IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

MAYOR AND CITY COUNCIL OF BALTIMORE, *Plaintiff,* v. ALEX M. AZAR II, in his official capacity as the Secretary of Health and Human Services; UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; DIANE FOLEY, M.D., in her official capacity as the Deputy Assistant Secretary, Office of Population Affairs; OFFICE OF POPULATION AFFAIRS, *Defendants.*	Case No. 1:19-cv-01103-RDB

PLAINTIFF'S OPPOSITION TO DEFENDANTS'
MOTION FOR STAY OF JUDGMENT PENDING APPEAL

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Defendants' motion to stay the judgment is "extraordinary," *Williams v. Zbaraz*, 442 U. S. 1309, 1316 (1979) (Stevens, J., in chambers), but it follows a now-familiar pattern. The Government loses a case on the merits after searching review by an Article III court, then seeks emergency relief, demanding the court grant a stay. The Government insists—even though review in a court of appeals is imminent—that it will suffer irreparable harm if the court does not do so. But the Government cannot state with precision any of the supposed harm that would come from the final judgment save an inability to enforce its regulatory goals, possibly in only the immediate term, in one of 50 States. The Government has recently sought stays in an unprecedented number of cases. In many it has issued ultimatums, like it has here, that district courts rule on its demanded timeline even though *it delayed* requesting the relief in the first instance, upending the normal appellate process and prejudicing its opponent. That the Government would seek this extraordinary relief seemingly as a matter of course is profoundly troubling. That the Government would seek it here, where its claimed harm is continuation of a 50-year status quo in one State, is more troubling still. The Court should deny Defendants' extraordinary motion to stay the Court's Order entering judgment in favor of Plaintiff and vacating and permanently enjoining the Rule in the State of Maryland.[1]

[1] Plaintiff's urges the Court to further clarify that the Rule has been vacated without limitation. The scope of the relief authorized by § 706 applies to the *regulation*, not to particular parties or particular geographic areas. Judicial review of agency action is analogous to review of the decision of a lower court and "vacatur" in the administrative context acts the same way it acts when a higher court "vacates" a lower court's ruling. Indeed, Plaintiff has not located a case where vacatur was limited to a party or geographic area.

The APA requires courts to "set aside" unlawful agency action. 5 U.S.C. § 706(2). When agency action is "set aside," it is "vacate[d]," "annul[led]," "render[ed] void," "deprive[d] of force," and "ma[d]e of no authority or validity." *Action on Smoking & Health v. Civil Aeronautics Bd.*, 713 F.2d 795, 797 (D.C. Cir. 1983) (per curiam). And where the challenged agency action is unlawful on a program-wide basis, the APA requires that action to be "set aside" on a program-wide basis. *See Harmon v. Thornburgh*, 878 F.2d 484, 495 n.21 (D.C. Cir. 1989). As the Supreme Court has recognized, a single adversely affected plaintiff can "of course" challenge

Defendants cannot meet the high standard for a stay pending appeal. To obtain a stay of the judgment pending appeal, Defendants must demonstrate (1) that they are likely to succeed on appeal, (2) that they will suffer irreparable injury in the absence of the stay, (3) that Plaintiff would not be substantially harmed if the stay were issued, and (4) that the public interest would be served by granting the stay. *Long v. Robinson*, 432 F.2d 977, 979 (4th Cir. 1970); Wright, Miller & Kane, 11 *Fed. Prac. & Proc. Civ.* § 2904 (3d ed.); *accord Nken v. Holder*, 556 U.S. 418, 433 (2009). Where the government is a party, the irreparable harm and public interest prongs "merge." *Nken*, 556 U.S. at 435.

1. Defendants are unlikely to succeed on the merits on appeal.

a. The Ninth Circuit's recent decision does not make Defendants more likely to succeed on appeal. The Ninth Circuit incorrectly resolved the arbitrary and capricious claims without reviewing the entire Administrative Record. *California v. Azar (California)*, --- F.3d ---, 2020 WL 878528, at *9-10 & n.11 (9th Cir. Feb. 24, 2020). The Administrative Record establishes that (1) the Rule requires medical providers to violate established codes of medical ethics; (2) there is no code of medical ethics under which the Rule's counseling restrictions would be considered ethical; (3) no professional medical organization of any kind takes the view that the Rule is consistent with medical ethics; (4) HHS had overwhelming evidence before it that numerous providers would withdraw from the Title X program and that their withdrawal would have severe negative repercussions for access to Title X services; (5) no evidence supported HHS's $30,000 cost estimate for the Separation Requirement; (6) no evidence supported HHS's

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final agency actions that apply "across the board" and thereby "affect[]" the "entire" agency program. *Lujan v. National Wildlife Fed'n*, 497 U.S. 871, 890 n.2 (1990).

