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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON
AT YAKIMA

STATE OF WASHINGTON,

Plaintiff,

v.

ALEX M. AZAR II, et al.,

Defendants.

NATIONAL FAMILY PLANNING & REPRODUCTIVE HEALTH ASSOCIATION, et al.,

Plaintiffs,

v.

ALEX M. AZAR II, et al.,

Defendants.

No. 1:19-cv-03040-SAB

THE NATIONAL FAMILY PLANNING & REPRODUCTIVE HEALTH ASSOCIATION PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO STAY PRELIMINARY INJUNCTION PENDING APPEAL

May 23, 2019
Without Oral Argument

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Defendants' request that this Court stay the preliminary injunction entered on April 25, 2019, pending appeal, ECF No. 58 ("Mot."), should be denied. Though Defendants have the burden of persuasion, their motion fails to establish that *any* of the four factors governing such extraordinary relief supports a stay, much less that the overall weight of those four factors warrants a stay in this case.

Instead, the Court's well-founded preliminary injunction should stand. That injunction maintains the status quo, prevents irreparable harms to Plaintiffs and unnecessary disruption to the Title X program, and allows it to continue serving low-income patients as it has for decades while Plaintiffs litigate the multiple claims on which this Court has determined they are likely to succeed.

ARGUMENT

A "stay is an 'intrusion into the ordinary processes of administration and judicial review'" and '"an exercise of judicial discretion.'" *Nken v. Holder*, 556 U.S. 418, 427, 433 (2009) (citations omitted). The Court considers four factors in determining whether a stay should issue:

> (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether the issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.

Id. at 434 (internal quotation and citation omitted); *see also Washington v. Trump*, 847 F.3d 1151, 1164 (9th Cir. 2017). On this motion, Defendants bear the burden of showing that their request for the unusual step of a stay pending appeal is warranted. *Nken*, 556 U.S. at 433-34. Defendants have not come close to meeting that burden—and cannot meet it—because, as the Court has already found,

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Plaintiffs are likely to succeed on the merits; they, not Defendants, face irreparable harms; and the balance of the equities and public interest tips sharply in Plaintiffs' favor. ECF No. 54 ("Order") at 2-6, 14-18.

As the Court made clear during the hearing on Plaintiffs' motion for a preliminary injunction just three weeks ago, the Court reviewed all of the extensive submissions from both sides on the legal questions raised by the Final Rule, Tr. at 5, 99, and considered the "substantial evidence of harm" shown by Plaintiffs, Order at 17-18 (citing 15 factual declarations); Defendants submitted no such evidence. The Court heard argument from the parties—unconstrained by time limits—and engaged in colloquies with counsel for almost three hours before rendering its lengthy oral ruling from the bench on April 25, 2019. The Court then issued a written order memorializing its ruling. The preliminary injunction remains necessary to shield Plaintiffs from irreparable harm and to preserve the status quo while this litigation proceeds. *See* Order at 14-18.

In their stay motion, Defendants offer no new legal arguments nor do they show that the Court's previous assessment of the balance of harms was erroneous.[1] Moreover, they set forth a standard that would improperly allow a stay of the preliminary injunction to be entered based on only the "possibility of irreparable injury" to Defendants, Mot. at 3. *See Winter v. Nat. Res. Def. Council, Inc.*, 555

[1] This 15-page opposition mirrors the length of Defendants' 15-page stay motion. *See* ECF No. 65 at 4 n.2.

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U.S. 7, 22 (2009) (holding that this '"possibility' standard is too lenient").[2] Defendants' stay motion should be denied because Defendants have not established, pursuant to *Nken*, a strong showing of likelihood of success in defeating Plaintiffs' claims; any irreparable harm to Defendants absent a stay; that such harms that outweigh the substantial injury to other persons, including Plaintiffs; and that a stay is in the public interest.

