JOSEPH H. HUNT
Assistant Attorney General
DAVID L. ANDERSON
United States Attorney
MICHELLE R. BENNETT
Assistant Branch Director
BRADLEY P. HUMPHREYS (D.C. Bar No. 988057)
DANIEL RIESS (Texas Bar No. 24037359)
Trial Attorneys
Federal Programs Branch
U.S. Department of Justice, Civil Division
1100 L Street, NW
Washington, DC 20005
Tel.: (202) 305-0878
Fax: (202) 616-8460
Bradley.Humphreys@usdoj.gov
Daniel.Riess@usdoj.gov
Counsel for Defendants

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

STATE OF CALIFORNIA, by and through ATTORNEY GENERAL XAVIER BECERRA, Plaintiff, v. ALEX M. AZAR, in his OFFICIAL CAPACITY as SECRETARY of the U.S. DEPARTMENT of HEALTH & HUMAN SERVICES; U.S. DEPARTMENT of HEALTH & HUMAN SERVICES, Defendants.	Case No.: 3:19-cv-01184-EMC **DEFENDANTS' MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION** Judge: Hon. Edward M. Chen Dep't: Courtroom 5, 17th Floor Date: April 18, 2019 Time: 12:30 p.m. Trial: None

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF CONTENTS

INTRODUCTION 1
LEGAL AND FACTUAL BACKGROUND 4
I. PRIOR REGULATORY INTERPRETATIONS AND *RUST V. SULLIVAN* 4
II. THE FINAL RULE 6
III. THIS LITIGATION 7
ARGUMENT 8
I. PLAINTIFFS ARE UNLIKELY TO SUCCEED ON THE MERITS 8
A. *Rust* Rejected Arguments Indistinguishable From Those Plaintiffs Advance 8
B. Neither The Nondirective Provision Nor The ACA Silently Overrules *Rust* 13
1. The Nondirective Provision Does Not Supplant *Rust*. 14
2. Section 1554 of the ACA Does Not Supplant *Rust*. 19
C. *Rust* Forecloses California's "Excess of Statutory Jurisdiction" Claim 23
D. The Final Rule Is Not Arbitrary and Capricious. 24
1. *Rust* Establishes That It is Not Arbitrary and Capricious for HHS to Place Conditions on Title X Funds that Require Physical Separation and Restrict Activities that Promote Abortion as a Method of Family Planning 24
2. HHS Was Not Required to—But Did—Submit Evidence of a Problem. 26
3. HHS Adequately Responded to Comments. 33
E. Essential Access's Notice-And-Comment Claim Is Meritless. 34
F. Essential Access's Constitutional Claims Are Meritless. 36
1. Dr. Marshall's First Amendment Claim Lacks Merit. 36
2. Essential Access's Vagueness Claim Lacks Merit. 38
II. PLAINTIFFS WILL SUFFER NO IRREPARABLE HARM 42
A. California 42
B. Essential Access 43
1. Harm to Title X Network 43
2. Harm to Provider-Patient Relationship 44
3. Diversion of Resources 45
III. THE BALANCE OF EQUITIES AND THE PUBLIC INTEREST WEIGH IN FAVOR OF DENYING PLAINTIFFS' MOTIONS 46
IV. ANY INJUNCTIVE RELIEF SHOULD BE LIMITED 46

A. Any Injunctive Relief Should Be Limited To The Plaintiffs. 46
B. Any Injunctive Relief Should Be Limited To Particular Provisions. 50
CONCLUSION 50

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF AUTHORITIES

Cases

Abbott Labs. v. Gardner,
387 U.S. 136 (1967) 49

Agency for Int'l Devel. v. All. For Open Soc'y Int'l, Inc.,
570 U.S. 205 (2013) 39

Alaska Oil & Gas Ass'n v. Jewell,
815 F.3d 544 (9th Cir. 2016) 25, 35

Alfred L. Snapp & Son, Inc. v. Puerto Rico,
458 U.S. 592 (1982) 43

Am. Wild Horse Pres. Campaign v. Perdue,
873 F.3d 914 (D.C. Cir. 2017) 27

Branch v. Smith,
538 U.S. 254 (2003) 21

California v. Azar,
911 F.3d 558 (9th Cir. 2018) 49, 50

Calloway v. District of Columbia,
216 F.3d 1 (D.C. Cir. 2000) 2, 16

Chaplaincy of Full Gospel Churches v. England,
454 F.3d 290 (D.C. Cir. 2006) 44,45

Citizens to Preserve Overton Park, Inc. v. Volpe,
401 U.S. 402 (1971) 22

City & Cty. of San Francisco v. Trump,
897 F.3d 1225 (9th Cir. 2018) 48, 50

Ctr. for Food Safety v. Vilsack,
636 F.3d 1166 (9th Cir. 2011) 43

Encino Motorcars, LLC v. Navarro,
136 S. Ct. 2117 (2016) 26, 31

Envt'l Def. Ctr. v. EPA,
344 F.3d 832 (9th Cir. 2003) 36

Ex parte Endo,
323 U.S. 283 (1944).. 17

Exeltis USA Inc. v. First Databank, Inc.,
No. 17-cv-04810-HSG, 2017 WL 6539909 (N.D. Cal. Dec. 21, 2017) 45

FCC v. Fox Television Stations, Inc.,
556 U.S. 502 (2009).. 25, 26, 27, 30

Forest Grove Sch. Dist. v. T.A.,
557 U.S. 230 (2009).. 15

Freedom Holdings, Inc. v. Spitzer,
408 F.3d 112 (2d Cir. 2005).. 46

Gill v. Whitford,
138 S. Ct. 1916 (2018).. 48, 49

Hecht Co. v. Bowles,
321 U.S. 321 (1944).. 49

Hill v. Colorado,
530 U.S. 703 (2000).. 40

Hodge v. Dalton,
107 F.3d 705 (9th Cir. 1997) 35

Int'l Rehab. Sciences Inc. v. Sebelius,
688 F.3d 994 (9th Cir. 2012) 31

Janus v. Am. Fed'n of State, Cty., & Mun. Emps.,
138 S. Ct. 2448 (2018).. 32, 39

Lopez v. Brewer,
680 F.3d 1068 (9th Cir. 2012) 8

Los Angeles Haven Hospice, Inc. v. Sebelius,
638 F.3d 644 (9th Cir. 2011) 49

Lujan v. Defs. of Wildlife,
504 U.S. 555 (1992).. 44, 45

Madsen v. Women's Health Ctr., Inc.,
512 U.S. 753 (1994).. 48

Marina Mercy Hosp. v. Harris,
633 F.2d 1301 (9th Cir. 1980) 29

Maryland v. King,
567 U.S. 1301 (2012).. 47

Mass. v. Bowen,
679 F. Supp. 137 (D. Mass. 1988) 48

MD/DC/DE Broadcasters Ass'n v. FCC,
236 F.3d 13 (D.C. Cir. 2001) 50

Morales v. Trans World Airlines, Inc.,
504 U.S. 374 (1992).. 23

Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co.,
463 U.S. 29 (1983).. 25, 26

Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs.,
545 U.S. 967 (2005).. 30

National Family Planning & Reproductive Health Association v. Gonzales,
468 F.3d 826 (D.C. Cir. 2006) 40, 41

National Fuel Gas Supply Corp. v. FERC,
468 F.3d 831 (D.C. Cir. 2006) 27

Nat'l Ass'n of Home Builders v. Defs. of Wildlife,
551 U.S. 644 (2007)... 14, 15

Nat'l Endowment for the Arts v. Finley,
524 U.S. 569 (1998).. 39

Nat'l Inst. of Family & Life Advocates v. Becerra,
138 S. Ct. 2361 (2018)... 39

New England Power Generators Ass'n v. FERC,
879 F.3d 1192 (D.C. Cir. 2018) 31

New York v. Sullivan,
889 F.2d 401 (2d Cir. 1989)... 17, 18

Nken v. Holder,
556 U.S. 418 (2009).. 47

Nuclear Energy Inst., Inc. v. EPA,
373 F.3d 1251 (D.C. Cir. 2004) 20

Nutraceutical Corp. v. Von Eschenbach,
459 F.3d 1033 (10th Cir. 2006) 20

Oregon v. Legal Servs. Corp.,
552 F.3d 965 (9th Cir. 2009) 43

Planned Parenthood Fed'n of Am. v. Bowen,
687 F. Supp. 540 (D. Colo. 1988) 48

Planned Parenthood of Cent. & N. Ariz. v. Ariz.,
718 F.2d 938 (9th Cir. 1983) 39

Planned Parenthood of Greater Ohio v. Hodges,
917 F.3d 908 (6th Cir. 2019) 50

RadLAX Gateway Hotel, LLC v. Amalgamated Bank,
566 U.S. 639 (2012) 23

Rincon Band of Mission Indians v. Califano,
464 F. Supp. 934 (N.D. Cal. 1979) 17

Rodriguez de Quijas v. Shearson/Am. Exp., Inc.,
490 U.S. 477 (1989) 39,40

Rust v. Sullivan,
500 U.S. 173 (1991) .... *passim*

Rybacheck v. EPA,
904 F.2d 1276 (9th Cir. 1990) 35

S.C. Pub. Serv. Auth. v. FERC,
762 F.3d 41 (D.C. Cir. 2014) 28

Sierra Forest Legacy v. Sherman,
646 F.3d 1161 (9th Cir. 2011) 43

Stilwell v. Office of Thrift Supervision,
569 F.3d 514 (D.C. Cir. 2009) 27, 28, 30

TC Heartland LLC v. Kraft Foods Grp. Brands LLC,
137 S. Ct. 1514 (2017) 15

Trump v. Hawaii,
138 S. Ct. 2392 (2018) 48, 49

Trustees of Ind. Univ. v. Curry,
918 F.3d 537 (7th Cir. 2019) 40

TVA v. Hill,
437 U.S. 153 (1978) 2, 16

United States v. City of Los Angeles,
595 F.2d 1386 (9th Cir. 1979) 46,47

United States v. Novak,
476 F.3d 1041 (9th Cir. 2007) 18

Univ. Health Servs., Inc. v. Thompson,
363 F.3d 1013 (9th Cir. 2004) 20

Univ. of Tex. v. Camenisch,
451 U.S. 390 (1981).. 48

W. Va. Ass'n of Cmty. Health Centers, Inc. v. Sullivan,
737 F. Supp. 929 (S.D.W. Va. 1990).. 48

Washington v. Chimei Innolux Corp.,
659 F.3d 842 (9th Cir. 2011) 43

Weinberger v. Romero-Barcelo,
456 U.S. 305 (1982).. 49

Whitman v. Am. Trucking Ass'ns,
531 U.S. 457 (2001).. 21

Winter v. NRDC,
555 U.S. 7 (2008).. *passim*

Zepeda v. U.S. INS,
753 F.2d 719 (9th Cir. 1983) 48

Statutes

5 U.S.C. § 702.. 49

5 U.S.C. § 703.. 49

5 U.S.C. § 705.. 51

5 U.S.C. § 706.. 49

42 U.S.C. § 294a.. 14

42 U.S.C. § 300.. 4, 24

42 U.S.C. § 300a.. 24

42 U.S.C. § 300a-4.. 4

42 U.S.C. § 300a-6 .... 1, 4, 8, 47

42 U.S.C. § 18032 22

42 U.S.C. § 18114 .... *passim*

Title X of the Public Health Service Act,
Pub. L. No. 91-572, 84 Stat. 1504 (1970) 4

Patient Protection and Affordable Care Act,
Pub. L. No. 111-148, 124 Stat. 119 (2010) 1, 22

Department of Defense & Labor, HHS, & Education Appropriations Act & Continuing Appropriations Act, 2019,
Pub. L. No. 115-245, 132 Stat. 2981 (2018) 14

Regulations

42 C.F.R. § 59.2 24

42 C.F.R. § 59.5 .... 4, 24

42 C.F.R. § 59.8 .... *passim*

42 C.F.R. § 59.10 .... 5, 40

42 C.F.R. § 59.14 .... *passim*

42 C.F.R. § 59.15 .... 5, 13

42 C.F.R. § 59.18 24

Legislative Material

116 Cong. Rec. 37,375 (1970) 4

H.R Rep. No. 102-204, accompanying H.R. 3090 (Sept. 13, 1991) 18

S.323, 102nd Congress (1991-1992) 18

Administrative and Executive Materials

Public Health Service, Department of Health, Education, & Welfare,
36 Fed. Reg. 18,465-02 (Sept. 15, 1971) 4

Statutory Prohibition on Use of Appropriated Funds in Programs Where Abortion Is a Method of Family Planning; Standard of Compliance for Family Planning Services Projects,
52 Fed. Reg. 33,210-01 (Sept. 1, 1987) 5

Statutory Prohibition on Use of Appropriated Funds in Programs Where Abortion is a Method of Family Planning; Standard of Compliance for Family Planning Services Projects,
53 Fed. Reg. 2922 (Feb. 2, 1988) .... *passim*

The Title X "Gag Rule,"
58 Fed. Reg. 7455 (Jan. 22, 1993) 6

Standard of Compliance for Aborton-Related Services in Family Planning Serivce Projects,
58 Fed. Reg. 7464 (Feb. 5, 1993) 6, 17

Standards of Compliance for Abortion-Related Services in Family Planning Services Projects,
65 Fed. Reg. 41,270-01 (July 3, 2000) 6

Ensuring That HHS Funds Do Not Support Coercive or Discriminatory Policies or Practices in Violation of Federal Law,
73 Fed. Reg. 78,072-01 (Dec. 19, 2008) 32

Regulation for the Enforcement of Federal Health Care Provider Conscience Protection Laws,
76 Fed. Reg. 9968-02 (Feb. 23, 2011) 32

Compliance With Statutory Program Integrity Requirements,
83 Fed. Reg. 25,502-01 (June 1, 2018) .... *passim*

Compliance With Statutory Program Integrity Requirements,
84 Fed. Reg. 7714-01 (Mar. 4, 2019) .... *passim*

<u>Other Authorities</u>

ANTONIN SCALIA & BRIAN A. GARNER, READING LAW 331 (2012) 15, 16

Black's Law Dictionary (10th ed. 2014) 17

HHS, *Announcement of Anticipated Availability of Funds for Family Planning Services Grants* (Feb. 23, 2018),
https://www.hhs.gov/opa/sites/default/files/FY18-Title-X-Services-FOA-Final-Signed.pdf 50

INTRODUCTION

Defendants agree with California about one thing: this controversy is "a throw-back to 1988" in major respects. No. 3:19-cv-01184, ECF No. 26 (Cal. Mem.) at 7. Then, as now, section 1008 of the Public Health Service Act (PHSA) provided that "[n]one of the funds appropriated under [the Title X program] shall be used in programs where abortion is a method of family planning." 42 U.S.C. § 300a-6. In 1988, the Department of Health and Human Services (HHS) promulgated regulations extremely similar to the rule Plaintiffs challenge here. Those regulations "require[d] a ban on . . . referral[ ] and advocacy [of abortion] within the Title X project" and "mandate[d] that Title X programs be organized so that they are physically and financially separate from [abortion-related] activities[.]" *Rust v. Sullivan*, 500 U.S. 173, 184, 188 (1991). The Supreme Court upheld that rule, concluding that its requirements were a lawful construction of Title X and consistent with the First and Fifth Amendments. *Id.* at 184, 192-203. Plaintiffs nevertheless seek to preliminarily enjoin a March 4, 2019 HHS Final Rule, the major components of which are materially indistinguishable from those the Supreme Court upheld in *Rust*. *See* Compliance with Statutory Program Integrity Requirements, 84 Fed. Reg. 7714 (Mar. 4, 2019) (Final Rule or Rule).

