Nos. 19-15974 & 19-15979

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STATE OF CALIFORNIA,

Plaintiff-Appellee,

v.

ALEX M. AZAR II, in his official capacity as Secretary of the United States Department of Health and Human Services; and UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Defendants-Appellants

ESSENTIAL ACCESS HEALTH, INC., 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; and UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Defendants-Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

REPLY IN SUPPORT OF MOTION FOR STAY PENDING APPEAL

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INTRODUCTION AND SUMMARY

Plaintiffs' responses only underscore how extraordinary this injunction is. Like the district court, plaintiffs fully accept that in *Rust v. Sullivan*, 500 U.S. 173 (1991), the Supreme Court upheld regulations materially indistinguishable from the ones challenged here. Plaintiffs nevertheless contend that a district court can effectively overrule that decision through an injunction and that the government must wait until the conclusion of a potentially lengthy appeal process to implement a policy that the Supreme Court has already sanctioned.

Nothing in plaintiffs' responses justifies this state of affairs. Congress did not amend Title X—much less abrogate a high-profile Supreme Court decision—*sub silentio* through a terse clause in an appropriations rider or a mousehole in the ACA. Nor did HHS behave irrationally in explaining its disagreements with plaintiffs or in making reasonable predictions in an area within its expertise. And plaintiffs' predicted harms do not outweigh injuries to the government that the Supreme Court has already identified—namely, the inability to enforce laws or to prevent taxpayer dollars from being used to promote abortion. In all events, nothing supports enjoining aspects of the Rule that the district court did not even address.

ARGUMENT

I. The Government Is Likely To Succeed On The Merits

As previously explained, the Supreme Court held that materially indistinguishable regulations are within HHS's statutory authority and not arbitrary and capricious. *See*

Rust v. Sullivan, 500 U.S. at 183-92. Although plaintiffs contend that the presumption against implied repeals is inapplicable here, their responses confirm that they believe "two different statutes … *removed* [HHS's] authority to issue a Final Rule that adopts the same interpretation at issue in *Rust*." Cal.Opp.13 (emphasis added); *see* EA.Opp.13.[1] And plaintiffs' theory that Congress overturned a high-profile Supreme Court decision in an appropriations rider and an obscure provision of the ACA cannot be squared with the fact that Congress does not hide elephants in mouseholes, a problem they barely address. *See* Cal.Opp.14.

A. Title X plainly authorizes the Rule's restrictions on referring for, promoting, or encouraging abortion; its requirement of prenatal care referrals; and its related restrictions on the list of providers included in that referral. If a program refers patients for, or otherwise promotes, encourages, or advocates 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. 7714, 7759 (Mar. 4, 2019). Neither plaintiffs nor the district court offers any alternative interpretation, and the Supreme Court in *Rust* recognized that Congress intended "that federal funds

[1] Contrary to California's assertion, the government did not abandon its reliance on this presumption below. *See* Cal.Opp.14n.3. In the quoted portion of the transcript, the government was explaining why the appropriations rider did not repeal § 1008. *See* Cal.Suppl.Add.176.

not be used to 'promote or advocate' abortion as a 'method of family planning." 500 U.S. at 195 n.4.

All of 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). That rider reinforces § 1008 by further ensuring that pregnancy counseling is not used to "direct" women *towards* abortion as a method of family planning.

Plaintiffs do not dispute that the failure to refer a patient for abortion does not direct a patient to do anything. Instead, they argue that when considered *in combination* with the separate requirement that pregnant patients be referred for prenatal health care, the requirements regarding referrals are directive. *See* Cal.Opp.15; EA.Opp.18-19. But the prenatal-referral requirement does not itself direct a decision about abortion—it merely refers women for care that is necessary while they are pregnant. And the Rule permits providers, including Essential Access, 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, they can provide her with a list of providers who can offer care while she is pregnant. 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 (§§ 59.16(a), 59.16(b)(1)), and HHS explained that the provisions of the Rule are severable. 84 Fed. Reg. at 7725.

Although plaintiffs insist that "nondirective counseling" clearly requires "nondirective referrals," the phrase "nondirective counseling" does not speak to the issue of referrals, much less require referrals for abortion specifically. As explained, HHS and Congress have repeatedly used the terms "counseling" and "referral" as distinct in the Title X context. *See* Mot.10-12. Plaintiffs provide no defense of the district court's erroneous interpretation of 42 U.S.C. § 254c-6(a)(1), and they offer no response to Congress's separate use of the terms in its failed attempt to overturn *Rust*. Moreover, the CDC recommendations cited by plaintiffs and the district court, as well as the previous HHS regulations and guidance, frequently use the terms separately. *See* Cal.Opp.16; EA.Opp.17-18. Indeed, if counseling clearly included referrals, then none of these materials would have needed to discuss referrals at all. At most, the few instances plaintiffs identify as implying that counseling may include referrals suggest that the term "nondirective counseling" is ambiguous and thus cannot supply the "clear and manifest" intent necessary to overcome the presumption against implied repeals. *See National Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 663 (2007). Instead, the Court should defer to HHS's reasonable interpretation.