I. THE COURT CORRECTLY FOUND THAT PLAINTIFFS, NOT DEFENDANTS, ARE LIKELY TO SUCCEED ON THE MERITS

The sole affirmative argument that Defendants advance as to why they believe they have a likelihood of success in this case is *Rust v. Sullivan*, 500 U.S. 173 (1991)—the same refrain repeated throughout their preliminary injunction opposition. Mot. at 1, 3-4. Defendants disingenuously contend that the Court did not "engag[e] with the Supreme Court's holdings in *Rust*" in granting the preliminary injunction. Mot. at 4. In so asserting, Defendants ignore the Court's clear delineation of *Rust*'s limited holdings in footnote 4 of its order and its discussion of *Rust* with counsel during the preliminary injunction hearing. Order at 10; Tr. at 53-58. Moreover, the Court ruled that *Plaintiffs*, not Defendants, have a likelihood of success in arguing that "laws passed by Congress since *Rust* limit the Department's discretion" in multiple ways that Defendants' 2019 promulgation

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[2] By contrast, this Court applied the correct legal standard for granting the preliminary injunction. *See* Order at 4-5. It found that "all four factors [of that standard] tip in" Plaintiffs' favor, including likelihood of success, with irreparable harm and balance of equities doing so especially strongly. Order at 14.

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of the Final Rule has violated. Order at 11, 15; *see also id*. at 18 (the status quo "carefully balances" Title X, the Nondirective Mandate, and Section 1554).

For all of the reasons Plaintiffs have previously argued, *Rust* does not control the outcome of this case. ECF No. 18 ("NFPRHA PI Mot.") at 12; ECF No. 51 ("NFPRHA PI Reply") at 1-2, 8, 10, 15-16. Defendants' persistent efforts to rely solely on the 1991 *Rust* decision—in the face of the subsequent congressional directives and despite HHS's failure to engage in proper rulemaking based on its 2018-19 administrative record—only highlight the weakness of Defendants' position. The "permissible" interpretation of Section 1008 at the time of *Rust*, which specifically found ambiguity, does not answer whether HHS has permissibly interpreted the present Title X statutory scheme and HHS's more limited rulemaking authority today. *See* Order at 10 & n.4, 14-15.

Aside from again invoking *Rust*, Defendants' motion does not argue, much less meet their burden to establish, Defendants' likelihood of success on the merits. Rather than attempting to show Defendants' likelihood of success, Defendants' motion uses isolated snippets from the parties' extensive previous arguments or from the Court's order to attempt to critique the Court's preliminary injunction ruling. *See* Mot. at 4-9. On the full record, however, and for all of the reasons articulated by the Court in its oral ruling and written order, the preliminary injunction is legally well-founded and necessary, contradicting Defendants' request for a stay. *See* ECF Nos. 1, 18-26, 34-1, 38-1, 39, 51, 54, 67 (Tr. at 96-104). Plaintiffs respond briefly below to Defendants' erroneous critiques and limited assertions, none of which shows Defendants' likelihood of success.

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Defendants, for example, do not even attempt to address most of the grounds on which the Final Rule violates the congressional mandate that "all pregnancy counseling shall be nondirective," Pub. L. 115-245, 132 Stat. at 3070-71. *See* Mot. at 7 (addressing only the Final Rule's mandatory referral to prenatal care); *cf.* NFPRHA PI Mot. at 10-14 (showing that at least 11 different parts of the Final Rule impose the Counseling Distortions that violate the Nondirective Mandate in at least four ways); NFPRHA PI Reply at 2-7. Moreover, as Plaintiffs have shown, the Nondirective Mandate forbids the Final Rule's directive scheme of requiring referrals for prenatal care and barring referrals for abortion care, regardless of patient wishes. NFPRHA PI Mot. at 13; NFPRHA PI Reply at 2-5; Order at 15. Defendants' assertion that the mandatory prenatal referral somehow means that the Nondirective Mandate is satisfied—because prenatal referral is purportedly "always medically necessary… even for those who later obtain an abortion," Mot. at 7—rests on an erroneous assertion of medical necessity that lacks any factual support in the record before HHS or before this Court and, in addition, ignores the full array of the Final Rule's myriad directive provisions.

