HHS regulations, even those unrelated to the ACA, it would have stated that § 1554 applies “notwithstanding any other provision of law,” rather than

III.

The district courts also held that the Final Rule likely violates the Administrative Procedure Act (APA)'s prohibition on "arbitrary and capricious" regulations. 5 U.S.C. § 706(2)(A). "'Arbitrary and capricious' review under the APA focuses on the reasonableness of an agency's decision-making process." *CHW W. Bay v. Thompson*, 246 F.3d 1218, 1223 (9th Cir. 2001) (emphasis in original). But "[t]he scope of review under the 'arbitrary and capricious' standard is narrow and a court is not to substitute its judgment for that of the agency." *Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). We think that is precisely what the district courts did.

To find that the Final Rule's enactment was arbitrary and capricious, the district courts generally ignored HHS's explanations, reasoning, and predictions whenever they disagreed with the policy conclusions that flowed therefrom.

For example, with respect to the physical separation requirement, the district courts ignored HHS's reasoning for its re-imposition of that requirement (which was approved by *Rust*): that physical separation would ensure that Title X funds are not used to subsidize abortions via co-location of Title X programs in abortion clinics. *See* 84 Fed. Reg. at 7763–68. HHS's reasoning included citation to data suggesting "that abortions are increasingly performed at sites that focus primarily on contraceptive and family

"[n]otwithstanding any other provision of this Act." *See, e.g., Andreiu v. Ashcroft*, 253 F.3d 477, 482 (9th Cir. 2001) (holding that the phrase "notwithstanding any other provision of law" in 8 U.S.C. § 1252(f)(2) meant that the provision "trumps any contrary provision elsewhere in the law").

planning services—sites that could be recipients of Title X funds.” *Id.* at 7765. Similarly, the district courts ignored HHS’s primary reasoning for prohibiting abortion counseling and referrals: that such restrictions are required by HHS’s reasonable reading of § 1008 (again, approved by *Rust*). *Id.* at 7746–47. Further, the district courts ignored HHS’s consideration of the effects that the Final Rule would likely have on the number of Title X providers, and credited Plaintiffs’ speculation that the Final Rule would “decimate” the Title X provider network, rather than HHS’s prediction—based on evidence cited in the administrative record—“that honoring statutory protections of conscience in Title X may increase the number of providers in the program,” by attracting new providers who were previously deterred from participating in the program by the former requirement to provide abortion referrals. *See id.* at 7780. Such predictive judgments “are entitled to particularly deferential review.” *Trout Unlimited v. Lohn*, 559 F.3d 946, 959 (9th Cir. 2009). With respect to the Final Rule’s definition of “advanced practice provider,” and its provision on whether family planning methods must be “medically approved,” HHS reasoned that these provisions would clarify subjects that had caused confusion in the past. 84 Fed. Reg. at 7727–28, 32. Although the district courts insist that HHS failed to consider that the Final Rule requires providers to violate medical ethics, HHS did consider and respond to comments arguing just that. *See id.* at 7724, 7748. HHS similarly considered the costs of compliance with the Final Rule. *Id.* at 7780.

In light of the narrow permissible scope of the district court’s review of HHS’s reasoning under the arbitrary and capricious standard, we conclude that HHS is likely to prevail on its argument that the district court erred in

concluding that the Final Rule's enactment violated the APA.⁵

IV.

The remaining factors also favor a stay pending appeal. HHS and the public at large are likely to suffer irreparable harm in the absence of a stay, which are comparatively greater than the harms Plaintiffs are likely to suffer.

Absent a stay, HHS will be forced to allow taxpayer dollars to be spent in a manner that it has concluded violates the law, as well as the Government's important policy interest (recognized by Congress in § 1008) in ensuring that taxpayer dollars do not go to fund or subsidize abortions. As the Supreme Court held in *Rust*, "the government may 'make a value judgment favoring childbirth over abortion, and . . . implement that judgment by the allocation of public funds,'" and by "declining to 'promote or encourage abortion.'" *Rust*, 500 U.S. at 193. Additionally, forcing HHS to wait until the conclusion of a potentially lengthy appeals process to implement the Final Rule will necessarily result in predictable administrative costs, and will beget significant uncertainty in the Title X program.

