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10 IN THE UNITED STATES DISTRICT COURT
 11 FOR THE NORTHERN DISTRICT OF CALIFORNIA
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15 **STATE OF CALIFORNIA, by and through**
 16 **ATTORNEY GENERAL XAVIER**
BECERRA,

17 Plaintiff,

18 v.

19 **ALEX AZAR, in his OFFICIAL**
 20 **CAPACITY as SECRETARY of the U.S.**
 21 **DEPARTMENT of HEALTH & HUMAN**
SERVICES; U.S. DEPARTMENT of
 22 **HEALTH & HUMAN SERVICES,**

23 Defendants.
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3:19-cv-01184-EMC

**PLAINTIFF’S ADMINISTRATIVE
 MOTION TO CONSIDER WHETHER
 CASES SHOULD BE RELATED**

[N. D. CAL. CIVIL L.R. 3-12 & 7-11]

Judge: Honorable Edward M. Chen
 Trial Date: None set.
 Action Filed: March 4, 2019

1 **I. INTRODUCTION & BACKGROUND**

2 Plaintiff the State of California seeks an order to relate three cases under Civil Local Rules
3 3-12 and 7-11 because all three cases involve identical defendants, similar claims and plaintiffs,
4 and because failure to relate the cases may result in burdensome duplication of labor and expense
5 and conflicting or inconsistent outcomes. In the cases, plaintiffs raise Administrative Procedure
6 Act (APA) and constitutional challenges to two healthcare regulations promulgated by the U.S.
7 Department of Health and Human Services (HHS) and HHS Secretary Alex M. Azar, and
8 Defendants recognize the interplay between the two challenged rules.

9 The first challenged rule is HHS's Title X Final Rule, the subject of the above-captioned
10 case. The rule seeks to supplant the 2000 Title X regulations which implement Congress'
11 nondirective counseling mandate. On March 4, 2019, California filed the complaint in this case.
12 (Dkt. No. 1), and on April 26, 2019, this Court issued a preliminary injunction prohibiting
13 implementation of the new Title X Final Rule in California. Order Granting Mot. for Prelim. Inj.,
14 Dkt. No. 103.

15 The second challenged rule is the Refusal Rule, which allows healthcare providers,
16 including Title X-funded family planning providers specifically, to refuse to comply with
17 programs rules and applicable state and federal laws—including nondirective counseling
18 requirements—on the basis of religious, ethical, or other beliefs. 84 Fed. Reg. 23170, 23264 (May
19 21, 2019). In May 2019, the City and County of San Francisco and California filed suits
20 challenging the Refusal Rule. *City and County of San Francisco v. Azar, et al.*, Case No. 3:19-cv-
21 2405 (N.D. Cal. May 2, 2019) (Declaration of Anna Rich ("Rich Decl."), Ex. A); *State of*
22 *California v. Azar, et al.*, Case No. 3:19-cv-02769 (N.D. Cal. May 21, 2019) (Rich Decl., Ex. B)
23 (collectively, the Refusal Rule cases).

24 However, there is a conflict between the Title X Final Rule and the Refusal Rule cases,
25 such that they should be related. In this case, the Court held that "nondirective counseling"
26 includes nondirective referrals to abortion providers if a client seeks such a referral. Dkt. No. 103
27 at 31-32. As such, Title X's referral restriction violates Congress' nondirective counseling
28 requirement. *Id.* Two other District Courts have also enjoined implementation of the Title X Final

1 Rule. *Oregon v. Azar*, 6:19-cv-00317-MC and *American Medical Association v. Azar*, No. 19-cv-
 2 00318-MC, 2019 WL 1897475 (D. Or. Apr. 29, 2019), appeal docketed, No. 19- 35386 (9th Cir.
 3 May 6, 2019); *Washington v. Azar*, No. 1:19-cv-03040-SAB and *Nat’l Family Planning &*
 4 *Reproductive Health Ass’n v. Azar*, No. 19-cv-03045, 2019 WL 1868362 (E.D. Wash. Apr. 25,
 5 2019), No. 19-cv-03045, appeal docketed, No. 19-35394 (9th Cir. May 6, 2019).

