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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

STATE OF CALIFORNIA, by and through ATTORNEY GENERAL XAVIER BECERRA, Plaintiff, v. ALEX M. AZAR, *et al.* Defendants.	Case No.: 3:19-cv-01184-EMC **RELATED TO** Case No. 3:19-cv-01195-EMC **MOTION TO STAY INJUNCTION PENDING APPEAL** Date: June 13, 2019 Time: 1:30 p.m. Place: Courtroom 5, 17th Floor 450 Golden Gate Avenue, San Francisco CA Judge: Hon. Edward M. Chen

NOTICE OF MOTION

PLEASE TAKE NOTICE that on June 13, 2019, at 1:30 p.m., before the Honorable Edward M. Chen, in Courtroom 5 of the 17th Floor of the San Francisco Courthouse, 450 Golden Gate Avenue, San Francisco, CA 94102, Defendants, by and through undersigned counsel, will move the Court for a stay of its Order Granting in Part and Denying in Part Plaintiffs' Motion for Preliminary Injunction, ECF No. 78 (Order). 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 Plaintiffs. Otherwise, the Government respectfully asks that the Court rule on the motion no later than May 10, 2019, at which time Defendants intend to seek relief in the Ninth Circuit. Defendants are also filing a separate motion under Civil L.R. 6-3(a)(4), formally requesting such relief. In all events, Defendants respectfully request that the Court decide this motion on the papers submitted, without oral argument, pursuant to Civil L.R. 7-1(b).

MOTION TO STAY

Pursuant to Federal Rule of Civil Procedure 62, Defendants respectfully move for a stay pending appeal of the Order, which enjoins Defendants from enforcing the Final Rule published on March 4, 2019, *see* Compliance with Statutory Program Integrity Requirements, 84 Fed. Reg. 7714 (Mar. 4, 2019) (Final Rule or Rule) in the State of California. At the very least, Defendants respectfully request that the Court stay the injunction insofar as it applies to those other than Plaintiffs here, and stay the injunction with respect to the provisions of the Rule other than the counseling and referral restrictions and the physical separation requirements. The reasons for this Motion are set forth in the following Memorandum of Points and Authorities, the declaration filed herewith (*see* Exhibit A), and all previous filings in this action, including but not limited to Defendants' brief in opposition to Plaintiffs' motions for a preliminary injunction (ECF No. 42).

MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

The Court should stay its injunction pending appeal because Defendants are likely to succeed on the merits of their appeal and will be irreparably harmed absent a stay.

In light of the Supreme Court's decision in *Rust v. Sullivan*, 500 U.S. 173 (1991), Defendants are likely to ultimately succeed on the merits. The balance of harms also weighs in Defendants' favor. If the Court's injunction remains in place, it would require HHS to expend millions of dollars in 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, including provisions Plaintiffs did not challenge and others that the Court's opinion did not address, notwithstanding the Rule's express severability statement.

Leaving the injunction in place pending appeal will also negatively affect Title X grantees and the agency's ability to administer the Title X program. For instance, grantees and their subrecipients may not take needed steps to comply with the March 4, 2020 deadline for physical separation, even though that deadline will remain in effect if the Rule is ultimately upheld—which, again, is likely in light of *Rust*. Moreover, without a stay, grantees will be uncertain as to which regulations will apply when requesting continuations of their Title X grants, and the agency will be unable to effectively evaluate those applications, given the uncertainty surrounding the Rule.

In contrast, Plaintiffs will not be harmed by a stay. Although the Court found that Plaintiffs and the public would be irreparably harmed absent injunctive relief, the basis for that judgment largely consisted of Plaintiffs' *own opinions* that the Rule requires them to violate their own views of medical ethics. Plaintiffs are entitled to their views on this subject. But HHS thoroughly explained *its* view that the Rule was consistent with principles of medical ethics, and that view is both logical and consistent with decades of legal precedent and numerous federal conscience statutes. That is all the Administrative Procedure Act (APA) requires. The remaining harms

identified by the Court rest on a chain of alleged events that are speculative and not sufficiently imminent to require preliminary injunctive relief.

