UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE

THE FAMILY PLANNING ASSOCIATION OF MAINE D/B/A MAINE FAMILY PLANNING, on behalf of itself, its staff, and its patients; and J. DOE, DO, MPH, individually and on behalf of Dr. Doe's patients, Plaintiffs, v. UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; ALEX M. AZAR II, in his official capacity as Secretary of Health and Human Services; OFFICE OF POPULATION AFFAIRS; and DIANE FOLEY, M.D., in her official capacity as the Deputy Assistant Secretary for Population Affairs, Defendants.	Case No. 1:19-cv-00100-LEW **REPLY MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION**

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Contrary to Defendants' mischaracterizations, this case does not seek to abrogate or repeal any statute or Supreme Court precedent. Plaintiffs seek only to maintain the decades-long status quo. Defendants' opposition rests on two key errors: *First*, Defendants are simply wrong that *Rust v. Sullivan*, 500 U.S. 173 (1991), forecloses Plaintiffs' claims about this new Rule. With respect to Plaintiffs' Administrative Procedure Act ("APA") claims, *Rust* did not decide the meaning of Section 1008, nor did it bind the agency to any future interpretations of the statute. On the contrary, *Rust* held only that the text of Section 1008 was ambiguous and that HHS's interpretation was plausibly justified by a rulemaking process that relied on the circumstances before the Court *at that time*—nearly thirty years ago. Since *Rust*, Congress has demonstrated that the Rule is contrary to its expressed intent and passed laws that prohibit the interpretation in the Rule. In addition, *Rust* has nothing to say with respect to the process of HHS's decision-making, which rests on a different administrative record and which will have very specific impacts in Maine that no court has previously evaluated. Despite *Rust*'s undeniable relevance, both facts and law have changed such that *Rust* is no longer directly on point. *See generally Nat'l Coalition for Men v. Selective Serv. Sys.*, 355 F. Supp. 3d 568, 576 (S.D. Tex. 2019) (changed factual circumstances cause male-only draft requirement to violate equal protection despite prior Supreme Court precedent that "squarely addressed" the same question).

Second, Defendants incorrectly claim that this case is about using government money to pay for abortion. It is not. This case does not challenge or seek to repeal Section 1008 of Title X, 42 U.S.C. § 300a-6, which, as confirmed by Defendants' own record, has been in place for decades under the existing regulatory framework without any need for the new Rule.

In fact, Plaintiffs have demonstrated that the Rule, far from its purported goals of preventing confusion or protecting against theoretical risk of noncompliance at some point in the

future, would wreak havoc on the functioning of the Title X program by reducing the provision of critical family planning services to thousands of Mainers and millions of Americans, causing healthcare providers to violate their ethical principles, and drastically reducing the availability of abortion. Defendants do not even contest that these harms will occur.

The Court should grant a preliminary injunction because the Rule is likely to be found unlawful under the APA and the Fifth and First Amendments of the United States Constitution, and because it would cause widespread irreparable harm if allowed to take effect.

I. Plaintiffs Are Likely to Succeed on Their APA Claims.

A. *Rust* Does Not Control the APA Claims in This Case.

Defendants' opposition to the claims that the Rule is contrary to law and in excess of statutory authority rests almost entirely on a mischaracterization of *Rust* and the subsequent legal landscape. They argue that *Rust* rendered an "authoritative interpretation of [Section 1008 of] Title X" such that any subsequent legislative action would have had to either impliedly repeal Section 1008 or impliedly abrogate *Rust*. Opp. at 13-14, 19. But *Rust* did no such thing. The *Rust* Court "agree[d] with every court to have addressed the issue that the language [of Section 1008] is ambiguous." 500 U.S. at 184. And in 1991, the legislative history of the section was also "ambiguous and unenlightening" such that the Court was willing to defer to HHS's "permissible construction of the statute." *Id.* at 186-87. The Court made no finding that the 1988 Rule reflected the only or authoritative interpretation of Section 1008—and, indeed, the statute has been read differently for almost the entire history of the Title X program.

As Plaintiffs have shown, the legislative and regulatory landscape has shifted since *Rust* such that the Rule is no longer a permissible interpretation of Section 1008. *See Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 143 (2000) ("At the time a statute is enacted, it may have a range of plausible meanings. Over time, however, subsequent acts can

shape or focus those meanings."). First, Congress clarified its intent with respect to the meaning of Section 1008 during the passage of the Family Planning Amendments Act of 1992, S. 323, 102nd Cong. (1992) ("FPAA"). *See* Pls.' Mem. at 21 (citing legislators' repudiation of *Rust*). That the FPAA was vetoed does not reduce the relevance of its legislative history to clarify the intent of a passed statute, and Defendants present no cases holding otherwise. Defendants cite to *Brill v. Countrywide Home Loans, Inc.*, 427 F.3d 446, 448 (7th Cir. 2005), for the proposition that "naked legislative history has no legal effect" to repeal a statute. *See* Opp. at 22. But Plaintiffs do not argue that Section 1008 has been repealed—and *Brill* in fact recognizes that "[w]hen a law sensibly could be read in multiple ways, legislative history may help a court understand which of these received the political branches' imprimatur." *Brill*, 427 F.3d at 448. Second, HHS restored its prior policies in 1993 and codified them in the 2000 Guidelines. Accordingly, the clauses in the annual appropriations bills from 1996 to the present, and Section 1554 of the 2010 Affordable Care Act ("ACA"), 42 U.S.C. § 18114, were drafted neither against the backdrop of a statute that needed to be repealed nor a controlling court decision that needed to be abrogated, but rather in the context of a regulatory scheme with which Congress *agreed*.

The doctrines of implied repeal or abrogation are therefore irrelevant. Repeal by implication is only at issue when the "provisions in two statutes are in 'irreconcilable conflict,' or where the latter act covers the whole subject of the earlier one and 'is clearly intended as a substitute.'" *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 663 (2007). "[W]hen two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed Congressional contention to the contrary, to regard each as effective." *United States v. Arif*, 897 F.3d 1, 7 (1st Cir. 2018). There is no conflict, irreconcilable or otherwise, between Section 1008 and either Section 1554 or the appropriations bills. Indeed, they have coexisted for

years under the current regulations. Defendants' implied abrogation argument, Opp. at 13, is similarly inapt. *TC Heartland* addresses the standard for Congress to amend a statute that a court has found to have a "definitive[] and unambiguous[] meaning"—not the case in *Rust*. *TC Heartland LLC v. Kraft Foods Grp. Brands LLC*, 137 S. Ct. 1514, 1520 (2017).