There is also a practical reason for vacatur to run against the rule. An agency can readily remedy a vacatur by expeditiously issuing a new rule.

conclusion that only 15% of providers (rather than 100% of providers), would be forced to comply with the Separation Requirement.

The Ninth Circuit also ignored—did not even mention—HHS's most egregious errors. HHS erroneously concluded that the Rule is consistent with medical ethics in the face of overwhelming contrary evidence, then failed to cite any evidence supporting its incorrect conclusion. The Ninth Circuit's discussion of medical ethics does not mention this clear error and instead substitutes the court's own (erroneous) view of medical ethics. 2020 WL 878528, at *24-25 & n.34. HHS also repeatedly incorrectly concluded that there was "no evidence"—*at all*—that the Rule would have adverse impacts on Title X services or Title X providers, 84 Fed. Reg. at 7749, 7775, 7780, 7785, when in fact it had overwhelming evidence of such impacts. The Ninth Circuit does not discuss this egregious error. *Id.* at *23. Finally, HHS underestimated the cost of the Separation Requirement for existing providers by *at least* $200 million by incorrectly concluding that the Separation Requirement would only apply to Title X grantees who provide abortions (rather than grantees that merely provide referrals). The Ninth Circuit did not address that flagrant error either. *Id.* at *23 & n.32.

b. Defendants new arguments are meritless and waived. As they have throughout this litigation, Defendants use their latest motion as an opportunity to raise a bevy of *new* arguments for the first time. Dkt.100-1 ("Mot."), at 5-11. For the reasons explained below, Defendants new arguments are meritless. But this is intolerable conduct. This is not "a petty concern with procedural trifles. The Court relies on the parties to bring to its attention matters that bear on the ruling it must make and the remedies, if any, that it must order." *Fairbaugh v. Life Ins. Co. of N. Am.*, 872 F. Supp. 2d 174, 179 (D. Conn. 2012). Parties cannot "keep arguments in reserve"

while a "judge spends a significant amount of time and effort" deciding the case, "then 'shift gears' based on the … ruling." *Id.*

This Court has the authority to hold that arguments—even by the Federal government, even in a challenge to a rulemaking—are waived if the Defendants fail to raise them until *after* the Court has rendered a decision on the merits, and it should do that here. *Cf. Carrero v. Farrelly*, 310 F. Supp. 3d 581, 584 (D. Md. 2018); *Royal Ins. Co. of Am. v. Miles & Stockbridge, P.C.*, 142 F. Supp. 2d 676, 677 n.1 (D. Md. 2001). "The premise of our adversarial system" is that courts "do not sit as self-directed boards of legal inquiry and research, but essentially as arbiters of legal questions presented and argued by the parties before them." *Carducci v. Regan*, 714 F.2d 171, 177 (D.C. Cir. 1983) (Scalia, J.). "Failure to enforce this requirement will ultimately deprive us in substantial measure of that assistance of counsel which the system assumes—a deficiency that we can perhaps supply by other means, but not without altering the character of our institution." *Id.* "[W]here counsel has made no attempt to address the issue, we will not remedy the defect, especially where, as here, important questions of far-reaching significance are involved." *Id.*

c. Defendants are unlikely to succeed on the merits of the arbitrary and capricious claims.

The Court's Memorandum Opinion painstakingly explains how HHS failed to act reasonably or to explain its reasoning adequately in the rulemaking by (1) inexplicably rejecting evidence of the consensus view of the requirements of medical ethics in the United States, (2) inexplicably disregarding evidence of the impacts of the Rule on Title X providers and services, and (3) inexplicably vastly underestimating the costs of the Separation Requirement on the basis of numbers HHS pulled from thin air. Dkt.93 ("Op."), at 16-25. In response, Defendants now offer new reasons that HHS *could* have given (but did not), and new evidence HHS *could* have relied

on (but did not) to justify the rule. Mot.5-11. But Defendants cannot save a rule by offering new justifications and new evidence in litigation. The first principle of administrative law is that agency action cannot be upheld on the basis of new reasons that the agency did not provide and new evidence upon which the agency did not rely. *SEC v. Chenery Corp.*, 318 U.S. 80, 93-94 (1943) (an agency's action "must be measured by what [it] did, not by what it might have done").