Similarly, Defendants ignore the plain text of Section 1554 of the Patient Protection and Affordable Care Act and fail to address the Court's findings that the Final Rule likely violates five different provisions of that law, each of which limit any HHS rulemaking. Order at 15; *see also* NFPRHA PI Mot. at 16-18, 28-29; NFPRHA PI Reply at 9-12. Defendants offer up no new legal or factual basis on which the Court should reconsider its prior determinations. Mot. at 7-8. Defendants only reveal their ongoing failure to reckon with the Final Rule's

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fundamental subversion of the Title X program by asserting that the rule does not conflict with Section 1554 because it (purportedly) "simply" puts patients back in the position they would be in if "Congress had never enacted Title X at all." Mot. at 8. But, of course, Congress *did* enact Title X in order to expand low-income patients' access to care. And the lawfulness of Defendants' regulatory actions under Title X must be assessed against the backdrop of *all* of Congress's requirements for HHS in implementing such a health care program, including Section 1554 and the Nondirective Mandate.

Defendants likewise have no answer for Plaintiffs' claims that the Final Rule (a) violates Title X's explicit voluntariness requirement and (b) is contrary to Title X's central purpose. Defendants' stay motion does not address the actual substance of, much less show they are likely to defeat, those claims. Again, Defendants point back to *Rust*, Mot. at 6, but the Supreme Court in that 1991 case did not have before it and did not decide any claim under 42 U.S.C. § 300a-5, the Title X provision governing "Voluntary Participation." NFPRHA PI Reply at 8. Nor did the *Rust* Court have before it any claim—which Plaintiffs press here, *see* Order at 15—that HHS's rulemaking single-mindedly pursued certain aims without regard to Congress's larger purpose for the Title X program, which its rulemaking undermined. *Rust* does not speak to Plaintiffs' claim that, in 2019, the Final Rule frustrates congressional purpose, is contrary to Title X, and is arbitrary and capricious because it will so drastically disrupt the Title X network of providers and undermine the functioning of the family planning program overall. *See* NFPRHA PI Mot. at 36-39; NFPRHA PI Reply at 21-23.

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Finally, Defendants fail to provide any facts from the rulemaking record or any legal authority in their motion for a stay that would show they are likely to defeat Plaintiffs' many other arbitrary and capricious claims. Defendants baldly assert that they have provided "reasoned analysis of the issues" and "a thorough analysis of the [claimed] problems with the 2000 regulations," and that they have "adequately considered the financial costs to providers." Mot. at 5, 8-9. But Defendants marshal no specifics to support those contentions. The Court correctly concluded that *Plaintiffs*, by contrast, have advanced facts and comments from the rulemaking record along with legal precedent that show that Plaintiffs "are likely to succeed on the merits" of their arbitrary and capricious arguments. Order at 14-16. Those include the well-founded arbitrary and capricious claims against the Final Rule as a whole, as well as those against the Separation Requirements, the Counseling Distortions, and the other Final Rule provisions that aim to change the composition of the Title X network of providers. NFPRHA PI Mot. at 18-27, 29-40; NFPRHA PI Reply at 12-23.

For all of these reasons, Defendants have not "made a strong showing that [they are] likely to succeed on the merits," *Nken*, 556 U.S. at 434; and their motion for a stay should be denied on that basis alone.

II. DEFENDANTS FAIL TO SHOW THEY ARE LIKELY TO SUFFER IRREPARABLE HARMS THAT A STAY MIGHT AVERT AND THAT THE BALANCE OF EQUITIES IS IN THEIR FAVOR

A. The Title X Program Continues to Operate as Congress Has Dictated

Contrary to Defendants' assertions, Mot. at 10, the preliminary injunction now in place does not prevent HHS from effectuating Title X or any other statute

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enacted by the people's representatives. This Court has already rejected their misplaced attempt to rely on *Maryland v. King*, 567 U.S. 1301 (2012). *See* NFPRHA Reply at 26; *see also* Order at 18 ("There is no public interest in the perpetuation of unlawful agency action. Preserving the status quo will not harm the government …. On the other hand, there is substantial equity and public interest in continuing the existing [operation of Title X].").