For these reasons, this Court should grant Defendants' motion for a stay of the preliminary injunction pending appeal. At the very least, Defendants respectfully request that the Court stay the injunction with respect to the provisions of the Rule that the Court has not deemed unlawful.

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 Plaintiffs. Otherwise, the Government respectfully asks that the Court rule on the motion no later than May 10, 2019, at which time Defendants intend to seek relief in the Ninth Circuit.

ARGUMENT

A party may obtain a stay pending appeal if it shows both a probability of success on the merits and irreparable injury. *Golden Gate Rest. Ass'n v. City and Cnty. of San Francisco*, 512 F.3d 1112, 1115 (9th Cir. 2008). 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 Order, the government is likely to succeed on the merits of its appeal. As Defendants explained in their Opposition to Plaintiffs' Motions for a Preliminary Injunction and at oral argument, *Rust v. Sullivan*, 500 U.S. 173 (1991), controls the key legal questions at issue in this litigation, and therefore Plaintiffs have no realistic likelihood of prevailing. ECF No. 61 (PI Opp.) at 8-13. The 1988 regulations upheld in *Rust* were materially identical to, indeed, *more* restrictive than, the conditions on federal funding contained in the Final Rule. Indeed, Plaintiffs have never seriously contended otherwise and the Court's Order did not dispute this. *See* Order at 9 (characterizing the Final Rule as "a return in many aspects to the 1988 regulations"). The Court, however, concluded that the Rule violates later enacted HHS Appropriations acts and the ACA, and that HHS acted arbitrarily and

capriciously. Respectfully, for the reasons explained in Defendants' opposition brief, at oral argument, and below, those conclusions are unlikely to withstand appellate review.

1. The Court concluded that the counseling and referral requirements violated a rider Congress began adding to appropriations bills in 1996 providing that "all pregnancy counseling shall be nondirective" (the nondirective provision). But the nondirective provision addresses *counseling* alone, which is distinct from *referrals*, as confirmed by, among other things, dictionary definitions, the text of Congress's *failed* 1992 attempt to overrule *Rust*, and longstanding agency usage of the terms. PI Opp. at 17-19. It is particularly anomalous to conclude that "pregnancy counseling" *within* the Title X program necessarily encompasses referrals *outside* the Title X program for something that Congress has expressly *prohibited* within the Title X program. Indeed, even the 2000 rule (promulgated four years after the nondirective provision was first promulgated) concluded that the 1988 regulations remained a permissible construction of the Title X statute.[1] If it were obvious that the nondirective provision had implicitly repealed *Rust*'s holding that prohibiting abortion referrals was permissible under section 1008—because the term "counseling" includes "referral"—then presumably the Secretary would have said as much then. In all events, a doctor's *refusal* to provide a patient with a referral for an abortion does not *direct* her to do anything. Referrals for prenatal care are also neither counseling nor do they direct a decision about abortion—rather, such care is always medically necessary for women during pregnancy, even for those who later obtain an abortion. *See* PI Opp. at 17 n.1, 32.

Concluding otherwise, the Court pointed to a federal statute that discusses developing and implementing training programs for "providing adoption information and referrals to pregnant women on an equal basis with all other courses of action included in nondirective counseling to

[1] When the Secretary promulgated the 2000 regulations, she acknowledged that the 1988 regulations remained a "permissible interpretation of the statute," 65 Fed. Reg. at 41,277, and explained that her adoption of the 2000 regulations was based on "experience" rather than statutory interpretation, *id.* at 41,271. At that time, however, the nondirective provision had been in effect for several years, and the Secretary discussed its existence in the preamble to the 2000 regulations. *See id.* at 41,273 ("[T]he [Title X] program's four most recent appropriations . . . required that pregnancy counseling in the Title X program be 'nondirective.'"). And the 2000 regulations—like the 1993 guidance before them—repeatedly use the terms "counseling" and referral" to address distinct phases of the process Title X providers had to offer.

pregnant women." 42 U.S.C. § 254c-6(a)(l). But that statute, if anything, shows that, when Congress wants to ensure that nondirective pregnancy counseling (when offered) includes discussion of a specific option, it knows how to do so. Indeed, the phrase "included in nondirective counseling" modifies "all other courses of action." The statute merely indicates that programs should train staff in "providing adoption information and referrals" to the same extent that they provide information and referrals for the other options that are "included in nondirective counseling," not that referrals are part of counseling.