The harms that Plaintiffs would likely suffer if a stay is granted are comparatively minor. The main potential harms that Plaintiffs identify are based on their prediction that implementation of the Final Rule will cause an immediate

⁵ The district court in Washington also briefly stated that the Final Rule was likely invalid because it "violates the central purpose of Title X, which is to equalize access to comprehensive, evidence-based, and voluntary family planning." Washington Preliminary Injunction Order at 15. But this conclusion is foreclosed by the existence of § 1008, and by the Supreme Court's contrary finding in *Rust*.

and steep decline in the number of Title X providers. But these potential harms obviously rely on crediting Plaintiffs' predictions about the effect of implementing the Final Rule, over HHS's predictions that implementation of the final rule will have the *opposite* effect. As described above, we think that HHS's predictions—supported by reasoning and evidence in the record (84 Fed. Reg. at 7780)—is entitled to more deference than Plaintiffs' contrary predictions. While some Title X grantees will certainly incur financial costs associated with complying with the Final Rule if the preliminary injunctions are stayed, we think that harm is minor relative to the harms to the Government described above.

V.

Because HHS and the public interest would be irreparably harmed absent a stay, harms to Plaintiffs from a stay will be comparatively minor, and HHS is likely to prevail in its challenge of the preliminary injunction orders before a merits panel of this court (which is set to hear the cases on an expedited basis), we conclude that a stay of the district courts' preliminary injunction orders pending appeal is proper.

The motion for a stay pending appeal is **GRANTED**.

FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

JUL 3 2019

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

STATE OF CALIFORNIA, by and through
Attorney General Xavier Becerra,

Plaintiff-Appellee,

v.

ALEX M. AZAR II, in his Official Capacity
as Secretary of the U.S. Department of
Health & Human Services; U.S.
DEPARTMENT OF HEALTH & HUMAN
SERVICES,

Defendants-Appellants.

No. 19-15974

D.C. No. 3:19-cv-01184-EMC
Northern District of California,
San Francisco

ORDER

ESSENTIAL ACCESS HEALTH, INC.;
MELISSA MARSHALL, M.D.,

Plaintiffs-Appellees,

v.

ALEX M. AZAR II, Secretary of U.S.
Department of Health and Human Services;
UNITED STATES DEPARTMENT OF
HEALTH AND HUMAN SERVICES,

Defendants-Appellants.

No. 19-15979

D.C. No. 3:19-cv-01195-EMC

STATE OF OREGON; STATE OF NEW YORK; STATE OF COLORADO; STATE OF CONNECTICUT; STATE OF DELAWARE; DISTRICT OF COLUMBIA; STATE OF HAWAII; STATE OF ILLINOIS; STATE OF MARYLAND; COMMONWEALTH OF MASSACHUSETTS; STATE OF MICHIGAN; STATE OF MINNESOTA; STATE OF NEVADA; STATE OF NEW JERSEY; STATE OF NEW MEXICO; STATE OF NORTH CAROLINA; COMMONWEALTH OF PENNSYLVANIA; STATE OF RHODE ISLAND; STATE OF VERMONT; COMMONWEALTH OF VIRGINIA; STATE OF WISCONSIN; 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.; MICHELE P. MEGREGIAN, C.N.M.,

Plaintiffs-Appellees,

v.

ALEX M. AZAR II; UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; DIANE FOLEY; OFFICE OF POPULATION AFFAIRS,

Defendants-Appellants.

No. 19-35386

D.C. Nos. 6:19-cv-00317-MC
6:19-cv-00318-MC

STATE OF WASHINGTON; NATIONAL
FAMILY PLANNING AND
REPRODUCTIVE HEALTH
ASSOCIATION; FEMINIST WOMEN'S
HEALTH CENTER; DEBORAH OYER,
M.D.; TERESA GALL,

Plaintiffs-Appellees,

v.

