No. 20-1215

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

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAYRLAND

REPLY IN SUPPORT OF MOTION FOR STAY PENDING APPEAL

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SUMMARY

Baltimore's opposition brief confirms that its arbitrary-and-capricious claims are mere disagreements with the predictions and policy conclusions of the Department of Health and Human Services (HHS). And Baltimore does not and cannot dispute the black-letter law that a district court may not second-guess the agency's judgment under the APA. Accordingly, because the agency adequately considered medical ethics, reliance interests, and compliance costs, and explained its basis for the Rule with "reasoned decisionmaking," the Rule is valid, as the en banc Ninth Circuit recently held. *California ex rel. Becerra v. Azar*, Nos. 19-15974 et al., 2020 WL 878528, at *21-25 (9th Cir. Feb. 24, 2020) (quotation marks omitted).

Moreover, having previously granted a stay of the district court's preliminary injunction against the Rule, a panel of this Court has already recognized that the equities favor a stay. Now that the Rule has gone into effect in Maryland and throughout the country without dire consequences, and Baltimore no longer participates in the Title X program, the balance of the equities tilts even more heavily in the government's favor.

Finally, Baltimore makes little attempt to defend the district court's grant of relief against the entire Rule within the State of Maryland. At a minimum, this Court should stay the district court's ruling insofar as it applies to provisions in the Rule that are wholly unrelated to the challenged ones, and insofar as it grants relief outside Baltimore.

ARGUMENT

Baltimore fails to explain how the same (or less restrictive) requirements and rationale upheld in *Rust v. Sullivan*, 500 U.S. 173 (1991), are now arbitrary and capricious. As explained in the government's motion and in the en banc Ninth Circuit's decision rejecting the same challenges, HHS specifically considered each of the arguments raised, explained its reasoning, and simply reached a different judgment than Baltimore and certain other commenters would have. Baltimore offers no objection that would justify setting aside the Rule.

I. The Government Is Likely To Succeed On The Merits.

A. Baltimore continues (at 10-14) to press its claim that HHS acted arbitrarily and capriciously because several medical organizations "told HHS that the Rule would violate medical ethics" and HHS failed to support its contrary conclusion with support from a medical organization or "individual physician" (ignoring that one of the named defendants is Dr. Diane Foley). But as the district court acknowledged, "HHS was not required to demonstrate that any professional organization supported the Rule." *Mayor & City Council of Baltimore v. Azar*, No. 19-1103, 2020 WL 758145, at *10 (D. Md. Feb. 14, 2020). The views of certain professional groups—without authority to regulate medical ethics—are only one part of the agency's consideration. And, when a professional group raises a concern about an issue, the APA does not require the agency to identify a similar professional group with a countervailing view that supports the

agency's position. That is particularly true when the agency instead relies on the determinations of the Supreme Court, Congress, and the States that declining to refer for abortions does not violate medical ethics. *Cf. Gonzales v. Carhart*, 550 U.S. 124, 166 (2007) (declining to "strike down legitimate abortion regulations" simply because "some part of the medical community were disinclined to follow" them).

Baltimore improperly discounts the Supreme Court's decision in *Rust* that an even stricter restriction on counseling did not "significantly impinge upon the doctor-patient relationship," given the limited nature of the federally funded Title X program. 500 U.S. at 200; *see California*, 2020 WL 878528, at *24 n.36. Contrary to Baltimore's suggestion (at 12-13), that conclusion was not somehow limited to the Fifth Amendment claim in that case, nor is it otherwise irrelevant. The dissent in *Rust* argued—just like Baltimore does here—that HHS's regulations violated "the ethical responsibilities of the medical profession," *see* 500 U.S. at 213-14 (Blackmun, J., dissenting), and the *Rust* majority squarely rejected those contentions. As the Ninth Circuit thus correctly held, HHS's reaffirmation of *Rust*'s conclusion cannot be arbitrary and capricious—especially since, unlike in *Rust*, the Rule allows a provider to provide nondirective counseling about abortion. *See California*, 2020 WL 878528, at *24 Moreover, HHS also reasonably relied on federal and state conscience laws that allow physicians to abstain from referring patients for abortion—physicians who presumably do not think that they are violating medical ethics in doing so—as evidence that

providers do not need to make abortion referrals to be ethical. *See* 84 Fed. Reg 7714, 7716, 7746-48, 7780-81 (Mar. 4, 2019); *California*, 2020 WL 878528, at *24 n.34.

The contrary view of Baltimore's preferred medical organizations is nothing more than *ipse dixit*. No medical code or other authority states that compliance with restrictions on abortion referrals in the context of a federally-funded prenatal family planning program is unethical. *Cf. California*, 2020 WL 878528, at *14 (noting no specific support for this asserted ethical rule in the American Medical Association's *Code of Medical Ethics*). Nor has Baltimore substantiated its remarkable claim (at 13-14) that Congress and the States have not only permitted but have required doctors to violate medical ethics. And Baltimore has no response (at 11-14) to the argument that not one medical provider has been disciplined for failing to refer for an abortion as part of such a program. Perhaps most significantly, Baltimore does not dispute that a majority of incumbent Title X providers today have continued in the program after the Rule went into effect. And it has provided no support for its bald assertion (at 14) that those providers are clearly violating medical ethics.

