No. 19-35394

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

NATIONAL FAMILY PLANNING & REPRODUCTIVE HEALTH ASSOCIATION, ET AL.,
Plaintiffs-Appellees,

v.

ALEX M. AZAR II, in his official capacity as the Secretary of Health and Human Services, et al.,
Defendants-Appellants.

On Appeal from the United States District Court for the Eastern District of Washington Nos. 19-cv-3040, 19-cv-3045 (Bastian, J.)

EMERGENCY MOTION TO THE EN BANC COURT OF PLAINTIFFS-APPELLEES NATIONAL FAMILY PLANNING & REPRODUCTIVE HEALTH ASSOCIATION, ET AL. FOR A TEMPORARY ADMINISTRATIVE STAY PENDING RESOLUTION OF THE FORTHCOMING EMERGENCY MOTION FOR RECONSIDERATION EN BANC OF THE MOTIONS PANEL'S JUNE 20, 2019 ORDER STAYING THE PRELIMINARY INJUNCTION PENDING APPEAL

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June 20, 2019

CIRCUIT RULE 27-3 CERTIFICATE

(i) The contact information for the attorneys for the parties is as follows:

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(ii) The nature of the emergency is as follows:

As set forth fully herein, an immediate, temporary administrative stay of the motions panel order issued today, June 20, 2019, granting Defendants' motion for a stay pending appeal of the preliminary injunctions entered in this matter (and by two other district courts in this circuit) is necessary to prevent immediate irreparable harm and to allow Plaintiffs to seek en banc review of the panel's order. That order would permit Defendants Alex M. Azar, United States Department of Health and Human Services ("HHS"), Diane Foley, and the Office of Population Affairs to impose drastic changes on a stable and successful decades-old program, Title X, on which low-income patients across the country rely for necessary health care. This program, as relevant here, has been effectively implemented through consistent federal regulations since its inception. Defendants' new regulations, undoing those stable rules, are contrary to law, arbitrary and capricious, and compel a national network of health care providers to provide substandard care, contravene medical ethics, and rip apart their successful Title X projects. Absent an administrative stay, the panel's order today has cleared the way for Defendants' new regulations to take effect. If that occurs—even briefly—it will fundamentally dismantle the Title X program, causing irreparable harm to Plaintiffs, their clinicians, their patients, and the public health.

(iii) Notification of parties:

Counsel for Defendants were notified of this emergency motion on June 20, 2019, by telephone call, and subsequently informed counsel for Plaintiffs that Defendants oppose Plaintiffs' emergency motion.

Counsel for Plaintiffs will serve counsel for Defendants by e-mail with copies of this motion and supporting documents attached.

(iv) The relief sought in this motion is not available in the district court. All grounds advanced in support of this motion were submitted to the district court in Plaintiffs' Motion for Preliminary Injunction, which the district court granted. Moreover, Plaintiffs asked the motion's panel to stay their ruling so that Plaintiffs could seek further review if it granted the stay, but the panel did not address that request, thereby effectively denying it.

(v) Plaintiffs request a ruling immediately.

/s/ Fiona Kaye
FIONA KAYE

INTRODUCTION

Today, a panel of this Court granted a stay pending appeal of three district court preliminary injunction orders that blocked new Title X regulations from taking effect. *See Washington v. Azar*, Case No. 19-35384, Dkt. No. 34 (attached hereto as Addendum A ("Add.A")). Without action from this Court, today's decision will upend the decades-long status quo in federal law that has ensured that low-income individuals receive necessary, high-quality family planning care; it will cause immediate, irreparable harm to Plaintiffs, their clinicians, their patients, and the public health. Pursuant to Federal Rule of Appellate Procedure 35(a)(2), given the exceptionally important questions presented by the need for an administrative stay and the petition for a rehearing en banc that will follow promptly hereafter, Plaintiffs-Appellees request that this Court immediately issue an administrative stay of today's decision to allow time to file a petition for rehearing en banc by June 24, 2019.

BACKGROUND

Three district courts entered preliminary injunctions to block Defendants' 2019 regulations, 84 Fed. Reg. 7114 (Mar. 4, 2019) (the "Final Rule"). Those three courts agreed with Plaintiffs—including hundreds of Title X provider organizations spread throughout the country, more than 20 states, and the American Medical Association—that the Final Rule likely is unlawful and would

impose extensive harms on the Title X program, its providers, and its patients, as well as on the public health. *See Washington v. Azar*, 2019 WL 1868362 (E.D. Wash. Apr. 25, 2019) (attached hereto as Addendum B ("Add.B"), at B1-B19); *Oregon v. Azar*, 2019 WL 1897475 (D. Or. April 29, 2019); *California v. Azar*, 2019 WL 1877392 (N.D. Cal. April 26, 2019). Unless further action is taken by this Court, today's order stays all of these district court decisions pending appeal, allowing the Final Rule overnight to upend the nearly fifty-year-old Title X program that low-income patients depend on for contraceptive care, pregnancy testing and counseling, and other urgent health care needs. As each of the district courts found, the Final Rule would immediately push many current Title X providers from the program (those who serve more than 40% of the patients across the country), and end access for their patients, while forcing other providers to offer care contrary to HHS's own clinical standards and to contort their Title X programs to the detriment of patients and the public health.