Defendants are incorrect that the referral restrictions must be ethical because "Congress and many States have excluded abortion referrals in variously publicly funded programs." Mot.6. This argument is new and waived, but still wrong. Congress and the States are not bound by the requirements of medical ethics. As the Court explained in its Opinion, HHS may not have been required to conclude that the Rule is consistent with medical ethics to issue the Rule. Op.21. But because HHS's decision to issue the Rule depended on that conclusion, and because commenters told HHS the decision was not consistent with medical ethics, HHS needed to provide a reasoned explanation for its conclusion that it was. Op.21-22. That it did not do. Op.21-22. As the Court pointed out, the government admitted at oral argument that the record does not disclose a professional medical organization of any kind that takes the view that the Rule's referral restrictions are consistent with medical ethics. Op.21.

Defendants are also incorrect that the referral restriction must be ethical because some providers have remained in the Title X program. Mot.6-7. The fact that some providers have remained in the program says nothing about whether those providers believe the referral restriction is *ethical*. Physicians can be placed in an ethically compromised position and still determine that the greater good requires that they accept that compromise if the alternative is that their patients will not receive any medical care at all.

Defendants are also incorrect that this Court held that HHS must "defer to the views of any particular commenter on any topic over the conclusions drawn by the agency itself." Mot.7. That was not its holding. Op.21. The Court merely held the agency to the basic requirement that its decision-making and explanations for its actions must be "reasoned," Mot.7; Op.21-22—a requirement Defendants themselves concedes the agency must meet. Mot.7. HHS summarily dismissed the consensus view of literally every major medical organization in the United States about the requirements of medical ethics (1) without providing a reasoned explanation and (2) without countervailing evidence in the record showing that the referral restriction is consistent with any recognized system or code of medical ethics. Op.21. That simply does not satisfy the most basic requirement that agency decisions and explanations must be "reasoned."

Defendants also fail to appreciate the reason this Court held that HHS erred in its conclusion that the Rule would not affect Title X providers or Title X services. Mot.8. It is undisputed that HHS is permitted to make reasonable predictive judgments that the evidence supports. Mot.8. But HHS based its determination about impacts on the program and on patients on an blatantly erroneous view of the evidence before it. HHS stated that "[t]he Department finds no evidence to support the assertion that the final rule will drive current providers from the Title X program," 84 Fed. Reg. at 7749, that "commenters did not provide evidence that the rule will negatively impact the quality or accessibility of Title X services," *id.* at 7780, that "[c]ommenters offer no compelling evidence that this rule will increase unintended pregnancies or decrease access to contraception," *id.* at 7785, and that HHS was "not aware, either from its own sources or from commenters, of actual data that could demonstrate a causal connection between the type of changes to Title X regulations contemplated in this rule-making and an increase in unintended pregnancies, births, or costs associated with either," *id.* at 7775.

All of those statements are provably wrong. Op.22-23. They are not wrong because Plaintiff has proffered after-the-fact "expert declarations elaborating … gloomy assumptions" at the litigation stage, Mot.8, but because HHS overlooked overwhelming evidence in the administrative record showing that providers would withdraw from the Title X program in droves and that those withdrawals would cause severe negative repercussions for patients. Op.22-23. Moreover, the one letter HHS cited as evidence that new providers would enter the program to fill gaps in services, *see* 84 Fed. Reg. at 7780 & n.138, does not come close to supporting HHS's sweeping conclusion that the Rule would "contribute to more clients being served, gaps in service being closed, and improved care." 84 Fed. Reg. at 7723.

Defendants are also incorrect that agencies that award grants in one year cycles are entitled to ignore the future impacts of sweeping programmatic changes. Mot.8-9. This argument is new and waived, but still clearly incorrect. As Defendants concede, agencies are required to provide reasoned responses to comments. Mot.7. HHS never responded to any comments by reasoning that it was only looking at the current-year impacts of the Rule and that it was entitled to do so. And HHS never asserted that it was disregarding relevant evidence that grantees would leave the program because it believed that crediting that evidence would give those grantees "veto" power over its decisions. Mot.9. Instead, HHS misapprehended the evidence before it—incorrectly concluding there was "no evidence" of future program impacts—and therefore failed to provide a reasoned explanation connecting the evidence before it to the choice it made. Op.22-24.