Moreover, Title X funds are being spent now and will continue to be spent just as Congress has directed. Defendants' assertions that "taxpayer funds will be spent unlawfully" absent a stay, Mot. at 10, is belied by Congress's *repeated* appropriations to continue the Title X program under its current, long-standing regulations and by HHS's own grant-making behavior as recently as April 1, 2019. In addition, Defendants mischaracterize the longstanding practice of referring pregnant patients to *out-of-program* abortion care upon patient request as incorporating "abortion as a method of family planning" within the Title X projects themselves. Mot. at 10. The existing regulations and practices do no such thing. *See* NFPRHA PI Reply at 6 ("Referring a pregnant patient *outside* a Title X project for abortion care does not include abortion *within* that Title X family planning program" and is completely consistent with Section 1008's requirements).

Congress is presumed to have knowledge of how an agency has interpreted its legislation; as such, when Congress enacts subsequent legislation without altering the agency's interpretations, that indicates Congress's comfort with the approach. *Do Sung Uhm v. Humana, Inc.*, 620 F.3d 1134, 1155 (9th Cir. 2010) (quoting *Lorillard v. Pons*, 434 U.S. 575, 580 (1978) and presuming that

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"Congress adopted CMS's interpretation in leaving the statutory language unchanged"). Here, as the Court knows, Congress has provided Title X funds and reenacted its appropriations conditions on those funds each year from 1996 to the present. That annual mandate has left unchanged the existing Title X regulations, including the required referral to abortion care upon request. And the appropriations limitations each year direct *both* that Title X funds "shall not be expended for abortions" and "that all pregnancy counseling shall be nondirective." Pub. L. 115-245, 132 Stat. at 3070-71. Clearly, Congress is comfortable with how HHS has been and is implementing Title X and spending taxpayers' money. Defendants cannot claim any "injury" by the way in which taxpayer funds continue to be used in the program.

HHS's own recent behavior contradicts its argument that taxpayers' funds must not be spent as they have been for decades and that there is an urgent need to prevent Title X from funding projects governed by the existing regulations, including 42 C.F.R. 59.5(a)(5) (requiring referral upon request to any pregnancy option, including termination). As Defendants admit, *on April 1, 2019,* HHS finalized grantees, awarded a new round of three-year grants, and distributed funds—all actions that were governed by the existing regulations and that continued spending under them. Mot. at 10; ECF No. 60-1 ¶ 3; ECF No. 11-1 (Notice of Award). HHS also awarded grants and distributed all of the appropriated Title X funds to projects governed by the existing regulations in 2017 and 2018. A party's years-long delay in asserting, not to mention its own participation in bringing about, purported irreparable harm contravenes the

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existence of that harm. *See, e.g., Miller v. Cal. Pac. Med. Ctr.*, 991 F.2d 536, 544 (9th Cir. 1993) (finding "that the [National Labor Relations] Board tarried so long before seeking this injunction is . . . relevant in determining whether relief is truly necessary" because "delay . . . implies a lack of urgency and irreparable harm"); *see also Dahl v. Swift Distribution, Inc.*, No. CV 10-00551, 2010 WL 1458957, at *3 (C.D. Cal. Apr. 1, 2010) ("unexplained delay in seeking 'emergency' injunctive relief undercuts a claim that an injunction is necessary to prevent immediate and irreparable injury"). Here, continued operation of the Title X program on the terms specified by HHS itself as of April 1, 2019, will not impose harm to taxpayers or violate any congressional requirements; there is no need for a stay.

B. All Parties Are Clear on the Title X Program's Current Operation; the Confusion Caused By Defendants Will End with a Final Merits Ruling

Defendants' other asserted basis for a stay is "confusion" and "uncertainty" as to the set of Title X regulations that will govern in the future, especially as of March 2020, when the next continuation grant awards would be made and HHS hopes to implement the physical separation requirements of the Final Rule. Mot. at 11-13. HHS itself introduced change and uncertainty by promulgating the Final Rule. Plaintiffs, including the hundreds of NFPRHA member grantees and sub-recipients, believe that HHS did so without complying with Title X law and in violation of the Administrative Procedure Act. HHS, for example, proceeded without any showing of need, without a factual grounding in the rulemaking record, and without regard to the reliance interests it was upending.

