No. 20-1215

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

MAYOR AND CITY COUNCIL OF BALTIMORE,
Plaintiff-Appellee,

v.

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

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

RESPONSE TO APPELLEE'S PETITION FOR INITIAL HEARING EN BANC

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INTRODUCTION

Baltimore requests that this Court take the extraordinary measure of granting initial en banc review to hear the government's appeal from a permanent injunction that is premised on the district court's determination that the Title X rule is arbitrary and capricious and cannot be enforced within Maryland. Although this Court's resolution of the Rule's validity (even limited to Maryland) is undoubtedly important, Baltimore's petition for initial en banc hearing nevertheless turns Federal Rule of Appellate Procedure 35 on its head: an en banc ruling by this Court affirming the district court's injunction would *create*, rather than eliminate, a square conflict with the en banc Ninth Circuit's recent decision that rejected identical arbitrary-and-capricious claims and that did so in large part on the ground that the claims were contrary to the Supreme Court's decision in *Rust v. Sullivan*, 500 U.S. 173 (1991). Unsurprisingly, Baltimore has identified neither precedent nor principle that would justify such a backwards use of the full Court's resources, let alone before a panel has even considered the appeal. To the contrary, Baltimore's initial en banc would serve as an end-run around a panel of this Court: that panel previously issued a stay pending appeal of a preliminary injunction of the same Rule on different legal grounds, and it is currently considering cross motions about the effect of the permanent injunction on the fully briefed and argued appeal of the preliminary injunction that remains pending before it. This Court should deny Baltimore's petition and allow the appeal to proceed in the ordinary course.

BACKGROUND

1.a. In 1970, Congress enacted Title X of the Public Health Service Act to create a limited grant program for certain types of preconception family-planning services. *See* Pub. L. No. 91-572, 84 Stat. 1504. The statute authorizes the Department of Health and Human Services (HHS) to make grants and enter into contracts with public or private nonprofit entities "to assist in the establishment and operation of voluntary family planning projects which shall offer a broad range of acceptable and effective family planning methods and services." 42 U.S.C. § 300(a). It also provides that "[g]rants and contracts made under this subchapter shall be made in accordance with such regulations as the Secretary may promulgate." *Id.* § 300a-4(a). Section 1008, however, directs that "[n]one of the funds appropriated under this subchapter shall be used in programs where abortion is a method of family planning." *Id.* § 300a-6.

b. In 1988, HHS issued regulations that implemented § 1008 by prohibiting Title X projects from promoting, encouraging, advocating, or providing counseling on or referrals for abortion as a method of family planning. 53 Fed. Reg. 2922, 2945 (Feb. 2, 1988) (§§ 59.8, 59.10). To prevent programs from evading these restrictions by steering patients toward abortion providers, the regulations placed limitations on the list of providers that a program must offer pregnant patients as part of a required referral for prenatal care. *See id.* (§ 59.8(a)(3)). And to maintain program integrity, the regulations required grantees to keep their Title X-funded projects "physically and

financially separate" from all prohibited abortion-related activities. *Id.* (§ 59.9). The Supreme Court upheld these regulations in *Rust*, concluding that they were authorized by Title X, were not arbitrary and capricious, and were consistent with the Constitution. 500 U.S. at 183-203.

In 1993, President Clinton and HHS suspended the 1988 regulations. 58 Fed. Reg. 7455 (Jan. 22, 1993); 58 Fed. Reg. 7462 (Feb. 5, 1993) (interim rule). After public comment, HHS finalized a new rule in 2000, which required Title X projects to offer and provide upon request "information and counseling regarding" specific options, including "[p]regnancy termination," followed by "referral upon request." 65 Fed. Reg. 41,270, 41,279 (July 3, 2000). The 2000 regulations also eliminated the physical-separation requirement. *See id.* at 41,275-76. In adopting these new regulations, HHS acknowledged that the 1988 regulations were "a permissible interpretation of the statute," *id.* at 41,277, but justified the shift in approaches on the basis of "experience," *id.* at 41,271.