The Court also pointed to language in the Rule stating that "nondirective pregnancy counseling can include counseling on adoption, and corresponding referrals to adoption agencies," 84 Fed. Reg. at 7730, and suggesting that "nondirective postconception counseling" may include "abortion counseling, information, and referral," *id* at 7733-74. But this language from the Rule does not suggest that referrals generally—let alone referrals for abortion as a method of family planning—are necessarily part of nondirective pregnancy counseling. Nor does the fact that Congress has repeatedly enacted the nondirective language in HHS's appropriations statute suggest that "counseling" includes "referrals"; to the contrary the regulatory language upon which the Court relies underscores that "counseling" and "referrals" are two distinct concepts. *See* Order at 31 (quoting 58 Fed. Reg. at 7464).

Even if there were some doubt about the language of the nondirective provision standing alone, Defendants respectfully submit that the Court's opinion gave insufficient weight to the many legal principles counseling against interpreting that provision expansively. As Defendants explained in their Opposition and at argument, no less than six canons of interpretation militate strongly against Plaintiffs' argument: (1) the presumption against implied repeals; (2) the presumption that Congress does not silently abrogate the Supreme Court's interpretation of a statute; (3) the "very strong" presumption that appropriations riders do not substantively change existing law; (4) the presumption that specific statutory language prevails over more general language; (5) the presumption that Congress does not "hide elephants in mouseholes"; and (6) the presumption that Congress does not silently enact language that has earlier been discarded. *See*,

e.g., PI Opp. at 13, 15-16, 20 22-23. The Court brushed aside the first two canons, reasoning that they did not apply because *Rust* found section 1008 ambiguous. Order at 27. But these principles do not turn on such a formalistic distinction; rather, they rest on the commonsense point that, if Congress intends to alter the permissible scope of a statute *as interpreted by the Supreme Court*, one would expect it to either actually amend *that statute* or otherwise make its intention clear. For these reasons as well as those stated in Defendants' opposition brief and at argument, Defendants are likely to prevail in their appeal of the Court's conclusions concerning the nondirective provision.

2. The Court also concluded that certain aspects of the Rule violate section 1554 of the Affordable Care Act (ACA). Order at 43-46. As a threshold matter, Defendants again note that this is a remarkable conclusion given that HHS received more than 500,000 comments on the proposed rule—many from highly sophisticated entities, including Plaintiffs—and as best anyone, including the Plaintiffs, can tell, not one even invoked this provision, much less argued that it precluded the proposed rule. This failure waives any challenge based on section 1554, as the waiver doctrine applies fully to statutory interpretation claims not brought to an agency's attention. PI Opp. at 19-20.

The Court contended that there was no waiver because "commenters raised issues pertaining to Section 1554 with sufficient clarity to provide notice," Order at 36, while acknowledging that the comments "did not explicitly reference Section 1554," *id* at 38. To the extent the Court intended to suggest that commenters actually meant to invoke Section 1554, this is not correct. The comments cited by Plaintiffs on which the Court relied consist entirely of generalities, and Plaintiffs do not assert (and could not plausibly assert) that any comments they cite *even intended* to argue that the proposed rule would violate section 1554. It is wholly inconsistent with the waiver doctrine to contend that commenters sufficiently "raised" an issue of which they were not actually aware, or fault the agency for not "correcting" a supposed error that no commenter actually thought of during the rulemaking process.

