IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

MAYOR AND CITY COUNCIL OF BALTIMORE, *Plaintiff*, v. ALEX M. AZAR II, in his official capacity as the Secretary of Health and Human Services; UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; DIANE FOLEY, M.D., in her official capacity as the Deputy Assistant Secretary, Office of Population Affairs; OFFICE OF POPULATION AFFAIRS, *Defendants*.	Case No. 1:19-cv-01103-RDB

MOTION FOR STAY OF JUDGMENT PENDING APPEAL

Pursuant to Federal Rule of Civil Procedure 62, Defendants respectfully move for a stay pending appeal of the Court's Order entering judgment in favor of Plaintiff and vacating and permanently enjoining the Final Rule titled Compliance with Statutory Program Integrity Requirements, 84 Fed. Reg. 7714 (Mar. 4, 2019) (Rule), in the State of Maryland. ECF No. 94, as clarified by ECF No. 99. At the very least, Defendants respectfully request that the Court stay the judgment insofar as it applies to those other than Plaintiff here, and stay the injunction with respect to the provisions of the Rule other than the abortion referral restrictions and the separation requirements. The reasons for this Motion are set forth in the accompanying Memorandum of Points and Authorities, the declaration filed herewith (*see* Exhibit A), and all previous filings in this action.

Dated: February 28, 2020

Respectfully submitted,

JOSEPH H. HUNT
Assistant Attorney General

MICHELLE R. BENNETT
Assistant Branch Director

/s/ R. Charlie Merritt
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CERTIFICATE OF SERVICE

I hereby certify that on February 28, 2020, I electronically filed the foregoing document using the CM/ECF system, which will send notification of such filing to the counsel of record in this matter who are registered on the CM/ECF system.

/s/ R. Charlie Merritt
R. CHARLIE MERRITT

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MAYOR AND CITY COUNCIL OF BALTIMORE, *Plaintiff*, v. ALEX M. AZAR II, in his official capacity as the Secretary of Health and Human Services; UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; DIANE FOLEY, M.D., in her official capacity as the Deputy Assistant Secretary, Office of Population Affairs; OFFICE OF POPULATION AFFAIRS, *Defendants*.	Case No. 1:19-cv-01103-RDB

DEFENDANTS' MEMORANDUM IN SUPPORT OF THEIR MOTION FOR STAY OF JUDGMENT PENDING APPEAL

INTRODUCTION

On February 14, 2020, the Court entered an order permanently enjoining Defendants from enforcing in the State of Maryland the Final Rule titled Compliance with Statutory Program Integrity Requirements, 84 Fed. Reg. 7714 (Mar. 4, 2019) (Rule). It later clarified that its judgment also vacated the Rule in the State of Maryland. Defendants respectfully request that the Court stay its judgment pending appeal because Defendants are likely to succeed on the merits of their appeal and will be irreparably harmed absent a stay.

Defendants are likely to succeed on the merits because the Supreme Court has already upheld materially indistinguishable regulations against the same challenges at issue here. *See Rust v. Sullivan*, 500 U.S. 173 (1991). Indeed, the en banc Ninth Circuit recently held as a matter of law that the Rule is reasonable, not arbitrary and capricious. *California v. Azar* (*California*), --- F.3d ---, 2020 WL 878528, at *9 (9th Cir. Feb. 24, 2020). The Ninth Circuit rejected each of the bases for the Court's judgment in this case. *Id*. at *20-*26. The court held that HHS adequately explained why the Rule did not violate medical ethics, *id*. at *23-*24, noting that the Rule's rationale is consistent with *Rust*'s reasoning, *id*. at *24 n.36. And the court determined that HHS adequately considered the compliance costs and reliance interests affected by the Rule. *See id*. at *22-*23.

The balance of harms also weighs in Defendants' favor. If the Court's judgment remains in place, it would require the Department of Health and Human Services (HHS) to expend taxpayer funds in a manner that the agency has concluded is contrary to Congress's express prohibition on the use of Title X funds in programs where abortion is a method of family planning. And the Court's order precludes HHS from enforcing the entire Rule within the State of Maryland—including provisions Plaintiff did not challenge and others that the Court's opinion did not

address—notwithstanding the Rule's express severability statement. Finally, although Defendants appreciate the Court's recognition of the many problems associated with nationwide injunctions, Defendants respectfully submit that the Court's injunction—which applies throughout the State of Maryland, even though Baltimore is the only Plaintiff here and the State of Maryland chose to litigate its claims in a separate action—is nonetheless overbroad.