c. In 2019, HHS adopted a rule that, as relevant here, is materially indistinguishable from the 1988 regulations upheld in *Rust*. 84 Fed. Reg. 7714. In implementing Title X and especially § 1008, the Rule, like the 1988 regulations, prohibits Title X projects from providing referrals for, or engaging in activities that otherwise encourage or promote, abortion as a method of family planning. 42 C.F.R. §§ 59.5(a)(5), 59.14(a), 59.16(a). As HHS explained, "[i]f a Title X project refers for,

encourages, promotes, advocates, supports, or assists with, abortion as a method of family planning, it is a program 'where abortion is a method of family planning' and the Title X statute prohibits Title X funding for that project." 84 Fed. Reg. at 7759. To prevent evasion of these requirements, the Rule, like the 1988 regulations, imposes certain restrictions on the list of providers that may be given along with the required referral for prenatal care. *See* 42 C.F.R. § 59.14(c)(2). In fact, the Rule is less restrictive than the 1988 regulations in that it allows, but does not require, "nondirective pregnancy counseling, which may discuss abortion," 42 C.F.R § 59.14(e)(5); *see also id.* § 59.14(b)(1)(i), provided that such counseling does "not encourage, promote or advocate abortion as a method of family planning," *id.* § 59.16(a); *see also* 84 Fed. Reg. at 7745-46 (preamble).

Like the 1988 regulations, the Rule also requires that Title X projects be physically separate from abortion-related activities conducted outside the grant program. 42 C.F.R. § 59.15. The Rule was scheduled to take effect on May 3, 2019 (and began to be enforced in July 2019 after the various preliminary injunctions against the Rule were stayed), but grantees had until March 4, 2020, to comply with the physical-separation requirement. 84 Fed. Reg. at 7714.

2. Baltimore challenged the Rule and sought a preliminary injunction, and the district court granted its motion on the grounds that the Rule violated certain statutory provisions. After the government appealed, a panel of this Court entered a

stay of the preliminary injunction. *See* Order, *Mayor and City Council of Baltimore v. Azar*, 778 F. App'x 212 (4th Cir. 2019). Baltimore moved for the Court to reconsider the grant of a stay en banc, and this Court on September 3, 2019, denied the motion for rehearing en banc without requesting a poll of the Court. The panel thereafter held oral argument on September 18, 2019. While the appeal from the preliminary injunction was pending before this Court, the district court heard the parties' cross-motions for summary judgment. The court granted summary judgment in part to Baltimore, holding that the Rule's referral and counseling restrictions as well as the physical-separation requirement are arbitrary and capricious. The district court did not rule on the statutory claims that are currently pending before this Court on the government's preliminary injunction appeal, and it granted summary judgment to the government on other remaining claims. *See Mayor & City Council of Baltimore v. Azar*, No. 19-1103, 2020 WL 758145, at *7 & n.5 (D. Md. Feb. 14, 2020) (declining to address the statutory claims "as they remain on appeal in connection with the Fourth Circuit's review of this Court's preliminary injunction" and noting that the court of appeals may consider and decide the "merits of the case," not just "propriety of the injunctive relief"). The district court limited the relief to the State of Maryland, denying Baltimore's requests to extend the relief nationwide. *Id.* at *8; *see also* Order, *Mayor & City Council of Baltimore v. Azar*, No. 19-1103, (D. Md. Feb. 26, 2020).

3. The government promptly filed a notice of appeal and on February 26, 2020, moved to consolidate the appeal of the permanent injunction based on the arbitrary-and-capricious claims with the appeal of the preliminary injunction based on the statutory claims. Baltimore opposed the motion to consolidate and moved to dismiss the preliminary injunction appeal as moot in light of the permanent injunction, notwithstanding that the injunctions rest on different grounds. Those motions, which are fully briefed, remain pending before the panel. After the district court denied the government's motion for a stay pending appeal, the government filed a motion for a stay with this Court on March 6, which also remains pending. The same day, Baltimore filed a motion for initial hearing en banc of the government's appeal of the permanent injunction.

ARGUMENT

I. Baltimore Cannot Meet The Standard For En Banc Review, Let Alone Initial En Banc Consideration

A. En banc hearings are generally reserved for those extraordinary cases in which full court review is necessary to "secure or maintain uniformity of the court's decisions." Fed. Rule App. P. 35(a)(1). Baltimore does not and cannot assert any such need in this case. Instead, Baltimore contends that it presents a "question of exceptional importance," *id.* 35(a)(2), but en banc review is not warranted under that catchall provision. As a threshold matter, while the question whether the rule is arbitrary and

capricious is undoubtedly important, Baltimore exaggerates the point. The government's appeal does not concern the nationwide validity of the rule, but only whether it can be enforced in Maryland. The district court properly refused to invalidate the rule nationwide, consistent with this Court's precedent. *See Virginia Soc'y for Human Life, Inc. v. FEC*, 263 F.3d 379, 393 (4th Cir. 2001) (vacating the application of a permanent injunction in an APA challenge to nonparties when such a remedy is "broader than necessary to afford full relief" to the plaintiff).