6 But under the Refusal Rule, any Title X program can refuse to provide a referral to an
 7 abortion provider. *Id.* at 23181; 23190-91. In explaining the need for the Refusal Rule,
 8 Defendants assert a conflict between the 2000 Title X regulations and the Refusal Rule:

- 9
- 10 • “The Department agrees that regulations finalized in 2000 governing the Title X
 program, which in some cases required referrals, information, and counseling about
 11 abortion, conflicted with certain Federal conscience and anti-discrimination laws
 and, consequently, with this rule.” 84 Fed. Reg. at 23190.
 - 12 • “The published Title X final rule revised the 2000 Title X regulations to eliminate
 that conflict and achieve consistency with Federal conscience statutes.” 84 Fed.
 Reg. at 23191.
 - 13 • “The Department has amended the Title X regulations to remove the requirements
 for abortion counseling, information, and referrals, while permitting the provision of
 14 nondirective counseling on, and information about, abortion. *Under the 2019 final
 rule governing the Title X program, the Title X regulations no longer conflict with
 Federal conscience and antidiscrimination laws or this final rule.*” 84 Fed. Reg. at
 15 23200 (emphasis added); *see also id.* at 23223.
 - 16 • “Regardless, as the Department recognized in the 2008 Rule, *a Federal regulatory
 requirement that a Title X applicant, grantee, program, or clinic – a recipient of
 17 Federal funds in carrying out a HHS program – provide abortion counseling,
 information, and referrals cannot be enforced against such entities whose refusal to
 18 do so is protected by applicable Federal conscience and related nondiscrimination
 statutes.*” 84 Fed. Reg. at 23201. (emphasis added).

19 Defendants assert that both the Title X Final Rule and the Refusal Rule are companion
 20 regulations necessary to comply with federal conscience laws. 84 Fed. Reg. at 23190-91, 23200-
 21 01. Defendants also filed a notice in this case stating that the Refusal Rule had been issued and
 22 would soon be published in the Federal Register. Dkt. No. 104 (May 2, 2019). Defendants added
 23 that they “d[id] not believe that the new [Refusal] rule conflicts with the [Title X] preliminary
 24 injunction.” *Id.*

25 Due to the common and overlapping issues, a failure to relate these three cases may result
 26 in inconsistent outcomes and in the burdensome duplication of labor and expense addressing
 27 related issues. Therefore, California respectfully requests that the Court relate the cases.
 28

1 **II. ARGUMENT**

2 The State of California moves pursuant to Local Rule 3-12 for a determination that the Title
3 X case is “related” to the Refusal Rule case. Under Rule 3-12, actions are related when:

4 (1) The actions concern substantially the same parties, property, transaction, or event; and

5 (2) It appears likely that there will be an unduly burdensome duplication of labor and
6 expense or conflicting results if the cases are conducted before different judges.

7 The Title X case and the Refusal Rule cases should be related because they involve the
8 same Defendants, similar plaintiffs and claims, and relation will promote judicial economy and
9 avoid inconsistent rulings. First, the cases involve the same or similar parties. The Defendants are
10 the same, California is a plaintiff in two of the three cases, and San Francisco is a sub-recipient of
11 federal funds granted to California. Second, the Refusal Rule cases and the Title X case concern
12 substantially similar claims and subject matter. The cases challenge HHS regulations under the
13 APA and the Constitution, and in all three cases, plaintiffs assert that the rule impedes access to
14 healthcare in violation of Section 1554 of the ACA.

15 Because of the similarity of issues and claims, relation is necessary to minimize the risk of
16 conflicting results. Here, Defendants assert that the 2000 Title X regulations conflict with the
17 Refusal Rule. 84 Fed. Reg. at 23190. The 2000 Title X regulations—and Congress—require that
18 Title X programs provide nondirective counseling, which includes referrals to abortion providers
19 if the patient wishes. *See* 2019 Continuing Appropriations Act, Pub. L. No. 115-245, Div. B., Tit.
20 II, 132 Stat. 2981, 3070-71 (2018) (requiring that “all pregnancy counseling shall be
21 nondirective”); 42 C.F.R. § 59.5(a)(5) (2000).