Leaving the judgment in place pending appeal would also adversely affect the agency's ability to administer and oversee the Title X program, particularly given that the Rule is in effect in 49 other states and HHS will have to monitor compliance with differential regulatory requirements across different parts of the country. And without a stay, there will be significant uncertainty regarding the upcoming fiscal year 2020 awards. In contrast, Plaintiff will not be irreparably harmed by a stay. After the Rule went into effect, the Maryland Department of Health withdrew from the Title X program and, as a result, the City of Baltimore, which had previously been a subrecipient of the state grantee, does not currently participate in Title X. Baltimore is thus not harmed directly if the Rule continues to be effective, and any harms it has identified rest on a chain of alleged events that are speculative and not sufficiently imminent to counsel against a stay.

In all events, Defendants respectfully request that the Court rule on this motion expeditiously. If upon reviewing this motion the Court does not believe Defendants have met the requirements for a stay, Defendants request that the Court summarily deny the motion without awaiting a response from Plaintiff. Otherwise, the Government respectfully asks that the Court rule on the motion no later than March 6, 2020, at which time Defendants intend to seek relief in the Fourth Circuit.

BACKGROUND

Plaintiff filed its complaint on April 12, 2019, asserting ten claims for relief. Compl., ECF No. 1. Plaintiff moved for a preliminary injunction, and the Court granted that motion on May 30, ordering that the Rule is "enjoined as to enforcement in the State of Maryland." ECF No. 44. The government appealed and sought a stay of the preliminary injunction from this Court and the Fourth Circuit. This Court denied the government's motion, ECF No. 56, but a divided Fourth Circuit panel granted a stay of the Court's preliminary injunction pending appeal, *Mayor & City Council of Baltimore v. Azar*, 778 Fed. Appx. 212 (4th Cir. 2019). The appeal remains pending, and the Fourth Circuit panel assigned to the case heard oral argument on the merits of the government's appeal on September 18, 2019. That panel has not lifted the stay since then.

The Rule has also been challenged in federal district courts in Washington, Oregon, and California, each of which issued a preliminary injunction against the Rule.[1] A Ninth Circuit motions panel, however, stayed those injunctions pending appeal. *See California v. Azar*, 927 F.3d 1068 (9th Cir. 2019). Then, on February 24, 2020, the en banc Ninth Circuit vacated the injunctions and, invoking its "power 'to examine the merits of the case' and resolve the legal issue," decided the plaintiffs' statutory and Administrative Procedure Act (APA) claims on their merits in favor of the government. *See California*, 2020 WL 878528, at *9 (quoting *Munaf v. Green*, 553 U.S. 674, 691 (2008)).

On September 12, 2019, this Court granted in part and denied in part Defendants' motion to dismiss, concluding that Plaintiff had failed to state a claim with respect to Counts IV and X of its Complaint, but that the remaining claims could proceed to the merits. ECF No. 74. The parties

[1] A suit challenging the Rule is also pending in the District of Maine, where the court declined to issue preliminary injunctive relief, *see Family Planning Ass'n of Me. v. HHS*, 404 F. Supp. 3d 286 (D. Me. 2019), and the case is now proceeding on the merits.

subsequently cross-moved for summary judgment, and on February 14, 2020, the Court granted in part and denied in part those cross motions. As relevant here, the Court entered judgment in Plaintiff's favor as to Counts VII and VIII, concluding that HHS acted arbitrarily and capriciously in promulgating the Rule. Mem. Op., ECF No. 93 (SJ Opinion); Order, ECF No. 94 (SJ Order). The Court permanently enjoined Defendants from implementing or enforcing the Rule in the State of Maryland, effective immediately. *See* SJ Order. The Court later entered an order clarifying that its prior summary judgment opinion and order vacated the Rule in the State of Maryland. ECF No. 99. On February 24, 2020, Defendants filed a notice of appeal to the Fourth Circuit from the portions of the Court's memorandum opinion and order entering judgment in favor of Plaintiff and permanently enjoining the Rule. ECF No. 95.