Similarly, Defendants' invocation of the general-specific canon of statutory interpretation is unavailing. This is not a case "in which a general permission or prohibition is contradicted by a specific prohibition or permission." *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012). Section 1008 and Section 1554 are addressed to different issues and can be harmonized—as they are by the 2000 regulations but not the Rule.

B. Defendants' Other Arguments Regarding Section 1554 Are Unavailing.

Plaintiffs have shown, *see* Pls.' Mem. at 15-20, that Section 1554 places a clear limitation on HHS's authority: HHS *shall not* promulgate regulations unreasonably creating barriers to health care or restricting doctors from communicating all relevant information to their patients. Defendants' arguments to the contrary are unavailing.

To begin, waiver does not bar Plaintiffs' claim. "[T]he waiver rule does not apply to preclude argument where the scope of the agency's power to act is concerned." *Sierra Club v. Pruitt*, 293 F. Supp. 3d 1050, 1061 (N.D. Cal. 2018). Whether an agency has the statutory authority to promulgate particular regulations is a "key assumption" that the agency must examine "as part of its affirmative burden of promulgating and explaining a nonarbitrary, non-capricious rule" even if not raised in comments. *Id.* (quoting *Nat. Res. Defs. Council v. Envtl. Prot. Agency*, 755 F.3d 1010, 1022-23 (D.C. Cir. 2014)); *see also St. Marys Cement Inc. v. U.S. Envtl. Prot. Agency*, 782 F.3d 280, 288 (6th Cir. 2015); *Brown v. Sec'y of Health & Human Servs.*, 46 F.3d 102, 114 (1st Cir. 1995) ("The claim turns primarily on issues of law concerning the scope of the Secretary's powers; such issues of law we are equipped to settle . . . now.").

Moreover, issue exhaustion is a prudential doctrine applied flexibly with the goals of permitting the agency to develop its reasoning in response to challenges and preventing litigants from "sandbagging" the agency. *See Hispanic Affairs Project v. Acosta*, 901 F.3d 378, 389-91 (D.C. Cir. 2018). Here, those goals have been met: the substantive components of every prong of Section 1554 were raised repeatedly before HHS, and HHS rejected each.[1] The agency has had the required "fair opportunity to address" these issues. *Ctr. for Sustainable Econ. v. Jewell*, 779 F.3d 588, 602 (D.C. Cir. 2015). And HHS was demonstrably aware of Section 1554 prior to the Rule's being finalized, analyzing it in a separate rulemaking related to contraception. *See* 83 Fed. Reg. 57551-52 (Nov. 15, 2018).

The bulk of Defendants' argument hinges on their disagreement with the clear text of Section 1554. They assert that it is "implausible" that Section 1554 says what it says; that Section 1554 does not apply to programs funded by the government; and that Section 1554 is confined to the ACA. Opp. at 12, 19-21. None of these assertions is grounded in statutory text or legislative history, and each contradicts the plain language of the statute. "[I]t is settled beyond hope of contradiction that 'courts must presume that a legislature says in a statute what it means and means in a statute what it says.'" *Ruiz v. Bally Total Fitness Holding Corp.*, 496 F.3d 1, 8 (1st Cir. 2007) (quoting *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 461-62 (2002)).

[1] Although Plaintiffs are not aware of a comment on the Proposed Rule specifically citing Section 1554, a small sample of the numerous comments that address the substantive prongs are as follows: **Unreasonable barriers to care:** Letter from Att'ys Gen., to Alex M. Azar II, Sec'y, U.S. Dep't of Health & Human Servs. 4 (July 30, 2018) [Multistate AG Letter]; Letter from George A. Hill, President & CEO, Family Planning Association of Maine, to Diane Foley, Deputy Ass't Sec'y for Population Affairs, U.S. Dep't of Health & Human Servs. 9, 11 (July 30, 2018). **Impediments to timely care access:** Letter from Ctr. for Reproductive Rights to U.S. Dep't of Health & Human Servs. 12 (July 31, 2018). **Interference with communications regarding treatment options:** *Id.* at 37-38; Letter from Amy Kohl, Dir. of Advocacy and Gov't Aff., Am. Coll. of Nurse-Midwives, to Office of Population Aff., U.S. Dep't of Health & Human Servs. 2-3 (July 31, 2018). **Restriction on full disclosure of all relevant information to patients:** *Id.* at 1; Multistate AG Letter, at 6. **Violation of ethical standards of healthcare professionals:** *See* Pls.' Mem. at 19 n.13 (citing comments).

Further, "[c]ourts are not free to disregard the plain language of a statute and, instead, conjure up legislative purposes and intent out of thin air." *Id.* Nor is there an "obvious injustice" or an "absurd result[]," *id.* at 9, that would compel the Court to create the otherwise unfounded limitations that Defendants propose. Indeed, other provisions in the ACA demonstrate that Congress used the statute to legislate with regard both to federal health care programs generally and, *where explicitly specified*, to only those created by the ACA. *Compare* 42 U.S.C. § 18116 (prohibiting discrimination on the basis of race in "any health program or activity, any part of which is receiving Federal financial assistance"), *with* 42 U.S.C. § 18113 (prohibiting discrimination on the basis of provision of assisted suicide by a "health care provider that receives Federal financial assistance under this Act"). Section 1554 explicitly limits the power of HHS to promulgate regulations that violate Congress's healthcare-related policy goals.

Lastly, Defendants argue that APA claims related to Section 1554 are unreviewable because the statute is "quite open-ended." Opp. at 20. But it is no more "open-ended" than the statutory language found reviewable in *Citizens to Preserve Overton Park, Inc. v. Volpe*, which provided the "clear and specific directive[]" that the Secretary of Transportation could not use public parkland for highways unless there was no "feasible and prudent alternative." 401 U.S. 402, 411 (1971). Likewise, Section 1554 provides clear limitations on HHS's power that incorporate, for example, well-established medical canons of ethics. The narrow exception Defendants cite does not permit courts to ignore clear statutory text and their "duty to try to give every word or phrase of a law meaning." *United States v. Gouse*, 798 F.3d 39, 43 (1st Cir. 2015).