Finally, Defendants are wrong that because a cost is difficult to quantify an agency may therefore invent a cost number with no basis in reality. Mot.9-10; *see Pub. Citizen v. Fed. Motor Carrier Safety Admin.*, 374 F.3d 1209, 1219 (D.C. Cir. 2004). There is no evidence—no study,

no pilot program, no comment in the record—supporting the agency's $30,000 cost estimate for the Separation Requirement. In contrast, a trove of record evidence supports a higher number, as this Court explained in its Memorandum Opinion. Op.24-25. And Defendants do not even attempt to defend HHS's inexcusable error regarding the *number* of affected sites, a number that was not difficult to estimate (100% of sites). That error—*at least* $200 million dollars in magnitude—warrants vacatur in its own right.

d. Defendants are unlikely to succeed on their claims regarding the remedy. Defendants are unlikely to persuade the Court of appeals to sever the referral restrictions and the Separation Requirement from the remainder of the Rule. Mot.10-11. Defendants cannot meet the high standard for establishing that the Rule is severable. At no point have Defendants represented to this Court that HHS would have undertaken this rulemaking without the referral restrictions or the Separation Requirement. Op.36. At no point have Defendants explained how they believe the Rule would function in the absence of those two key provisions. Op.36. Defendants have instead repeatedly pointed to the Rule's severability clause as the basis for severability. But as the Court noted in its opinion, severability clauses are "rarely" decisive of severability. Op.34. HHS, not the courts, is best positioned to craft a new Rule when that Rule's "[m]ajor [p]rovisions" have been vacated. Op.36.

Defendants are also unlikely to succeed in restricting the remedy to Baltimore. In fact, the opposite is true. Baltimore is likely to succeed in establishing on appeal that the Rule is vacated without any limitations. The APA requires courts to "set aside" unlawful agency action. 5 U.S.C. § 706(2). When agency action is "set aside," it is "vacate[d]," "annul[led]," "render[ed] void," "deprive[d] of force," and "ma[d]e of no authority or validity." *Action on Smoking & Health v. Civil Aeronautics Bd.*, 713 F.2d 795, 797 (D.C. Cir. 1983) (per curiam).

And where the challenged agency action is unlawful on a program-wide basis, the APA requires that action to be "set aside" on a program-wide basis. *See Harmon v. Thornburgh*, 878 F.2d 484, 495 n.21 (D.C. Cir. 1989). As the Supreme Court has recognized, a single adversely affected plaintiff can "of course" challenge final agency actions that apply "across the board" and thereby "affect[]" the "entire" agency program. *Lujan v. National Wildlife Fed'n*, 497 U.S. 871, 890 n.2 (1990).

2. The balance of irreparable harms tips sharply in Plaintiff's favor. To meet the high standard for a stay pending appeal, defendants must establish that they will suffer irreparable injury in the absence of the stay, that Plaintiff would *not* be substantially harmed if the stay issues, and that the public interest favors a stay. Defendants cannot do any of these things.

Defendants fail to address the irreparable harm to patients and providers should the Court enter a stay. The absence of a preliminary injunction in this and other cases has been devastating. Once the Rule took effect, its consequences materialized across the United States. At least half a dozen states and more than a thousand Title X clinics have been forced to stop using Title X funds or to withdraw from the program altogether, threatening access to reproductive health care for as many as 1.6 million low-income women nationwide. Guttmacher Institute, *Domestic Gag Rule Has Slashed the Title X Network's Capacity by Half* (Feb. 5, 2020), http://bit.ly/3csjZle ("[O]ne in every four Title X service sites left the network in 2019 because of the domestic gag rule…. The impact is huge.").