B. Baltimore's objections to HHS's reasoning regarding the Rule's effects and costs are also illusory. Baltimore asserts (at 17) that HHS "included no discussion whatsoever of the evidence before the agency," (emphasis omitted), but does not specify what evidence it is referring to other than commenters' statements that

providers would withdraw from the program. As the Ninth Circuit explained, HHS specifically addressed those comments. *See California*, 2020 WL 878528, at *22-23.

Similarly, Baltimore presses the argument that HHS unreasonably discounted commenters' predictions that the Rule would impair the quality or accessibility of Title X services. *See* Opp. 14-16 (objecting to HHS's statement that "commenters did not provide evidence" that the program's services would suffer). HHS considered the contentions of some commenters that certain existing providers would withdraw, but HHS reasonably concluded that comments about the Rule's potential effects on *a subset of* the existing Title X provider network did not establish that the Rule would reduce Title X services *as a whole*. Instead, HHS explained that certain providers had been deterred from applying for grants because of the 2000 regulations' requirement that they provide abortion counseling and referrals. *See* 84 Fed. Reg. at 7766, 7780-82. The Rule's net effect on Title X services would therefore depend on how many new providers would join the program and how existing providers would expand their services, and HHS did not "anticipate that there will be a decrease in the overall number of facilities offering services," *id.* at 7782.

As the Ninth Circuit explained, HHS's predictive judgment about the effects on the Title X network is "squarely within HHS's field of discretion and expertise" and therefore entitled to "particularly deferential review," *California*, 2020 WL 878528, at *23 & n.29 (quotation marks omitted). And HHS's judgment has also borne out:

following the departure of some providers from the program, "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." *Id.* at *22 n.30 (cleaned up).

The same deference is due to HHS's prediction of the physical-separation requirement's costs. *See California*, 2020 WL 878528, at *23. Relying in part on a Congressional Research Service report that estimated that 10% of clinics receiving Title X funding offered abortion as a method of family planning, HHS reasonably determined that only 10 to 20% of existing grantee facilities would need to change their operations to comply with the requirement, and that most of those could choose low-cost options such as shifting abortion services to other existing facilities. *See id.* at *22-23 & n.32; 84 Fed. Reg. at 7781-82. On average, it predicted such changes would cost between $20,000 and $40,000, and taking the average of $30,000, estimated a total cost of $36.08 million. 84 Fed. Reg. at 7781-82. Contrary to Baltimore's assertions, "HHS was not required to accept the commenters' 'pessimistic' cost predictions." *California*, 2020 WL 878528, at *23.

Baltimore mistakenly asserts (at 17-18) that the real number of non-compliant facilities was 100%. Its only support for that proposition is that all providers were making abortion referrals before the Rule took effect. But that was true only because the 2000 regulations required providers to make abortion referrals, even if they

otherwise would not have. The Rule changed that, requiring instead that providers refrain from doing so. A provider that continues making abortion referrals as part of its Title X services would have to withdraw from the Title X program entirely, so HHS reasonably calculated only the physical-separation costs incurred by providers who would choose to remain in the program.

D. In sum, Baltimore seeks to replace HHS's judgment with its own. The Ninth Circuit's thorough analysis explains why the Rule is reasonable. Contrary to Baltimore's unsubstantiated assertions (at 22), the Ninth Circuit carefully considered HHS's rationale regarding medical ethics and the Rule's costs and effect on services, and concluded that HHS had adequately considered and explained its decision. *See id.* at *20-26.

Baltimore attempts (at 21) to discount that decision on the ground that the Ninth Circuit lacked the entire administrative record. But as the Ninth Circuit emphasized, all of the critical facts are publicly available, including the public comments and passages from the Rule Baltimore cites here. *See California*, 2020 WL 878528, at *10 n.11. And like the plaintiffs in the Ninth Circuit, Baltimore does not "identify additional arguments that could [have been] made" to that court "after submission of the full record." *Id.*