ARGUMENT

A party may obtain a stay pending appeal if it shows both a probability of success on the merits and irreparable injury. *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987). That standard is met here because Defendants are likely to succeed on the merits and will be irreparably injured absent a stay.

I. DEFENDANTS ARE LIKELY TO PREVAIL ON THE MERITS

Defendants respectfully submit that, notwithstanding the Court's ruling and permanent injunction, the government is likely to succeed on the merits of its appeal. As Defendants explained in their summary judgment briefs (as well as their brief opposing Plaintiff's motion for a preliminary injunction and in moving to dismiss) and at oral argument, the Rule is not arbitrary and capricious because HHS acted rationally in adopting regulations implementing the best reading of § 1008. The Supreme Court already blessed that interpretation and upheld materially indistinguishable regulations against arbitrary-and-capricious challenges. In any event, HHS

thoroughly explained its reasoning, articulated a rational justification for the choices it made, and made reasonable predictions using its expertise. As the en banc Ninth Circuit recently held, "the [Rule] is not arbitrary and capricious as a matter of law." *California*, 2020 WL 878528, at *20 n.27. For the reasons explained in that opinion, Defendants' briefs, and below, the Court's contrary conclusion is unlikely to withstand appellate review.

1. The Court concluded that the Rule "is arbitrary and capricious, being inadequately justified and objectively unreasonable," relying heavily on the views of "the nation's major medical organizations" that the Rule violates medical ethics. SJ Opinion at 2, 21. But "*Rust* rejected ethical arguments similar to those raised here," *California*, 2020 WL 878528, at *24 n.36, as Defendants have previously explained. *See, e.g.*, Mem. in Opp'n to Pl.'s Mot. for Summ. J & in Supp. of Defs.' Cross Mot. for Summ. J. at 20-21, ECF No. 83 (Defs.' MSJ).

In any event, it is not the case that "HHS's entire justification for disagreement with the comments regarding medical ethics is that *Rust* would not have upheld similar regulations if they were inconsistent with medical ethics." SJ Opinion at 20. Rather, the agency expressly addressed Plaintiff's concerns in the preamble and explained why, properly construed, the Rule "would not result in ethical violations.'" *California*, 2020 WL 878528, at *24 (quoting 84 Fed. Reg. at 7724); *see also* Defs.' MSJ at 13; 84 Fed. Reg. at 7724, 7748. Noting that "medical ethics obligations require the medical professional to share full and accurate information with the patient, in response to her specific medical condition and circumstance," HHS explained that under the Rule, physicians "may provide nondirective pregnancy counseling to pregnant Title X clients on the patient's pregnancy options, including abortion," and may "discuss the risks and side effects of each option, so long as this counsel in no way promotes or refers for abortion as a method of family planning." 84 Fed. Reg. at 7724. Moreover, the Rule "permits the patient to ask questions and to

have those questions answered by a medical professional." *Id*. HHS also noted that "where care is medically necessary, referral for that care is required, notwithstanding the [Rule's] other requirements," *California*, 2020 WL 878528, at *24 (citing 84 Fed. Reg. at 7724), and explained how its conclusion regarding medical ethics was consistent not only with *Rust* but with other Supreme Court decisions and other legal authorities. *See* Defs.' MSJ at 13; Defs.' Reply in Supp. of Mot. for Summ. J at 9-10, ECF No. 90 (Defs.' Reply).

Indeed, if Plaintiff's view of medical ethics were correct, it is unclear why Congress and many States have excluded abortion referrals in variously publicly funded programs. *See, e.g.*, 42 U.S.C. § 300z-10(a); Ark. Code § 20-16-1602; Cal. Health & Safety Code § 124180(b); Mich. Stat. § 390.1595 sec. 5(1)(e); Minn. Stat. § 145.925 subd. 1a; Ohio Rev. Code § 3701.046; 72 Pa. Stat. §§ 1702-D, 1703-D; 42 R.I. Gen. Laws § 42-12.3-3(b); Va. Code § 32.1-325.A.7; Wis. Stat. § 253.07; *see also California*, 2020 WL 878528, at *24 n.34 (noting that "abortion … raise[s] controversial ethical questions, as demonstrated by (among other things) the continued enactment of federal conscience laws and public comments urging HHS to protect physicians' ability to decline to counsel on or refer for abortion" (citing 84 Fed. Reg. at 7746-47)). And the overwhelming majority of Title X providers have remained in the program after the Rule went into effect, which is compelling real-world evidence that these providers recognize that the Rule is consistent with their ethical obligations. *See, e.g.*, HHS Issues Supplemental Grant Awards to Title X Recipients (Sept. 30, 2019), https://www.hhs.gov/about/news/2019/09/30/hhs-issues-supplemental-grant-awards-to-title-x-recipients.html; *see also California*, 2020 WL 878528, at *22 n.30 (observing that "some grantees, such as Planned Parenthood, have voluntarily terminated their participation in Title X," but that "HHS has issued supplemental grant awards to other Title