More fundamentally, the importance of the question cannot justify Baltimore's request for en banc review where a ruling in Baltimore's favor would *create* rather than eliminate a conflict in authority. As Baltimore concedes (at 11), a decision in its favor in this Court would create a direct conflict with the Ninth Circuit's recent decision. Moreover, as discussed in greater detail below, affirming the district court holdings would be contrary to the Supreme Court's decision in *Rust*, as the Ninth Circuit explained. Granting a petition for hearing en banc only to create such a conflict would turn Rule 35 on its head. Where there is no existing conflict between a decision of this Court and another court, proceeding before a panel in the usual course would allow a panel to avoid any conflict in authority and thus obviate any need for rehearing en banc. *See Belk v. Charlotte-Mecklenburg Bd. of Educ.*, 211 F.3d 853, 854 (4th Cir. 2000) (Wilkinson, J., concurring in the denial of initial hearing en banc) ("In the vast majority of cases, panel decisions are the end of the matter. . . . Quite often the work of the panel renders

an en banc decision unnecessary.") Baltimore has provided no adequate reason to deviate from that course here.

B. All the more so given how exceedingly rare it is to grant an initial hearing en banc. *See Belk*, 211 F.3d at 855 (Wilkinson, J., concurring) ("In cases too numerous to mention, we have rejected the request of litigants for an initial hearing en banc."). Baltimore has identified only two cases in which this Court has taken this extraordinary step; neither is remotely close to the circumstances of this case. In *Meadows v. Holland*, 831 F.2d 493 (4th Cir. 1987), *vacated*, 489 U.S. 1049 (1989), the Court granted initial en banc hearing because prior circuit precedent controlled the case and the only question was whether to overrule that precedent, which the Court chose to do. *Id.* at 494, 497. In *International Refugee Assistance Project v. Trump*, 857 F.3d 554 (4th Cir. 2017), *vacated* 138 S. Ct. 2710 (2018), this Court granted initial en banc hearing *sua sponte* to review a worldwide injunction prohibiting on constitutional and statutory grounds enforcement of a Presidential Proclamation premised on national security.[1]

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[1] The few out-of-circuit cases that Baltimore cites also do not support its request. For example, the D.C. Circuit *sua sponte* granted initial en banc hearing of a challenge to the EPA's Clean Power Plan—a rule that established far-ranging guidelines for States' regulation of emissions from existing power plants and that had been stayed by the Supreme Court pending appeal (the first time the Supreme Court had issued a stay of regulations before an initial review by an appeals court). *West Virginia v. EPA*, No. 15A773 (S. Ct. Feb. 9, 2016). Indeed, the extremely high bar for initial en banc applied by other circuits is well illustrated by the Eleventh Circuit's denial of such review even in the facial challenge to the Patient Protection and Affordable Care Act that was

Bypassing panel resolution of this appeal makes little sense in these circumstances, particularly where a panel of this Court has issued a stay, has heard argument in the prior appeal, and has cross motions pending before it on this appeal. Baltimore asserts (at 3) that "initial en banc hearing may promote a swifter resolution of this appeal in comparison to en banc review after a panel disposition," implying that the panel is likely to rule in a manner that in plaintiff's view will require en banc review. But it is exceedingly "inappropriate" to seek initial en banc on the theory that "that the three-judge panel's disposition is all but foreordained and that we should remove the case from its hands *instanter*." *Belk*, 211 F.3d at 855 (Wilkinson, J., concurring) (rejecting argument that initial en banc was required because the panel's earlier grant of a stay likely foreshadowed its decision on the merits).