In essence, Plaintiffs ask this Court to overrule Supreme Court precedent. They make no serious effort to distinguish the Rule from the regulations upheld in *Rust*, and Congress has not amended the statute *Rust* interpreted. To the contrary, Congress responded to *Rust* by attempting to enact legislation that would have partially overruled it by permitting abortion referrals within the Title X program, but that legislation was vetoed. *Rust* thus squarely controls.

Plaintiffs' attempts to avoid this binding precedent are unpersuasive. Plaintiffs principally argue that Congress silently superseded section 1008 as interpreted in *Rust* in two provisions—(1) a one-line rider Congress began adding to appropriations bills in 1996 providing that "all pregnancy counseling shall be nondirective" (the nondirective provision); and (2) a section of the Affordable Care Act (ACA), codified at 42 U.S.C. § 18114 (section 1554), that says nothing specific about abortion or abortion-related services. This argument—basically implied repeal on

steroids—is implausible. Neither the nondirective provision nor section 1554 even mentions abortion, section 1008, or *Rust*, much less creates a statutory conflict. And Plaintiffs cite no legislative history suggesting that Congress sought to smuggle such a major change on a highly controversial subject into these subsequent provisions.

The problems with Plaintiffs' statutory arguments do not end there. The nondirective provision supports rather than undermines the Rule, which allows pregnancy counseling, including about abortion, if it is nondirective. Additionally, the presumption against implied repeals "applies with even *greater* force when the claimed repeal rests solely on an Appropriations Act[,]" *TVA v. Hill*, 437 U.S. 153, 190 (1978), and there is a "very strong presumption that [appropriations bills] do not" substantively change existing law, *Calloway v. District of Columbia*, 216 F.3d 1, 9 (D.C. Cir. 2000). Plaintiffs come nowhere close to rebutting that "very strong presumption" here: the text of the nondirective provision they invoke nowhere mentions abortion, *Rust*, or (unlike the legislation that Congress unsuccessfully tried to enact following *Rust*) referrals.

In addition, Plaintiffs have waived any challenge based on section 1554 because they never allege that they (or anyone else) raised this provision during the notice-and-comment process. That omission is understandable. Section 1554 concerns the *denial* of information and services. As the Supreme Court squarely held in *Rust*, restrictions such as those in the Rule *deny* nothing; they are merely restrictions on what the Government chooses to fund. And even if section 1554 and section 1008 did conflict, section 1554 only supersedes contrary requirements in the ACA—not preexisting requirements elsewhere in the U.S. Code, such as section 1008. *See* 42 U.S.C. § 18114 (applies only "[n]otwithstanding any provision of [the Affordable Care] Act").

Plaintiffs' remaining challenges to the Rule likewise fail:

(1) California's argument that the Rule is in excess of statutory jurisdiction because it is an unreasonable interpretation of the Title X statute fails. The Rule follows directly from section 1008 and includes requirements *Rust* reviewed and expressly affirmed.

(2) There is no merit to Plaintiffs' claims that the Rule is arbitrary and capricious. The agency thoroughly explained its reasoning and articulated a rational justification for the choices it made—choices the Supreme Court has already upheld in substantial part.

(3) The claim of the Essential Access Plaintiffs (Essential Access) that two provisions of the Rule violate the notice-and-comment requirements of the Administrative Procedure Act (APA) is meritless. Both provisions were logical outgrowths of the proposed rule, as reflected by the multiple commenters who raised substantially the same concerns Essential Access raises here.

(4) *Rust* squarely forecloses Essential Access's contention that the Rule violates the First Amendment. And Essential Access's claim that the Rule is impermissibly vague fails under any conceivable standard, as the Rule is perfectly clear and just as specific as the materially identical provisions sustained in *Rust*. In any event, the Due Process Clause tolerates greater imprecision when government subsidies—rather than criminal or civil penalties—are involved.

Merits aside, Plaintiffs also fail to meet the equitable criteria for a preliminary injunction. It is unclear that California's allegations are sufficient even to establish standing, much less irreparable harm. Essential Access's speculative predictions of irreparable harm likewise fail to establish that it will suffer any irreparable harm in the absence of preliminary relief. The remaining two factors similarly favor the government, which suffers irreparable injury whenever its laws are set aside by a court and which has a compelling interest in following longstanding federal law prohibiting the use of Title X funds for programs where abortion is a method of family planning.

Finally, even if the Court grants relief, that relief should be limited in at least two respects. First, any relief should be confined to Plaintiffs and not extended nationwide. Indeed, in the lead-up to *Rust*, courts that enjoined the 1988 regulations limited that relief to the parties before it. Title X funds are also allocated on a state-by-state basis, so any effect of the Rule on funding in other states would have no impact on Plaintiffs. A nationwide injunction would, however, render the proceedings in three other district courts academic and effectively allow Plaintiffs' views to govern the entire country. Second, any relief should be limited to particular provisions found unlawful.

1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28

The Rule contains an express severability statement and, as a practical matter, the Rule's major components can operate independently. Even if the Court agrees with Plaintiffs' attacks on some of the Rule's components, there is no basis for enjoining the entire Rule.

LEGAL AND FACTUAL BACKGROUND

Congress enacted Title X of the PHSA in 1970 to provide federal subsidies for certain types of family planning services. *See* Pub. L. No. 91-572, 84 Stat. 1504. Nothing material in the statutory language of Title X has changed since the 1970s, or, for that matter, since the Supreme Court decided *Rust* in 1991. Section 1001(a) authorizes the Secretary of 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 (including natural family planning methods, infertility services, and services for adolescents).

42 U.S.C. § 300(a). Section 1006(a) states 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). And section 1008 requires 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. As a sponsor explained, "the committee members clearly intend that abortion is not to be encouraged or promoted in any way through this legislation." 116 Cong. Rec. 37,375 (1970) (Rep. Dingell).

I. PRIOR REGULATORY INTERPRETATIONS AND *RUST V. SULLIVAN*

HHS's initial regulations for the Title X program required only that a grantee's application state that the Title X "project will not provide abortions as a method of family planning." 36 Fed. Reg. 18,465, 18,466 (Sept. 15 1971); 42 C.F.R. § 59.5(a)(9) (1971). Between the time of those regulations and 1988, however, HHS interpreted Title X both to prohibit projects from engaging in activities that "in any way promot[e] or encourag[e] abortion as a method of family planning," and to "requir[e] that the Title X program be 'separate and distinct' from any abortion activities of a grantee." 53 Fed. Reg. 2923-25 (Feb. 2, 1988). In 1981, HHS also issued guidelines that required

Title X projects to offer "nondirective" counseling about pregnancy termination, followed by referral for abortions if requested. *Id.* HHS then "took the view that activity which did not have the . . . principal purpose or effect of promoting abortion was permitted." *Id.*

The agency formalized and in some respects modified its approach in 1988. The Secretary adopted final regulations to address uncertainty and confusion concerning the use of Title X funds and to effectuate more faithfully the underlying policy embodied in section 1008 against the use of Title X funds in any way to encourage or promote abortion. *See* 53 Fed. Reg. at 2923-2925; Proposed Rules, 52 Fed. Reg. 33,210, 33,211-22 (Sept. 1, 1987). Those 1988 regulations bear a striking resemblance to the ones Plaintiffs challenge here. The 1988 regulations:

- Prohibited Title X projects from engaging in abortion counseling and referrals, even upon specific request. *See* 53 Fed. Reg. at 2945 (section 59.8(a)(1)).
- Required referrals "for appropriate prenatal and/or social services by furnishing a list of available providers that promote the welfare of mother and unborn child" to every patient client. *See id*. (section 59.8(a)(2)).
- Prohibited Title X projects from "encourag[ing], promot[ing] or advocat[ing] abortion as a method of family planning." *Id.* (section 59.10).
- Prohibited providers from using a list of prenatal and/or social services to indirectly encourage or promote abortion. *Id.* (section 59.8(a)(3)).
- Prohibited providers from "including on the list of referral providers health care providers whose principal business is the provision of abortions[.]" *Id.* (section 59.8(a)(3)).
- Required all abortion services to be separate and distinct from a Title X funded project, including by requiring Title X grantees to structure their Title X project "so that it is physically and financially separate" from other parts of a grantee's organization that might provide abortion services. *Id*. (section 59.9).

Various plaintiffs challenged the 1988 regulations, contending that these requirements were not authorized by Title X, were arbitrary and capricious, and violated the First and Fifth Amendments. In *Rust*, the Supreme Court upheld the regulations against these attacks, concluding that the requirements were based on a permissible interpretation of the statute and were not arbitrary and capricious. 500 U.S. at 183-91. The Court accepted as reasonable the Secretary's explanation that the "prior policy failed to implement properly the statute and . . . [the new

regulations were] necessary to provide clear and operational guidance to grantees about how to preserve the distinction between Title X programs and abortion as a method of family planning," as well as that "the new regulations [were] more in keeping with the original intent of the statute, [were] justified by client experience under the prior policy, and [were] supported by a shift in attitude against the elimination of unborn children by abortion." *Id.* at 187 (quotation marks omitted). The Court also rejected plaintiffs' constitutional challenges. *Id.* at 192-203.

In February 1993, the President suspended the 1988 regulations and directed HHS to propose new regulations. *See* The Title X "Gag Rule," Memorandum, 58 Fed. Reg. 7455 (Jan. 22, 1993). HHS then issued a proposed rule, *see* 58 Fed. Reg. 7464 (Feb. 5, 1993), which HHS finalized on July 3, 2000, *see* 65 Fed. Reg. 41,270 (July 3, 2000). The 2000 regulations removed the provisions of the 1988 regulations that (1) prohibited Title X projects from counseling or referring project clients for abortion, (2) required grantees to separate their Title X project physically and financially from any abortion activities, and (3) implemented compliance standards for Title X projects designed to eliminate the promotion or encouragement of abortion as a method of family planning. *See id.* at 41,280. The regulations also affirmatively required grantees to counsel about and refer for abortion in certain situations. *Id.* at 41,279.

II. THE FINAL RULE

On June 1, 2018, HHS published a proposed rule soliciting comments on proposed changes to the 2000 regulations. *See* Proposed Rules, 83 Fed. Reg. 25,502 (June 1, 2018) (NPRM). HHS explained that its proposed changes were based on what HHS considers the best interpretation of Title X, and, in particular, section 1008. *Id.* at 25,505. HHS further explained that the intent of the changes was to "refocus the Title X program on its statutory mission—the provision of voluntary, preventive family planning services specifically designed to enable individuals to determine the number and spacing of their children[.]" *Id.*

On March 4, 2019, after considering public comments, HHS published in the Federal Register the Final Rule at issue. *See* 84 Fed. Reg. 7714. The Rule adopted the proposals from the

proposed rule with only modest changes. As discussed in detail below, the Rule for all intents and purposes restores the 1988 regulations that the Supreme Court upheld in *Rust*. *See infra* Part I.A. HHS explained that the Rule provides much needed clarity regarding the Title X program's role as a family planning program that is statutorily forbidden from paying for abortion and from funding programs/projects where abortion is a method of family planning. *See* 84 Fed. Reg. at 7721. HHS further explained that the Rule is necessary because the 2000 regulations "fostered an environment of ambiguity surrounding appropriate Title X activities"—an assessment confirmed by many of the comments submitted in response to the proposed rule. *Id.* at 7721-7722. HHS explained that the Rule rectifies this ambiguity by making a clear delineation between Title X and non-Title X activities and provides grantees with clear direction on how to ensure that no Title X funds are expended where abortion is a method of family planning. *Id.* at 7722. Notably, the Final Rule is more permissive than the 1988 regulations in a significant respect: it allows abortion counseling, although grantees must comply with Congress's requirement that all pregnancy counseling be nondirective. *See, e.g.*, *id.* at 7716.

The Final Rule will become effective on May 3, 2019, although funding recipients have until July 2, 2019 to comply with the financial separation requirement, and until March 4, 2020 to comply with the physical separation requirement. 84 Fed. Reg. at 7714.

III. THIS LITIGATION

On March 4, 2019, California filed its complaint asserting claims under the APA and the Constitution. *See* Compl., ECF No. 1. Essential Access filed suit the same day asserting substantially similar claims. *See Essential Access Health, Inc. et al. v. Azar*, No. 3:19-cv-01195-EMC, Compl., ECF No. 1. Essential Access moved to relate the two cases, and the Court granted their motion. *See* Order, ECF No. 18. On March 21, 2019, Plaintiffs in both cases moved for a preliminary injunction to block implementation of the Rule. *See* Cal. Mem.; *Essential Access*, No. 3:19-cv-011955, ECF No. 25 (EA Mem.). Per the Court's March 20, 2019 Minute Order, ECF No. 25, Defendants now file this consolidated opposition.

ARGUMENT

A preliminary injunction is "an extraordinary and drastic remedy" that should not be granted "unless the movant, *by a clear showing*, carries the burden of persuasion." *Lopez v. Brewer*, 680 F.3d 1068, 1072 (9th Cir. 2012). "A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. NRDC*, 555 U.S. 7, 20 (2008). Plaintiffs fail to satisfy any of these requirements.

I. PLAINTIFFS ARE UNLIKELY TO SUCCEED ON THE MERITS

Plaintiffs challenge a Rule that is materially indistinguishable from one the Supreme Court has already upheld. Most of Plaintiffs' arguments bear a striking resemblance to those the Supreme Court rejected in *Rust*, and their remaining claims are without merit. Because Plaintiffs have no realistic likelihood of prevailing on the merits, their motions should be denied for that reason alone.

A. *Rust* Rejected Arguments Indistinguishable From Those Plaintiffs Advance

Plaintiffs' challenge to the Rule fails in significant part for a simple reason: The Supreme Court has already upheld HHS's materially indistinguishable 1988 regulations against both statutory and constitutional challenges. Section 1008 of the PHSA provides that "[n]one of the funds appropriated under [the Title X program] shall be used in programs where abortion is a method of family planning." 42 U.S.C. § 300a-6. In *Rust*, the Supreme Court held that this text authorized regulations that (1) barred counseling concerning the use of abortion or abortion referrals as a method of family planning within the Title X program, (2) broadly prohibited a Title X project from advocating abortion as a method of family planning, and (3) mandated financial and physical separation between Title X projects and prohibited abortion activities. 500 U.S. at 183-91. The Court rejected multiple constitutional challenges as well. *Id.* at 192-202.

The language of Title X and section 1008 has not changed since *Rust*. The regulatory provisions Plaintiffs principally challenge—which prohibit abortion referrals as a method of family planning and mandate the separation of Title X projects from abortion activities—are

1 materially indistinguishable from those upheld in *Rust*. Indeed, Plaintiffs make no serious effort
2 to distinguish the Rule from the 1988 regulations, and their objections to the Rule are for the most
3 part indistinguishable from those the Supreme Court rejected in *Rust*.