X recipients that, in HHS's estimation, 'will enable grantees to come close to—if not in excess of—prior Title X patient coverage'" (brackets omitted)).

In light of HHS's explanation, the Court erred in concluding that HHS did not "provide a reasoned basis for its disagreement with the medical ethics concerns outlined by the nation's major medical organizations." SJ Opinion at 21. Rather, "HHS specifically addressed those concerns," "examined the relevant considerations," and "rationally articulated an explanation for its conclusions." *California*, 2020 WL 878528, at *24. This is all the APA requires. But while the Court correctly recognized that "HHS was not required to demonstrate that any professional organization supported the Rule," *id.* at 21, it faulted HHS for failing to do just that and, in the process, impermissibly substituted the judgment of the medical organizations that opposed the Rule for that of HHS. The APA does not require an agency to defer to the views of any particular commenter on any topic over the conclusions drawn by the agency itself. *See*, *e.g.*, *California*, 2020 WL 878528, at *23 (rejecting argument that HHS acted arbitrarily and capriciously in "rely[ing] on its own predictions" and "reject[ing] those submitted by commenters opposing the [Rule]"); *id*. at *23 n.31 ("HHS may reasonably decide not to rely on the opinions of outside commenters, even where they claim expertise."). Rather, under the APA's deferential standard, it is sufficient that an agency considers significant comments and provides a reasoned response, which HHS did here. *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1203 (2015). Defendants respectfully submit that, in focusing its analysis on whether HHS cited any "code of medical ethics, any medical organization, or any medical provider" to support its conclusion, SJ Opinion at 21, the Court improperly applied the APA standard of review and that its conclusion is unlikely to withstand appellate review. *See California*, 2020 WL 878528, at *24-25.

2. The Court also erred in concluding that the Rule is arbitrary and capricious because HHS "did not account for reliance interests," noting that several commenters raised concerns that the Rule would "force a large number of providers out of the Title X program." SJ Opinion at 22. But as Defendants have explained, HHS took these concerns into account and responded to them. *See* Defs.' MSJ at 23; Defs.' Reply at 10-11. In short, HHS exercised its expert judgment to project that, while any calculation of future program participation would be inherently speculative, it did not ultimately anticipate "a decrease in the overall number of facilities offering services." 84 Fed. Reg. at 7782. As the Ninth Circuit made clear, this is a judgment HHS was entitled to make and to which the Court should defer:

> HHS's predictive judgments about the Final Rule's effect on the availability of Title X services are entitled to deference. *See Trout Unlimited v. Lohn*, 559 F.3d 946, 959 (9th Cir. 2009). Here, the predictions concern matters squarely within HHS's "field of discretion and expertise." *BNSF Ry. Co. v. Surface Transp. Bd.*, 526 F.3d 770, 781 (D.C. Cir. 2008) (quoting *Wis. Pub. Power v. FERC*, 493 F.3d a239, 260 (D.C. Cir. 2007)). As the agency tasked with implementing the grant program, HHS is in the best position to anticipate the behavior of grantees and prospective grantees. HHS reasonably considered the evidence before it, where "complete factual support" for any prediction was "not possible or required," *FCC v. Nat'l Citizens Comm. for Broad.*, 436 U.S. 775 (1978), such that its decision "remained 'within the bounds of reasoned decisionmaking,'" *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2569 (2019) (quoting *Baltimore Gas & Elec. Co. v. Nat. Res. Def. Council, Inc.*, 462 U.S. 87, 105 (1983)). Although the commenters opposing the Final Rule provided numerous expert declarations elaborating their gloomy assumptions about the future behavior and activities of current and future Title X grantees, at bottom such future-looking "pessimistic" predictions and assumptions are "simply evidence for the [agency] to consider," *Dep't of Commerce*, 139 S. Ct. at 2571, and are not entitled to controlling weight. HHS need not produce "some special justification for drawing [its] own inferences and adopting [its] own assumptions." *Id*. Although plaintiffs . . . have reached a different conclusion, we consider only whether the agency examined the relevant considerations and laid a reasonably discernable path.