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

Defendants-Appellants.

No. 19-35394

D.C. Nos. 1:19-cv-03040-SAB
1:19-cv-03045-SAB

THOMAS, Chief Judge:

Upon the vote of a majority of nonrecused active judges, it is ordered that these cases be reheard en banc pursuant to Federal Rule of Appellate Procedure 35(a) and Circuit Rule 35-3. The three-judge panel Order on Motions for Stay Pending Appeal in these cases shall not be cited as precedent by or to any court of the Ninth Circuit.

Judges Graber, Christen, and Owens did not participate in the deliberations or vote in these cases.

FILED

JUL 11 2019

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

STATE OF CALIFORNIA, by and
through Attorney General Xavier Becerra,

Plaintiff-Appellee,

v.

ALEX M. AZAR II, in his Official
Capacity as Secretary of the U.S.
Department of Health & Human Services;
U.S. DEPARTMENT OF HEALTH &
HUMAN SERVICES,

Defendants-Appellants.

Nos. 19-15974

D.C. No. 3:19-cv-01184-EMC
Northern District of California,
San Francisco

ORDER

ESSENTIAL ACCESS HEALTH, INC.;
MELISSA MARSHALL, M.D.,

Plaintiffs-Appellees,

v.

ALEX M. AZAR II, Secretary of U.S.
Department of Health and Human
Services; UNITED STATES
DEPARTMENT OF HEALTH AND
HUMAN SERVICES,

Defendants-Appellants.

Nos. 19-15979

D.C. No. 3:19-cv-01195-EMC
Northern District of California,
San Francisco

STATE OF OREGON; et al.,

Plaintiffs-Appellees,

v.

ALEX M. AZAR II; et al.,

Defendants-Appellants.

No. 19-35386

D.C. Nos. 6:19-cv-00317-MC
6:19-cv-00318-MC

District of Oregon,
Eugene

STATE OF WASHINGTON; et al.,

Plaintiffs-Appellees,

v.

ALEX M. AZAR II, in his official capacity
as Secretary of the United States
Department of Health and Human
Services; et al.,

Defendants-Appellants.

Nos. 19-35394

D.C. Nos. 1:19-cv-03040-SAB
1:19-cv-03045-SAB

Eastern District of Washington,
Yakima

Before: THOMAS, Chief Judge, and LEAVY, WARDLAW, W. FLETCHER, PAEZ, BYBEE, CALLAHAN, M. SMITH, JR., IKUTA, MILLER, AND LEE, Circuit Judges.

Pending before the en banc court are several emergency motions for an administrative stay of the three-judge panel order staying the district courts’

preliminary injunction orders. *See Oregon, et. al. v. Azar*, No. 19-35386 (Dkt. nos. 59 and 66); *Washington, et. al. v. Azar*, No. 19-35394 (Dkt. nos. 35, 37, and 40).

Pursuant to prior order of the Court upon granting reconsideration en banc, the three-judge panel Order on Motions for Stay Pending Appeal in these cases was ordered not be cited as precedent by or to any court of the Ninth Circuit. However, the order granting reconsideration en banc did not vacate the stay order itself, so it remains in effect. Thus, the motions for administrative stay remain pending and were not mooted by the grant of reconsideration en banc.

After due consideration of the emergency motions, the motions for administrative stay of the three-judge panel order are DENIED. The en banc court will proceed expeditiously to rehear and reconsider the merits of the Appellants' motions for stay of the district courts' preliminary injunction orders pending consideration of the appeals on the merits. Until further order of the Court, no further briefing is required of the parties for the en banc court's reconsideration of the three-judge panel order. The briefing schedule established for the merits appeal shall remain as originally ordered.

Chief Judge Thomas and Judges Wardlaw, W. Fletcher, and Paez would grant the motions for administrative stay and therefore respectfully dissent from this order.