II. Baltimore's Initial En Banc Request Is Particularly Unwarranted Because The City's Arbitrary-And-Capricious Claims Are Meritless, As The En Banc Ninth Circuit Recently Held

The Title X statute mandates in § 1008 that "[n]one of the funds appropriated under this subchapter shall be used in programs where abortion is a method of family planning." 42 U.S.C. § 300a-6. Based on an interpretation of that provision that the Supreme Court upheld in *Rust*, the Rule reasonably bars Title X recipients from

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ultimately decided by the Supreme Court. *See* Order, *Florida v. Sebelius*, Nos. 11-11021 & 11-11067 (11th Cir. March 31, 2011); *see also National Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012).

providing referrals for abortion as a method of family planning, and requires that facilities that provide Title X-funded services be physically separate from those that provide abortions as a method of family planning. As the Supreme Court explained, it is not arbitrary and capricious for HHS to adopt such measures on the ground that they are "more in keeping with the original intent of the [Title X] statute," even if they constitute a "sharp break from the Secretary's prior construction." *Rust*, 500 U.S. at 186-87. The same restrictions upheld in *Rust* are not arbitrary and capricious now; rather, as the en banc Ninth Circuit held, the Rule represents "reasoned decisionmaking." *California*, 2020 WL 878528, at *21-*25 (quotation marks omitted).

A. Remarkably, Baltimore's petition fails to mention that the Supreme Court upheld substantially the same requirements and rationale that the Rule adopts. Instead, Baltimore incorrectly says that the Rule marks a departure from the "policies and interpretations [that] have been used by the [Title X] program for virtually its entire history." Pet. 4 (quotation marks omitted). Yet the Rule merely reprises substantially the same interpretation of Title X that HHS adopted in 1988 and that the Supreme Court upheld. Because that interpretation is lawful, HHS could reasonably determine that the Rule's costs are outweighed by the benefits of adhering to § 1008 and the underlying policy that taxpayer funds should not be used to support abortion as a method of family planning. That conclusion renders most of Baltimore's assertions about cost beside the point.

B. Baltimore's contentions that HHS ignored evidence are also mistaken on their own terms. Baltimore states (at 13) that HHS acted arbitrarily because several medical organizations "told HHS that the Rule would violate medical ethics." As the district court acknowledged, however, "HHS was not required to demonstrate that any professional organization supported the Rule." *Mayor & City Council of Baltimore v. Azar*, No. 19-1103, 2020 WL 758145, at *10 (D. Md. Feb. 14, 2020). And more fundamentally, Baltimore again ignores that the Supreme Court in *Rust* held that an even stricter restriction on counseling did not "significantly impinge upon the doctor-patient relationship." 500 U.S. at 200; *see California*, 2020 WL 878528, at *24 n.36. HHS's reaffirmation of that conclusion cannot be arbitrary and capricious, *see* 84 Fed. Reg. at 7748—especially since, unlike in *Rust*, the Rule allows a provider to give non-directive counseling about abortion. *See California*, 2020 WL 878528, at *24; *Compare* 42 C.F.R. § 59.14(b)(1)(i), *with Rust*, 500 U.S. at 184, 192. Baltimore likewise ignores federal and state conscience laws that allow physicians to abstain from referring patients for abortion, laws which HHS reasonably interpreted as evidence that providers do not need to make abortion referrals to be ethical. *See* 84 Fed. Reg. at 7716, 7746-48, 7780-81; *California*, 2020 WL 878528, at *24 n.34.

Many other reasons exist to doubt Baltimore's assertions about medical ethics. For example, Baltimore provides no evidence that a medical ethics body has disciplined any provider for failing to provide an abortion referral upon demand. *Cf. California*,

2020 WL 878528, at *14 (noting no specific support for this asserted ethical rule in the American Medical Association's *Code of Medical Ethics*). And just like the Rule, many States prohibit abortion referrals in their own publicly funded programs. *See, e.g.*, Cal. Health & Safety Code § 124180(b); Va. Code § 32.1-325.A.7; Wis. Stat. § 253.07(b); *see also* 42 U.S.C. § 300z-10(a). Perhaps most significantly, a majority of incumbent Title X providers today have continued in the program even after the Rule's restrictions went into effect. Those facts belie the supposedly clear ethical rule that Baltimore alleges exists. *Cf. Gonzales v. Carhart*, 550 U.S. 124, 166 (2007) (declining to "strike down legitimate abortion regulations" simply because "some part of the medical community were disinclined to follow" them).