22 But by promulgating the Refusal Rule, Defendants seek to broaden the scope of federal
23 conscience laws to permit any healthcare entity or individual to refuse to provide referrals to
24 abortion providers. Here, conduct protected under the Refusal Rule includes “assist[ing] in the
25 performance of” any abortion, which, under the Refusal Rule, is defined as including “*counseling,*
26 *referral, training, or otherwise making arrangements for the procedure* or a part of a health
27 service program or research activity.” 84 Fed. Reg. at 23263 (emphasis added). Under the Refusal
28 Rule’s broad new definition of “discrimination,” Title X funding may be extended to entities that

1 refuse to provide nondirective counseling. *Id.* As such, the Refusal Rule cases require the Court to
2 construe the scope of conscience protection laws in light of federal law that applies to the Title X
3 regulations. And the Title X case requires the Court to construe the scope of conscience
4 protections, a process which the Court has already begun. *See* Dkt. 103 at 62.

5 Without relation, there is a risk of inconsistent rulings that may result in confusion as to
6 which rules apply to Title X programs. There is also possibility that without relation, Defendants
7 may use the Refusal Rule as an end-run around the Court's April 26 Preliminary Injunction,
8 which preserved the status quo—including longstanding Title X regulations which require Title X
9 grant recipients to provide neutral, factual counseling to pregnant clients regarding their full range
10 of options—pending resolution of the merits of California's cases. Relation will ensure that the
11 Court can provide consistent enforcement of its orders.

12 Finally, if the cases are related, only one judge and chambers staff will be burdened with
13 overlapping fact-finding, including details about the specific healthcare programs at issue and
14 facts relating to the harm that will be caused by the two Final Rules. This will conserve judicial
15 resources and ensure that the same court is able to monitor the interplay between the rules and
16 any relief afforded by the Court.

17 **III. CONCLUSION**

18 Plaintiff respectfully requests that this Court relate *State of California v. Azar, et al.*, Case
19 No. 19-cv-01184-EDL, *City and County of San Francisco v. Azar, et al.*, Case No. 3:19-cv-2405,
20 and *State of California v. Azar, et al.*, Case No. 3:19-cv-02769.

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Dated: May 24, 2019

Respectfully Submitted,

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Supervising Deputy Attorney General

/s/Anna Rich
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Deputy Attorney General
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 15 **STATE OF CALIFORNIA, by and through**
ATTORNEY GENERAL XAVIER
 16 **BECERRA,**

3:19-cv-01184-EMC

17 Plaintiff,

**[PROPOSED] ORDER IN SUPPORT OF
 PLAINTIFF’S ADMINISTRATIVE
 MOTION TO CONSIDER WHETHER
 CASES SHOULD BE RELATED**

18 v.

[N. D. CAL. CIVIL L.R. 3-12 & 7-11]

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 20 **CAPACITY as SECRETARY of the U.S.**
DEPARTMENT of HEALTH & HUMAN
 21 **SERVICES; U.S. DEPARTMENT of**
HEALTH & HUMAN SERVICES,

Judge: Honorable Edward M. Chen
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[PROPOSED] ORDER

The Motion of Plaintiff the State of California, by and through Attorney General Xavier Becerra (“Plaintiff”), to consider whether cases should be related was filed on May 24, 2019. Having read the parties’ papers, the Court GRANTS Plaintiff’s motion and relates the following cases with the *State of California v. Azar, et al.*, Case No. 3:19-cv-01184:

- *City and County of San Francisco v. Azar, et al.*, Case No. 3:19-cv-2405
- *State of California v. Azar, et al.*, Case No. 3:19-cv-02769

The parties are instructed that all future filings in any reassigned case are to bear the initials of the newly assigned judge immediately after the case number. Any case management conference in any reassigned case will be rescheduled by the Court. The parties shall adjust the dates for the conference, disclosures, and report required by Fed. R. Civ. P. 16 and 26 accordingly. Unless otherwise ordered, any dates for hearing noticed motions are vacated and must be re-noticed by the moving party before the newly assigned judge; any deadlines set by the ADR Local Rules remain in effect; and any deadlines established in a case management order continue to govern, except dates for appearance in court, which will be rescheduled by the newly assigned judge.

IT IS SO ORDERED.

Dated:

Hon. Edward M. Chen
United States District Judge