4 *The counseling, referral, and advocacy restrictions*: The Rule prohibits referrals for
5 abortion as a method of family planning but allows nondirective pregnancy counseling, including
6 counseling concerning abortion, so long as "a Title X project [does] not perform, promote, refer
7 for, or support abortion as a method of family planning, nor take any other affirmative action to
8 assist a patient to secure such an abortion." 84 Fed. Reg. at 7758 (to be codified at 42 C.F.R.
9 § 59.14(a)). The 1988 regulations, like the Rule here, prohibited "referral for abortion as a method
10 of family planning" in a Title X project. 53 Fed. Reg. at 2945. "[T]he broad directives provided
11 by Congress in Title X in general and § 1008 in particular," the Court explained in *Rust*, "plainly
12 allows" this "construction of the statute." *Rust*, 500 U.S. at 184. The Rule's more modest
13 approach—prohibiting abortion referrals but allowing counseling—is thus even more defensible.

14

15 Plaintiffs do not explain what features of the restrictions on abortion counseling, referral,
16 and advocacy here distinguish this case from *Rust* in a way that favors them. Indeed, the aspects
17 of the Rule that Plaintiffs attack here were all features of the 1988 regulations *Rust* upheld:

18 a. Plaintiffs complain that the Rule generally bans abortion referrals. EA Mem. at 7;
19 Cal. Mem. at 11. So did the 1988 regulations. *See Rust*, 500 U.S. at 184.

20 b. Plaintiffs object that the Rule mandates referrals for prenatal care. Cal. Mem. at 8;
21 EA Mem. at 13. Again, so did the 1988 regulations. *See Rust*, 500 U.S. at 179 (noting that the
22 regulations "clarif[ied] that pregnant women must be referred to appropriate prenatal care
23 services" (quoting 53 Fed. Reg. at 2925)); *compare* 42 C.F.R. § 59.14(b)(1) (effective May 3,
24 2019) (providing that "once a client served by a Title X project is medically verified as pregnant,
25 she shall be referred to a health care provider for medically necessary prenatal health care"), *with*
26 53 Fed. Reg. at 2945 (providing that "once a client served by a Title X project is diagnosed as
27 pregnant, she must be referred for appropriate prenatal and/or social services by furnishing a list
28

1 of available providers that promote the welfare of mother and unborn child"). And more broadly,
2 the fact that a patient might *later* obtain an abortion *outside* the auspices of Title X is no basis for
3 withholding information or medically necessary services *within* the Title X project.

4 c. Plaintiffs protest that providers may refuse to provide information about abortion
5 even if a patient directly requests abortion-related information, and providers must furnish
6 information about alternatives even if the provider believes the patient does not want this
7 information. Cal. Mem. at 8; EA Mem. at 11. But Plaintiffs have no basis to challenge a rule
8 *allowing* them to provide nondirective counseling concerning abortion, simply because it also
9 *allows others not* to provide such counseling. In any event, the 1988 regulations, like the Rule,
10 "expressly prohibited [a Title X project] from referring a pregnant woman to an abortion provider,
11 even upon specific request." 500 U.S. at 180. And the 1988 regulations were more stringent on
12 counseling. Whereas the Rule permits providers to furnish "nondirective pregnancy counseling,
13 which may discuss abortion," 42 C.F.R. § 59.14(e)(5), the 1988 regulations prohibited *any*
14 "counseling concerning the use of abortion as a method of family planning[,]" *id*. at 179 (quoting
15 42 C.F.R. § 59.8(a)(1) (1989)).
16
17 d. Essential Access disparages the Rule's provision allowing providers to inform a
18 patient who requests information about abortion that "the project does not consider abortion a
19 method of family planning." EA Mem. at 7 (quoting 42 C.F.R. § 59.14(e)(5)). But they omit that
20 the Rule directs that a provider may offer "nondirective pregnancy counseling, *which may discuss*
21 *abortion*, [provided that] the counselor neither refers for, nor encourages, abortion." 42 C.F.R.
22 § 59.14(e)(5) (emphasis added). In any event, the regulation upheld in *Rust* permitted a virtually
23 identical response. *See* 500 U.S. at 180 (noting that a "permissible response" to a patient's request
24 for an abortion referral "is that 'the project does not consider abortion an appropriate method of
25 family planning and therefore does not counsel or refer for abortion'" (citation omitted).

26 e. The Rule permits a provider to furnish a pregnant patient with a "list of licensed,
27 qualified, comprehensive primary health care providers (including providers of prenatal care)
28

some (but not the majority) of which also provide abortion as part of their comprehensive health care services." 84 Fed. Reg. at 7789 (to be codified at 42 C.F.R. § 59.14(c)(2)). Plaintiffs object that the Rule requires including providers who do not provide abortion on the list, even if the patient indicates she would like to seek an abortion. Cal. Mem. at 8; EA Mem. at 7. But the same was true of the 1988 regulations. *See* 500 U.S. at 180 (list could not "exclud[e] available providers who do not provide abortions"). Plaintiffs also attack the no-majority specification but, again, the rule upheld in *Rust* prohibited providers from "weighing the list of referrals in favor of health care providers which perform abortions[.]" *Id.* at 179; *see also* 53 Fed. Reg. at 2945. And while Plaintiffs note that the Rule prohibits including abortion providers who do not also provide comprehensive primary health care, EA Mem. at 7; Cal. Mem. at 8-9, the 1988 regulations likewise prohibited "including on the list of referral providers health care providers whose principal business is the provision of abortions[.]" 500 U.S. at 180; *see also* 53 Fed. Reg. at 2945.

f. Although Plaintiffs assert that the Rule does not "make an explicit exception where an abortion is medically necessary," EA Mem. at 7, the Rule expressly provides that "[i]n cases in which emergency care is required, the Title X project shall only be required to refer the client immediately to an appropriate provider of medical services needed to address the emergency[,]" 42 C.F.R. § 59.14(b)(2), and gives an example of an emergency warranting an abortion referral (an ectopic pregnancy), *id.* § 59.14(e)(2)—an example no reasonable reader would interpret as exclusive. And because the prohibition on referrals for abortion encompasses only "abortion as a method of family planning[,]" *id.* § 59.14(a), "it does not seem that a medically necessitated abortion in [the circumstance of a medical emergency] would be the equivalent of its use as a 'method of family planning,'" *Rust*, 500 U.S. at 195.

More fundamentally, any attempt to distinguish the restrictions here from those in *Rust* cannot be reconciled with *Rust*'s reasoning. *Rust* broadly concluded that section 1008 "plainly allows" a "ban on [abortion] counseling, referral, and advocacy" within Title X. 500 U.S. at 184. Here, where only referral and advocacy are banned, the Rule is permissible under *Rust*. Even if

1 Plaintiffs could identify some differences in their favor between the prohibitions here and those
2 considered in *Rust*—and they hardly try to—*Rust* obviously permits these restrictions.

3 *The program integrity requirements*: Plaintiffs characterize the Rule's program integrity
4 requirements as "a radical departure from the Department's established policy." EA Mem. at 7.
5 Although these requirements are an acknowledged and justified change from the 2000 regulations,
6 *see infra* Part I.D, they are materially indistinguishable from the 1988 regulations upheld in *Rust*—
7 which themselves were a departure from HHS's previous approach. The Court held that the
8 program integrity requirements—"mandating separate facilities, personnel, and records"—were
9 "not inconsistent with the plain language of Title X" and "[c]ertainly . . . cannot be judged
10 unreasonable." *Rust*, 500 U.S. at 187-88, 190. The Court thus accepted HHS's view that
11 "[m]eeting the requirement of section 1008 mandates that Title X programs be organized so that
12 they are physically and financially separate from other activities which are prohibited from
13 inclusion in a Title X program" and that "[h]aving a program that is separate from such activities
14 is a necessary predicate to any determination that abortion is not being included as a method of
15 family planning in the Title X program." *Id.* at 188 (quoting 53 Fed. Reg. at 2940).

17 Plaintiffs do not—and cannot—identify any material differences between these
18 requirements and those upheld in *Rust*:

19 a. Both mandate that "[a] Title X project must be organized so that it is physically and
20 financially separate . . . from activities which are prohibited under section 1008";

21 b. Both provide that a "project must have an objective integrity and independence
22 from prohibited activities";

23 c. Both direct that "[m]ere bookkeeping separation of Title X funds from other monies
24 is not sufficient";

25 d. Both set forth a list of four basically identical factors that the Secretary will use to
26 determine whether the requisite separation exists: (i) separate accounting records (the Rule adds
27 the requirement that such records be "accurate"); (ii) facilities separation; (iii) separate personnel
28

1 (the Rule adds records and workstations to this requirement); and (iv) the extent to which
2 identification of the Title X project is present and abortion-referencing materials are absent. 42
3 C.F.R. § 59.15; *see also* 53 Fed. Reg. at 2945. (This fact alone should put an end to Essential
4 Access's complaint that "[t]he Final Rule confers boundless discretion on the Secretary to
5 determine whether such 'objective integrity and independence' exist 'based on a review of the
6 facts and circumstances.'" EA Mem. at 8.)

7 ***

8 For all these reasons, neither group of Plaintiffs seriously contends that the Rule reflects
9 an impermissible interpretation of section 1008. Nor could they. *Rust* expressly held otherwise
10 and Congress has not changed the statutory language since.

11

12 **B. Neither The Nondirective Provision Nor The ACA Silently Overrules *Rust***

13 *Rust*'s on-point statutory holding—and the remarkable overlap between Plaintiffs'
14 arguments and the arguments *Rust* rejected—precludes Plaintiffs from showing that the materially
15 indistinguishable Rule here is unlawful. By necessity, Plaintiffs therefore take a more creative
16 approach, arguing that two subsequent provisions—(1) a single line requiring that any pregnancy
17 counseling provided in a Title X program be "nondirective," in a rider Congress began adding to
18 HHS appropriations acts in 1996, and (2) section 1554 of the ACA, codified at 42 U.S.C. § 18114,
19 which does not mention abortion or abortion-related activities—silently supplant *Rust*. *See* Cal.
20 Mem. at 12 (arguing that "*Rust* has been superseded by subsequent Congressional action").

21 This argument—that Congress silently overruled portions of *Rust* by enacting two separate
22 statutes and leaving the language of section 1008 unchanged—not only misconstrues the
23 appropriations rider and section 1554, but "runs foursquare into [the] presumption against implied
24 repeals." *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 664 (2007). Even
25 putting aside this presumption, any argument that the two provisions supersede *Rust* is implausible.
26 Neither the nondirective provision nor section 1554 mentions abortion, section 1008, or *Rust*, and
27 neither provision was accompanied by any legislative history suggesting that Congress intended
28

to overrule *Rust*. Indeed, when Congress *did* attempt to pass legislation that would have permitted abortion referrals within the Title X program, that legislation was vetoed. *See infra* p. 18. Plaintiffs' argument based on these two provisions fails.

1. The Nondirective Provision Does Not Supplant *Rust.*

Since 1996, Congress has included a rider in its annual HHS appropriations act that—in addition to stating that funds appropriated to Title X projects "shall not be expended for abortions"—requires that "all pregnancy counseling shall be nondirective[.]" *E.g.*, HHS Appropriations Act 2019, Pub. L. No. 115-245, Div. B, 132 Stat. 2981, 3070-71. Consistent with this requirement, the Rule permits providers to provide "[n]ondirective pregnancy counseling," which "may discuss abortion[.]" 84 Fed. Reg. at 7789 (to be codified at 42 C.F.R. § 59.14(b)(1)(i), (e)(5)). The annual HHS appropriations language requires no more.

Plaintiffs nevertheless contend that the Rule violates the nondirective provision because it (1) requires that providers refer pregnant patients for prenatal care, while (2) prohibiting referral for abortion as a method of family planning. *See* EA Mem. at 13-14; Cal. Mem. at 11-12. In other words, Plaintiffs read the nondirective provision to *require* that Title X providers make abortion referrals upon request (and to bar HHS from mandating prenatal referrals). *See id.* But the nondirective provision says nothing about abortion referrals, much less does it require HHS to bankroll only programs that provide them. This is clear for at least three reasons.

a. First, reading the nondirective provision to require abortion referrals conflicts with the Supreme Court's authoritative interpretation of Title X itself—*i.e.*, that it delegated authority to HHS to prohibit referrals for abortion as a method of family planning and to allow for mandatory referrals of pregnant patients for prenatal care. *See Rust*, 500 U.S. at 184-87. Plaintiffs' argument, then, must be that the nondirective provision implicitly repealed section 1008 and *Rust*. But again, repeals by implication "are not favored and will not be presumed unless the intention of the legislature to repeal is clear and manifest." *Nat'l Ass'n of Home Builders*, 551 U.S. at 662.

1 The same is true with respect to judicial interpretations of statutory provisions, such as the
2 one in *Rust*: "A clear, authoritative judicial holding on the meaning of a particular provision should
3 not be cast in doubt and subjected to challenge whenever a related though not utterly inconsistent
4 provision is adopted in the same statute or even in an affiliated statute." *TC Heartland LLC v.*
5 *Kraft Foods Grp. Brands LLC*, 137 S. Ct. 1514, 1520 (2017) (quoting ANTONIN SCALIA & BRIAN
6 A. GARNER, READING LAW 331 (2012)); *see also, e.g.*, *Forest Grove Sch. Dist. v. T.A.*, 557 U.S.
7 230, 240 (2009) (requiring "a clear expression" of congressional intent to "abrogate" Supreme
8 Court's interpretation of a statute). Even when an "earlier ambiguous provision has already been
9 construed by the jurisdiction's high court to have a meaning that does not fit as well with a later
10 statute as another meaning[,]" any "[l]egislative revision of law clearly established by judicial
11 opinion ought to be by express language or by unavoidably implied contradiction." SCALIA &
12 GARNER at 331. Put differently, it makes no difference that section 1008 contains an *implicit* rather
13 than *explicit* delegation of authority to HHS to prohibit referrals for abortion as a method of family
14 planning and to permit mandatory referrals of pregnant patients for prenatal care.
15
16 Plaintiffs' argument that Congress silently supplanted the Supreme Court's *Rust* decision
17 and repealed part of Title X in an appropriations rider is particularly weak because the doctrine
18 "disfavoring repeals by implication . . . applies with even *greater* force when the claimed repeal
19 rests solely on an Appropriations Act." *Hill*, 437 U.S. at 190. Because appropriations acts have
20 "the limited and specific purpose of providing funds for authorized programs," *id*., there is a "very
21 strong presumption that they do not" substantively change existing law, *Calloway*, 216 F.3d at 9.
22 Plaintiffs cannot overcome that "very strong presumption" here because the nondirective
23 provision expresses no "clear and manifest" intention to override the Supreme Court's
24 interpretation of Title X in *Rust*. The provision neither mentions *Rust* nor alters Title X, and
25 Plaintiffs point to nothing in the legislative record evincing such an intent. Nor is there any conflict
26 between the Rule and the appropriations rider. The latter provision addresses only "counseling,"
27 which is different than the actual *referral* of a patient for medical care. The appropriations rider
28

1 does not use the word "referral" or dictate terms upon which a Title X provider must make (or
2 refrain from making) referrals for medical care outside of the Title X program. Congress and HHS
3 have long recognized that counseling a patient and referring a patient for particular services are
4 different. *See, e.g.*, *supra* pp. 4-5 (discussing 1981 guidance); *infra* pp. 16-17 (discussing 1993
5 guidance); *infra* p. 18 (discussing failed 1992 legislation and nondirective provision).