C. Baltimore's objections to HHS's reasoning regarding the Rule's effects and costs are also illusory. Baltimore does not contest that HHS specifically addressed comments that providers would withdraw from HHS, *see California*, 2020 WL 878528, at *22-23 (delineating HHS's thorough consideration), but contends (at 15-16) that HHS nonetheless acted arbitrarily by saying that the comments offered no evidence that the Rule would actually hurt the quality or accessibility of Title X services. In support of its argument, Baltimore points out (at 15) that "[n]umerous existing Title X providers explained that they would have to withdraw from Title X if the Rule took effect." But as HHS reasonably concluded, those assertions did not show that the Rule would reduce the availability of services, because they were only relevant to half of the

equation. *See* 84 Fed. Reg. at 7766, 7780-82. Other providers had previously been deterred from applying for grants because of the 2000 regulations' requirement that they provide abortion counseling and referrals. *See id.* The net effect on services would thus depend on how many new providers would join the program and how existing providers would expand their services, and HHS in its expertise did not "anticipate that there will be a decrease in the overall number of facilities offering services," *id.* at 7782. In addition, HHS noted that "the Department closely monitors the performance of the Title X program, including through the Family Planning Annual Report, which should allow the Department to quickly identify and respond to any problems in order to maintain high quality standards within the program." *Id.* at 7781. As the Ninth Circuit observed, that predictive judgment, concerning matters "squarely within HHS's field of discretion and expertise," is entitled to "particularly deferential review," *California*, 2020 WL 878528, at *20, *23 & n.29 (quotation marks omitted). It is also one that has borne out: as the Ninth Circuit observed, following the departure of some providers from the program, "HHS has issued supplemental grant awards to other Title X recipients that, in HHS's estimation, will enable grantees to come close to—if not in excess of—prior Title X patient coverage." *Id.* at *22 n.30 (cleaned up).

The same deference is due to HHS's prediction of the physical-separation requirement's costs. *See California*, 2020 WL 878528, at *23. Relying in part on a Congressional Research Service report that estimated that 10% of clinics receiving Title

X funding offered abortion as a method of family planning, HHS reasonably determined that only 10 to 20% of existing grantee facilities would need to change their operations to comply with the requirement, and that most of those could choose low-cost options such as shifting abortion services to other existing facilities. *See California*, 2020 WL 878528, at *22-23 & n.32; 84 Fed. Reg. at 7780-81. On average, it predicted such changes would cost between $20,000 and $40,000, and taking the average of $30,000 estimated a total cost of $36.08 million. 84 Fed. Reg. at 7781-82. Contrary to Baltimore's assertions, "HHS was not required to accept the commenters' 'pessimistic' cost predictions," nor should courts "second-guess HHS's consideration of the risks and benefits of its action." *California*, 2020 WL 878528, at *23.

Baltimore mistakenly asserts (at 17-18) that the real number of non-compliant facilities was 100%. Its only support for that proposition is that all providers were making abortion referrals before the Rule took effect. But that was true only because the 2000 regulations required providers to make abortion referrals, even if they otherwise would not have. The Rule changed that, requiring instead that providers refrain from doing so. A provider that continues making abortion referrals as part of its Title X services would have to withdraw from the Title X program entirely, so HHS reasonably calculated only the physical-separation costs incurred by providers who would choose to remain in the program.

D. In sum, Baltimore seeks to replace HHS's judgment with its own. *See California*, 2020 WL 878528, at *23 (noting that similar argument reduced to a contention that "HHS's determination was arbitrary and capricious because the agency relied on its own predictions and rejected those submitted by commenters opposing the Final Rule"). The Ninth Circuit's lengthy analysis thoroughly explains why the Rule is reasonable. Baltimore attempts (at 18) to discount that decision on the ground that the "Administrative Record establishes critical facts that the Ninth Circuit did not account for" because it lacked the entire administrative record. But as the Ninth Circuit emphasized, all of the critical facts are publicly available, including the public comments and passages from the Rule Baltimore cites here. *See California*, 2020 WL 878528, at *10 n.11. Like the plaintiffs in the Ninth Circuit, Baltimore does not "identify additional arguments that could [have been] made" to that court "after submission of the full record." *Id.* And in all events, if Baltimore thinks otherwise, it should make those arguments in the first instance to the panel that will hear this appeal, rather than asking the full Court to proceed en banc based on unsubstantiated assertions.

CONCLUSION

For the foregoing reasons, this Court should deny the petition for initial hearing en banc.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing complies with the type-volume limitation of Federal Rule of Appellate Procedure 35 because it contains 3,832 words. It complies with the typeface and the type style requirements of Federal Rule of Appellate Procedure 32 because this brief has been prepared in a proportionally spaced typeface using Word 14-point Garamond typeface.

s/ *Joshua Dos Santos*
JOSHUA DOS SANTOS

CERTIFICATE OF SERVICE

I hereby certify that on March 16, 2020, I filed the foregoing motion with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system. All participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

s/ *Joshua Dos Santos*
JOSHUA DOS SANTOS