In any event, the Rule does not conflict with section 1554 of the ACA for the reasons explained in Defendants' Opposition. PI Opp. at 20-23. Section 1554 does not limit the Secretary's authority—if at all—outside of the context of the ACA, for the reasons Defendants have provided. *Id.* at 21-22. The Court conclusion that the provision applies to "any regulation" promulgated by the Secretary cannot be reconciled with Congress's clear indication that section 1554 applies only "notwithstanding" the ACA, particularly since, as Defendants noted, the ACA is replete with provisions that, unlike section 1554, actually do apply "notwithstanding any other provision of law." *Id.*

And even if section 1554 did apply outside the ACA, it is implausible that Congress intended either (a) to quietly repeal portions of *Rust* through section 1554, or (b) to restrain the Secretary's authority to condition the receipt of federal grant money using section 1554's extremely broad and open-ended subsections. PI Opp. at 22-23. Put differently, any limitations on health care are not caused by the Rule, which simply sets conditions on federal funds. The Rule leaves women with the same access to medical services as they would have had if Congress had never enacted Title X at all. For these reasons and those previously expressed by Defendants in their opposition brief and at argument, Defendants are likely to succeed in their appeal on this issue.

3. The Court also erred in concluding that HHS's promulgation of the Rule was arbitrary and capricious. *See* Order at 46-74. As an initial matter, many of the arguments the Court found persuasive for why the Rule is arbitrary and capricious in the Court's view were not included in Plaintiffs' motion, and therefore were not properly before the Court. *See, e.g.*, *Kovesdy v. Kovesdy*, No. 10-02012 SBA, 2010 WL 3619826, at *4 (N.D. Cal. Sept. 13, 2010) (citing *Zamani v. Carnes*, 491 F.3d 990, 997 (9th Cir. 2007)). For instance, although the Court concluded that HHS failed to adequately consider the compliance costs and benefits surrounding the Rule, *see* Order at 57-58, that argument does not appear in Plaintiffs' motions for a preliminary injunction, *see generally* Cal. PI Mot. at 15-18; EA Mot. at 16-19. In any event, the Court's reasoning on this point is unpersuasive. 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 the concerns the Court raised in its order. *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"). Nothing about HHS's weighing of the costs and benefits of the Rule was arbitrary or capricious, and HHS considered each of the alleged harms that Plaintiffs and others raised during the rulemaking, including the effects on patients and public health. Plaintiffs, moreover, cannot possibility suffer any legally cognizable injury from an increase in compliance costs surrounding a federal grant program, because—if compliance costs exceed the benefit they receive from the grant—they can may make the economically rational choice to withdraw from the program.

4. More broadly, the Court erred by concluding that HHS failed to justify the need for the Rule. *See* Order at 49-53. As Defendants explained in opposition, HHS set out in detail its justification for the program integrity requirements, including the risk that Title X and other funds will be commingled, that Title X funds will be used for prohibited purposes, and that the public will be deprived of the clear statutorily required assurance that taxpayer dollars are not being used for improper purposes. And while the Court criticized HHS for focusing on the "risk" of harms, Order at 50, the Secretary surely may adopt prophylactic rules to ensure public funds are used properly, *see* PI Opp'n at 28 (citing *Sitwell v. Office of Thrift* Supervision, 569 F.3d 514, 519 (D.C. Cir. 2009) (Kavanaugh, J.); *Marina Mercy Hosp. v. Harris*, 633 F.2d 1301, 1304 (9th Cir. 1980)). Moreover, there is no dispute that Title X clinics are referring patients for abortions and collocating their Title X services with their abortion-related ones—that is part of the reason why Plaintiffs have brought this lawsuit.

5. Contrary to the Court's conclusion in the Order, some sort of "more detailed justification" was not required under the Supreme Court's decisions in *FCC v. Fox Television*

Stations, Inc., 556 U.S. 502 (2009), and *Encino Motorcars LLC*, 136 S. Ct. 2117 (2016). *See* Order at 54-61. As Defendants have explained, the principle articulated in *Fox* and *Encino* does not apply in the context of this discretionary funding program, in which grantees have no legitimate expectation in receiving additional grant funds in any subsequent year. *See* PI Opp'n at 30-31. And even if there were serious reliance interests at stake, all that *Fox* and *Encino* require is for the agency to acknowledge the change in policy and provide a reasoned explanation for the change, which is exactly what HHS did in the preamble to the Rule. *See id.* at 31.

6. The Court also takes issue with the requirement that nondirective counseling be offered only by a physician or an advanced practice provider (APP) and concludes that HHS failed to justify the requirement. *See* Order at 64-65. Yet, it is entirely permissible and reasonable for HHS to impose certification requirements to limit the types of professionals who may provide pregnancy counseling through a discretionary grant program. Defendants are likely to succeed on the merits of this issue on appeal.