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The preliminary injunction preserves the decades-old practices and terms with which HHS and grantees are thoroughly familiar until the courts can finally resolve all of the legal questions raised by the Final Rule. *See* ECF No. 60-1 ¶ 7 (admitting "OPA staff and consultants are currently trained on providing oversight with respect to the 2000 rules"). Contrary to Defendants' arguments, a stay will not avert any confusion or uncertainty; rather, it would create *more* because HHS and all Title X grantees would suddenly be called upon to implement a new scheme for the near future, which could then quickly be reversed as the litigation proceeds. Instead, this Court properly determined in its preliminary injunction ruling that the status quo should remain until the legality or illegality of the Final Rule is conclusively determined by this litigation. Order at 4-6, 11, 14-19.

Defendants have not shown that the injunction "prevents the effective administration of the Title X program" or that it will "hinder the continuation application and award process." Mot. at 12-13. Program administration, including continuation awards after the first year of a project period, has long been occurring under the existing Title X regulations and HHS itself just made grants without incident—in the context of possible future changes to the regulations occurring. Defendants' objection is really that they would prefer not to have to contend with Plaintiffs' strong legal claims against the Final Rule, and they would like to implement the rule's upheavals unchecked by litigation of those claims. Mot. at 11-13. But Defendants' desire to avoid the uncertainty of litigation and the enforcement of legal constraints on agency rulemaking does not entitle them to a stay. *See Texas v. United States*, 787 F.3d 733, 768 (5th Cir. 2018) (in denying a

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stay of a preliminary injunction to the federal government, explaining that delayed implementation of a new program does not constitute harm because "injunctions often cause delays" and the government can maintain its prior practices).

C. Plaintiffs Have Shown Serious, Imminent Irreparable Harm

Defendants also attempt to speak for Title X grantees, without foundation, and to assert "harms" from the preliminary injunction on grantees' behalf. Mot. at 10-13. In fact, it is *those very grantees* that have sought and obtained a preliminary injunction in order to prevent imminent irreparable harms to the grantees' provision of health care and to their organizations, missions, clinicians, and patients. *See* Order at 16-18 (citing declarations). As the Court has already recognized, Plaintiffs' harms would start on day one if the Final Rule were allowed to take effect, with its new requirement of substandard and coercive pregnancy counseling by all Title X providers and other immediate changes imposed on current grantees' programs. Order at 17 ("[U]pon its effective date, the Final Rule will cause all current NFPRHA member[] grantees, sub-recipients, and their individual Title X clinicians to face a Hobson's Choice that harms patients as well as the providers.").

Plaintiffs' irreparable harms do not depend on "uncertain events." Mot. at 14. Defendants again lose sight of the health care purpose of the Title X program (and its grantees) by claiming that Plaintiffs can simply exit the program without any harm. *Id.* But substandard care, interference with Title X's purpose, and immediate and ongoing departures from the provider network (among the Final Rule's other negative effects) will decimate Title X's health care and irreparably

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harm public and non-profit provider entities, clinicians, and patients—all of whose interests are properly asserted by Plaintiffs here. Order at 16-18; NFPRHA PI Mot. at 40-45; NFPRHA PI Reply at 7, 23-26.

At most, Defendants suggest "administrative burdens" and that "several weeks" of ordinary, Title X administrative follow-up might have to occur in a more compressed time period than it otherwise would. ECF No. 60-1 ¶¶ 2, 6. These *de minimis* interests stand in sharp contrast to the concrete, immediate damage if the Final Rule takes effect to: the quality of Title X health care; patient well-being, access to care, and trust; Title X's important purpose of assisting low-income patients; the organizations it funds to provide that public service; and the larger public. *See* Order at 16-18. When minimal administrative or financial concerns are balanced against "preventable human suffering," the balance of hardships tips sharply in favor of preventing those human harms. *Golden Gate Restaurant Ass'n v. City & Cty. of San Francisco*, 512 F.3d 1112, 1125-26 (9th Cir. 2008). Defendants have failed to meet their burden of establishing imminent irreparable harm to HHS and of establishing that the balance of the equities here favors Defendants' minimal administrative concerns. Thus, no stay should issue.