California, 2020 WL 878528, at *23.

Additionally, Title X grants are awarded in one year increments, 42 C.F.R. § 59.8(b), and neither Plaintiff nor the Court cited any authority for the novel proposition that the APA requires

an agency administering a competitive grant program subject to discretionary funding to catalog future prospective applicants for that program. Indeed, the concerns related to some grantees departing from the Title X program were also raised in *Rust*, but the Supreme Court did not permit those grantees to assert what would be tantamount to a veto power over the agency's reasoned policy judgment in promulgating an extremely similar regulation. *See* Planned Parenthood Amicus Brief at 14 n.45, *Rust* (No. 89-1391), 1990 WL 10012649 (arguing that "[s]ince many providers will not accept Title X funds under the unethical restrictions imposed by the regulations, they will be forced to close or drastically curtail services, depriving poor women of their sole source of family planning services."). And in any event, HHS concluded that "compliance with statutory program integrity provisions is of greater importance" than the "cost" of departing from the status quo, 84 Fed. Reg. at 7783, and the Court provided no basis to second-guess that policy judgment under the APA.

3. The Court's final basis for concluding that the Rule is arbitrary and capricious is that HHS "did not adequately consider the likely costs of the physical separation requirement," crediting the predictions of Plaintiff and some commenters that such costs would "far exceed[] HHS's estimate" SJ Opinion at 24. As Defendants have explained, however, vacating the entire Rule based on challenges to HHS cost estimates in an area of acknowledged uncertainty is inconsistent with the Court's role in reviewing agency action under the APA standard. Defs.' MSJ at 24; Defs.' Reply at 11-12. The principle "that a court is not to substitute its judgment for that of the agency" is "especially true when the agency is called upon to weigh the costs and benefits of alternative policies." *Consumer Elecs. Ass'n v. FCC*, 347 F.2d 291, 303 (D.C. Cir. 2003). In promulgating the Rule, HHS reasonably relied on the available data and considered concerns about the cost of compliance with the separation requirement. *See* 84 Fed. Reg. at 7781 (pointing to data

from the Congressional Research Service, and explaining that commenters "contend that the department underestimated the costs related to the new physical separation requirements, but themselves did not provide sufficient data to estimate these effects across the Title X program"). "HHS was not required to accept the commenters' 'pessimistic' cost predictions," *California*, 2020 WL 878528, at *23, and reasonably concluded, as it was entitled to do, that "providers would tend to seek out lower cost options, such as shifting abortion services to distinct facilities rather than constructing new ones," *id*. (citing 84 Fed. Reg. at 7781-82).

HHS's weighing of these costs was not arbitrary and capricious. This Court relied in part on a court in the Northern District of California's conclusion that the Rule is arbitrary and capricious, *see* SJ Opinion at 25 (quoting *California v. Azar*, 385 F. Supp. 3d 960, 1010 (N.D. Cal. 2019), for the proposition that HHS's analysis "flies in the face of established APA principles"), but, as explained, the Ninth Circuit sitting en banc reversed that determination as a matter of law. Defendants respectfully submit that the Fourth Circuit is likely to concur with the en banc Ninth Circuit, which recognized its obligation under the APA to "give substantial deference to such predictive judgments within the scope of HHS's expertise" and declined to "second-guess HHS's consideration of the risks and benefits of its action," *California*, 2020 WL 878528, at *23.

4. Finally, even putting aside the points above, Defendants are likely to succeed in their arguments that the Court's judgment is overbroad in at least two respects. First, although the Court's analysis was limited to the abortion referral and counseling provisions and separation requirements, the Court vacated and enjoined the entire Rule—including provisions Plaintiff did not challenge and others that the Court's opinion did not address—notwithstanding the Rule's express severability statement. Defendants respectfully submit that the Court's summary conclusion that it was "unable to delineate which remaining provisions could or should survive,"

SJ Opinion at 36, is insufficient to justify invalidation of the entire Rule, including the many portions that do not either reference the referral, counseling, and separation provisions or "include language similar to that used in those provisions," *id.*; *see, e.g.*, 42 C.F.R. § 59.17 (requiring that Title X projects comply with state and local laws that mandate notification or reporting of sexual abuse).