7. Finally, the Court erred in by concluding that it was arbitrary and capricious for HHS to remove the requirement that a Title X project provide "medically approved" family planning methods. *See* Order at 65-66. Any complaint with regard to the removal of the "medically approved" requirement should be with Congress, not HHS: "When Congress specified what family planning methods and services Title X projects must provide, Congress directed that the methods and services be 'acceptable and effective'; it did not specify that they be 'medically approved.'" 84 Fed. Reg. at 7732 (quoting 42 U.S.C. § 300(a)). HHS addressed this issue directly, *see id.* at 7732, 7740-41, and explained that the "medically approved" language had not proved workable, *see id.* at 7732 (explaining practical difficulty of enforcing the "medically approved" requirement). HHS also considered and responded to views of commenters who objected to the change. Yet, HHS adopted a different approach, which HHS may, of course, do consistent with the APA. *See* PI Opp'n at 33-34.

For all the reasons above, and for the reasons stated in Defendants' Opposition and at oral argument, Defendants have made a strong showing that they are likely to prevail on the merits.

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

Both HHS and the public at large (and particularly Title X grantees) will be irreparably harmed if the Court's preliminary injunction 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—unless the injunction is stayed—millions of dollars in taxpayer funds will be spent unlawfully. As David Johnson, Operations and Management Officer for the Office of Population Affairs, explains in the attached declaration, on April 1, 2019, HHS awarded nearly $256 million dollars for fiscal year 2019, with the expectation that all of those grant funds would be spent before March 31, 2020. *See* Declaration of David Johnson ¶ 3 ("Johnson Decl."). The agency, moreover, currently interprets the 2000 regulations—which will remain in effect if the Court's preliminary injunction is not stayed—to violate section 1008's prohibition on the use of Title X funds in programs where abortion is a method of family planning. *See, e.g.*, 84 Fed. Reg. at 7745; *see also* 42 U.S.C. § 300a-6. Therefore, without a stay, and so long as Title X grantees may continue to refer patients for abortions, federal funds will be expended in violation of the prohibition on the use of Title X funds in programs where abortion is a method of family planning. That unlawful expenditure of federal money causes serious harm to the government and the public and is alone sufficient to justify a stay of the Court's Order. Similarly, as *Rust* and other cases recognize, the government has an interest in not funding abortion as a method of family planning that will be harmed if the injunction is not stayed pending appeal.

The government and Title X grantees will also be harmed if the injunction is not stayed because the injunction will cause confusion as to what will ultimately be required of grantees and, accordingly, grantees and subrecipients may fail to comply with deadlines necessary to maintain Title X funding and/or receive further funding going forward. To be clear, Defendants believe that the Rule is lawful and that they are likely to succeed on the merits in this litigation. Accordingly, and assuming HHS does ultimately prevail, the agency intends to enforce the Rule's

March 4, 2020 deadline for physical separation, without any tolling for the time that the Rule is enjoined, in order to prevent federal funds from being expended contrary to HHS's interpretation of section 1008. *See* Johnson Decl. ¶ 4. Given that fact—and that, in the absence of stay of the injunction, grantees and subrecipients may not take steps to comply with the separation requirements—many grantees and subrecipients will likely be unable to achieve physical separation before the March 4, 2020 deadline, and therefore may not be entitled to retain funding or receive future funding if Defendants ultimately prevail on the merits. *Id.* Indeed, there is no guarantee that, in the absence of a stay, there will be enough (or any) time for recipients to comply with the Rule before Defendants would begin enforcing the physical separation requirement. *Id.*