C. The Nondirective Counseling Mandate Includes Referral.

In seeking to rebut Plaintiffs' demonstration that the Rule is not in accordance with law, Defendants argue that the Nondirective Counseling Mandate does not include referral because

counseling and referral are separate activities.[2] This argument is contrary not only to common medical understanding and practice, *see* Wynia Decl. ¶¶ 13, 26, but also to legislative and regulatory history. Both Congress and HHS have expressly recognized that referrals are part of nondirective counseling. *See, e.g.*, 42 U.S.C. § 254c-6(a)(1), (a)(2)(B)(ii) (requiring provision of "adoption information and referrals to pregnant women on an equal basis with all other courses of action included in nondirective counseling to pregnant women"). Indeed, HHS has in this very rulemaking described nondirective counseling as including referrals. *See* 84 Fed. Reg. at 7730 ("[P]ostconception adoption information and referrals [should] be included as part of any nondirective counseling in Title X projects"); *id.* at 7747 (discussing "nondirective pregnancy counseling, or referrals made . . . during such counseling); *id.* at 7748 ("Referrals for . . . adoption are . . . permitted, as long as the counseling remains nondirective."). Likewise, HHS's own QFP guideline discusses pregnancy testing, nondirective counseling, and referrals under the heading "Pregnancy Testing and Counseling." Ctrs. for Disease Control & Prevention, U.S. Dep't of Health & Human Servs., Providing Quality Family Planning Services at 13-14 (Apr. 25, 2014) ["2014 QFP"]. Defendants cannot avoid the medical meaning of "referrals" and "counseling" by citing to generic definitions in *Black's Law Dictionary*. Opp. at 14-15.

D. Defendants Fail to Rebut Plaintiffs' Demonstration that the Rule is Arbitrary and Capricious.

1. Defendants' Reliance on Rust *Misconstrues the Nature of Arbitrary and Capricious Review and Misapplies* Rust*'s Holdings.*

Contrary to Defendants' assertion, *Rust* did *not* determine that the 1988 Rule was a "superior interpretation of section 1008." Opp. at 25. *Rust* expressly stated that attempts by the

[2] Defendants also mischaracterize Plaintiffs' position as being that abortion referrals are "require[d]." Opp. at 13. Abortion referral, like prenatal referral, should not be required if a patient does not wish to receive one; no one has argued to the contrary. But it is directive—that is, not neutral or unbiased—to prevent abortion referrals from *ever* being given while mandating prenatal referrals for every pregnant patient.

parties, including HHS, "to characterize highly generalized, conflicting statements in the legislative history into accurate revelations of congressional intent are unavailing." 500 U.S. at 185. *Rust* held only that the 1988 Rule was, at the time, a permissible interpretation—nothing more. And that conclusion came only after a finding that HHS had met the APA's requirement to engage in a "reasoned analysis," in the course of the rulemaking leading up to the 1988 Rule. *Id.* at 187 (quoting *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983) ["*State Farm*"]). That analysis was based on now thirty-year-old facts of little relevance today. *Rust* gave particular weight, for example, to government reports based on audits of Title X clinics from 1982. *See id.*; Pls.' Mem. at 24-25.[3] By contrast, the rulemaking at issue here involved no evidence of any similar facts, instead illustrating HHS's failure to identify even a single incident of a provider commingling Title X funds. *See* Pls.' Mem. at 24 & n.15.

By insisting that *Rust* is dispositive here, Defendants fail to recognize that arbitrary and capricious review tests the decision-making process itself, not merely the substance of the decision. Agency decisions must be "founded on a reasoned evaluation of the relevant factors." *Penobscot Air Servs., Ltd. v. Fed. Aviation Admin.*, 164 F.3d 713, 720 (1st Cir. 1999) (quoting *Marsh v. Oregon Nat. Res. Council*, 490 U.S. 360, 378 (1989)). Regardless of whether an agency's interpretation of a statute is reasonable or permissible under *Chevron v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984), any such finding does not immunize its rulemaking process from arbitrary and capricious review. *See, e.g., U.S. Postal Serv. v. Postal Regulatory Comm'n*, 785 F.3d 740 (D.C. Cir. 2015) (finding agency decision arbitrary and capricious even where interpretation of statute was not foreclosed by ambiguous statute); *Van Hollen, Jr. v. Fed.*

[3] Defendants do not dispute that they failed to collect or present evidence for their current rulemaking akin to what was before the Court in *Rust*. Rank speculation that *Rust* would not "have come out differently had the Secretary not relied on the GAO and OIG reports in issuing the 1988 regulations," Opp. at 25, cannot substitute.

Election Comm'n, 811 F.3d 486, 495 (D.C. Cir. 2016) (conducting *State Farm* analysis after finding statutory interpretation permissible under *Chevron*). The administrative record of today, not thirty years ago, and the agency's reasoning based on that new record must be assessed. Based on that record, it is clear that Defendants failed to conduct the requisite analysis here.

2. *Defendants Do Not Demonstrate Meaningful Consideration of All Relevant Factors.*

Court review of agency decision-making "is not a rubber stamp." *Citizens Awareness Network, Inc. v. U.S. Nuclear Regulatory Comm'n*, 59 F.3d 284, 290 (1st Cir. 1995). And while there is not *necessarily* a heightened standard of review for agency decisions that reflect a change in policy, *see* Opp. at 33, the agency must always demonstrate that there are "good reasons for the new policy." *Fed. Commc'n Comm'n v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). "[A] more detailed justification is required" where, as here, an agency's "new policy rests upon factual findings that contradict those which underlay its prior policy; or when its prior policy has engendered serious reliance interests that must be taken into account." *Id.*

The agency's calculus in achieving its goals "must fairly account for any benefits lost by modifying existing rules, as well as any advantages expected to be gained through the adoption of updated rules." *Citizens Awareness Network v. United States*, 391 F.3d 338, 352 (1st Cir. 2004). It is insufficient for an agency to "baldly state[] its belief" that particular outcomes will occur, *id.* at 353, or to "merely recite" the existence of uncertainty without also explaining "the evidence which is available, and . . . offer[ing] a 'rational connection between the facts found and the choice made,'" *State Farm*, 463 U.S. at 52 (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)). "Stating that a factor was considered . . . is not a substitute for considering it." *Getty v. Fed. Savs. & Loan Ins. Corp.*, 805 F.2d 1050, 1055 (D.C. Cir. 1986). The Rule is fatally flawed when tested against these standards.

a) The Separation Requirement is Arbitrary and Capricious.

With respect to the Separation Requirement, Defendants primarily argue that: (1) they have a theoretical need to prevent commingling of funds in the future, without providing any evidence that there is an actual problem warranting prophylactic measures; and (2) two items of evidence—a study showing increased colocation of family planning and abortion services and examples of overbilling in the Medicaid program—suffice to justify the Rule. Opp. at 27-28.