II. The Remaining Factors Favor A Stay.

A. At the outset, Baltimore erroneously argues (at 1, 6) that granting a stay here would be unprecedented or, alternatively, that this Court imposes a heightened standard for granting a stay of a permanent injunction. Nothing bars this Court from staying a permanent injunction pending appeal, as courts do routinely. *See, e.g.*, *Trump v. Sierra Club*, 140 S. Ct. 1 (2019) (permanent injunction of certain border barrier construction); *E. I. Dupont De Nemours & Co. v. Kolon Indus. Inc.*, No. 12-1260, 2012 WL 4335968 (4th Cir. Sept. 21, 2012) (permanent injunction in a trade secret case). Moreover, Baltimore has identified no authority suggesting that the standard for granting a stay should apply differently here. Indeed, the only case that Baltimore cites (at 6) does not identify any difference between the standard for a stay of a permanent injunction and that for a stay of a preliminary injunction at all; instead, that case merely noted that the standard for granting a preliminary injunction was, at the time, more "lenient" than the standard "governing motions for stays pending appeal." *Blackwelder Furniture Co. of Statesville v. Seilig Mfg. Co.*, 550 F.2d 189, 197 (4th Cir. 1977). And the Supreme Court's articulation of the standard for granting a stay pending appeal does not differentiate in any way based on the particular type of order under review. *See Nken v. Holder*, 556 U.S. 418, 426-27, 433-36 (2009).

As a panel of this Court has determined in granting a previous stay, HHS's irreparable harm outweighs any harm that Baltimore alleges. *See* Order, *Mayor and City*

Council of Baltimore v. Azar, 778 F. App'x 212 (4th Cir. 2019). Baltimore does not meaningfully contend that any of the equities have changed in its favor. Instead, Baltimore dismisses the harms to the government and the public interest in enjoining the Rule as "minor inconveniences," Opp. 23-25, contrary to this Court's prior decision.

As this Court has recognized, the harms arising from the district court's injunction are severe: the injunction will disrupt the Title X program, create confusion among potential grantees, and delay HHS's ability to disburse grants to areas in need. Moreover, the injunction will cause HHS to disburse taxpayer funds to promote abortion in a manner that it believes will violate the best reading of Title X. *See Maryland v. King*, 567 U.S. 1301, 1301 (2012) (Roberts, C.J., in chambers).

The balance has tipped even more sharply in the government's favor since this Court stayed the preliminary injunction, because the Rule has gone into effect. Moreover, Baltimore is no longer a sub-recipient in the Title X program, does not allege that it will imminently rejoin the program as a result of the injunction, and has not even stated that it will apply for a grant in the near future. There is no basis, therefore, for Baltimore's claim that a stay during the pendency of this appeal would "result in [Baltimore's] relinquishment of millions" of dollars. Opp. 25. Nor can Baltimore rely on its assertions of the Rule's "consequences" in "half a dozen states," Opp. 24, because the injunction here is limited to the Rule's enforcement in Maryland.

III. This Court Should At Least Stay The Injunction's Overbroad Scope.

At a minimum, this Court should stay the injunction insofar as it 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). Baltimore offers no explanation for why it needs an injunction encompassing all of Maryland to redress its injuries. Nor does it respond to the point that a state-wide injunction is particularly inappropriate since Maryland litigated nearly identical claims in the Ninth Circuit, and that court rejected its request for relief. Moreover, even assuming that Baltimore had alleged harm from the Rule's application to other areas in Maryland, it would still be an abuse of discretion to issue a statewide injunction on the basis of entirely theoretical harms.

This Court also should stay the injunction insofar as it prohibits enforcement of the entire Rule, even provisions not challenged by Baltimore. The preamble expressly states that the Rule's provisions are severable, 84 Fed. Reg. at 7725, and Baltimore offers no substantive reason why the district court's conclusion that the referral and physical-separation requirements were invalid justifies enjoining the entire Rule. At most, Baltimore contends that the government has waived this argument even though it is Baltimore's burden to justify why an injunction is necessary for each provision of the Rule. *Cf. Printz v. United States*, 521 U.S. 898, 935 (1997) (courts "have no business answering" questions about the validity of provisions that concern only "the rights and obligations of parties not before [them]"). In any event, the government made this

point below and explained which provisions are severable. *See, e.g.*, Dkt. 82-1, at 8, 15; Dkt. 90, at 2; *see also id* at 2 n.1 (citing previous filings).

Baltimore's other argument on the merits of severability and the scope of relief is that the APA requires a reviewing court to set aside an entire Rule nationwide. But both this Court and the district court have properly rejected that argument. *See Virginia Soc'y for Human Life*, 263 F.3d at 394 ("Nothing in the language of the APA . . . requires [the court] to exercise such far-reaching power."); Order, *Mayor & City Council of Baltimore v. Azar*, No. 19-1103 (D. Md. Feb. 26, 2020).

CONCLUSION

This Court should stay the injunction pending appeal.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing n complies with the type-volume limitation of Federal Rule of Appellate Procedure 27 because it contains 2,583 words. It complies with the typeface and the type style requirements of Federal Rule of Appellate Procedure 27 because this brief has been prepared in a proportionally spaced typeface using Word 14-point Garamond typeface.

s/ *Joshua Dos Santos*
JOSHUA DOS SANTOS

CERTIFICATE OF SERVICE

I hereby certify that on March 16, 2020, I filed the foregoing motion 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/ *Joshua Dos Santos*
JOSHUA DOS SANTOS