The government and grantees will also be harmed in the absence of a stay because the injunction would cause significant uncertainty as to how HHS may administer the Title X program and/or allocate funds going forward. Title X grantees typically receive awards for a one-year period with the opportunity to apply to renew their Title X project through non-competitive continuation awards for an additional two years. *Id.* ¶ 5. Put differently, Title X projects often encompass three years of funding, though grantees must apply to receive funding for each year separately. If the injunction is not stayed, uncertainty as to which regulations will apply will hinder the continuation award process. For instance, absent an injunction, HHS intended to offer guidance for continuation awards on October 1, 2019 and otherwise instruct grantees on how to comply with the new Rule through a controlled rollout. *Id.* ¶¶ 5-7. However, if HHS remains enjoined from implementing the Rule, agency staff cannot instruct grantees on compliance or effectively consider continuation applications without knowing which set of regulations to apply. *Id.* And, unless the injunction is stayed, applicants may write continuation applications under the assumption that the 2000 regulations will apply, *id.* ¶ 5, even though those regulations would no longer be in effect if Defendants prevail at a later stage of this litigation or on appeal. Keeping the injunction in place, therefore, would harm the government—because it prevents the effective administration of the Title X program—as well as grantees, who may hinder their own chances of receiving continuation awards under the assumption that the Rule will never go into effect.

The balance of harm also weighs in favor of a stay because of the injunction's overly broad scope. Many aspects of the Rule are not at issue in this litigation, including, but not limited to, proposed section 59.5(a)(13), which would have allowed the agency to collect information on grantees and subrecipients in order to aid oversight; and proposed section 59.17, which would have required 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.* ¶¶ 8-9. 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, Plaintiffs will not suffer any imminent injury for the reasons explained in Defendants' Opposition and at oral argument. Plaintiffs' predictions of harm assume that the Rule is unlawful and depend on a number of uncertain events, and Plaintiffs may simply forego receiving taxpayer funds if it would be too costly on balance to comply with the Rule's requirements. *See* PI Opp. at 55-59.

III. REQUEST FOR AN EXPEDITED RULING ON THIS MOTION

For the reasons stated above, in Defendants' brief in opposition to the preliminary injunction motions, and at oral argument on the motions, Defendants believe that no preliminary injunction should have been issued and that this stay motion should be granted. Given the Court's prior opinion, however, Defendants recognize that the Court may disagree. The Rule, moreover, would have gone into effect on Friday, May 3 absent the injunctions from this Court and two others. In Defendants' judgment therefore, every day that these injunctions remain in place taxpayer funds are being spent for programs where abortion is a method of family planning

contrary to Congress's express directive in section 1008—and the agency is stymied from implementing a judgment that the Supreme Court has expressly held is permissible.

Given these circumstances, Defendants respectfully request that the Court rule on this motion quickly. 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 Plaintiffs, so that Defendants can seek relief from the Ninth Circuit without further delay. In any event, Defendants respectfully request a ruling on this motion no later than May 10, 2019, at which time Defendants intend to seek relief in the Ninth Circuit.

CONCLUSION

For the foregoing reasons, and for all the reasons stated in Defendants' Opposition to Plaintiffs' Motions for Preliminary Injunction, the Court should stay its Order Granting Plaintiffs' Motions for Preliminary Injunction 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 May 10, 2019.

Dated: May 6, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 6, 2019, I electronically filed the foregoing document with the Clerk of the Court, 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/ Bradley P. Humphreys
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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

STATE OF CALIFORNIA, by and through ATTORNEY GENERAL XAVIER BECERRA, Plaintiff, v. ALEX M. AZAR, in his OFFICIAL CAPACITY as SECRETARY of the U.S. DEPARTMENT of HEALTH & HUMAN SERVICES; U.S. DEPARTMENT of HEALTH & HUMAN SERVICES, Defendants.	Case Nos.: 3:19-cv-01184-EMC **DECLARATION OF DAVID JOHNSON**

I, David Johnson, declare as follows:

1. I am the Operations and Management Officer for the Office of Populations Affairs, Department of Health and Human Services (DHHS), and I have served in that capacity since August 7, 2016. My duties in this role 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 injunction that is currently in place enjoining implementation and enforcement of the March 4, 2019 rule at issue in this litigation (the Rule) will result in uncertainty and administrative burdens on both OPA and the grantees.

3. On April 1, 2019, the agency awarded nearly $256 million dollars in fiscal year 2019 with the expectation that funds would be spent within that budget year, which ends on March 31, 2020. These funds will be spent for grants administered by 90 different grantees. It is OPA's understanding that grantees have already begun spending the award money and will continue to do so while the injunction is in place. Additionally, 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 financial separation as required in the 2019 rules. And the longer the injunction remains in place, the more funds will be spent in this manner.