Defendants' purported justification for the Rule is improperly thin, and the action cannot be upheld where there is "no evidence of a real problem." *Nat'l Fuel Gas Supply Corp. v. Fed. Energy Regulatory Comm'n*, 468 F.3d 831, 841 (D.C. Cir. 2006). Defendants have not come forward with any support for their *factual* assertions that there are risks of confusion about the extent of Title X services or improper use of Title X funds for abortion services. This support need not, of course, be empirical—but it must underpin a reasoned decision. *See Stilwell v. Office of Thrift Supervision*, 569 F.3d 514, 519 (D.C. Cir. 2009) (finding that agency supported its decision to institute proposed rule by "thoroughly explain[ing] its concern" that regulated entities "could . . . and were" acting improperly). As Plaintiffs explained, a handful of examples of overbilling in a much different program (Medicaid) and the trend for more abortions to be performed in nonspecialized clinics fails to meet this standard. Pls.' Mem. at 24.

At the same time, Defendants ignore the overwhelming evidence in the administrative record that the Rule will cause a substantial reduction in Title X providers, as well the scope of family planning healthcare more broadly, and that the result of this loss will be to reduce, delay or even eliminate that necessary health care for thousands of underserved women in Maine and millions in the United States as a whole, with dire consequences. Pls.' Mem. at 26-28; Br. of Amicus Curiae Policy Integrity at 5-12, ECF No. 22-1. Instead, Defendants only reiterate their unsupported and bald statement of belief, *see Citizens Awareness Network*, 391 F.3d at 353, that

"other, new entities will apply for funds" such that patient care will be maintained. Opp. at 28. Defendants point to *nothing* in the administrative record that supports this facially unreasonable expectation—in Maine or elsewhere—nor any of their other factual conclusions such as their unreasonably low estimate of separation costs. *See* Opp. at 28-29. Maine Family Planning ("MFP") has submitted evidence of its own separation costs to illustrate the difficulties Title X providers will face under the Rule, and Plaintiffs also identified numerous comments citing compliance costs that were orders of magnitude higher than HHS's estimate. Pls.' Mem. at 26.

Defendants' failure to weigh the enormous harm that the Separation Requirement will cause to the Title X program and to the healthcare of thousands of Mainers and millions of Americans, against the speculative benefits they claim for the Rule, is arbitrary and capricious.

b) The Gag Rule is Arbitrary and Capricious.

Defendants' Opposition largely reiterates the same conclusory and unsupported statements from the Rule and then relies on *Rust* rather than meaningfully explaining why its bald statements of belief should be adopted. *See* Opp. at 29-33. This is insufficient. Four responses are particularly deficient:

***Medical Ethics*:** Defendants argue that "HHS considered" concerns related to medical ethics and "simply adopted a different view." Opp. at 30. Defendants nowhere explain why a different view was adopted, much less point to any evidence in the administrative record in support of their view. Nor do they grapple with the significant fact that nearly every leading medical association and public health policy organization in the country has opposed the Rule on ethical grounds. Nor does *Rust* constitute an adequate justification for the Rule: *Rust* did not base its holding on any findings about ethical responsibilities and, in any case, an interpretation of 1988 medical ethics would be out of date. *See* 500 U.S. 173. Merely stating that the agency considered medical ethics is not a substitute for actually doing so. *See Getty*, 805 F.2d at 1055.

***Patient Harm*:** Defendants argue that HHS properly considered patient harm by considering "the effect the Rule would have on Title X patients" and concluding that more providers would join the Title X program, Opp. at 31, but they offer no support for this inherently factual conclusion.[4] Providers serving more than 40% of Title X patients have already stated publicly, including in the administrative record, that they will leave if the Rule goes into effect; many more are likely to follow. *See* Pls.' Mem. at 16, 26-27. Notwithstanding the scale of this expected exodus, Defendants remarkably conclude that the program will *expand* in scope as of May 3 through a flood of new, unidentified providers. This assumption is especially implausible in rural areas, like the areas of Maine served by MFP, where it is particularly challenging to find any specialty care at all, including reproductive healthcare. Defendants fail even to acknowledge the ample evidence growing out of similar state-level legislation barring abortion-affiliated providers from participating in family planning programs, which clearly demonstrates that the quantity and quality of family planning services will decrease as a result of the Rule. *See* Bailey Decl. ¶¶ 69-83 (describing studies in other states).[5]

Defendants also have failed to address harms to patients who seek abortion care but will be unable to access that care because of the Rule. The agency has not only failed to evaluate that harm in a reasoned fashion, it has refused to recognize that it exists. If HHS believes that there is a trade-off here worth making it must "seriously examine[] the record data" and "*face* the trade-off." *Competitive Enter. Inst. v. Nat'l Highway Traffic Safety Admin.*, 956 F.2d 321, 323-24

[4] The only evidence Defendants cite for this wholly-unjustified assumption is a single poll of medical professionals that does not address the question of Title X participation. Opp. at 31. The cited statistics demonstrate only that some doctors who are members of faith-based organizations would alter their practices if the federal conscience protections existing in 2009 were eliminated. *See* 84 Fed. Reg. at 7781 n.139. There is no rational connection between that fact and the assertion that more providers would join Title X, in Maine or the United States generally.

[5] *See also, e.g.*, Letter from Claire Brindis to Alex Azar, Sec'y of Health & Human Servs., 11-12 (July 31, 2018).

(D.C. Cir. 1992). Thousands of commenters provided HHS with evidence that the Gag Rule will harm patients' access to abortion; HHS's failure to engage with that evidence is arbitrary and capricious on its face. Policy Integrity Br. at 5-13.

***2014 QFP Standards*:** Defendants treat HHS's decision to abandon the 2014 QFP standards requiring nondirective counseling, including "appropriate referrals," 2014 QFP at 14, as a purely legal matter. Opp. at 30. It is not. The QFP contains recommendations based on scientific evidence about how family planning care should be provided. *See* 2014 QFP at 3. As *Fox* notes, "a reasoned explanation is needed for disregarding facts and circumstances that underlay . . . [a] prior policy." 556 U.S. at 516. It is arbitrary and capricious for HHS to have adopted the Rule without any explanation of why the QFP standards no longer apply.