The Final Rule taking effect would cause those immediate and devastating consequences, but an administrative stay would impose no significant harm on the government. These Defendants issued the Final Rule after years of operating the program under the existing, long-governing regulations and offered no evidence of any consequences but mere abstract delay in accomplishing a policy change to the district court, when it properly weighed the preliminary injunction factors.

In particular, the District Court for the Eastern District of Washington ruled that, "[a]lthough Plaintiffs have met their burden of showing that all four factors tip in their favor, the irreparable harm and balance of equities factors tip so strongly in Plaintiffs' favor that a strong showing of likelihood [of success] on the merits was not necessary." Add. B14; *see also Washington v. Azar*, Case No. 19-35394, Dkt. No. 9 ("Stay Mtn. Add.") at 99-100, 109-10 (district court's ruling from the bench).

On every claim before it, the district court found Plaintiffs had presented arguments that indicated they were likely to success on the merits. Add.B14; *see* Stay Mtn. Add. 97-103; Add.B14-B16. The district court recognized that the Final Rule likely violates Congress's Nondirective Mandate for pregnancy counseling, Pub. L. No. 115-245, 132 Stat. at 3070-71, and Section 1554 of the Patient Protection and Affordable Care Act, as well as Title X itself. Add.B15. Likewise, Plaintiffs had made the requisite threshold showing that the Final Rule is arbitrary and capricious, because *inter alia* "it reverses long-standing positions of the Department without proper consideration of sound medical opinions and the economic and non-economic consequences." Add.B15; *see also id.* (Plaintiffs' showings that separation requirements increase expenses "unnecessarily and unreasonably" and counseling distortions are "inconsistent with ethical … and

evidence-based health care"). The court also recognized Plaintiffs' showing that HHS:

> failed to consider important factors, acted counter to and in disregard of the evidence in the administrative record and offered no reasoned analysis based on the record. Rather, it seems the Department has relied on the record made 30 years ago, but not the record made in 2018-19.

Add.B15-B16.

Further, the court agreed Plaintiffs faced irreparable harm from a Hobson's Choice because the Final Rule immediately requires either participation in substandard health care "that harms patients as well as the providers" or departure from the program, leaving low-income patients without free or subsidized Title X care. Add.B16-17. It found likely serious disruption to the network of providers "knit together over the past 45 years," accompanied by further harms to patients' health and interference with the work of those Plaintiff government and non-profit health care entities. *See* Add.B16. These "harmful consequences of the Final Rule will uniquely impact rural and uninsured patients." Add.B16.

The court emphasized the "substantial evidence of harm" contained in Plaintiffs' *fifteen* fact declarations. Add.B17; *see Washington v. Azar*, Case No. 19-35394, Dkt. No. 13 ("Stay Mtn. Supp. Add.") at 1-245 (containing the eight declarations filed by NFPRHA Plaintiffs). By contrast, the Government offered no declaration or other evidence of any harm to it. The Court found that "the Government's response in this case is dismissive, speculative, and not based on any evidence presented in the record before this Court." Add.B18.

The court specifically found "[t]here's no evidence presented by the Department … that [Section 1008 of] Title X is being violated or ignored by this network of providers," Stay Mtn. Add. 102; found that "[p]reserving the status quo will not harm the Government;" and found that delaying the effective date of the Final Rule will cost it nothing," because that date was "arbitrary," Add.B18. "On the other hand, there is substantial equity and public interest in continuing the existing structure and network of health care providers" while this case is litigated. Add.B18.

The district court on June 3, 2019 denied HHS's request for a stay. When HHS sought a stay in this court, Plaintiffs disputed that HHS had any of the predicates necessary for a stay of the preliminary injunction but also requested, if a stay were granted, that Plaintiffs be given 60 days or some other interim period in which to seek further review. *See Washington v. Azar*, Case No. 19-35394, Dkt. No. 13 at 22 n.3. The panel that issued the stay today did not address that request, and thus effectively denied Plaintiffs' request for a stay of its decision. The panel has thereby paved the way for HHS to immediately implement the Final Rule, even while Plaintiffs seek en banc review. The panel also designated their decision to grant the stay a published opinion.