B. The district court likewise erred in the holding that the referral restrictions and the physical-separation requirement likely violate § 1554 of the ACA. To start,

plaintiffs waived the argument by not raising it before HHS. Although they claim that the Department was on "notice" of this objection because various comments used "substantially identical language to section 1554 to describe how the Final Rule would impede access to care," Cal.Opp.17, preservation requires that the "specific argument" advanced 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). Nor is it impossible for a party to waive a challenge to "the scope of the agency's power to act." EA.Opp.15. 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." *Koretoff*, 707 F.3d at 398.

On the merits, § 1554 did not implicitly repeal the Department's authority to enact the regulations at issue. The regulations merely limit what the government chooses to fund and thus do not "create[]," "impede[]", "interfere[] with," "restrict[]," or "violate[]" anything. 42 U.S.C. § 18114; *see* Mot.12-13. The Supreme Court drew a clear distinction between impeding abortion and choosing not to subsidize it, including specifically observing that, under the 1988 regulations, "Title X clients are in no worse position than if Congress had never enacted Title X." *See Rust*, 500 U.S. at 196-98, 200-03. That reasoning disposes of plaintiffs' § 1554 challenges.

California does not respond to this contention, and Essential Access attempts to distinguish *Rust* only with respect to the restrictions on the list of providers that may be given as part of the mandatory prenatal referral. *See* EA.Opp. 14-15 (discussing

§ 59.14(c)(2)).[2] Essential Access contends that these restrictions could allow other Title X providers to impede care by misleading patients, EA.Opp.15, but it has no standing to complain about—and is certainly not irreparably harmed by—what the Rules might allow *other* providers to do. And there is no basis for the district court's conclusion that these restrictions "go far beyond" the 1988 regulations. *See* EA.Opp.15. The 1988 regulations also prohibited "weighing the list of referrals in favor of health care providers which perform abortions" and "'steering clients' to providers who offer abortion as a method of family planning," and they did not require projects to alert patients if the list does not include abortion providers. *Rust*, 500 U.S. at 180; 42 C.F.R. § 59.8(a)(3) (1988). *See generally id.* § 59.8(b)(3)-(5) (1988). Plaintiffs cannot evade the Supreme Court's reasoning in *Rust*, which forecloses these claims.

C. The Rule's various provisions are not arbitrary and capricious.

1. Start with the prohibitions on promoting and referring for abortion. Essential Access repeats the district court's argument that "[f]ederal conscience laws 'do not provide a reasoned explanation'" for the restrictions, EA.Opp.19 (quoting Add.62), ignoring the government's explanation that those laws merely support the decision not to *require* abortion counseling and referrals, Mot.14. Plaintiffs offer no response to the actual reason for the restrictions, which is that they implement the best reading of § 1008—namely, that a program that refers patients for or promotes abortion

[2] Plaintiffs do not even dispute that the Supreme Court's reasoning in *Rust* applies to the prohibition on referring for, or otherwise promoting or encouraging, abortion.

as a method of family planning is by definition a program "where abortion is a method of family planning." *Id.*

2. The physical-separation requirement is likewise far from irrational. To the contrary, HHS's conclusion that "separate facilities are necessary, especially in light of the express prohibition of § 1008, cannot be judged unreasonable." *Rust*, 500 U.S. at 190. Specifically, the Supreme Court has already credited HHS's judgment that the "separation requirements … are necessary to assure that Title X grantees apply federal funds only to federally authorized purposes and that grantees avoid creating the appearance that the Government is supporting abortion-related activities." *Id.* at 188. The Department made the same judgment in reinstating the physical-separation requirement here, and plaintiffs have yet to explain why that conclusion is irrational. *See* Mot.15.