Second, consistent with the Court's discussion about the problems associated with nationwide injunctions, *see, e.g.*, SJ Opinion at 26 n.8, Defendants respectfully submit that an injunction applying throughout the State of Maryland is overbroad. Under Article III, a court's "constitutionally prescribed role is to vindicate the individual rights of the people appearing before it" and thus "[a] plaintiff's remedy must be tailored to redress the plaintiff's particular injury." *Gill v. Whitford*, 138 S. Ct. 1916, 1933-34 (2018). Equitable principles likewise require that an injunction "be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 765 (1994). As applied to this case, a judgment vacating and enjoining the Rule only with respect to the City of Baltimore would be sufficient to provide complete relief to the City. That is particularly true where, as here, the State of Maryland has chosen to litigate its claims against the Rule in a separate action which, as discussed above, it has now lost in the Ninth Circuit. *See* No. 6:19-cv-00317-MC (D. Ore.); *California*, 2020 WL 878528. This Court's state-wide injunction in Maryland in effect grants the State the relief that the Ninth Circuit decided it could not obtain. At the very least, principles of comity counsel in favor of a stay pending Defendants' appeal to the Fourth Circuit.

For all the reasons above, and for the reasons stated in Defendants' briefing, Defendants are likely to prevail on the merits of their appeal.

II. HHS AND THE PUBLIC WILL BE IRREPARABLY INJURED ABSENT A STAY

HHS, the public at large, and Title X grantees will be irreparably harmed if the Court's judgment is not stayed. The federal government, of course, suffers harm in the form of irreparable injury if it "is enjoined by a court from effectuating statutes enacted by representatives of its people." *Maryland v. King*, 567 U.S. 1301 (2012) (Roberts, C.J., in chambers) (citation omitted). Here, that harm is particularly acute because the Supreme Court has already upheld the government's construction of a statute now reflected in a regulation that the Court has vacated and enjoined. The government also has a weighty interest in declining to promote abortion through taxpayer funds, *see, e.g.*, *Rust*, 500 U.S. at 192-93, particularly when the Supreme Court has already upheld HHS's judgment that certain activities would do so (in violation of law), and sanctioned the remedial steps that HHS has proposed to ensure that taxpayer dollars are not being used for that purpose.

The government and Title X grantees will also be harmed if the judgment is not stayed because the Court's order will cause confusion as to what applicants will be eligible for Title X funds and a delay in the time it takes to issue program awards. Decl. of David Johnson ¶ 6 (Johnson Decl.). This, in turn, will lead to a delay in the provision of Title X services, including in unserved and underserved areas. *Id.* Moreover, potential Title X grantees may be deterred from entering the program now that this Court has effectively reinstated the 2000 regulations, *cf. Obria Grp., Inc. v. HHS*, No. 19-905 (C.D. Cal.). The government and grantees will also be harmed in the absence of a stay because the Court's judgment creates confusion and a significant disruption with respect to HHS's ongoing monitoring and oversight efforts. *See* Johnson Decl. ¶ 8. This is particularly true given that the Rule has now been in effect since July 2019 and remains in effect in 49 states and the territories. *Id*. ¶¶ 7-8. Now that two different sets of regulations are in place—

the 2000 regulations in Maryland, the Rule in the rest of the country—OPA will need to duplicate its scarce resources to adequately train its staff to monitor Title X compliance under these differential regimes. *Id.* ¶ 8. This is in addition to the resources OPA has already devoted towards implementing the Rule and ensuring compliance over the last seven months that is has been in effect nationwide. *Id.* ¶ 7. Keeping the judgment in place, therefore, would harm the government because it prevents the effective administration of the Title X program in Maryland and across the country.