6 There is thus no conflict—much less an irreconcilable one—between Title X, as interpreted
7 by HHS and the Supreme Court, and the nondirective provision. Instead, the Final Rule adopts a
8 position that appropriately harmonizes the two statutes—prohibiting abortion referrals, consistent
9 with the interpretation of Title X upheld in *Rust*, while requiring that pregnancy counseling, to the
10 extent it is offered, be nondirective. *See* 84 Fed. Reg. at 7730. The Court thus can give effect to
11 the appropriations act, which by its terms does not govern a Title X project's referral activities,
12 without repealing section 1008 or the Supreme Court's interpretation in *Rust*.

13 Contrary to California's suggestion, the fact that the nondirective provision was first
14 adopted "against the backdrop" of HHS regulations requiring Title X projects to, upon a patient's
15 request, "provide nondirective counseling . . . *and* to refer her for abortion, if that is the option she
16 selects," 58 Fed. Reg. 7464, 7464 (Feb. 5, 1993) (emphasis added) (cited in Cal. Mem. at 11 n.5),
17 does not help Plaintiffs for two reasons. First, "[c]ourts will not find that Congress intended to
18 ratify agency policy through an appropriation unless there is express language to that effect
19 included in the legislation." *Rincon Band of Mission Indians v. Califano*, 464 F. Supp. 934, 937
20 (N.D. Cal. 1979) (citing *Ex parte Endo*, 232 U.S. 283, 303 n.24 (1944)); *see also New York v.*
21 *Sullivan*, 889 F.2d 401, 408 (2d Cir. 1989) (upholding 1988 regulations and finding that "Congress
22 has not reenacted Title X, and the reauthorization of funding [through appropriations] does not
23 imply Congress was aware of, much less endorsed every expenditure of funds by the agency").
24 Here, Congress included no definition of the term "nondirective counseling" in its appropriations
25 rider, much less any indication that it intended to adopt a particular HHS interpretation of that
26 language. And second, even if Congress were aware of the 1993 guidance and intended to adopt
27
28

its definition of "counseling," that guidance makes clear that such definition does not, standing alone, include referrals. To the contrary, it requires, in distinct phrases, that Title X projects (1) provide nondirective counseling, and (2) refer patients for abortion upon request. Congress, in its appropriations rider, chose only to include the former term, while excluding reference to the latter.

b. Even putting aside the strong presumption against implied repeals and silent legislative abrogations of Supreme Court statutory holdings (and the even stronger presumption against implied repeals in appropriations bills), Plaintiffs' attempt to equate "counseling" and "referrals" fails. "Counseling" does not, in its common usage, necessarily include within its definition the act of "referral." While the former is defined in purely verbal terms, *i.e.*, the "furnishing of advice or guidance," Black's Law Dictionary (10th ed. 2014), the latter entails the further, active step of "sending or directing to another for information, service, consideration, or decision," *id*. Counseling and referrals are discussed distinctly in the 1988 regulations, *Rust*, and most notably, Congress's *failed* attempt to overturn *Rust* with the Family Planning Amendment Act of 1992, discussed in the next paragraph.[1]

c. If there were any doubt that the nondirective provision did not impliedly repeal section 1008 and *Rust*—and that "counseling" does not mean "referrals" within the context of the Title X program—the immediate aftermath of *Rust* should erase it. In an explicit attempt to overturn that decision, Congress set out to "reverse[] the regulations issued in 1988 and upheld by the Supreme Court in 1991 to restrict the provision of information on abortion to Title-Ten patients." H.R Rep. No. 102-204, accompanying H.R. 3090 (Sept. 13, 1991). Both houses of

[1] Plaintiffs' unwarranted assumption that "counseling" includes "referrals" also explains their misplaced argument that the Rule violates the nondirective provision in requiring referral of a pregnant patient for prenatal care. *See* EA Mem. at 13-14; Cal. Mem. at 11-12. The requirement that a Title X project *refer* a pregnant woman for medically necessary prenatal health care has nothing to do with the requirement that pregnancy *counseling* be nondirective. Rather, it reflects HHS's judgment that "such care is medically necessary to maintain or improve the health of both the mother and the unborn baby." 84 Fed. Reg. at 7759.

1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28

Congress passed a bill, the "Family Planning Amendments Act of 1992," that would have amended Title X to explicitly condition Title X funding upon a project's agreement to "provide to individuals information regarding pregnancy management options" upon request. *See* S.323, 102nd Congress (1991-1992). The bill defined "pregnancy management options" to mean "nondirective counseling *and referrals* regarding (A) prenatal care and delivery; (B) infant care, foster care, and adoption; and (C) *termination of pregnancy*." *Id*. (emphases added).

That bill was vetoed, *see* Message From the President, Senate Document 102-28, 102nd Congress (1991-1992), and when Congress returned in 1996 to enact the nondirective provision, which *did* become law, it used entirely *different* language. The nondirective provision addresses counseling but says nothing about referral. It says nothing about *Rust*. And it does not even require counseling, but merely provides that *if* pregnancy counseling occurs, it must be nondirective. "Few principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language." *United States v. Novak*, 476 F.3d 1041, 1071 (9th Cir. 2007) (citation omitted). And this history confirms that the term "counseling" refers only to counseling, not also to referrals, and that the rider in no way intends to or actually supersedes *Rust* (much less by *requiring* abortion referrals in Title X).

Stripped of their atextual arguments that the Rule's *referral* provisions contravene Congress's directive that pregnancy *counseling* shall be nondirective, Plaintiffs' alleged conflict between the two disappears. Essential Access's arguments hinge on the notion that nondirective pregnancy counseling must include referrals for abortion. *See* EA Mem. at 14 (arguing that "[f]orbidding abortion referral is inherently directive," and that the prohibition on such referrals, coupled with the mandatory prenatal care referral requirement, "contravenes" the nondirective provision by "steering pregnant patients away from abortion services"). California, for its part, simply argues that the Rule's requirement that Title X projects not "encourage, promote, or advocate abortion as a method of family planning," 84 Fed. Reg. at 7789, inhibits providers' ability

to provide "respectful, client-centered counseling." Cal. Mem. at 11. But California does not explain why this would be the case when the Rule explicitly requires that any pregnancy counseling be "non-directive," which, as HHS explained, "is designed to assist the patient in making a free and informed decision," presenting each option in a "factual, objective, and unbiased manner." 84 Fed. Reg. at 7747. In sum, Congress prohibited HHS from using Title X to fund pregnancy counseling that is directive, and the Rule implements that prohibition by specifying that projects can provide pregnancy counseling, including about abortion, but only if it is nondirective.

2. Section 1554 of the ACA Does Not Supplant *Rust.*

Plaintiffs' claim based on section 1554 of the ACA fares no better. That provision states that, "[n]otwithstanding any other provision of this [the Affordable Care] Act, the Secretary of Health and Human Services shall not promulgate any regulation that"

> (1) creates any unreasonable barriers to the ability of individuals to obtain appropriate medical care;
>
> (2) impedes timely access to health care services;
>
> (3) interferes with communications regarding a full range of treatment options between the patient and the provider;
>
> (4) restricts the ability of health care providers to provide full disclosure of all relevant information to patients making health care decisions;
>
> (5) violates the principles of informed consent and the ethical standards of health care professionals; or
>
> (6) limits the availability of health care treatment for the full duration of a patient's medical needs.

42 U.S.C. § 18114.

To start, Plaintiffs have waived any challenge based on section 1554. A plaintiff "must first utilize the opportunity for comment [on an agency regulation] before it may raise issues" in federal court, or else arguments are "waived." *Nutraceutical Corp. v. Von Eschenbach*, 459 F.3d 1033, 1041 n.9 (10th Cir. 2006) (citation omitted) (alterations in original) (collecting cases). "Th[is] rule applies with no less force to a statutory interpretation claim not brought to an agency's

1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28

attention[,]" because "[r]espect for agencies' proper role in the *Chevron* framework requires that the court be particularly careful to ensure that challenges to an agency's interpretation of its governing statute are first raised in the administrative forum." *Nuclear Energy Inst., Inc. v. EPA*, 373 F.3d 1251, 1298 (D.C. Cir. 2004); *see also Univ. Health Servs., Inc. v. Thompson*, 363 F.3d 1013, 1019 (9th Cir. 2004). Here, Plaintiffs challenge regulations that are the product of notice-and-comment rulemaking, but never allege that they (or any other party) raised any purported inconsistency between the Rule and section 1554 during the rulemaking process, and the government is aware of no such objection.

Waiver aside, this argument is meritless. It is extraordinary to now claim that the Rule "conflicts directly with Section 1554," Cal. Mem. at 12, when *none* of the Plaintiffs (or, as best as the Government can tell, anyone else) noticed this supposed direct conflict during the notice-and-comment process. And before turning to specifics, consider the fundamental implausibility of Plaintiffs' argument. It is a basic principle that Congress "does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001). Plaintiffs contend, however, that Congress (1) abrogated a Supreme Court decision on an *extremely* controversial subject; (2) *after* it had tried and failed to do so expressly; (3) in a provision that does not mention abortion, pregnancy, Title X generally, section 1008, or *Rust*; (4) without generating any meaningful legislative history; and (5) in a manner that was so subtle in effecting this transformational change that not even Plaintiffs thought to invoke it in their comments expressing opposition to the Rule. That is, to put it mildly, an unlikely proposition.

Turning to specifics, Plaintiffs cannot seriously contend that section 1554 repealed by implication section 1008 as interpreted in *Rust*. Section 1554 does not refer to abortion or even pregnancy; it does not refer to section 1008; and it does not refer to *Rust*. And as far as Defendants are aware, this provision was not the subject of any meaningful legislative history before the ACA's enactment, and Plaintiffs provide none.

1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28

Nor are section 1554 and section 1008 in "irreconcilable conflict." As discussed further below, section 1554—which applies only "notwithstanding [the Affordable Care] Act"— does not even apply to section 1008 (which is not part of the ACA). Beyond that, section 1554 can quite comfortably be read as simply not speaking to the issue of *funding* of abortion as a method of family planning within the Title X program. Indeed, since section 1554 does not refer to either funding of abortion or Title X, it neither "covers the whole subject of [section 1008]" nor "is clearly intended as a substitute." *Branch v. Smith*, 538 U.S. 254, 273 (2003) (citation omitted).

Plaintiffs' argument also conflicts with section 1554's text and multiple interpretive principles. Start with the text. All six subjects of section 1554's sub-sections—unreasonable barriers to appropriate medical care, impediments to timely access to health care services, interference with medical communications, restrictions on disclosure of relevant information, violation of ethical standards and principles of informed consent, and limitations on the availability of health care treatment—involve the *denial* of information or services to patients. The Rule, however, denies nothing. It is merely a limit on what the government chooses to fund. As *Rust* held, when the government places restrictions on the permissible use of Title X funds, it "is not *denying* a benefit to anyone, but is instead simply insisting that public funds be spent for the purposes for which they were authorized." 500 U.S. at 196 (emphasis added). "By requiring that the Title X grantee engage in abortion-related activity separately from activity receiving federal funding, Congress has . . . merely refused to fund such activities out of the public fisc, and the Secretary has simply required a certain degree of separation from the Title X project in order to ensure the integrity of the federally funded program." *Id.* at 198.

Plaintiffs also fail to mention that section 1554 expressly applies "[n]otwithstanding any other provision *of this Act*," 42 U.S.C. § 18114 (emphasis added)—that is, the ACA. Section 1008, however, is not part of the ACA (it was enacted as section 1008 of the PHSA). Nor are Sections 1001 and 1006 of Title X of the PHSA, which give the Secretary authority to award grants and issue Title X regulations. Had Congress intended section 1554 to extend beyond the ACA, it could

have simply specified that section 1554 applies "notwithstanding any other provision of law." Indeed, such language is frequently used in American law in general, and in the ACA specifically 21 times, by the government's count. *See, e.g.*, 42 U.S.C. § 18032(d)(3)(D)(i)). By its own terms, section 1554 does not apply to Title X of the PHSA or its implementing regulations.

That reading also comports with common sense. Section 1554's sub-sections are quite open-ended. Nothing in the statute specifies, for example, what constitutes an "unreasonable barrier[]," "appropriate medical care[,]" "all relevant information[,]" or "the ethical standards of health care professionals[.]" And as noted above, there is—as best as the government can tell—nothing in the ACA's legislative history that sheds light on this provision. Under these circumstances, it is a substantial question whether section 1554 claims are reviewable under the APA at all. *See Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971) (APA bars judicial review of agency decision where, among other circumstances, "'statutes are drawn in such broad terms that in a given case there is no law to apply'" (citation omitted)).[2] But even if section 1554 claims are reviewable, it is inconceivable to imagine that Congress intended to subject the entire U.S. Code to these general and wholly undefined concepts—and that it did so without leaving any meaningful legislative history.

Other principles point in the same direction. In addition to the presumption against elephants in mouseholes, *see supra* p. 20, "it is a commonplace of statutory construction that the specific governs the general," *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992). That is particularly true where Congress has enacted a "comprehensive scheme and has deliberately targeted specific problems with specific solutions." *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012) (citation omitted). "The general/specific canon is

[2] Even within the ACA, HHS routinely issues regulations placing criteria and limits on what the government will fund, and on what will be covered in ACA programs. Under Plaintiffs' standardless interpretation of section 1554, it is far from clear that the Government could ever impose any limit on any parameter of a health program—even if the program's own statute requires it—and how a court could possibly evaluate such challenges.

1 perhaps most frequently applied to statutes in which a general permission or prohibition is
2 contradicted by a specific prohibition or permission." *Id.* Under such circumstances, "[t]o
3 eliminate the contradiction, the specific provision is construed as an exception to the general one."
4 *Id.* Thus, even if section 1554 applied to regulations implementing section 1008 (it does not), even
5 if sections 1554 and 1008 were in conflict (they are not), and even if Plaintiffs had preserved this
6 challenge (they have not), section 1008 as interpreted in *Rust* would prevail over section 1554.
7 Section 1554 is at best a general prohibition of certain types of regulations (very broadly
8 described). Section 1008, however, is a much more specific prohibition. It applies to funding of
9 abortion as a method of family planning within the Title X program. And in *Rust*, the Supreme
10 Court held that section 1008 authorized HHS to adopt regulations materially indistinguishable
11 from the ones challenged here. Section 1554, by contrast, does not speak specifically to abortion
12 or, for that matter, Title X at all. Plaintiffs are thus unlikely to succeed on the merits of this claim.

13 **C. *Rust* Forecloses California's "Excess of Statutory Jurisdiction" Claim**

14 California contends that HHS exceeded its statutory jurisdiction because the "Rule is an
15 unreasonable exercise of Defendants' authority under the Title X statute, which requires that grants
16 for Title X programs 'shall offer a broad range of acceptable and effective family planning methods
17 and services,' and a 'comprehensive program of family planning services,' that 'shall be
18 voluntary.'" Cal. Mem. at 14 (quoting 42 U.S.C. §§ 300(a), 300a(a), 300a-5). But none of the
19 provisions California quotes mentions abortion, and all of them predate *Rust*, which held that the
20 Secretary's physical and financial separation requirements, as well as the abortion counseling,
21 referral, and advocacy restrictions, were permissible under Title X. *See supra* Part I.A.
22 California's argument consequently fails.