Instead, plaintiffs observe that the 1988 regulations partially relied upon reports from the Office of Inspector General (OIG) and the General Accounting Office (GAO), which, they contend, cannot be considered "thirty-seven years later." EA.Opp.20. In issuing the Rule here, however, HHS did not rely on those reports, but rather the common-sense determination that collocation of Title X and abortion clinics necessarily results in financial support for abortion-related activities and the perception that Title X clinics offer abortion-related services, an explanation plaintiffs have yet to refute. *See* Mot.15. That justification is no less reasonable now than it was thirty years ago. Nor is there any indication that *Rust* would have come out differently had HHS

not relied on the GAO and OIG reports in issuing the 1988 regulations. To the contrary, in the lead-up to *Rust*, the First Circuit rejected an arbitrary-and-capricious challenge to the 1988 regulations notwithstanding its conclusion that those "reports provide[d] a very slim reed of support." *Massachusetts v. HHS*, 899 F.2d 53, 63 (1st Cir. 1990) (en banc), *abrogated on other grounds by Rust*, 500 U.S. 173.

3. Plaintiffs fare no better in dismissing HHS's expert predictions about the net effect on the number of Title X providers as speculative and illogical. *See, e.g.*, *BNSF Ry. Co. v. Surface Transp. Bd.*, 526 F.3d 770, 781 (D.C. Cir. 2008) (Kavanaugh, J.) ("We owe substantial deference to an agency's predictive judgments.") (cleaned up). As the Department sensibly predicted, withdrawing incumbent providers likely will be replaced by new providers who were previously discouraged from joining the program by the abortion-referral requirement in the 2000 rule, or who will otherwise be willing to compete for and accept federal funds under the Rule.

That prediction was supported in the administrative record. HHS explained that it "expects that honoring statutory protections of conscience in Title X may increase the number of providers in the program," 84 Fed. Reg. at 7780, and it pointed to data showing that a substantial number of medical professionals would limit the scope of their practice if conscience protections were not put in place, *id.* at 7781 n.139. Those predictions have been borne out, with new providers emerging as a result of the Rule's new referral restrictions. *See Obria Group, Inc. v. HHS*, No. 19-cv-905 (C.D. Cal.) (May 14, 2019) (suit filed by new network of providers to enjoin 2000 regulations). In any

event, plaintiffs cite no authority for the extraordinary proposition that an agency administering a competitive grant program must either accede to the wishes of a subset of current grantees or identify in advance those entities who will take their place.

4. Plaintiffs' remaining objections fail. As explained in our Motion (at 16-18), HHS adequately discussed and supported the medical-qualification requirements for those providing certain counseling, the elimination of the confusing "medically appropriate" language, and HHS's cost-benefit analysis.

II. The Balance Of Harms Supports A Stay

The injunction subjects the government to an ongoing and irreparable harm. The government has a significant interest in enforcing statutes, *see Maryland v. King*, 567 U.S. 1301 (2012) (Roberts, C.J., in chambers), particularly when the Supreme Court has already upheld its construction of a statute that plaintiffs seeks to enjoin. 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 (1) upheld HHS's judgment that certain activities would do so (in violation of law); and (2) sanctioned the remedial steps HHS proposes to ensure that taxpayer dollars are not being used for that purpose. Indeed, plaintiffs' asserted harms—the closure of certain clinics and curtailment of lawful Title X services—confirm that, under the 2000 regulations, Title X funds are being used to support abortion.

On the other hand, plaintiffs' asserted harms to public health are speculative and cannot overcome the government's significant interests. The threatened public-health

consequences depend on crediting plaintiffs' speculation of curtailed Title X services, rather than the agency's expert prediction that services will be *expanded* under the Rule.

III. The District Court's Injunction Is Overbroad

At a minimum, this Court should stay the injunction insofar as it prohibits enforcement of provisions of the Rule that the district court never held to be unlawful. The Rule's preamble expressly provides for severability, 84 Fed. Reg. at 7725, and portions of the Rule that the district court enjoined have nothing to do with abortion, *see, e.g.*, *id.* at 7787 (amending § 59.2 to explain how a woman's eligibility for Title X services should be assessed where a woman's insurance does not provide desired contraceptive coverage due to her employer's religious or moral objections). Likewise, even if the prenatal referral requirement were invalid, that would not justify enjoining the prohibition on abortion referrals. Plaintiffs assert that the district court "already narrowly tailored the injunction to exclude provisions that it determined were unchallenged," EA.Opp.24, but it failed to explain how that court could enjoin aspects of the Rule that it never even addressed.

CONCLUSION

This Court should grant the government's motion.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Motion complies with the type-volume limitation of Ninth Circuit Rules 27-1 and 32-3 because it contains 2,492 words. This Motion 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/Jaynie Lilley
JAYNIE LILLEY

CERTIFICATE OF SERVICE

I hereby certify that on May 24, 2019, I filed the foregoing motion with the Clerk of the Court for the United States Court of Appeals for the Ninth 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