The balance of harm also weighs in favor of a stay because of the judgment's overly broad scope (discussed above). Many aspects of the Rule are not at issue in this litigation, including, but not limited to, section 59.5(a)(13), which allows the agency to collect information on grantees and subrecipients in order to aid oversight; and section 59.17, which requires grantees to provide documentation demonstrating compliance with state reporting and notification laws regarding the abuse of minors, as well as the implementation of protocols to ensure minors are aware of ways to resist sexual coercion. *Id.* ¶¶ 10-11. The Court nonetheless enjoined all of these ancillary portions of the Rule despite the agency's clear statement that "[t]o the extent a court may enjoin any part of the rule, the Department intends that other provisions or parts of provisions should remain in effect." 84 Fed. Reg. at 7725. Absent a stay, neither the government nor the public will benefit from these and other aspects of the Rule.

On the other side of the scale, Plaintiff will not suffer any imminent irreparable injury for the reasons explained in Defendants' brief opposing Plaintiff's preliminary injunction motion and in Defendants' prior motion to stay the Court's preliminary injunction pending appeal. *See* Defs.' Mem. in Opp'n to Pl.'s Mot. for Prelim. Inj. at 40-42, ECF No. 25 (PI Opp'n); Defs.' Mem. in Support of Mot. for Stay of Injunction Pending Appeal at 11, ECF No. 49-1. Plaintiff's predictions

of harm assume that the Rule is unlawful and depend on a number of uncertain events. *See* PI Opp'n at 40-42. Indeed, the chain of events connecting the funding conditions at issue in the Rule and harm to the City of Baltimore has become even more attenuated now that the Maryland Department of Health, and thus Baltimore as a subrecipient, has chosen to withdraw from the Title X program and no longer receive funds. *See* Johnson Decl. ¶ 3. As the Fourth Circuit necessarily concluded in granting the government's motion to stay this Court's preliminary injunction pending appeal, Plaintiff is not suffering a harm as a result of the Rule remaining in effect that would justify injunctive relief during the pendency of these proceedings.

III. REQUEST FOR AN EXPEDITED RULING ON THIS MOTION

For all of these reasons, Defendants believe that judgment should not have been entered against the government and thus that this stay motion should be granted. Given the Court's summary judgment opinion, however, Defendants recognize that the Court may disagree. Every day that this judgment (which in light of the Ninth Circuit's recent ruling is now the only injunction in effect against the Rule) remains in place taxpayer funds are being spent for programs where abortion is a method of family planning, contrary to the best reading of Congress's express directive in § 1008—and the agency is stymied from implementing a judgment that the Supreme Court has expressly held is permissible.

Given these circumstances, Defendants asked the district courts that preliminarily enjoined the Rule to decide Defendants' stay motions expeditiously, including in this case. *See* ECF No. 49. Defendants repeat that request with respect to the Court's judgment here. If the Court, upon reviewing this motion, concludes that a stay is inappropriate, Defendants respectfully ask that the Court summarily deny the motion without awaiting a response from Plaintiff, so that Defendants can seek relief from the Fourth Circuit expeditiously. In any event, Defendants respectfully

request a ruling on this motion no later than March 6, 2020, at which time Defendants intend to seek relief in the Fourth Circuit.

CONCLUSION

For the foregoing reasons, and for all the reasons stated in Defendants' summary judgment briefing and its briefs seeking dismissal of the case and opposing Plaintiff's motion for a preliminary injunction, the Court should stay its judgment pending final resolution of Defendants' appeal. In any event, Defendants respectfully request that the Court rule on this motion as soon as possible, and no later than March 6, 2020.

Dated: February 28, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 28, 2020, I electronically filed the foregoing document using the CM/ECF system, which will send notification of such filing to the counsel of record in this matter who are registered on the CM/ECF system.

/s/ R. Charlie Merritt
R. Charlie Merritt

Exhibit A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

MAYOR AND CITY COUNCIL OF BALTIMORE, *Plaintiff,* v. ALEX M. AZAR II, in his official capacity as the Secretary of Health and Human Services; UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; DIANE FOLEY, M.D., in her official capacity as the Deputy Assistant Secretary, Office of Population Affairs; OFFICE OF POPULATION AFFAIRS, *Defendants.*	Case No. 1:19-cv-01103-RDB

DECLARATION OF DAVID JOHNSON

I, David Johnson, declare as follows:

1. I am the Deputy Director for the Office of Populations Affairs (OPA), Department of Health and Human Services (DHHS), and I have served in that capacity since June 10, 2019. Prior to that, I served as the Operations and Management Officer for OPA, beginning on August 7, 2016. In both of these roles, my duties include oversight of Office of Population Affairs' (OPA) budget and organizational policies and procedures for the office. Additionally, I am responsible for the administrative oversight of the Title X grant program including providing guidance to grantees on program requirements.