23 California also briefly references "[o]ther aspects of the Final Rule" that it believes "run
24 counter to Congressional language and purpose," Cal. Mem. at 14, specifically, (1) the provision
25 prohibiting the use of Title X funds to "build infrastructure for purposes prohibited with these
26 funds, such as support for the abortion business of a Title X grantee or subrecipient," 42 C.F.R.
27
28

§ 59.18(a); (2) the provision requiring that nondirective medical counseling be provided by medical professionals who are licensed with a relevant graduate degree (including physician assistants and a broad range of nurse practitioners), *id.* §§ 59.2, 59.14(b)(i); and (3) the elimination of the atextual and confusing requirement that counseling and services be "medically approved" (in favor of the statutory requirement that counseling and services be "acceptable and effective"), *id.* § 59.5(a)(1). As to the first, the requirement that Title X funds not be used to "build infrastructure for" prohibited purposes "such as support for . . . abortion business" follows directly from section 1008. The other two modest changes are not even arguably addressed by the statutes California cites. And as discussed below, HHS cogently explained each of these provisions in the Final Rule. *See infra* Part I.D.

D. The Final Rule Is Not Arbitrary and Capricious

Agency action must be upheld in the face of an APA claim if the agency "examine[s] the relevant data and articulate[s] a satisfactory explanation for its action[,] including a rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (citation omitted). Under this deferential standard of review, "a court is not to substitute its judgment for that of the agency . . . and should uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 513-14 (2009) (citations omitted); *see also Alaska Oil & Gas Ass'n v. Jewell*, 815 F.3d 544, 554 (9th Cir. 2016) ("arbitrary and capricious" standard establishes a "high threshold" for setting aside agency action, which is "presumed valid and is upheld if a reasonable basis exists for the decision"). The Rule—the major components of which have already been upheld by the Supreme Court—easily satisfies this deferential review.

1. *Rust* Establishes That It is Not Arbitrary and Capricious for HHS to Place Conditions on Title X Funds that Require Physical Separation and Restrict Activities that Promote Abortion as a Method of Family Planning.

HHS had a simple and compelling basis for promulgating the Final Rule: to ensure compliance with federal law, and in particular section 1008's emphatic command that "none of the

funds appropriated" for Title X "be used in programs where abortion is a method of family planning." *See* 83 Fed. Reg. at 25,505. HHS reads this statute, as it did in 1988, to establish "a broad prohibition on funding, directly or indirectly, activities that treat abortion as a method of family planning." 84 Fed. Reg. at 7723; *see also* 53 Fed. Reg. at 2922 (explaining that section 1008 "creates a wall of separation between Title X programs and abortion as a method of family planning"). Based on that interpretation, HHS determined that the intervening 2000 regulations are inconsistent with section 1008 to the extent they "require referral for abortion as a method of family planning, allow the use of funds for building infrastructure that could be used for abortion services, and do not require clear physical separation between Title X activities and abortion-related services." 84 Fed. Reg. at 7723. HHS thus determined that the Final Rule is necessary to rectify the problems with the 2000 regulations and to properly implement section 1008.

The Supreme Court already approved of this reasoning. In particular, it determined that (1) Title X authorizes HHS to prohibit abortion "counseling, referral, and advocacy within the Title X project," *Rust*, 500 U.S. at 184; (2) Title X authorizes HHS to require physical separation of Title X and non-Title X projects, *id*. at 188-90; and (3) HHS's interest in ensuring compliance with its interpretation of section 1008 justified separation, counseling, and referral requirements materially indistinguishable from those in the Rule, *id*. at 184-91.

The Supreme Court's rejection of the arbitrary and capricious arguments in *Rust* is equally applicable here. Essential Access nevertheless contends that *Rust* "does not control" in light of more recent Supreme Court decisions addressing changes to an agency's position. *See* EA Mem. at 15 n.18. But *Rust* also addressed the question of an agency's change in position on these very issues. Indeed, the petitioners in *Rust* similarly challenged the 1988 regulations on the ground that they constituted a "sharp break" from years of agency practice construing Title X. 500 U.S. at 186. Rejecting this challenge, the Court recognized that agencies are free to adapt their "rules and policies to the demands of changing circumstances," so long as the new policies they announce are justified with a "reasoned analysis[,]" *id.* at 186-87 (quoting *State Farm*, 463 U.S. at 42). Given

HHS's conclusion that its "prior policy failed to implement properly the statute[,]" and its reasoned explanation for enacting the specific provisions of the 1988 regulations, the Court found that the change of interpretation was "amply justified[.]" *Id.* at 187.

Rust is also fully consistent with the decisions Plaintiffs cite. *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117 (2016), affirms that "[a]gencies are free to change their existing policies as long as they provide a reasoned explanation for the change." *Id.* at 2125. *Fox* likewise confirms that when an agency changes position, it must "ordinarily . . . display awareness that it *is* changing position" and show that "there are good reasons for the new policy." 556 U.S. at 515. Neither case purported to break new ground in recognizing that any serious reliance interests must be "taken into account." *Id.* Here, HHS discussed those interests, comments received, and the approach taken in past rules, ultimately "reaffirm[ing the] reasoned determination" it made in 1988. 84 Fed. Reg. at 7724. On this point, *Fox* and *Encino Motorcars* require no more. *See Am. Wild Horse Pres. Campaign v. Perdue*, 873 F.3d 914, 928 (D.C. Cir. 2017) (citing *Fox* and *Encino Motorcars* for the proposition that, if an agency wishes to change its policy going forward, "it must acknowledge that it is actually changing course and explain its reasons for doing so").

2. <u>HHS Was Not Required to—But Did—Submit Evidence of a Problem.</u>

Plaintiffs' primary contention is that the Rule is not supported by sufficient empirical evidence. *See* EA Mem. at 16, 17; Cal. Mem. at 16. The APA, however, "imposes no general obligation on agencies to produce empirical evidence." *Stilwell v. Office of Thrift Supervision*, 569 F.3d 514, 519 (D.C. Cir. 2009) (Kavanaugh, J.).

Arguing to the contrary, Essential Access relies almost entirely on *National Fuel Gas Supply Corp. v. FERC*, 468 F.3d 831 (D.C. Cir. 2006) (Kavanaugh, J.). *See* EA Mem. at 15-17. That case is inapposite and does not undermine the principle that the APA imposes no general obligation on agencies to produce empirical evidence. In the context in which that case arose—FERC's regulation of the relationship between natural gas pipelines, which the court termed "natural monopolies," *Nat'l Fuel Gas Supply*, 468 F.3d at 834, and their non-marketing affiliates—

D.C. Circuit precedent held that "FERC cannot impede vertical integration between a pipeline and its affiliates without 'adequate justification.'" *Id.* at 840 (citation omitted). To meet that standard, FERC attempted to justify the rule at issue on the basis of both (1) a "theoretical threat" of pipelines granting undue preferences to their affiliates, and (2) "record evidence" indicating that this type of abuse was "a real problem in the industry." *Id.* at 833-34. When the court found such evidence to be "non-existent[,]" the court predictably concluded that FERC acted arbitrarily and capriciously to the extent it "staked its rationale in part on a record of abuse[.]" *Id.* at 843. The court "did not purport to establish a generally applicable standard for agency regulation based on a 'theoretical threat[,]'" but merely held that when an agency "fail[s] to support [the] grounds on which it had purported to act," it fails to "meet the substantial evidence test" applicable to the type of FERC action at issue there. *S.C. Pub. Serv. Auth. v. FERC*, 762 F.3d 41, 69 (D.C. Cir. 2014). *National Fuel* thus does not impose upon an agency a hitherto unrecognized obligation to submit empirical evidence in support of its policy, nor prevent it from "adopt[ing] prophylactic rules to prevent potential problems before they arise." *Stilwell*, 569 F.3d at 519. HHS has done so here, and, as explained below, "justif[ied] its rule with a reasoned explanation." *Id.*

As HHS noted in the Rule in response to comments contending that it had not "provided sufficient reasons or evidence to justify the physical and financial separation requirements," 84 Fed. Reg. at 7764, the Supreme Court has already upheld the separation requirements "as a legitimate interpretation of the Congressional mandate in section 1008[.]" *Id.* Similarly, the Court in *Rust* already considered and endorsed the same restrictions on abortion counseling and abortion referrals adopted in the Rule. *See id.* at 7746; *Rust*, 500 U.S. at 193. That by itself was sufficient justification. But as set forth below, HHS also detailed the problems with the 2000 regulations and explained the need to impose anew the separation, counseling, and referral provisions.

Program Integrity Requirements: HHS noted that allowing Title X projects to operate in shared spaces with non-Title X activities increases the risk that Title X and other funds will be comingled, that Title X funds will be used for prohibited purposes, and that the public will be

deprived of the clear statutorily required assurance that taxpayer dollars are not being used to fund projects where abortion is a method of family planning. 84 Fed. Reg. at 7764-65. HHS explained that these concerns are particularly acute because Title X projects use flexible grants that give considerable "latitude and versatility to grantees on how funds are used." 83 Fed. Reg. at 25,508. This flexibility raises the specter of projects using Title X funds to build infrastructure used to support abortion, which HHS chronicled. *See* 84 Fed. Reg. at 7773 (citing report that Title X funds are used to address "staff-related issues," for "operational investments," and towards "infrastructure and general operations"); *id.* at 7776 (comments arguing that separation requirements would "increase the cost for doing business" confirms the need for the Rule because, if "the collocation of a Title X clinic with an abortion clinic permits the abortion clinic to achieve economies of scale, [Title X funds] would be supporting abortion as a method of family planning"). In this context, HHS determined that even using the "strictest accounting and charging of expenses, a shared facility greatly increases the risk of confusion and the likelihood that a violation of the Title X prohibition will occur." *Id*. at 7764; *cf. Marina Mercy Hosp. v. Harris*, 633 F.2d 1301, 1304 (9th Cir. 1980) ("In a program as complex and ripe with potential for abuse as Medicare, the Secretary has broad discretion to control excessive costs by adopting general prophylactic rules.").

Moreover, while HHS was not required to submit empirical evidence in support of its Rule, it did explain that its concerns were more than theoretical. In particular, it cited a study showing that abortions are increasingly being performed at "sites that focus primarily on contraceptive and family planning services"—*i.e.*, precisely the type of sites that receive Title X funds. *See* 84 Fed. Reg. at 7765. Essential Access tries to discredit this study by noting that it does not actually conclude that any of the referenced "nonspecialist" sites are in fact Title X recipients, but Essential Access relies on nothing more than the "evidence of a real problem" standard from the inapposite *National Fuel*. *See* EA Mem. at 16. HHS also pointed to examples of overbilling in the Medicaid program as demonstrating a need for clarity with respect to permissible and impermissible

activities.[3] As HHS explained, when abortions are performed at Title X facilities that are not clearly separated, it confuses the public about whether federal funds are being used for services that Title X prohibits—as evidenced by the fact that many commenters apparently assumed that abortion was a permissible method of family planning within the Title X program, *see* 84 Fed. Reg. at 7729-30—and increases the likelihood that funds will be used for improper purposes. The more abortions that are performed at the type of nonspecialized clinics that often house Title X services, the higher both risks. *See id*. at 7765 ("The performance of abortions at nonspecialized clinics that also may provide Title X services increases the risk and potential both for confusion and for the co-mingling or misuse of Title X funds."). Given these risks, HHS concluded that it need not "suffer the flood before building the levee[,]" *Stilwell*, 569 F.3d at 519, and adopted the separation requirements to increase transparency, promote accountability, and "facilitate auditing and enforcement of program requirements[,]" 84 Fed. Reg. at 7765.

Contrary to Plaintiffs' suggestion, the Supreme Court's decision in *Fox* does not require HHS to provide an even more "detailed explanation" to "explain the difference in their underlying factual findings and 'those which underlay its prior policy.'" EA Mem. at 16 (quoting *Fox*, 556 U.S. at 515). The cited language from *Fox* does not apply to every agency action. Indeed, *Fox* squarely *rejected* the notion that a "heightened standard" should apply where an agency changes policy, 556 U.S. at 514, and held that "it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency *believes* it to be better, which the conscious change of course adequately indicates[,]" *id*. at 515. A "more detailed justification" is only required when a new policy "rests upon factual findings that contradict those which underlay

[3] Although Essential Access criticizes the Secretary's reference in the NPRM to examples of overbilling in the Medicaid program, EA Mem. at 16, HHS did not rely on such overbilling to establish a record that "Title X grants are being abused[,]" 84 Fed. Reg. at 7725. Rather, it stated that this example of abuse of federal funds in a different program "illustrate[s] the need for clarity with respect to permissible and impermissible activities in connection with the Title X program and Title X funds," particularly given the confusion fostered by the existing regulatory regime. *Id*.

its prior policy; or when its prior policy has engendered serious reliance interests that must be taken into account." *Id*. Neither circumstance exists here.

The separation requirements are based upon HHS's renewed interpretation of section 1008 and the need for prophylactic measures to address the risk and the perception that taxpayer funds will be used to fund abortion—not "factual findings that contradict those which underlay [the] prior policy[.]" *Id.* That policy and legal judgment—a judgment blessed by the Supreme Court—is legitimate even if it differs from Plaintiffs' judgment and of prior administrations. *See Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005) ("[T]he agency . . . must consider varying interpretations and the wisdom of its policy on a continuing basis, for example, in response to changed factual circumstances, or a change in administrations." (internal citation omitted)). That HHS currently has procedures in place to ensure compliance with section 1008 and that, in 2000, HHS found these existing procedures sufficient, s*ee* EA Mem. at 16-17, adds nothing to the calculus. HHS no longer believes that existing procedures are sufficient to ensure compliance with section 1008, as interpreted by HHS and as sanctioned in *Rust*. Such "change[s] in policy" are permissible so long as the agency provides a rational explanation, *see Int'l Rehab. Sciences Inc. v. Sebelius*, 688 F.3d 994, 1001 (9th Cir. 2012) (emphasis added), which, as discussed above, HHS has done here. *See New England Power Generators Ass'n v. FERC*, 879 F.3d 1192, 1201 (D.C. Cir. 2018) ("So long as any change is reasonably explained, it is not arbitrary and capricious for an agency to change its mind in light of experience, or in the face of new or additional evidence, or further analysis or other factors indicating that the agency's earlier decision should be altered or abandoned.").