III. THE PRELIMINARY INJUNCTION'S FULL SCOPE IS NECESSARY AND WELL GROUNDED IN THE RECORD

Lastly, Defendants erroneously assert that "many aspects of the [Final] Rule are not at issue in this litigation," Mot. at 13. As referenced above, Plaintiffs challenge the whole rule and did so not only in the Complaint, *see* ECF No. 1, 1:19-cv-03040 (NFPRHA Complaint) ¶¶ 196, 200, 206, 212-13, but also on their

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preliminary injunction motion. NFPRHA PI Mot. at 36-40; NFPRHA PI Reply at 21-23, 28-30. For this reason, among several, the Court properly addressed the entire rule in its injunction. NFPRHA PI Reply at 28-30.

Moreover, a stay motion is not a motion for reconsideration, and Defendants inappropriately attempt to re-litigate the terms of the injunction through this stay request. Defendants reference "compliance" provisions of the Final Rule, such as Section 59.5(a)(13) and Section 59.17(d), that are tied to many other subsections of it, including the Counseling Distortions and Separation Requirements, *see* NFPRHA PI Reply at 30. These types of provisions cannot be stripped of their connections with the remainder of the Final Rule without re-drafting, which is not a court's role. Similarly, Defendants suggest that the Court should re-write one sentence within subsection (b) of the larger Section 59.14. Mot. at 14. But Defendants have not shown that any aspect of the Final Rule should take effect at this early stage of litigation, which, again, challenges both the rule's various provisions and its entirety. Instead, Plaintiffs fully supported the need for and scope of the preliminary injunction that the Court entered to preserve the status quo. Order at 14-18 (noting "no public interest in the perpetration of unlawful agency action" and "no hurry for the Final Rule to become effective");[3] NFPRHA PI Reply at 28-30.

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[3] The short declaration now proffered from David Johnson of OPA implies (a) that HHS currently lacks the ability to "collect information on grantees and subrecipients," (b) that HHS's Title X administration does not already address

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CONCLUSION

For the foregoing reasons, and those contained in Plaintiffs' preliminary injunction briefing and the Court's order, Defendants' motion to stay the preliminary injunction pending appeal should be denied in full. Likewise, Defendants' attempt to re-litigate the scope of the preliminary injunction on this stay motion should be rejected.

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grantees' compliance with state reporting laws and protection of minors, and (c) that Title X grants do not now require a detailed plan for and reporting of grant dollars' use, as well as pre-approval for significant changes in grantees' use of funds. ECF No. 60-1 ¶¶ 8-10. In fact, those items are already a part of existing regulations and/or Title X grant terms. *See* 42 C.F.R. §§ 59.4(c)(2) & (3), 59.9, 59.10; ECF No. 11-1 (Notice of Award) at 2-5 (discussing terms related to state reporting laws, protection of minors, notice of all service sites, accurate data reporting, grant administration requirements, and requirement of prior approval for changes); Fiscal Year 2019 Title X Funding Opportunity Announcement at 13-14, 27-37, 52-62, https://www.hhs.gov/opa/sites/default/files/FY2019-FOA-FP-services.pdf (same, as well as detailed budgeting and internal controls, required information about each subrecipient, and quarterly financial and cash reporting). Moreover, Mr. Johnson's declaration asserts the purported need for *added* authority along such lines in order to implement the Final Rule; while the Final Rule is enjoined, however, paragraphs 8-10 of his declaration show no effects—much less irreparable harms for OPA—as Title X continues to operate.

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Respectfully Submitted,

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DECLARATION OF SERVICE

I hereby declare that on this day I caused the foregoing document to be electronically filed with the Clerk of the Court using the Court's CM/ECF System which will serve a copy of this document upon all counsel of record.

DATED, this 17th of May, 2019, at Seattle, Washington.

/s/ *Emily Chiang*
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