ARGUMENT

I. PLAINTIFFS AND THEIR PATIENTS WILL SUFFER IMMEDIATE IRREPARABLE HARMS ABSENT AN EMERGENCY ADMINISTRATIVE STAY PENDING THEIR PETITION FOR REHEARING EN BANC

This request for an administrative stay presents an extraordinarily important question: whether the Final Rule should be allowed to immediately take effect, which would disrupt the status quo, and cause irreparable harm to Plaintiffs, the Title X program, and the vulnerable patients that rely on it for critical family planning care. For almost five decades, a national Title X network of government and non-profit providers has effectively made contraception, pregnancy testing and counseling, cervical cancer screening, and similar services available for free or at reduced cost to those in need. Stay Mtn. Supp. Add. 195-204 (Decl. of Clare M. Coleman). No major deleterious change to the Title X program has ever taken effect until now, including the 1988 amendments to the Title X regulations that were repeatedly enjoined, and eventually rescinded. *See* 65 Fed. Reg. at 41,271, 41, 276.

Plaintiffs have shown (and the district court found) that, "upon its effective date"—which the panel's ruling now allows HHS to implement—the Final Rule would require Plaintiffs either to provide clinical care below professional standards that is harmful to both providers and patients or to abandon the program, imposing yet more harms on Plaintiffs. Add.B17-B18; Stay Mtn. Supp. Add. 21-44 (Decl.of Dr. Kathryn Kost); *id.* at 228-45 (Decl. of Clare M. Coleman). The district court credited the declarations of numerous Title X clinicians as to immediate harms to the patient-provider relationship. *See* Stay Mtn. Supp. Add. 106-15 (Decl. of Elisabeth Kruse); *id.* at 121-36 (Decl. of Dr. Tessa Madden); *id.* at 168-79 (Decl. of Dr. Sarah Prager). Various Title X funded entities and clinicians explained why the rule would force them to leave the program, *see, e.g.,* Stay Mtn. Supp. Add.

103-15 (Decl. of Elisabeth Kruse); *id*. 119-36 (Decl. of Dr. Tessa Madden); *id.* at 166-79 (Decl. of Dr. Sarah Prager); others explained why it would force them to suffer losses to staff, mission and reputation as they fought to maintain some of their Title X project, *see, e.g.,* Stay Mtn. Supp. Add. 80-100 (Decl. of Kristin A. Adams); *id.*142-63 (Decl. of Heather Maisen). Either way, Plaintiffs suffer serious, unavoidable harms. *See* Stay Mtn. Supp. Add. 231 (Decl. of Dr. Tessa Madden); Add.B16-B18 (crediting fifteen declarants in consolidated proceeding); *see also* Stay Mtn. Supp. Add. 1-245 (all harm declarations from NFPRHA's case).

II. THE GOVERNMENT WILL NOT SUFFER ANY SIGNFICANT HARM IN CONTINUING TO IMPLEMENT TITLE X AS IT HAS FOR DECADES

The Government cannot show that it will face any concrete irreparable harm if an administrative stay issues, especially given that it is the one that seeks to change the status quo. In fact, "the district court's order merely returned the nation temporarily to the position it has occupied for many previous years," in the face of this new HHS policy effort. *Washington v. Trump*, 847 F.3d 1151, 1168 (9th Cir. 2017).

Indeed, Congress's annual Title X appropriations acts, while specifying the Nondirective Mandate and other conditions, have never evinced the purported misuse of taxpayer dollars in the decades-old Title X regulations that HHS now conjures, and that today's panel credits. To the contrary, Congress continues to fund the program without dictating that, for example, referral for abortion on patient request should be discontinued. That annual iterative action indicates Congress's approval of the existing regulations and use of funding. *See Do Sung*

Uhm v. Humana, Inc., 620 F.3d 1134, 1155 (9th Cir. 2010) (citing *Lorillard v. Pons*, 434 U.S. 575, 580 (1978)).

Furthermore, HHS on April 1, 2019, distributed all of the Fiscal Year 2019 Title X funds under the existing scheme, Stay Mtn. Add. 127 (Decl. of David Johnson), using taxpayer dollars in the very way it claims this Court must urgently prevent. *See Miller v. Cal. Pac. Med. Ctr.*, 991 F.2d 536, 544 (9th Cir. 1993) (finding that federal agency's protracted timeline "implies a lack of urgency and irreparable harm"). The most stable course for all interested parties is maintaining the long-standing status quo during litigation. See *California v. Azar*, 2019 WL 2029066, at *2 (N.D. Cal. May 8, 2019) (explaining that some uncertainty is inevitable, but maintaining current regulations creates least upheaval).