4. If Defendants prevail at a later stage of the litigation or on appeal, the March 4, 2020 deadline for physical separation would still apply. As a result, the injunction will cause serious uncertainty between now and any future date at which the injunction could be lifted, because grantees will not know whether they should take the steps needed to physically separate before the March 4, 2020 deadline, whether they should spend resources on separation, and

whether they need to seek guidance from OPA on whether their separation plans are sufficient. There is no guarantee that, if the injunction is lifted, there will be enough, or even any, time left for grantees to comply with the Rule before Defendants would begin enforcing the physical separation requirement.

5. If it is not stayed, the injunction will also cause significant uncertainty given the nature of the awards to grantees. Current grantees received awards on April 1, 2019 for a one-year budget period with the projected opportunity to renew for two additional years. Grantees must apply for continuation awards to receive funding for each of those subsequent years and will have to comply with any rules in place at that time, absent an injunction. *See* 42 C.F.R. § 59.8(b), (c). If the injunction remains in place, the typical continuation award process could be significantly disrupted, because grantees will not know when or if the injunction may be lifted. For example, noncompeting continuation award guidance is likely to be posted on October 1, 2019, continuation applications are likely to be due January 1, 2020, and continuation grants will be awarded on April 1, 2020. At all points during this process, the uncertainly of which rules will be in effect creates significant uncertainty and burdens. Agency staff will be unable to effectively write continuation award guidance, not knowing which compliance regime will be in effect. In addition, applicants may write continuation applications responsive to one set of rules that changes after they have submitted applications, and, similarly, staff may be required to review and assess applications against one set of rules, even though those rules may no longer be in effect when/if grantees receive a continuation award.

6. If the injunction is lifted after continuation applications have been submitted, OPA staff will need to follow-up with grantees to ensure they will be in compliance with the Rule, which could take several weeks given that there are 90 different grantees. In contrast, in

the absence of an injunction, OPA staff would provide compliance guidance beforehand, in a more controlled rollout, including in written guidance, webinars, and at the national grantee meeting to be held in July 2019.

7. Additionally, the injunction creates uncertainty with respect to ongoing monitoring and oversight. While OPA staff and consultants are currently trained on providing oversight with respect to the 2000 rules, OPA is unsure of how and when to devote resources to training on the new Rule, as it is unclear if or when it will go into effect.

8. Part of the regulation, § 59.5(a)(13), would have allowed the agency to collect information on grantees and subrecipients in order to better make administrative and fiscal plans and ensure proper oversight. Without such information, it will be more difficult to ensure grantee compliance with this new provision. Additionally, it will be harder for the agency to ensure that Title X beneficiaries are getting the proper distribution of scarce resources.

9. Another section, § 59.17, would have required 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 ensure compliance with this new provision.

10. Finally, to ensure that Title X funds are not used to build infrastructure for prohibited purposes, § 59.18 would have required 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 ensure compliance with this new provision.

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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 May 3, 2019, in Rockville, Maryland

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

	Case No.: 3:19-cv-011984-EMC
	RELATED TO
STATE OF CALIFORNIA, by and through ATTORNEY GENERAL XAVIER BECERRA, Plaintiff, v. ALEX M. AZAR, *et al.*, Defendants.	Case No. 3:19-cv-01195-EMC **[PROPOSED] ORDER RE MOTION TO STAY INJUNCTION PENDING APPEAL** Date: June 13, 2019 Time: 1:30 p.m. Place: Courtroom 5, 17th Floor 450 Golden Gate Avenue, San Francisco CA Judge: Hon. Edward M. Chen

Defendants' motion for a stay of this Court's April 26, 2019 preliminary injunction order pending appeal is GRANTED.

Based upon Defendants' motion, any opposition filed by Plaintiffs, and the entire record herein, the Court's April 26, 2019 order is STAYED pending Defendants' appeal to the United States Court of Appeal for the Ninth Circuit.

Dated: _____

_____
Edward M. Chen
U.S. District Court Judge