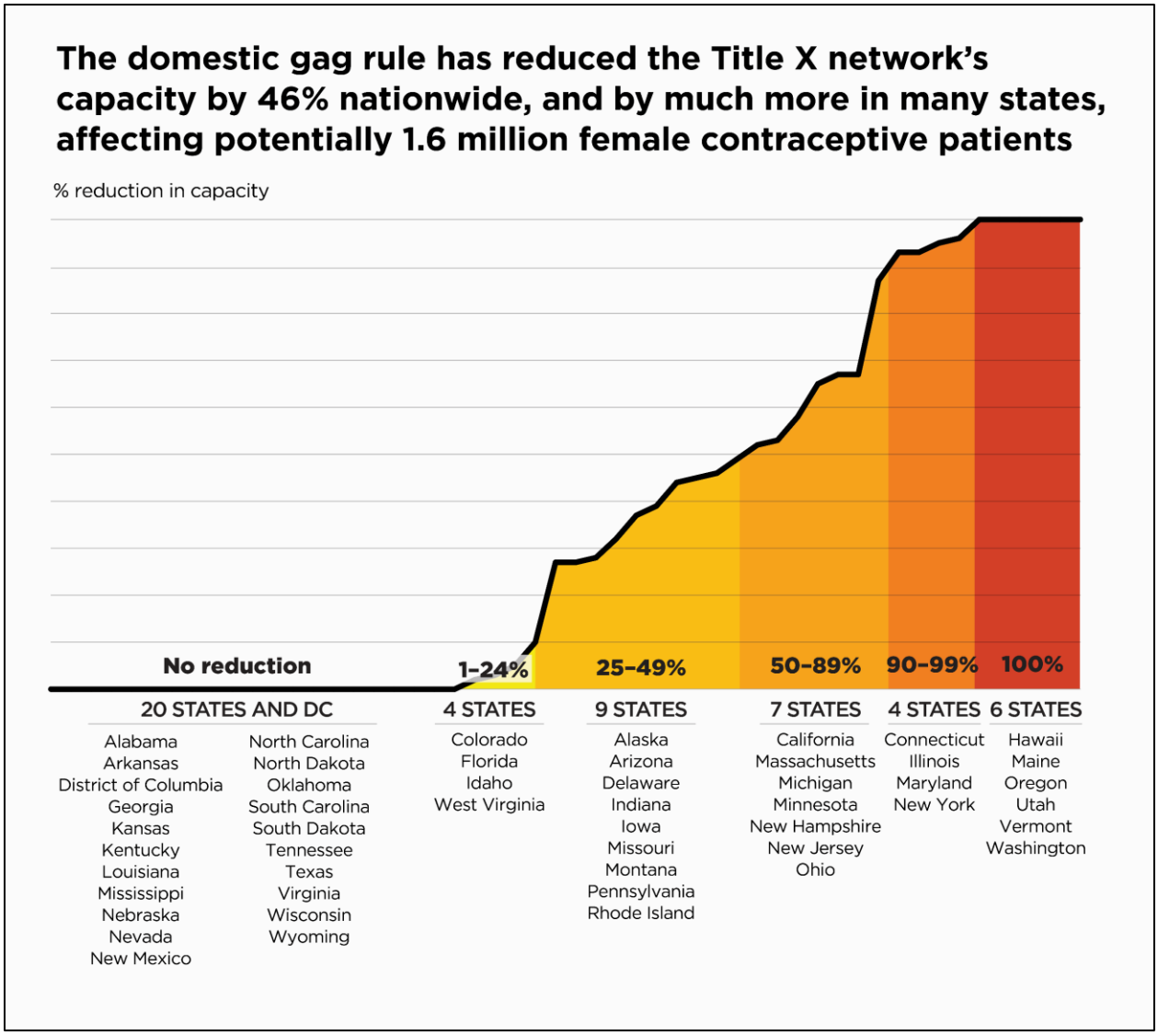

Figure 1. Impact on Title X From Implementation of the Rule (Source: Guttmacher)

The harms to Plaintiff from a stay of the judgment would also be severe. Unable to comply with the Rule's requirements, Maryland withdrew from Title X, forcing Plaintiff out of the program as well. Plaintiff relinquished hundreds of thousands of dollars in Title X funds during the pendency of this litigation, and a stay could result in the relinquishment of millions more. For the first time since Title X's inception almost 50 years ago, Plaintiff is not a part of the Title X program. Planned Parenthood in Maryland also withdrew from Title X, threatening access to Title X care for thousands of individuals in the State and in the City of Baltimore,

further straining Plaintiffs' limited health care resources. Plaintiff intends to reenter the Title X Program immediately once it is clear that compliance with the Rule is no longer a condition for receiving funds. The harm from a stay—to Plaintiff and to countless Title X patients—is serious. With fewer providers in the Title X program, Baltimore has to devote more funds to attempt to maintain the same level of care. And patients and providers both in and out of the Title X program are directly harmed by the Rule in its impact on the ability to provide evidence-based, patient-centered reproductive health care.