Finally, California contends that HHS was obligated to provide a "greater justification for the Final Rule" (it does not say which provision) "[g]iven the number of individuals nationwide who rely on Title X funded services." Cal. Mem. at 16. But the fact that many people may "rely" on a particular program does not mean that every policy affecting that program "engender[s]" the type of "serious reliance interests" that the Supreme Court had in mind in *Fox*. *See, e.g.*, *Encino*

1 *Motorcars*, 136 S. Ct. at 2126. Here, Plaintiffs have no legally cognizable reliance interests in the
2 continued receipt of Title X grants under the conditions they prefer. In contrast to the agency
3 action at issue in *Encino Motorcars*, which concerned private parties' substantive statutory rights,
4 *id.* at 2126-27, the challenged regulations here concern discretionary funding decisions. Title X
5 grants are generally available for only one year, 42 C.F.R. § 59.8(b), and HHS regulations provide
6 that "[n]either the approval of any application nor the award of any grant commits or obligates the
7 United States in any way to make any additional, supplemental, continuation, or other award with
8 respect to any approved application or portion of an approved application," *id.* § 59.8(c). Even
9 assuming that the 2000 regulations were lawful, a discretionary funding program cannot create
10 legally cognizable reliance interests—and certainly not beyond the stated duration (generally one
11 year) of a Title X grant. *Cf. Janus v. Am. Fed'n of State, Cty., & Mun. Emps.*, 138 S. Ct. 2448,
12 2484 (2018) (discounting asserted reliance interests because the relevant "contract provisions . . .
13 will expire on their own in a few years' time"). In any event, HHS *did* consider the effect the Rule
14 would have on Title X patients and concluded that the Rule would "contribute to more clients
15 being served, gaps in service being closed, and improved client care." 84 Fed. Reg. at 7723.
16
17 <u>*Counseling and Referral Restrictions*</u>: HHS explained at length how the 2000 regulations
18 were in tension with a number of other federal conscience-protection statutes and, at least with
19 respect to referral for abortion, with section 1008 itself. 84 Fed. Reg. at 7746. Essential Access
20 contends that reliance on these conscience-protection statutes is arbitrary and capricious because—
21 in its view—the fact that those statutes already protect providers from violating their conscience
22 demonstrate that no change in the regulation is needed. *See* EA Mem. at 17. But this misses the
23 point. The 2000 regulations *required* grantees to provide counseling and referrals for abortion.
24 That requirement violated—or was at least in tension with—the conscience-protection statutes
25 because it effectively prevented providers with religious objections to abortion counseling and
26 referrals from receiving Title X grants. Indeed, HHS had already acknowledged this problem
27 when it implemented conscience protections in 2008 (that were later partially repealed in 2011).
28

1 *See* 76 Fed. Reg. 9968 (Feb. 23, 2011); 73 Fed. Reg. 78,072 (Dec. 19, 2008). HHS also noted that
2 many grantees and Title X providers may not know of their rights under the conscience-protection
3 statutes and that, even if the previous referral requirement was not in tension with those statutes,
4 such a requirement could deter qualified providers from participating in Title X projects and
5 otherwise create ambiguity. 84 Fed. Reg. at 7716-17.

6 Essential Access also claims that HHS failed to consider certain comments indicating that
7 the Final Rule contravenes "medical, legal, and ethical obligations[.]" EA Mem. at 17-18. But
8 HHS considered and responded to this precise issue:

9
10 > In general, medical ethics obligations require the medical professional to share full and accurate information with the patient, in response to her specific
11 > medical condition and circumstance. Under the terms of this final rule, a physician or APP may provide nondirective pregnancy counseling to pregnant
12 > Title X clients on the patient's pregnancy options, including abortion. . . . Within the limits of the Title X statute and this final rule, the physician or APP
13 > is required to refer for medical emergencies and for conditions for which non-Title X care is medically necessary for the health and safety of the mother or
14 > child.

15 84 Fed. Reg. at 7724; *see also id.* at 7748 (offering additional responses to medical ethics
16 objections based on conscience statutes, *Rust*, and other Supreme Court cases). HHS did not ignore
17 the concerns that Essential Access raised; it considered them and adopted a different view—that
18 the requirements, properly understood, are consistent with medical ethics obligations. And *Rust*
19 upheld a nearly identical version of the counseling-and-referral requirements that had the same
20 implications (and were even more restrictive). 500 U.S. at 199. In fact, Justice Blackmun argued
21 in dissent in *Rust* that "the ethical responsibilities of the medical professional demand" that Title
22 X patients be "provide[d] with the full range of information and options regarding their health and
23 reproductive freedom," including "the abortion option." *Id.* at 213-14. His view did not prevail.

24 Essential Access further errs in contending that HHS "fail[ed] to offer any justification"
25 for requiring that nondirective pregnancy counseling be offered by a physician or an advanced
26 practice provider (APP). EA Mem. at 18. HHS initially proposed to allow *only physicians* to
27 provide either a list of providers to patients or nondirective counseling. *See* 83 Fed. Reg. at 25,531
28

("If asked, a medical doctor may provide a list of licensed, qualified, comprehensive health service providers (some, but not all, of which also provide abortion, in addition to comprehensive prenatal care)"); *id.* at 25,507 ("Recognizing [ ] the duty of a physician to promote patient safety, a doctor would be permitted to provide nondirective counseling on abortion."); *id.* at 25,518 ("[A] doctor, though not required to do so, would be permitted to provide nondirective counseling on abortion."). In response to comments, HHS decided to allow *both physicians and APPs* to provide nondirective counseling. 84 Fed. Reg. at 7761. HHS considered which types of health care professionals to include, and reasonably drew the line at APPs, who have "advanced medical degrees, licensing, and certification requirements." *Id.* at 7728 n.41.

Finally, although Essential Access contends that HHS failed to justify the requirement that abortion providers on the list provided to patients be "comprehensive primary health care providers," EA Mem. at 18-19, HHS acknowledged this concern, *see* 84 Fed. Reg. at 7760 ("Commenters believe the list . . . may be difficult to . . . implement for some providers because of the lack of comprehensive service providers who also provide abortion in their community."). And contrary to Plaintiffs' misquotation of the preamble, this requirement was not intended only to "prevent[] distribution of that list from violating section 1008." *Id.*; *see* EA Mem. at 18-19. HHS explained that providing a list of comprehensive primary health care providers would enable some projects to create a single list of comprehensive providers—including those who offer prenatal care, and, if the providers choose, those who also offer abortions. *See id.* HHS also explained the importance of access to comprehensive care to reduce costs and improve health outcomes. *Id.* at 7749. Although Plaintiffs may disagree with HHS's decision, HHS considered the issues Plaintiffs raised and provided a reasoned explanation, which is all the APA requires.

3. HHS Adequately Responded to Comments.

California accuses HHS of failing to respond to certain comments and—in California's view—"fail[ing] to acknowledge how expert opinion weighs against the Final Rule[.]" Cal. Mem. at 16-19. But a review of the preamble to the Final Rule shows that is not the case—and in all

events, the relevant "expert[]" here is HHS, *Rust*, 500 U.S. at 186. Indeed, California's quotation from the preamble discussing removal of the "medically approved" requirement clearly shows that HHS was aware of the views of various medical doctors and professional organizations and simply chose a policy with which some commenters disagreed. *See* Cal. Mem. at 16 (quoting 84 Fed. Reg. at 7741 & n.70); *see also* 84 Fed. Reg. at 7732, 7740-7741. California claims HHS "ignored" the views of various organizations who endorsed permitting referrals for abortion, and who indicated that the Rule would "interfere with the relationships between health providers and their patients, and violate accepted principles of medical ethics," as well as failed to acknowledge potential adverse consequences of the Rule. Cal. Mem. at 17-18. But HHS explicitly considered and responded to those views, yet adopted a different approach and explained its reasons for doing so. *See* 84 Fed. Reg. at 7745-7748; *id.* at 7745 (acknowledging the concerns that "withholding information about pregnancy options interferes with the patient-provider trust relationship, is contradictory to patient-centered care, and compromises the health of the patient" and that the Rule "would encroach on physicians' code of ethics and responsibilities to patients"); *id.* at 7746 (explaining that "the purpose of Title X is not to provide" information about abortion). The APA requires no more. *See Alaska Oil*, 815 F.3d at 554.

Similarly, California claims that HHS did not adequately consider comments regarding the requirement that Title X projects encourage family participation. *See* Cal. Mem. at 18. Again, this claim is refuted by the record. HHS considered the concerns that the Final Rule could "create[] barriers for young people to obtain care" and could "undermine[] patient confidentiality and access to care," 84 Fed. Reg. at 7751, and addressed those concerns in response to comments, *see id*. at 7751-7752 (addressing confidentiality and pointing to the Title X statute, which itself encourages family participation "to the extent practical").

E. Essential Access's Notice-And-Comment Claim Is Meritless.

Although Essential Access claims that the NPRM provided no notice with respect to two of the Rule's ancillary provisions, EA Mem. at 19-21, a "final regulation that varies from the

1 proposal, even substantially, will be valid as long as it is 'in character with the original proposal
2 and a logical outgrowth of the notice and comments.'" *Hodge v. Dalton*, 107 F.3d 705, 712 (9th
3 Cir. 1997) (citation omitted). To determine whether notice was adequate, courts ask whether a
4 complaining party should have anticipated that a particular requirement might be imposed, and
5 whether a new round of notice and comment would provide the first opportunity for interested
6 parties to offer comments that could persuade the agency to modify its rule. *Envt'l Def. Ctr. v.*
7 *EPA*, 344 F.3d 832, 851 (9th Cir. 2003). Plaintiffs received sufficient notice under this standard.

8 First, as to the requirement in Section 59.14(b)(1)(ii) that the list provided to patients
9 include only "licensed, qualified, comprehensive primary health care providers," EA Mem. at 20,
10 HHS could not have been clearer in the proposed rule that *only* "comprehensive health service
11 providers" could be on the list, *see* 83 Fed. Reg. at 25,531. Plaintiffs appear to object that the
12 language in the proposed rule did not specify that "comprehensive health care service providers"
13 must also provide "primary care services." EA Mem. at 20. But "comprehensive" means just
14 that—"comprehensive" care, which necessarily includes primary care services. And commenters
15 raised precisely the same concern that Essential Access flags—that the restrictions on what type
16 of providers may be included in the list will "substantially shrink[] the universe of providers to
17 whom a pregnant woman may be referred." EA Mem. at 20 (citing Declaration of Kathryn Kost
18 ¶¶ 89-90). As HHS described in the preamble, "many commenters oppose the list of providers
19 that may be shared with pregnant patients who request abortion" because they "believe the list . . .
20 may be . . . difficult to implement for some providers because of the lack of comprehensive service
21 providers who also provide abortion in their community." 84 Fed. Reg. at 7760. Thus, not only
22 were commenters on notice of this aspect of the Rule, they offered their views.

23 Second, any claim of inadequate notice with respect to the requirement that nondirective
24 pregnancy counseling come from physicians or APPs cannot be sustained. EA Mem. at 20. As
25 discussed, the question of which types of providers and/or staff may engage with and provide
26
27
28

information to patients was presented, HHS received comments objecting to those proposed restrictions, and HHS adopted a *less restrictive* approach in response. *See supra* p. 33.

F. Essential Access's Constitutional Claims Are Meritless.

The Supreme Court in *Rust* held that the counseling, referral, advocacy, and program integrity provisions of the 1988 regulations (1) did not violate the First Amendment rights of program participants; (2) did not improperly condition funding on the relinquishment of a constitutional right; and (3) did not violate a woman's Fifth Amendment right to choose abortion. *See* 500 U.S. at 192-203. Although California, to its credit, does not seek to re-litigate any of these constitutional holdings, Essential Access contends that the Rule both violates Dr. Marshall's First Amendment rights and is unconstitutionally vague. Both arguments fail.

1. Dr. Marshall's First Amendment Claim Lacks Merit.

Essential Access contends that the Rule "violates Dr. Marshall's First Amendment right to free speech because it impermissibly interferes with the provider-patient relationship and communications, and requires her to espouse opinions that she does not hold as her own—namely, that a referral for prenatal care is necessary or appropriate for a woman who has decided to terminate her pregnancy." EA Mem. at 21. This claim is foreclosed by *Rust*.

In *Rust*, the Supreme Court expressly considered—and rejected—the contention that the 1988 "regulations violate the First Amendment by impermissibly discriminating based on viewpoint because they prohibit all discussion about abortion as a lawful option—including counseling, referral, and the provision of neutral and accurate information about ending a pregnancy—while compelling the clinic or counselor to provide information that promotes continuing a pregnancy to term." 500 U.S. at 192 (citation omitted); *see also id*. at 192-200. And the Court rejected it. *Id.* at 192-200. As the Court explained, the 1988 regulations simply "refus[ed] to fund activities, including speech, which are specifically excluded from the scope of the project funded[,]" and the Constitution generally permits "the Government [to] choose not to subsidize speech[.]" *Id.* at 194-95, 200. In other words, Dr. Marshall remains free to refer for

abortion outside the Title X project, but she cannot require the government to pay her for doing so—a physician "employed by [a Title X] project may be prohibited in the course of his project duties from counseling abortion or referring for abortion." *Id.* at 193-94.

Essential Access nevertheless insists that the Rule violates the First Amendment because: (1) "*Rust* expressly did not reach the question of whether the 'traditional relationships such as that between doctor and patient should enjoy protection under the First Amendment from Government regulation, even when subsidized by the Government; and (2) it did not reach that question because it concluded that the 1988 regulations did not 'require a doctor to represent as his own any opinion that he does not in fact hold'"; and (3) "that is exactly what the Final Rule requires providers like Dr. Marshall to do" because it "demands that providers make referrals to prenatal care that they do not believe are appropriate." EA Mem. at 22 (quoting *Rust*, 500 U.S. at 200).

This argument fails. The regulations upheld in *Rust* likewise prohibited Title X providers from making abortion referrals and required Title X providers to refer patients for prenatal care, and Plaintiffs make no attempt to distinguish those regulations from the Rule. *See supra* pp. 9-10. Moreover, Plaintiffs' description of the question "not reach[ed]" in *Rust* is misleading. EA Mem. at 22. The Court's point was not that the plaintiffs in *Rust* failed to sincerely believe in the abortion-related speech they wished to engage in within the Title X program; obviously, they did. Rather, the Court's conclusion that the regulations did not violate the plaintiffs' First Amendment rights followed from the basic structure of the Title X program, specifically: (1) "the doctor-patient relationship established by the Title X program [was not] sufficiently all encompassing so as to justify an expectation on the part of the patient of comprehensive medical advice"; (2) "a doctor's silence with regard to abortion cannot reasonably be thought to mislead a client into thinking that the doctor does not consider abortion an appropriate option for her"; and (3) "[t]he doctor is always free to make clear that advice regarding abortion is simply beyond the scope of the program." *Rust*, 500 U.S. at 200. All of this remains true under the Final Rule, and Plaintiffs never contend otherwise. Accordingly, as in *Rust*, "the general rule that the Government may choose not to

subsidize speech applies with full force." *Id.*

Essential Access also implies that recent precedent—*National Institute of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018) (*NIFLA*), and *Janus*, 138 S. Ct. 2448—calls *Rust* into question. EA Mem. at 21-22. But neither decision has anything to do with *Rust*. *NIFLA* did not address government *subsidization* of speech at all, but a law purporting to *compel* certain pregnancy clinics to provide particular notices. *See* 138 S. Ct. at 2368-78. *Janus*, likewise, invalidated an Illinois fee scheme that *compelled* public employees to subsidize speech with which they disagreed. *See* 138 S. Ct. at 2459-86. Understandably, neither decision even mentions *Rust* given the settled rule that as a general matter, "if a party objects to the condition on the receipt of federal funding, its recourse is to decline the funds," even "when the objection is that a condition may affect the recipient's exercise of its First Amendment rights." *Agency for Int'l Devel. v. All. For Open Soc'y Int'l, Inc.*, 570 U.S. 205, 214 (2013) (collecting cases); *see also id.* at 216-17 (reaffirming *Rust*). And even if those decisions could plausibly be read as calling *Rust* into question—which they cannot—*Rust* would still be binding here. *See Rodriguez de Quijas v. Shearson/Am. Exp., Inc.*, 490 U.S. 477, 484 (1989) ("If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.").