2. The permanent injunction that is currently in place enjoining implementation and enforcement of the March 4, 2019 rule at issue in this litigation (the Rule) in Maryland will result in uncertainty and administrative burdens on both OPA and the one grantee in the State.

3. The Maryland Department of Health was one of two grantees in the state of Maryland when the Rule went into effect. The Maryland Department of Health relinquished its Title X grant as of September 3, 2019. Baltimore City was a subrecipient of that grant. Therefore, Baltimore County is no longer a recipient of Title X funds, is currently not part of the Title X program, and is not subject to the Rule's requirements.

4. On September 30, 2019, OPA issued a supplemental grant award to the other grantee in the state of Maryland, Community Clinic, Inc. (CCI). Supplemental funds were awarded to CCI to increase services in Maryland.

5. CCI does not have co-located abortion facilities.

6. If it is not stayed, the injunction will cause significant uncertainty regarding the fiscal year 2020 awards. OPA plans to award approximately $18,000,000 in Title X funds to areas that are currently unserved and/or underserved by the Title X network. The uncertainty will cause a delay in the time it takes to issue these awards and confusion as to which applicants will be eligible—especially if the injunction is eventually stayed. And, the delay in the time it takes to issue these awards also means that there will be a delay in the provision of Title X services to these unserved and/or underserved areas.

7. Relying, in significant part, on decisions from the Fourth and Ninth Circuits, OPA devoted significant resources to implementing the Rule in the last seven months. These efforts included issuing guidance documents, FAQs, and sample compliance plans to grantees. https://www.hhs.gov/opa/title-x-family-planning/about-title-x-grants/statutes-and-regulations/compliance-with-statutory-program-integrity-requirements/index.html. OPA also devoted resources to providing technical assistance to individual grantees to help them to come into compliance with the Rule.

8. Additionally, the injunction creates uncertainty with respect to ongoing monitoring and oversight. The 2019 rule is currently in effect in 49 states, as well as in the territories. OPA staff are trained to provide oversight and monitoring to grantees with respect to the 2019 rules. OPA will need to duplicate scarce resources to train staff to monitor Title X compliance in one state, Maryland, under the 2000 rules, while at the same time monitoring Title X compliance in the rest of the country, which operates under the 2019 rules.

9. Under the 2000 instead of the 2019 regulations, OPA will be funding programs where there are referrals for abortion and where there is not physical separation or the new financial separation as required in the 2019 rules, contrary to the agency's interpretation of section 1008. And the longer the injunction remains in place, the more funds could be spent in this manner.

10. Part of the regulation, § 59.5(a)(13), allows the agency to systematically collect information on grantees and subrecipients in order to better make administrative and fiscal plans and ensure proper oversight. Not having this information with respect to all grantees, will make it difficult to compare performance across grantees. Additionally, it will be harder for the agency to ensure that Title X beneficiaries across geographic areas are getting the proper distribution of scarce resources.

11. Another section, § 59.17, requires grantees to provide the agency appropriate documentation demonstrating compliance with state reporting and notification laws regarding the abuse of minors. Additionally, it requires grantees to provide a plan, annual training, and protocols to ensure minors are aware of ways to resist sexual coercion. While the injunction is in place, the agency will not have the ability to fully enforce Maryland's compliance with this new provision.

12. Finally, to ensure that Title X funds are not used to build infrastructure for prohibited purposes, § 59.18 requires grantees to provide a detailed plan or accounting for the use of grant dollars, both in their applications and in annual reporting, and to seek prior approval for any significant changes in the use of grant dollars. While the injunction is in place, the agency will not have the ability to fully enforce Maryland's compliance with this new provision.

13. This declaration highlights OPA's salient concerns regarding the effects of the Court's injunction. It does not, however, represent all of my knowledge on this topic.

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Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury under the laws of the United States that the foregoing declaration is true and correct to the best of my knowledge, information, and belief.

Executed on February 27, 2019, in Rockville, Maryland