In this highly regulated grant program, where grantees must supervise and ensure compliance by often dozens of subrecipient organizations, and where patients are being treated at almost 4000 sites around the country on an ongoing basis, it would be extraordinarily disruptive to have a yo-yo of regulatory terms. Unless a temporary administrative stay intervenes, individual clinicians and provider entities forced to leave the program when the Final Rule is initially implemented may never be able to return, even if Plaintiffs succeed with their ultimate merits challenges in the future.

III. EN BANC REVIEW OF THE PANEL STAY ORDER IS LIKELY

In addition, a temporary administrative stay is warranted because the Court is likely to grant reconsideration en banc of today's panel stay decision, once Plaintiffs have the chance to file that petition. As discussed above, this case

involves questions of exceptional importance: the continued operation of the only federal family planning program that provides critical health care to millions of low-income individuals, and whether decades of building the program should be undone.

En banc review is also necessary to correct manifest errors of law, which Plaintiffs' forthcoming motion for reconsideration en banc will explain in greater detail. For example, the motions panel held that the Final Rule does not violate the Nondirective Mandate because the Final Rule "require[s] that any pregnancy counseling" provided by Title X projects "shall be nondirective." Add.A18. That conclusion ignores the provisions of the Rule that prohibit a Title X project from counseling only on abortion even when that is all the patient seeks, and permit a Title X project to omit any counseling on abortion, thus giving patients the impression that abortion is not a legal or medically appropriate option. *See* 84 Fed. Reg. at 7,747. The Rule further requires directive pregnancy counseling by requiring Title X projects to provide pregnant patients referrals for prenatal care and prohibiting them from providing referrals for abortion—thus steering patients toward a particular course of treatment. 84 Fed. Reg. at 7788-89 (42 C.F.R. §§ 59.5(a)(5), 59.14(a)-(b)). The motions panel also reasoned that "counseling" does not include referral. *See* Add.A18. But this ruling is contrary to Congress's expressed understanding of the term "counseling" elsewhere, *see* 42 U.S.C. § 254c-6(a)(1), as well as HHS's own interpretation of that term in the Rule, *see* 84 Fed. Reg. at 7,730 ("[N]ondirective pregnancy counseling can include counseling on adoption, and corresponding referrals to adoption agencies."). It also makes a

mockery of the statute by permitting Title X projects to do through referrals exactly what Congress expressed an intent to prohibit—steering patients toward a particular pregnancy option.

The motions panel also misconstrued Section 1554 of the ACA, holding that it imposes no restraint on HHS's regulation of government funding programs. Add.A20-A21. But that statute expressly applies to "any regulation" issued by HHS, and there can be no doubt that compared to the prior regulations, the Rule imposes unreasonable barriers to care, impedes timely access to care, and interferes with patient-provider communications.

Finally, the panel reversed findings that Plaintiffs are likely to succeed in showing that the Final Rule as a whole and its numerous intertwined provisions are arbitrary and capricious, because HHS sharply departed from the requirements of reasoned rulemaking. *See* Add.A22-A24. The panel did so based on abbreviated briefing and without reference to the detailed showings that Plaintiffs had made from that rulemaking record, which showed HHS acted contrary to overwhelming evidence and failed to consider the Final Rule's negative impact on the ongoing functioning of the Title X program for its patients. *See id.* HHS was so single-mindedly focused on addressing a non-existent compliance program that it adopted a Final Rule that would gravely undermine the purpose for which Congress created the Title X program. Reconsideration is warranted to correct these and other errors of law, as will be discussed in Plaintiffs' forthcoming motion.

CONCLUSION

The Court should grant an immediate temporary administrative stay of the motions panel's order—keeping the district court's preliminary injunction in effect—pending consideration of Plaintiffs' motion for en banc reconsideration of the panel's order, which Plaintiffs intend to file by June 24, 2019.

June 20, 2019

Respectfully submitted.

/s/ Fiona Kaye

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Ninth Circuit Rules 27-1 and 32-3 because it contains 2,540 words, exclusive of the exempted portions of the brief. The brief has been prepared in proportionally spaced typeface using Microsoft Word 2016 in 14 point Times New Roman font.

/s/ Fiona Kaye
FIONA KAYE

June 20, 2019

CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of June 20, 2019, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF system. Counsel for all parties to the case are registered CM/ECF users and will be served by the appellate CM/ECF system. I have also separately served counsel for Defendants by e-mail.

/s/ Fiona Kaye
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