***Reliance Interests*:** Notwithstanding the clear standard set forth in *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126 (2016), Defendants eschew any obligation to account for the substantial reliance interests engendered by their longstanding policy, arguing that a "discretionary funding program cannot create legally cognizable reliance interests" if the government is not contractually obligated to renew the funding. Opp. at 34. Defendants do not cite any relevant support for this proposition,[6] nor does it make sense here. Determining whether Defendants' actions are arbitrary and capricious under the APA does not turn on whether the prior rules created an independent legal right. Rather, the question is whether *actual* people *actually* relied on longstanding policy such that reversing it will result in substantial harms.

[6] Defendants' attempt to draw an analogy with *Janus v. Am. Fed'n of State, Cty., & Mun. Emps.*, 138 S. Ct. 2448, 2484 (2018), is misplaced. Opp. at 34. In *Janus*, the Supreme Court balanced the import of ongoing First Amendment violations caused by its own precedent against reliance on that precedent, ultimately concluding that the constitutional violations required remedy. 138 S. Ct. at 2484. Putting aside the fact HHS has not contended that it is remedying widespread constitutional violations with the Rule, it is significant that, unlike the *Janus* Court, Defendants here failed even to consider serious reliance interests, much less balance them.

In this case, Defendants have ignored that the Title X program has developed into a successful and geographically-comprehensive network based on providers' implementation of the longstanding rules over the course of decades, and ample evidence shows that forcing *post hoc* separation of these established practices would be complicated, expensive, and for some impossible.[7] Defendants likewise failed to consider evidence of harms that will result to millions of patients who rely on this now-threatened network as a primary source for health care services. *See* Pls.' Mem. at 27-31, 47-49. It was arbitrary and capricious to ignore such matters.

II. Plaintiffs Are Likely to Succeed on Their Constitutional Claims.

The Rule violates the Constitution: it infringes on Plaintiffs' patients fundamental right to choose abortion before viability; it violates MFP's First Amendment right to freedom of speech; and it is so vague as to rob Plaintiffs of their Fifth Amendment due process rights. *See* Pls.' Mem. at 31-47. Notwithstanding Defendants' mischaracterization of the claims here, Plaintiffs in no way seek to overrule *Rust* nor do they otherwise contend that *Rust* is "no longer good law." Opp. at 38; *see also* at 1, 12, 37, 39, 41. Plaintiffs' uncontroversial position is simply that binding Supreme Court precedent decided *after Rust—as well as Rust*—control this case.

A. The Rule Violates Plaintiffs' Patients' Fundamental Right to Choose Abortion Before Viability.

Defendants do not dispute that the Rule, if allowed to go into effect, will burden abortion access for MFP's patients by shuttering between 50% to 85% of the abortion sites in Maine. Nor do they contest Plaintiffs' application of the well-settled undue burden standard mandated by the Supreme Court in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833

[7] *See, e.g.*, Hill Decl. ¶ 8; Letter from Joseph Alifante, President & CEO, N.J. Family Planning League, to Diane Foley, Deputy Assistant Sec'y, U.S. Dep't of Health & Human Servs. 5 (July 31, 2018) ("NJFPL would have a difficult, if not impossible, task in ascertaining what activities could run afoul of these separation requirements and then trying to accomplish sufficient physical separation.").

(1992), and *Whole Woman's Health v. Hellerstedt,* 136 S. Ct. 2292 (2016) ("*WWH*"), which determines whether a government regulation violates women's fundamental right to abortion under the Fifth Amendment.[8] Instead, Defendants try to hide behind *Rust*'s rejection of a *facial* challenge to the 1988 Rule, which does not govern Plaintiffs' as-applied challenge here.

1. Rust Left Open the Door for Plaintiffs' As-Applied Challenge.

Defendants wrongly claim that Plaintiffs' as-applied challenge is an attempt to "relitigate *Rust*." Opp. at 40. It is well-settled that denial of facial relief for constitutional challenges does not foreclose granting as-applied relief to specific parties in subsequent cases, or even in the same case. *See, e.g.*, *WWH*, 136 S. Ct. at 2304-06 (allowing as-applied challenge following prior unsuccessful facial challenge to the same law by many of the same plaintiffs due to subsequent "concrete factual developments"); *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 328-31 (2006) (remanding case for reconsideration of remedy after holding plaintiff failed to meet standard for facial relief); *Jackson Women's Health Org. v. Currier*, 760 F.3d 448, 458 (5th Cir. 2014). *Rust* itself explicitly left the door open for as-applied challenges based on plaintiff-specific facts. 500 U.S. at 183.

2. The Undue Burden Standard Governs Plaintiffs' Claim.

The well-settled undue burden standard requires the Court to determine whether, when "compared to prior law" (here the *existing* Title X program), "the burdens a law imposes on abortion" outweigh "the benefits those laws confers." *WWH*, 136 S. Ct. at 2309-11.

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[8] Notwithstanding Defendants' mischaracterization, Plaintiffs have not argued that *Casey* or *WWH* overrule *Rust*, Opp. at 39, only that those subsequent cases provide the operative standard for evaluating laws that will close clinics and burden women's fundamental right to abortion. Nor is there any merit to Defendants' emphasis on the fact that the undue burden standard, which replaced the strict scrutiny standard in place at the time of *Rust*, is arguably less stringent under some circumstances. *Id.* The standard for upholding abortion restrictions today is *different in kind* from what it was at the time of *Rust*. In any event, *Rust* did not consider an as-applied abortion claim under *any* standard—and Plaintiffs bring an as-applied claim here.

Constitutional protections do not fall by the wayside for providers and patients who participate in a government-subsidized program. To be sure, courts have held that the government may treat abortion providers differently from other entities within its own programs, but those same courts also make clear that this disparate treatment of providers can only pass constitutional muster "[*a*]s *long as the difference in treatment does not unduly burden a woman's right to obtain an abortion.*" *Planned Parenthood of Ind., Inc. v. Comm'r of Ind. State Dep't of Health*, 699 F.3d 962, 988 (7th Cir. 2012) ("PPI") (emphasis added).[9]