2. Essential Access's Vagueness Claim Lacks Merit.

Essential Access is also unlikely to succeed on its claim that the Rule is unconstitutionally vague. EA Mem. at 22-25. The Rule does not impose any penalties but instead sets conditions on government funding. And "when the Government is acting as patron rather than as sovereign, the consequences of imprecision are not constitutionally severe." *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 589 (1998). Accordingly, the Supreme Court has upheld even "opaque" funding provisions that "could raise substantial vagueness concerns" had "they appeared in a criminal statute or regulatory scheme[.]" *Id.* at 588; *see also Planned Parenthood of Cent. & N.*

Ariz. v. Ariz., 718 F.2d 938, 948 (9th Cir. 1983) ("Our tolerance should be even greater in a case, such as the one before us, where the consequence of noncompliance with the enactment is not a civil penalty, but merely reduction of a government subsidy.").

The Rule easily clears this lenient vagueness standard. Plaintiffs' vagueness argument boils down to a claimed confusion about when and how to apply the Rule in certain hypothetical situations. EA Mem. at 23-25. But this argument does not get out of the starting gate: Because Plaintiffs mount a facial challenge, "speculation about possible vagueness in hypothetical situations not before the Court will not support a facial attack on a [regulation] when it is surely valid in the vast majority of its intended applications[.]" *Hill v. Colorado*, 530 U.S. 703, 733 (2000) (citation omitted); *cf. Rust*, 500 U.S. at 195 (rejecting argument about hypothetical application of rule because the cases under review "involve only a facial challenge to the regulations, and we do not have before us any application by the Secretary to a specific fact situation"). Indeed, even for criminal statutes, "a core of meaning is enough to reject a vagueness challenge, leaving to future adjudication the inevitable questions at the [regulatory] margin." *Trustees of Ind. Univ. v. Curry*, 918 F.3d 537, 541 (7th Cir. 2019). And like the Title X grantee in *National Family Planning & Reproductive Health Association v. Gonzales*, 468 F.3d 826 (D.C. Cir. 2006), Plaintiffs have "within [their] grasp an easy means for alleviating the alleged uncertainty[,]" namely, to "inquire of HHS exactly how the agency proposes to resolve any of the" purported ambiguities. *Id.* at 831.[4] Thus, even if the Rule, in hypothetical applications, could

[4] HHS specifies in the preamble that contacting the program to implement compliance is encouraged: "As is true for all program requirements, the Department welcomes regular interaction with grantees and subrecipients, should they have questions. Project officers are available to help grantees successfully implement the Title X program in compliance with both the statute and the regulation. The Department encourages grantees to contact the program office with questions, discuss ways to comply . . . , and put a workable plan in place . . . ." 84 Fed. Reg. at 7766. Even where this process does not resolve a grantee's concern, there are procedures available to obtain clarity. *See* 42 C.F.R. § 59.10 (referencing 45 C.F.R. Part 75, which addresses remedies for noncompliance, and referencing the appeal procedures found in 45 C.F.R. Part 16). Thus, a grantee can work with the program to resolve concerns, and if there is an impasse leading to remedial action, a grantee may take appeals that can eventually proceed to federal district court.

possibly give rise to borderline situations, that does not render it impermissibly vague as a facial matter.

In any event, the Rule does provide guidance on the hypothetical applications raised by Plaintiffs. EA Mem. at 23-25. First, the Rule's restriction on "encourag[ing], promot[ing] or advocat[ing] for abortion," *id.* at 23 (alterations in original), gives providers fair notice of prohibited conduct. Section 59.14 of the Rule explains that if a pregnant woman "requests information on abortion and asks the Title X project to refer her for an abortion[,]" a provider may "offer[] her nondirective pregnancy counseling, which may discuss abortion, but [may] neither refer[] for, nor encourage[] abortion." 84 Fed. Reg. at 7789. Because permission to "discuss abortion" includes a discussion of recovery time for a medical abortion, Dr. Marshall could provide such information. EA Mem. at 23.[5]

Second, Section 59.14's "emergency care" exception is clear. *Contra id.* at 23-34. That section does not prohibit referral for abortion other than "as a method of family planning," 84 Fed. Reg. at 7788, and the emergency-care provision does not exclude abortion providers. Instead, the exception simply provides that "[i]n cases in which emergency care is required, the Title X project shall only be required to refer the client immediately to an appropriate provider of medical services needed to address the emergency." *Id.* at 7789. The Rule discusses emergencies so that grantees have a clear safe harbor that they may (indeed, must) use to refer women in emergency situations. In such cases, referral to an abortion provider would be proper, and an abortion provider could be considered an "appropriate provider of medical services." *Id.* In discussing an analogous provision in the 1988 regulations, *Rust* rejected a "claim that the regulations would not, in the circumstance of a medical emergency, permit a Title X project to refer a woman whose pregnancy

[5] Additionally, in requiring that a Title X project provide assurance "satisfactory to the Secretary" that it is not encouraging, promoting, or advocating for abortion, the Rule provides four specific examples of "[t]he types of documentary evidence that might be required" to demonstrate such assurance, and states that "[t]o the extent that additional documentation is required by the Secretary at a later date, future guidance will be communicated to grantees." 84 Fed. Reg. at 7758.

1 places her life in imminent peril to a provider of abortions or abortion-related services[,]" and
2 explained that "we do not read the regulations to bar abortion referral or counseling in such
3 circumstances." 500 U.S. at 195.

4 Third, Section 59.15's physical and financial separation requirements are sufficiently clear.
5 EA Mem. at 24-25. *Rust* upheld a similar requirement allowing HHS to determine whether such
6 objective integrity and independence exist based on a review of facts and circumstances and a list
7 of factors relevant to this determination. 500 U.S. at 180-81. As in the 1988 regulations, the
8 current Rule empowers the Secretary to determine whether the requisite independence exists by
9 reference to "the existence of separate accounting records and separate personnel, and the degree
10 of physical separation of the project from facilities for prohibited activities." *Id.* at 181. HHS has
11 explained that it "welcomes regular interaction with grantees and subrecipients, should they have
12 questions" as to these requirements and has made available project officers "to help grantees
13 successfully implement the Title X program in compliance with both the statute and the
14 regulation." 84 Fed. Reg. at 7766. And HHS has delayed requiring compliance with the separation
15 requirements until May 2020 to "give grantees and subrecipients time to make arrangements to
16 comply with [the requirements] if they choose to seek Title X funds (or to participate in a Title X
17 project) and also [separately] offer abortions as a method of family planning." *Id.*

18

19 Plaintiffs therefore are unlikely to succeed on the merits of their vagueness challenge.
20 Indeed, the plaintiffs in *Rust* raised similar vagueness arguments, and the Supreme Court did not
21 even bother to address them. *See* Brief for Petitioners, *New York v. Sullivan*, No. 89-1392, Brief
22 for Petitioners at 45 n.48, 1990 WL 505760, at *45 n.48 (July 27, 1990) ("[T]he separation
23 requirement, as well as the counseling, referral and advocacy ban are unconstitutionally vague. . . .
24 A Title X project cannot know what is required or prohibited by the physical separation
25 requirement or, for that matter, by the prohibitions against 'encouraging', 'counseling' or
26 'promoting' 'abortion as a method of family planning.'"). There is no reason why the vagueness
27 arguments here should be taken more seriously.

28

II. PLAINTIFFS WILL SUFFER NO IRREPARABLE HARM

Showing irreparable harm absent an injunction is "necessary" for Plaintiffs to obtain such relief. *Ctr. for Food Safety v. Vilsack*, 636 F.3d 1166, 1171 n.6 (9th Cir. 2011); *see Winter*, 555 U.S. at 19. And not just any showing will suffice. A party "seeking preliminary relief [must] demonstrate that irreparable injury is *likely* in the absence of an injunction." *Winter*, 555 U.S. at 22. Plaintiffs cannot carry that burden.

A. California

Most of California's arguments address the Rule's impact on private parties.[6] Because these allegations "do not rise to the level of a concrete, particularized, actual or imminent injury against the state itself, that is independent from alleged harm to private parties," *Oregon v. Legal Servs. Corp.*, 552 F.3d 965, 972 (9th Cir. 2009), they cannot establish that California even has standing, much less that it has satisfied the irreparable injury standard. Although the "doctrine of *patens patriae* allows a sovereign to bring suit on behalf of its citizens" in certain circumstances, *Washington v. Chimei Innolux Corp.*, 659 F.3d 842, 847 (9th Cir. 2011), it is well-established that "California, like all states, 'does not have standing as *parens patriae* to bring an action against the Federal government,'" *Sierra Forest Legacy v. Sherman*, 646 F.3d 1161, 1178 (9th Cir. 2011) (quoting *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 610 n.16 (1982)).

California's passing references to its own "concrete and proprietary interest[s]," Cal. Mem. at 23-24, are insufficient to demonstrate that it, as a state, is likely to suffer irreparable harm. California asserts that the Rule will "undermine the effectiveness" of its state reproductive health care coverage policy. *Id.* at 23. But the Rule does not regulate California or interfere with its

[6] *See* Cal. Mem. at 19 (alleging harm to "patient-provider relationships"); *id.* at 20-21, 22 (alleging Rule will decrease patients' access to reproductive health care and harm "California women"); *id.* at 21 (alleging that the Rule will "disproportionately harm marginalized groups"); *id.* at 22 (alleging that Rule will weaken the quality of Title X services to California patients); *id.* at 23 (discussing harm to Essential Access's investments in its Title X provider network).

1 interest in enacting and enforcing whatever health care policies it deems appropriate. California
2 thus has identified no legally cognizable harm through this assertion.

3 California also alleges that the Rule will damage "public health," which will cause the state
4 to "absorb financial and administrative burdens as a result." Cal. Mem. at 23-24. But again,
5 California's claimed injury stems from a Rule that regulates "*someone else*," *i.e.*, entities that
6 receive Title X funding, and depends on "the response of the regulated . . . third party to the
7 government action"—and perhaps on the response of others as well—*i.e.*, Title X patients. *Lujan*
8 *v. Defs. of Wildlife*, 504 U.S. 555, 562 (1992). California has not shown that the attenuated chain
9 of events necessary to create these speculative harms are imminently likely to occur.

10 **B. Essential Access**

11 Putting aside its meritless allegations of constitutional injury,[7] Essential Access asserts that
12 the Rule will (1) harm its Title X network, (2) interfere with the provider-patient relationship, and
13 (3) cause it to suffer economic harms. None of these assertions establish irreparable harm.

14 1. Harm to Title X Network

15 First, Essential Access asserts that the Final Rule will lead many of the sub-recipients that
16 currently provide Title X services to forgo federal funds rather than comply. *See* EA Mem. at 26.
17 That alleges harm not to Essential Access but to sub-recipients and Title X patients, and therefore
18 cannot establish *Essential Access* will suffer irreparable injury.

19 Essential Access also contends the harm to its Title X network hinders its mission of
20 promoting quality reproductive health care. EA Mem. at 26-27. Even assuming this type of injury
21 could be deemed irreparable, Plaintiffs have not demonstrated that it is "of such *imminence* that
22 there is a clear and present need for equitable relief to prevent irreparable harm." *Chaplaincy of*
23 *Full Gospel Churches v. England*, 454 F.3d 290, 297 (D.C. Cir. 2006) (citation omitted). By
24
25

26 [7] Because Essential Access's constitutional claims are meritless, *see supra* Part I.F, it
27 cannot carry its burden of establishing that it is "likely to suffer" the alleged constitutional injuries
"in the absence of preliminary relief." *Winter*, 555 U.S. at 20.
28

1 Plaintiffs' own theory, this harm will only materialize if (1) a significant number of sub-recipient
2 providers—*i.e.*, "independent actors not before the court and whose exercise of broad and
3 legitimate discretion the courts cannot presume either to control or to predict," *Lujan*, 504 U.S. at
4 562—choose to leave the Title X program rather than comply with the Final Rule; (2) without such
5 funding, current sub-recipients would "worsen the quality of their patient care," EA Mem. at 27;
6 and (3) this decrease in the quality of care will "cause unintended pregnancies and STIs to spike[,]"
7 *id*. at 28. And this chain of hypotheticals in turn rests on the unstated assumption that Essential
8 Access will be unable to find new sub-recipients to fill any gap if providers leave the program.
9 *See* 84 Fed. Reg. at 7756 (concluding that Rule will "expand[] the type and nature of the Title X
10 providers . . . so as to fill gaps and expand family planning services").
11 2. Harm to Provider-Patient Relationship
12 Next, Plaintiffs claim that the Rule will "undermine the relationship between providers like
13 Dr. Marshall and their patients[.]" EA Mem. at 29. Plaintiffs again ignore what *Rust* correctly
14 recognized: providers like Dr. Marshall are free to make abortion referrals and take other
15 contemplated steps outside the Title X program; they simply cannot use the Government's money
16 to do so. Moreover, Plaintiffs impermissibly "attempt[] to redirect the focus of the irreparable
17 harm inquiry to third parties," but "'[a] plaintiff seeking a preliminary injunction must establish
18 that *he is* likely to suffer irreparable harm in the absence of preliminary relief.'" *Exeltis USA Inc.*
19 *v. First Databank, Inc.*, No. 17-cv-04810-HSG, 2017 WL 6539909, at *9 (N.D. Cal. Dec. 21,
20 2017) (quoting *Winter*, 555 U.S. at 20) (ellipses omitted). Plaintiffs can rely only on the harm
21 allegedly suffered by the named plaintiff, Dr. Marshall, not other providers "like" her or other
22 hypothetical patients. EA Mem. at 29. Thus, Plaintiffs' contentions (*id.* at 29-30) that (1) the
23 Rule's referral-list provisions will cause some hypothetical women in rural areas to travel longer
24 distances to obtain abortion services, (2) the Rule's APP provisions will shrink the number of
25 health care professionals who can provide pregnancy counseling, and (3) the Rule's provisions
26 relating to adolescent patients will have a "chilling effect" on such patients seeking care—none of
27
28

1 which refer to Dr. Marshall or rely upon her declaration—are insufficient to establish that any
2 named plaintiff "is likely to suffer irreparable harm in the absence of preliminary relief." EA
3 Mem. at 30; *Winter*, 555 U.S. at 20.