Defendants' "harms" are not harms at all. *Contra* Mot.12-14. The government has no interest in enforcing a regulation that violates a federal statute (here the Administrative Procedure Act). The Government cites *Maryland v. King* for the proposition that the government suffers a form of irreparable injury if it "is enjoined by a court from effectuating statutes enacted by representatives of its people." 567 U.S. 1301 (2012) (Roberts, C.J., in chambers) (citation omitted). But the government suffers just as much of an irreparable injury—if not a graver injury—when the Executive Branch issues arbitrary and capricious rules in contravention of "statutes enacted by representatives of its people." *Id.* Here, vacatur of the Rule simply requires the Government to continue to enforce Title X in the way that it did for nearly half a century. Defendants' other argument—that this Rule must urgently go into effect to promote childbirth over abortion, which carries with it the implicit claim that the Title X program has been promoting abortion for the last 50 years—is simply wrong. Mot.12.

Defendants' claimed administrative hardship does not rise to the level of irreparable harm. *See, e.g., Casa de Maryland, Inc. v. Trump*, No. PWG-19-2715, 2019 WL 7565389, at *3 (D. Md. Nov. 14, 2019); *Woollard v. Sheridan*, 863 F.Supp.2d 462, 478 (D. Md. 2012) *rev'd on other grounds sub nom. Woollard v. Gallagher*, 712 F.3d 865 (4th Cir. 2013). Defendants'

claimed burdens are particularly unpersuasive given that they are the product of Defendants' own litigation tactics. At the preliminary injunction stage, Defendants claimed HHS would suffer irreparable harm from delay in implementing the Rule. Defendants got the preliminary injunctions lifted and implemented the Rule, taking the risk that an adverse final judgment would require HHS to undo the Rule and return to the status quo if the Rule were ultimately found to be unlawful. Yet now Defendants claim the need to *stop* implementing the Rule will cause HHS irreparable harm. If undoing the Rule threatened irreparable harm, the prudent course would have been to stay the rule *before it went into effect* and litigate this case quickly to judgment—not seek delay at every turn and now claim harm from being required to reverse it.

Defendants' other argument—that the Court's decision to award a limited injunction only in Maryland is *itself* a source of irreparable harm, Mot.12-13—is even more audacious, given that it is precisely the limited relief that Defendants have consistently *demanded*. The Court could readily remedy that harm by clarifying that its judgment vacated the Rule without limitation. *See supra*, Footnote 1.

Perplexingly, Defendants also asserts that the failure to leave the Rule in place will harm Title X grantees and Title X patients. Mot.12-13. To credit Defendants' argument would be to hold that Title X, *as it was administered for 50 years before the new Rule took effect*, caused grantees and Title X patients irreparable harm. The old regulations do not irreparably harm Title X patients and grantees—the new regulations do. The new Rule has caused clinics to close, forced grantees out of the program, forced physicians into ethically compromised positions, and created barriers to access and care for millions of Title X patients.

Finally, none of defendants' claimed harms are irreparable. Defendants could initiate a new rulemaking tomorrow and issue a new Rule in a matter of months. They did that with this

very Rule. The Court's judgment gave Defendants clear guidance about how to promulgate a Rule that does not violate the Administrative Procedure Act. Assuming that HHS conducts a rulemaking, but this time carefully considers the evidence and arguments, and decides to issue the same Rule again, Defendants harms will be completely overcome. Any injuries to HHS are thus the very definition of *reparable*. Ordering an agency to return to an agency policy that stood for nearly fifty years does not inflict irreparable harm on the agency, no matter how strenuously the Government insists otherwise.

CONCLUSION

For the reasons set forth above and in Baltimore's motion for Summary Judgment, Baltimore respectfully requests that the Court deny the Governments Motion for Stay of Judgment Pending Appeal.

Dated: March 2, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on March 2, 2020, I filed the foregoing with the Clerk of the Court using the ECF System which will send notification of such filing to the registered participants identified on the Notice of Electronic Filing.

/s/ Andrew Tutt
Andrew T. Tutt