Defendants cite *Planned Parenthood of Greater Ohio v. Hodges* for the proposition that "government may refuse to subsidize abortion services." 917 F.3d 908, 912 (6th Cir. 2019) (en banc). *See* Opp. at 39. But Defendants fail to acknowledge *Hodges*'s clear statement that its outcome—upholding an Ohio statute prohibiting the state from entering into new contracts with or providing federal funding to abortion providers—*would have been different* had the record reflected that the law at issue "would impose an undue burden on a woman's right to an abortion." *Id.* at 916. *Hodges* recognized that evidence of increased travel distances for abortion care could "support an undue-burden challenge by establishing a 'substantial obstacle' in the way of those seeking abortions." *Id.* (citing *WWH*, 136 S. Ct. at 2309-18). Thus, *Hodges* held that an undue burden finding would be available—and indeed imperative—if borne out by the facts presented to the court, regardless of the fact that the regulation at issue involved a government-subsidized program. While *Hodges* concluded that it would be "premature to assess any [undue burden] claim," *id.*, because the record at that stage did not support a conclusion that

[9] Defendants point out that *PPI* cited *Rust*. Opp. at 39. More important is that, while *PPI* recognized that *Rust*'s holding was based on its determination that the 1988 Rule facially did not unduly burden abortion, it also made clear that a different outcome is warranted where evidence shows that a regulation will actually place an undue burden on a woman's right to abortion. *PPI*, 699 F.3d at 988.

the clinics at issue would stop providing abortion services, this Court, by contrast, is presented with uncontroverted facts demonstrating that sites providing abortion services in Maine will close under the Rule and that access will diminish exponentially. Pls.' Mem. at 31-39.

3. The Rule Will Impose an Undue Burden on MFP's Patients.

MFP has submitted substantial evidence that the Rule will shutter at least 11 and up to 17 of the 20 abortion sites in Maine. As detailed in extensive fact and expert declarations—none of which Defendants contest—these closures will impose tremendous burdens on MFP's patients by forcing them to travel great distances for abortion services, thereby delaying care or preventing it altogether. Pls.' Mem. at 34-39. The Gag Rule's obfuscation of information about abortion care will compound these harms. *See June Med. Serv. v. Gee*, 306 F. Supp. 3d 886, 893 (M.D. La. 2018) ("[C]ourts should address the cumulative effects of abortion regulations.") (citing *Planned Parenthood of Wis., Inc. v. Van Hollen*, 738 F.3d 786, 796 (7th Cir. 2013); *Planned Parenthood of Ariz., Inc. v. Humble*, 753 F.3d 905, 915 (9th Cir. 2014)).[10]

Defendants' only response to this evidence is to suggest that "any Title X clinic that finds the physical separation requirement to be financially prohibitive is free to leave the program, and any loss of abortion-related services resulting from that decision cannot constitute an undue burden." Opp. at 41. But, the Rule will gut abortion access in Maine *regardless of whether MFP accepts Title X funds or not*. *See* Pls.' Mem. at 31-39. If MFP loses its Title X funding, it will be forced to close at least 11 and up to 15 of its clinics, including the most rural—which will eliminate *both* abortion services and family planning in those locations. *See* Pls.' Mem. at 35-36.

[10] Defendants argue that *Rust* made an implicit ruling related to burdens resulting from the 1988 Rule's separation requirements, even though the Court's Fifth Amendment analysis addressed only the counseling restrictions. As detailed in Plaintiffs' opening brief, there is no basis for this theory. Pls.' Mem. at 34. In any event, because *Rust* did not analyze an as-applied challenge to *any* of the restrictions in the 1988 Rule, much less how restrictions in the 2019 Rule apply to the facts and the Plaintiffs at hand, Defendants cannot rely on *Rust* for this claim.

As a result, MFP's *patients*, not the organization, will suffer irreparable harm to their constitutional right to abortion.

Finally, Defendants seize on *Rust*'s conclusion that the 1988 Rule "le[ft] a pregnant woman with the same choices as if the Government had chosen not to fund family-planning services at all." Opp. at 36 (quoting *Rust*, 500 U.S. at 201). But, as discussed above, under the *operative* undue burden standard for this as-applied challenge, the question is not what might have happened in a hypothetical situation in which the government never created this program. Rather, the undue burden standard requires courts to compare the actual state of abortion access in Maine under the existing Title X program to the actual impact of the new law (what would become the Title X program under the Rule) and determine if the Rule imposes burdens that outweigh its benefits. *WWH*, 136 S. Ct. at 2309-14. The actual impact under that analysis is a decrease of sites providing abortion in Maine of at least 50% and up to 85%. Pls.' Mem. at 32.

Defendants' argument also fails as a factual matter. For the last three decades, MFP has expanded its practice, including construction of new facilities, as part of the Title X program and in reliance upon the longstanding regulations. MFP originally formed as a Title X umbrella agency, and it only began providing direct health services in 1997, several years after the program's longstanding policies were reinstated following *Rust*. Hill Decl. ¶ 7. MFP began providing abortions *before* it offered Title X family planning services and would not eventually have set up its clinics to co-locate family planning and abortion services at its sites absent the well-established Title X regulations. *Id.* ¶¶ 7-9. MFP's patients will be much worse off today if the new Rule takes effect than if Title X had never existed, because there will be a substantial disruption to how healthcare services have been delivered in Maine for decades.

For these reasons, *Rust* does not foreclose Plaintiffs' claims that the Rule violates MFP's patients' fundamental right to abortion. There is abundant evidence that the Rule will impose substantial obstacles in the way of MFP's patients access to abortion. Because these burdens far outweigh Defendants' unsubstantiated claims that the Rule might protect against theoretical confusion about the use of Title X funds or unsubstantiated risk of hypothetical commingling at some point in the future—particularly in light of the absence of evidence that such problems exist—the undue burden standard is met and Plaintiffs' claim is likely to succeed.

B. The Rule Violates MFP's First Amendment Right to Freedom of Speech.

Rust does not foreclose MFP's First Amendment claim. *First*, as a threshold matter, Defendants wrongly characterize the Gag Rule as mere government policy regarding which speech to "subsidize," Opp. at 36, obscuring that, in practice, the Gag Rule will operate to restrict and compel the speech of medical professionals. MFP does not, as Defendants suggest, seek government funding to subsidize or support abortion advocacy: MFP is not seeking reimbursement or any type of payment in exchange for referring patients for abortion, let alone payment to provide abortions. Rather, medical professionals at MFP seek not to be muzzled or compelled to speak the government's message in contravention of the standard of care and their medical ethics while they provide medical services that are partially funded by Title X.