4 Even where Plaintiffs base their claim to harm on Dr. Marshall's experience, they fail to
5 establish that the harm they describe is real, immediate, and likely to occur. Although Plaintiffs
6 assert that the Rule's restrictions on abortion referrals have "immediate, irreversible consequences,
7 because abortion is a time-sensitive procedure[,]" EA Mem. at 29-30, Dr. Marshall does not
8 identify any patient who will be delayed in seeking an abortion as a result of the Rule, nor does
9 she identify any patient whom she would otherwise refer for abortion but cannot because she is
10 worried that the circumstances do not meet the Rule's "medically necessary" exception for
11 abortion referral. Again, Dr. Marshall remains free to make abortion referrals outside the Title X
12 program; she simply cannot make such referrals and be compensated with taxpayer funds.
13 Plaintiffs thus have failed to establish that Dr. Marshall's relationships with her patients are likely
14 to be irreparably harmed during the pendency of this litigation absent injunctive relief.

15

16 3. Diversion of Resources

17 Finally, Essential Access argues that the Rule's physical separation requirement will cause
18 it "irreparable economic harm" because it "will be forced to expend enormous resources on
19 compliance." EA Mem. at 31. But "ordinary compliance costs are typically insufficient to
20 constitute irreparable harm," *Freedom Holdings, Inc. v. Spitzer*, 408 F.3d 112, 115 (2d Cir. 2005)
21 (collecting cases), and Essential Access offers no reason why this case should be treated any
22 differently. To the contrary, Essential Access—unlike regulated parties who must absorb
23 significant costs to comply with federal regulations—can simply forgo receiving taxpayer funds if
24 it would be more costly on balance to comply. And if the costs of compliance are less than Title
25 X funding, Essential Access will come out ahead. Either way, there is no irreparable injury here.
26 *See United States v. City of Los Angeles*, 595 F.2d 1386, 1391 (9th Cir. 1979) (federal agency
27
28

actions "cannot be enjoined simply because those actions may require recipients of congressional largesse to expend large amounts of time and [monetary] resources").

III. THE BALANCE OF EQUITIES AND THE PUBLIC INTEREST WEIGH IN FAVOR OF DENYING PLAINTIFFS' MOTIONS

On the other side of the ledger, the government will "suffer[] a form of irreparable injury" if it "is enjoined by a court from effectuating statutes enacted by representatives of its people." *Maryland v. King*, 567 U.S. 1301 (2012) (Roberts, C.J., in chambers) (citation omitted).[8] That is particularly true here, as the government has a compelling interest in following longstanding federal law prohibiting the use of Title X funds for programs where abortion is a method of family planning. *See* 42 U.S.C. § 300a-6. Granting Plaintiffs their desired injunction would require HHS to disburse taxpayer dollars in violation of Title X, an unquestionably irreparable injury to both the government and the public more generally.

The need to avoid that harm significantly outweighs any of Plaintiffs' asserted injuries. At bottom, Plaintiffs simply desire to receive government subsidies under the terms and conditions they prefer. But "the government may 'make a value judgment favoring childbirth over abortion, and implement that judgment by the allocation of public funds,'" by "subsidiz[ing] family planning services which will lead to conception and child birth, and declining to 'promote or encourage abortion.'" *Rust*, 500 U.S. at 192-93 (citation omitted). Accordingly, the balance of equities and public interest make preliminary injunctive relief inappropriate.

IV. ANY INJUNCTIVE RELIEF SHOULD BE LIMITED

A. Any Injunctive Relief Should Be Limited To The Plaintiffs.

At a minimum, any injunction should be no broader than necessary to provide Plaintiffs relief, and should therefore be limited to redressing the injuries of the parties before this Court. As the Supreme Court recently confirmed, any "remedy" ordered by a federal court must "be limited

[8] When the federal government is the opposing party, the balance of equities and public interest merge. *See Nken v. Holder*, 556 U.S. 418, 435 (2009).

1 to the inadequacy that produced the injury in fact that the plaintiff has established"; a court's
2 "constitutionally prescribed role is to vindicate the individual rights of the people appearing before
3 it"; and "[a] plaintiff's remedy must be tailored to redress the plaintiff's particular injury." *Gill v.*
4 *Whitford*, 138 S. Ct. 1916, 1921, 1933-34 (2018). Equitable principles likewise require that an
5 injunction "be no more burdensome to the defendant than necessary to provide complete relief to
6 the plaintiffs." *Madsen v. Women's Health Ctr., Inc.,* 512 U.S. 753, 765 (1994) (citation omitted);
7 *see also Trump v. Hawaii*, 138 S. Ct. 2392, 2429 (2018) (Thomas, J., concurring) (noting that
8 nationwide injunctions "are legally and historically dubious"). These principles apply with even
9 greater force to a preliminary injunction, an equitable tool designed merely to "preserve the relative
10 positions of the parties until a trial on the merits can be held." *Univ. of Tex. v. Camenisch*, 451
11 U.S. 390, 395 (1981); *accord Zepeda v. U.S. INS*, 753 F.2d 719, 728 n.1 (9th Cir. 1983).
12 Here, Plaintiffs fail to show that a nationwide injunction is necessary to redress their
13 alleged injuries. Indeed, leading up to the Supreme Court's decision in *Rust*, every district court
14 to enjoin the 1988 regulations limited that relief to the parties before it. *See W. Va. Ass'n of Cmty.*
15 *Health Centers, Inc. v. Sullivan*, 737 F. Supp. 929, 956-57 (S.D.W. Va. 1990); *Planned*
16 *Parenthood Fed'n of Am. v. Bowen*, 687 F. Supp. 540, 544 (D. Colo. 1988); *Mass. v. Bowen*, 679
17 F. Supp. 137, 148 (D. Mass. 1988). Plaintiffs provide no tenable reason why the Rule should be
18 treated differently from how courts proceeded before.
19 To start, Plaintiffs' choice to bring a facial constitutional challenge does not justify
20 nationwide injunctive relief. *Compare* EA Mem. at 33, *with, e.g.*, *City & Cty. of San Francisco v.*
21 *Trump*, 897 F.3d 1225, 1244-45 (9th Cir. 2018) (vacating nationwide scope of injunction in facial
22 constitutional challenge to executive order). The Supreme Court recently explained that under
23 Article III, the proper remedy in a constitutional vote-dilution challenge brought by an individual
24 voter entailed "revising only such districts as are necessary to reshape the voter's district" rather
25 than "restructuring all of the State's legislative districts[,]" *notwithstanding* that the alleged
26 gerrymandering was "statewide in nature" rather than limited to each plaintiff's particular district.
27
28

1 *Gill*, 138 S. Ct. at 1930-31. That holding confirms that it is the scope of the plaintiff's injury and
2 not the defendant's policy that governs the permissible breadth of an injunction under Article III.
3 Nor does Plaintiffs' decision to bring APA claims necessitate a nationwide remedy. *See,*
4 *e.g.*, *California v. Azar*, 911 F.3d 558, 582-84 (9th Cir. 2018) (vacating nationwide scope of
5 injunction in facial challenge under the APA); *Los Angeles Haven Hospice, Inc. v. Sebelius*, 638
6 F.3d 644, 664-65 (9th Cir. 2011) (same). A court "do[es] not lightly assume that Congress has
7 intended to depart from established principles" regarding equitable discretion, *Weinberger v.*
8 *Romero-Barcelo,* 456 U.S. 305, 313 (1982), and the APA's general instruction that unlawful
9 agency action "shall" be "set aside," 5 U.S.C. § 706(2), is insufficient to mandate such a departure.
10 Indeed, the Supreme Court held that not even a provision directing that an injunction "shall be
11 granted" with respect to a threatened or completed violation of a particular statute was sufficient
12 to displace traditional principles of equitable discretion, *Hecht Co. v. Bowles*, 321 U.S. 321, 328-
13 30 (1944), and Congress is presumed to have been aware of that holding when it enacted the APA
14 two years later. In fact, the APA expressly confirms that, absent a special review statute, "[t]he
15 form of proceeding for judicial review" is simply the traditional "form[s] of legal action, including
16 actions for declaratory judgments or writs of prohibitory or mandatory injunction," 5 U.S.C. § 703,
17 and that the statutory right of review does not affect "the power or duty of the court to . . . deny
18 relief on any . . . appropriate legal or equitable ground," *id.* § 702(1). The Supreme Court therefore
19 has confirmed that, even in an APA case, "equitable defenses may be interposed." *Abbott Labs. v.*
20 *Gardner*, 387 U.S. 136, 155 (1967). Accordingly, the Court should construe the "set aside"
21 language in Section 706(2) as applying only to the named Plaintiffs, especially as no federal court
22 had issued a nationwide injunction before Congress's enactment of the APA in 1946, nor would
23 do so for more than fifteen years thereafter, *see Hawaii*, 138 S. Ct. at 2426 (Thomas, J.,
24 concurring).
25
26 Finally, the structure of the Title X program does not support entry of a nationwide
27 injunction. EA Mem. at 34-35; Cal. Mem. at 25. Contrary to Plaintiffs' suggestions, Title X funds
28

1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28

are allocated on a state-by-state basis, so any effect of the Rule on funding in other states would have no impact on California (or Essential Access). *See* HHS, *Announcement of Anticipated Availability of Funds for Family Planning Services Grants* 13-14 (Feb. 23, 2018), https://www.hhs.gov/opa/sites/default/files/FY18-Title-X-Services-FOA-Final-Signed.pdf. And although California speculates that the Rule "will likely" affect the state because individuals may "cross state lines in search of reproductive healthcare[,]" Cal. Mem. at 25, "the record is not sufficiently developed" on this point, to put it mildly, rendering any nationwide relief inappropriate. *California*, 911 F.3d at 584 (quoting *San Francisco*, 897 F.3d at 1244-45).

Nationwide relief would be particularly harmful here given that three other district courts in Maine, Oregon, and Washington are currently considering similar challenges. If the government prevails in all three other jurisdictions, a nationwide injunction would render those victories meaningless as a practical matter. It would also preclude appellate courts from testing Plaintiffs' factual assertions against the Rule's operation in other jurisdictions. For example, in *Rust* itself, the claim that the separation requirements in the 1988 regulations would "be applied in an arbitrary manner" was refuted by the fact that in the states where those regulations "ha[d] been implemented," there had been "no issues of compliance." Brief for Respondent at 45 n.48, *Rust* (No. 89-1391), 1990 WL 10012655; *see also California*, 911 F.3d at 583 ("The Supreme Court has repeatedly emphasized that nationwide injunctions have detrimental consequences to the development of law and deprive appellate courts of a wider range of perspectives."). In addition, other states—especially ones that have taken measures to ensure that their own funds are not used to subsidize family planning through abortion—are likely to welcome the Rule, and there is no reason why California's views on abortion funding should govern the rest of the country. *See, e.g.*, *Planned Parenthood of Greater Ohio v. Hodges*, 917 F.3d 908, 910 (6th Cir. 2019) (en banc) (upholding Ohio law prohibiting state health department from funding organizations that "[p]erform nontherapeutic abortions"); *see also California*, 911 F.3d at 583 ("The detrimental

consequences of a nationwide injunction are not limited to their effects on judicial decisionmaking. There are also the equities of non-parties who are deprived the right to litigate in other forums.").

B. Any Injunctive Relief Should Be Limited To Particular Provisions.

Similarly, should the Court decide to enjoin any portion of the Rule, the Court should allow the remainder to go into effect. In determining whether severance is appropriate, courts look to both the agency's intent and whether the regulation can function sensibly without the excised provision(s). *MD/DC/DE Broadcasters Ass'n v. FCC*, 236 F.3d 13, 22 (D.C. Cir. 2001).

Here, the intent of the agency is clear: the Rule provides that "[t]o the extent a court may enjoin any part of the rule, the Department intends that other provisions or parts of provisions should remain in effect." 84 Fed. Reg. at 7725. Nor is there any functional reason why the entire Rule must fall if the Court agrees with Plaintiffs' attacks on particular provisions. The separation requirements can operate independently of the referral provisions (and vice versa). And there is certainly no logical basis for enjoining the entire Rule if the Court agrees with some of Plaintiffs' various challenges to more ancillary provisions (*e.g.*, the "medically approved" argument, the definition of advanced practice provider, the prohibition on use of funds to "build infrastructure for purposes prohibited by these funds," and the adolescent requirements). Cal. Mem. at 14. None of these provisions should be enjoined, but there is certainly no compelling justification for extending any injunctive relief beyond any particular allegedly offending provision(s).[9]

CONCLUSION

Accordingly, Plaintiffs' motions for preliminary injunction should be denied.

[9] Plaintiffs argue in passing that if the Court does not enjoin the Rule, it should stay its effective date pursuant to 5 U.S.C. § 705. *See* Cal. Mem. at 25; EA Mem. at 35 n.23. As Essential Access correctly notes, courts considering requests for such relief apply the same test as when considering a request for a preliminary injunction. Plaintiffs have not satisfied that standard. And even if they had, as discussed in this section, nationwide relief would not be appropriate.

1 Dated: April 8, 2019

Respectfully submitted,

2 JOSEPH H. HUNT
3 Assistant Attorney General

DAVID L. ANDERSON
4 United States Attorney

5 MICHELLE R. BENNETT
Assistant Branch Director

6
7 */s/ Bradley P. Humphreys*
BRADLEY P. HUMPHREYS
8 (DC Bar No. 988057)
Trial Attorney
9 United States Department of Justice
Civil Division, Federal Programs Branch
10 1100 L Street, NW
Washington, DC 20005
11 Tel: (202) 305-0878
Fax: (202) 616-8460
12 Email: Bradley.Humphreys@usdoj.gov

Counsel for Defendants

13
14
15
16 **CERTIFICATE OF SERVICE**

17 I hereby certify that on April 8, 2019, I electronically filed the foregoing document with
18 the Clerk of the Court, using the CM/ECF system, which will send notification of such filing to
19 the counsel of record in this matter who are registered on the CM/ECF system.

20
21 */s/ Bradley P. Humphreys*
BRADLEY P. HUMPRHEYS
22 (D.C. Bar No. 988057)

23
24
25
26
27
28

JOSEPH H. HUNT
Assistant Attorney General
DAVID L. ANDERSON
United States Attorney
MICHELLE R. BENNETT
Assistant Branch Director
BRADLEY P. HUMPHREYS (D.C. Bar No. 988057)
DANIEL RIESS (Texas Bar No. 24037359)
Trial Attorneys
Federal Programs Branch
U.S. Department of Justice, Civil Division
1100 L Street, NW
Washington, DC 20005
Tel.: (202) 305-0878
Fax: (202) 616-8460
Bradley.Humphreys@usdoj.gov
Daniel.Riess@usdoj.gov
Counsel for Defendants

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

STATE OF CALIFORNIA, by and through ATTORNEY GENERAL XAVIER BECERRA, Plaintiff, v. ALEX M. AZAR, in his OFFICIAL CAPACITY as SECRETARY of the U.S. DEPARTMENT of HEALTH & HUMAN SERVICES; U.S. DEPARTMENT of HEALTH & HUMAN SERVICES, Defendants.	Case No.: 3:19-cv-01184-EMC **[PROPOSED] ORDER DENYING STATE OF CALIFORNIA'S MOTION FOR PRELIMINARY INJUNCTION** Judge: Hon. Edward M. Chen Dep't: Courtroom 5, 17th Floor Date: April 18, 2019 Time: 12:30 p.m. Trial: None

Upon consideration of Plaintiff State of California's motion for preliminary injunction, the opposition and reply thereto, and all applicable law, it is hereby ORDERED that Plaintiff's motion is DENIED.

Dated: ______________________________

____
Edward M. Chen
United States District Judge