Second, Defendants misread *Rust*, which recognized a two-part test to analyze restrictions on speech that implicate expenditure of government funds: (1) Does the restriction impose on "a traditional sphere of free expression so fundamental to the functioning of our society" such that it is entitled to First Amendment protection even within a government-funded program? (2) If so, does the restriction pass constitutional muster? *See Rust*, 500 U.S. at 199-200. The first question, which *Rust* explicitly left open with respect to the patient-provider relationship, was resolved by the Supreme Court in *Nat'l Inst. of Family & Life Advocates* ("*NIFLA*") *v. Becerra*,

138 S. Ct. 2361, 2371-74 (2018). *NIFLA* clarified that because "[d]octors help patients make deeply personal decisions and their candor is crucial," regulating the content of medical professionals' speech "pose[s] the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information." *Id.* at 2374. Defendants do not address *NIFLA*'s holding that the patient-provider relationship is a sphere so fundamental that any content-based regulation of speech in that sphere is inherently dangerous.[11]

Because it is now clear that the patient-provider relationship is entitled to First Amendment protection, the Court must proceed beyond the analysis conducted in *Rust* to the test's second step. *Rust*, 500 U.S. at 192. The Gag Rule is clearly content-based, viewpoint-discriminatory, and both restricts and compels speech based on the government's attempt to take sides in the public abortion debate. *See* Pls.' Mem. at 42-44. This is precisely the type of speech restriction that is inherently suspect under the First Amendment. *See NIFLA*, 138 S. Ct. at 2374-75; *Evergreen Ass'n, Inc. v. City of N.Y.*, 740 F.3d 233, 249 (2d Cir. 2014) (striking down abortion-related ordinance because requirement to "address abortion, emergency contraception, or prenatal care at the beginning of their contact with potential clients alters the [speakers'] political speech by mandating the manner in which the discussion of these issues begins").

Third, Defendants point out that *NIFLA*, among other cases Plaintiffs cite, did not discuss *Rust*. Opp. at 36. This is of no consequence. It is a common principle of *stare decisis* that a

[11] As Plaintiffs show, factual distinctions between the Gag Rule and the 1988 Rule further entitle the current patient-provider relationship in Title X to First Amendment protection. The Gag Rule, unlike the 1988 Rule, restricts *how* health care professionals may provide options counseling and *who* can provide such counseling. Pls.' Mem. at 43-44. The Gag Rule requires all pregnant patients to be referred for prenatal care, deeming such care "medically necessary," 84 Fed. Reg. 7789, while the 1988 Rule provided wider physician discretion by requiring referrals for "*appropriate* prenatal care *and/or social services.*" 53 Fed. Reg. 2945. Finally, the 1988 Rule prohibited both abortion and prenatal counseling in Title X projects; the Gag Rule allows some post-conception counseling and requires projects to "offer either comprehensive primary health services onsite or have a robust referral linkage with primary health providers who are in close physical proximity to the Title X site." 84 Fed. Reg. 7788.

subsequent case need not cite every prior relevant case to move the caselaw in a new direction. *See, e.g., Carpenters Local Union No. 26 v. U.S. Fid. & Guar. Co.*, 215 F.3d 136, 141-42 (1st Cir. 2000). *NIFLA*'s conclusions about the scope of First Amendment protections for medical professionals apply even though the decision did not specifically mention *Rust*.

Finally, Defendants cannot dispose of the Gag Rule's speaker-based discrimination against medical professionals who are not advanced practice providers ("APPs") with a diversionary reference to the state's unrelated interest in regulating entry into a profession. Opp. at 37. The Constitution protects the free speech rights of medical professionals whether within a government program or outside. *See NIFLA*, 138 S. Ct. at 2371-72.

C. As Applied to MFP, the Rule Unconstitutionally Conditions Funding on Relinquishing its Freedom of Speech.

Defendants incorrectly characterize MFP's as-applied unconstitutional conditions claim as an attempt to "silently overrule[] *Rust*," Opp. at 37, but *Rust* explicitly left the door open for as-applied challenges based on plaintiff-specific facts. Pls.' Mem. at 45; *see supra* p.15.

Because Plaintiffs' claim is an as-applied challenge, the only relevant facts here are the specific constitutional harms to MFP. In the decades since *Rust* was decided, it has become clear that the Gag Rule would significantly impinge on the doctor-patient relationship at MFP. *See Rust*, 500 U.S. at 200. Defendants do not dispute Plaintiffs' evidence demonstrating this impairment. *See, e.g.*, Jenkins Decl. ¶ 18 (describing how patient "relationships would be significantly impacted by any restriction on my ability to openly and honestly counsel my patients."); NP Decl. ¶ 19 ("If I could not communicate openly and honestly with my patients, these trust-based relationships would be damaged."). Accordingly, *Rust* does not control.

D. The Rule is Unconstitutionally Vague.

Defendants make no serious attempt to dispute that the Rule is unworkably vague on its face, falling far short of giving "fair notice of conduct that is forbidden." *Fox*, 567 U.S. at 253. By failing to explain how the Rule works in practice, Defendants effectively concede that it imposes free-wheeling standards that give the government unbridled enforcement discretion. If the Rule takes effect on May 3, 2019, Plaintiffs have no way to know what they must do to comply. This is not a "hypothetical" circumstance, Opp. at 41-42, but rather the imminent and inevitable challenge facing Title X providers. Defendants nonetheless insist that these concerns are speculative and that confusion caused by the Rule should be disregarded because it would result only in the loss of funding rather than criminal penalties. Opp. at 41-42. But such loss of funding would be a death knell for many Title X providers and services, causing serious harm to the millions who rely on Title X services. *See supra* at p. 12-14..

With respect to the Gag Rule, Defendants provide only a conclusory statement that "the Rule *does* explain," Opp. at 43, how providers can offer options counseling in a manner that "in no way promote[s]" or "support[s]" abortion, 84 Fed. Reg. at 7789, 7758, but inexplicably point only to the very same ambiguous language Plaintiffs challenge in the first place. *Compare* Opp. at 43 (quoting 84 Fed. Reg. at 7789), *with* Pls.' Mem. at 47.

As to the Separation Requirements, Defendants do not argue that the Rule tells providers what they *actually need to do*, pointing only to language stating that "the answer will depend on 'the individual circumstances' of the particular 'Title X service site.'"[12] Opp. at 43 (quoting 84 Fed. Reg. 7767). And their suggestion that confused funding recipients should just ask HHS, *id.*, only confirms that providers are left to unpredictable and *ad hoc* enforcement by the agency.

[12] As Defendants themselves acknowledge, Opp. at 43, the Supreme Court did not address any vagueness challenges in *Rust*; it therefore does not foreclose Plaintiffs' arguments now.

III. Plaintiffs Will Suffer Irreparable Harm Absent a Preliminary Injunction.

Defendants' opposition fails to address, much less dispute, the long list of devastating and inevitable harms that will result if the Rule goes into effect. Compl. ¶¶ 131-84; Pls.' Mem. at 47-49. The record contains overwhelming evidence that the Rule will force many Title X providers out of the program, pushing critical health services, including clinical breast exams, pap tests, and contraceptive care, out of reach for women. *See, e.g.*, Bailey Decl. ¶¶ 96-97, 108. The Rule will also immediately require health care professionals to violate their ethical principles in regular interactions with patients, damaging the ongoing relationships of trust that are essential to success of the Title X program. *See* Wynia Decl. ¶¶ 17, 23; NP Decl. ¶¶ 17-19; Jenkins Decl. ¶¶ 17-21. The Rule also will erect enormous barriers to abortion care, delaying care for some women and pushing it out of reach for others entirely. *See* Compl. ¶¶ 153-84.

Plaintiffs also have submitted abundant evidence demonstrating that the Rule will wreak havoc on healthcare in Maine specifically. In particular, the Rule will substantially impair family planning services in Maine by decimating MFP's comprehensive Title X network. Subrecipients serving over 10,000 Mainers will certainly leave the program if the Rule goes into effect, and others—including MFP itself—are still undecided. If MFP is forced to leave, it will have to close 11 to 15 of its Title X clinics, many of which are located in rural areas where there will be limited or no other access to reproductive healthcare. This reduction will result in MFP serving between 4,500 and 8,000 fewer family planning patients per year. If MFP remains in the program, it will be forced to provide care that is contrary to its standards and to patient needs. *See* Hill Decl. ¶¶ 26-27, 56; NP Decl. ¶¶ 17-19; Jenkins Decl. ¶¶ 17-21; Bailey Decl. ¶¶ 90-93; Lindo Decl. ¶¶ 18-19. The Rule will also devastate abortion access by *inter alia* shuttering 50% to 85% of the sites providing abortion services in Maine. Hill Decl. ¶ 26; Lindo Decl. ¶ 18.

Importantly, Defendants do not dispute that this will occur. Opp. at 44-45. Although they attempt to characterize Plaintiffs' injuries as being "from 'constitutional violations,'" *id.* at 44, in fact the harms shown in the record are tangible and irreparable for the numerous women involved, and will flow from any implementation of the Rule regardless of the legal merits of Plaintiffs' claims. Of course, additional harm is caused by the Rule's violation of constitutional rights, itself a form of irreparable injury. *See Elrod v. Burns*, 427 U.S. 347, 373 (1976).

Nor is there any merit to Defendants' argument that harm caused by the Rule should be discounted because providers "can simply forgo receiving taxpayer funds if it would be more costly on balance to comply." Opp. at 44. As Plaintiffs have explained and supported with extensive evidence, irreparable harms will result under the Rule *regardless of whether providers continue to accept Title X funds or leave the program*. *See* Pls.' Mem. at 10-13, 47-49.

Finally, Defendants ask the Court to disregard harms that will befall countless patients as a result of the Rule based on the inapplicable position that a preliminary injunction requires a showing of harm to the plaintiffs, not third parties. Opp. at 44-45. But Plaintiffs have brought this lawsuit on behalf of themselves, their staff, *and their patients*, *see* Compl. ¶¶ 17, 20, 215-238. Defendants have not challenged Plaintiffs' standing, and it is well-settled that abortion providers have standing to challenge restrictions that violate their patients' constitutional rights. *See, e.g.*, *Singleton v. Wulff*, 428 U.S. 106, 118 (1976) (plurality) ("[I]t generally is appropriate to allow a physician to assert the rights of women patients as against governmental interference with the abortion decision."); *see also Deerfield Med. Ctr. v. City of Deerfield Beach*, 661 F.2d 328, 334 (5th Cir. Unit B Nov. 1981). Courts routinely grant injunctions in cases with doctor and clinic plaintiffs on the basis of harms to patients. *See, e.g.*, *Planned Parenthood of Wis., Inc. v. Van Hollen*, 963 F. Supp. 2d 858, 860, 868 (W.D. Wis. 2013) ("All plaintiffs sue on their own

behalf as well as on behalf of their patients" and "there will almost certainly be irreparable harm to those women who will be foreclosed from having an abortion").

IV. Nationwide Relief is the Appropriate Remedy.

Plaintiff MFP is the sole Title X grantee for all of Maine and it provides essential health care services to thousands of underserved Mainers. The serious adverse impacts that the Rule would have on MFP and these women warrants at minimum a Maine-wide injunction here.

In addition, a nationwide injunction is necessary to prevent wildly uneven application of the Title X program, as well as constitutional injury. "When a reviewing court determines that agency regulations are unlawful, the ordinary result is that the rules are vacated—not that their application to the individual petitioners is proscribed." *Nat'l Mining Ass'n v. U.S. Army Corps of Eng'rs*, 145 F.3d 1399, 1409 (D.C. Cir. 1998); *Maine Right to Life Comm. v. Fed. Election Comm'n*, 914 F. Supp. 8 (D. Me. 1996) (vacating invalid and unconstitutional regulation), *aff'd*, 98 F.3d 1 (1st Cir. 1996). Even if the APA itself does not mandate a nationwide injunction, nationwide relief here is "necessary to give prevailing parties the relief to which they are entitled." *California v. Azar*, 911 F.3d 558, 582 (9th Cir. 2018); *Vaqueria Tres Monjitas, Inc. v. Irizarry*, 587 F.3d 464, 487 (1st Cir. 2009) (finding territory-wide relief appropriate where necessary to provide individual petitioners "complete relief"). Title X funding recipients draw from a single pool of funding, such that Defendants, if enjoined from enforcing the Rule in Maine, would be able to shift funding to other states as an indirect way of penalizing MFP and Maine patients. OPA has in the past claimed its right to make such funding shifts. *See* 81 Fed. Reg. 91859 (asserting that a "reallocation of resources" may result if states do not participate in Title X). The unfair playing field that a piecemeal injunction would create warrants nationwide relief. *See City of Los Angeles v. Sessions*, 293 F. Supp. 3d 1087, 1100-01 (C.D. Cal. 2018).

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 23, 2019, I electronically filed the within Reply Memorandum in Support of Plaintiffs' Motion for Preliminary Injunction with the Clerk of Court using the CM/ECF system, which will send notification of such filing to counsel of record.

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