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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 **RELATED TO** Case No.: 3:19-cv-01195-EMC **DEFENDANTS' NOTICE OF MOTION AND MOTION TO DISMISS, WITH MEMORANDUM AND POINTS OF AUTHORITIES** Date: October 10, 2019 Time: 1:30 p.m. Judge: Hon. Edward M. Chen Dep't: Courtroom 5, 17th Floor Trial: None

ESSENTIAL ACCESS HEALTH, INC.; MELISSA MARSHALL, M.D., Plaintiffs, v. ALEX AZAR II, Secretary of U.S. Department of Health and Human Services; U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES; DOES 1-25, Defendants.	)

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INTRODUCTION[1]

Plaintiffs' challenge to the federal regulation at issue is a transparent attempt to evade the Supreme Court's decision in *Rust v. Sullivan*, 500 U.S. 173 (1991). When *Rust* was decided, as now, Title X of the Public Health Service Act (PHSA) authorized the Department of Health and Human Services (HHS) to make grants for family-planning services and issue regulations to implement the statute. Title X is a limited program: It does not fund medical care for pregnant women, and instead narrowly addresses preconception family planning. In addition, Congress directed in § 1008 of the PHSA 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 accordance with the limited nature of the program and § 1008, HHS in 1988 issued regulations that, among other things, prohibited Title X projects from referring patients for abortion as a method of family planning and required Title X programs to be physically separate from abortion-related activities. 53 Fed. Reg. 2922 (Feb. 2, 1988). In *Rust*, the Supreme Court held that those regulations were authorized by Title X, were not arbitrary and capricious, and were constitutional.

Relying on the Supreme Court's holding in *Rust*, HHS in 2019 issued a final rule that, in the respects challenged here, reinstated the 1988 regulations (which had been rescinded in the interim). 84 Fed. Reg. 7714 (Mar. 4, 2019) (Rule). Plaintiffs make no serious effort to distinguish the Rule from the regulations upheld in *Rust*, and Congress has not amended the statute *Rust* interpreted. Plaintiffs contend, rather, that Congress implicitly and indirectly amended Title X through a clause in an appropriations rider and an obscure provision of the Affordable Care Act (ACA). A unanimous motions panel of the Ninth Circuit correctly rejected Plaintiffs' remarkable

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[1] This memorandum in support of Defendants' combined motion to dismiss the two related cases exceeds the page limits set out in Civil L.R. 7-2(a). Defendants filed a consent motion to expand the page limits for the instant motion, as well as the page limits for Plaintiffs' responses, on July 29, 2019. Defendants recognize that the timing of their motion to expand the page limits gave the Court a very limited window in which to rule, and Defendants apologize to the Court. Given the number and complexity of the issues presented in Plaintiffs' separate complaints, and in light of Plaintiffs' consent, Defendants respectfully renew their request to allow a combined memorandum in excess of the page limits set out in Civil L.R. 7-2(a).

position.[2] As the panel explained, Congress did not amend Title X—much less abrogate *sub silentio* a high-profile Supreme Court decision. Plaintiffs, moreover, have waived any challenge based on § 1554 of the ACA because neither they nor anyone else raised this provision during the notice-and-comment process. In light of *Rust*, and for the reasons explained more fully below, Plaintiffs' statutory claims are meritless and should be dismissed.

Plaintiffs likewise cannot show that the Rule is arbitrary and capricious. As the merits panel of the Ninth Circuit recognized, HHS did not act irrationally in adopting regulations implementing its permissible interpretation of § 1008 or in making reasonable predictions using its expertise. 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. Moreover, there is no merit to Essential Access's claim that two provisions of the Rule violate the notice-and-comment requirements of the Administrative Procedure Act (APA).

There is also no merit to Plaintiffs' constitutional claims. *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. California, for its part, cannot succeed on its sex discrimination claim. The Rule does not do not discriminate on the basis of sex, facially or otherwise. Rather, it imposes conditions on the receipt of federal funding through the Title X program, consistent with § 1008 and *Rust*. And, in any event, the Rule is in service of an important government interest—avoiding the use of federal funds to promote or encourage abortion in violation of § 1008—and therefore easily passes constitutional muster.

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[2] Although the Ninth Circuit ordered Defendants' appeal to be reheard en banc and instructed that the motions panel's order not be cited as precedential, *California v. Azar*, No. 19-15974, Order (9th Cir. July 3, 2019), the motions panel's order constitutes persuasive authority. The Ninth Circuit also expressly indicated that the motions panel's order has not been vacated. *California v. Azar*, No. 19-15974, Order (9th Cir. July 11, 2019).

For these reasons and for the reasons explained below, the Court should dismiss Plaintiffs' claims pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

LEGAL AND FACTUAL BACKGROUND

A. Statutory and Regulatory Background

In 1970, Congress enacted Title X of the PHSA to create a limited grant program for certain types of preconception family planning services. *See* Pub. L. No. 91-572, 84 Stat. 1504. The statute authorizes 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). It also provides that "[g]rants and contracts made under this subchapter shall be made in accordance with such regulations as the Secretary may promulgate." *Id*. § 300a-4(a).

Section 1008, however, directs that "[n]one of the funds appropriated under this subchapter shall be used in programs where abortion is a method of family planning." 42 U.S.C. § 300a-6. "That restriction was intended to ensure that Title X funds would 'be used only to support *preventive* family planning services, population research, infertility services, and other related medical, informational, and educational activities.'" *Rust v. Sullivan*, 500 U.S. 173, 178-79 (1991) (emphasis added) (quoting H.R. Rep. No. 91-1667, at 8 (1970) (Conf. Rep.)). As a sponsor of § 1008 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) (statement of Rep. Dingell).

The Secretary's initial regulations, which remained largely unchanged until the late 1980s, did not provide additional guidance on the scope of § 1008. Instead, they simply required 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). During this period, HHS construed § 1008 and its regulations "as prohibiting Title X projects from in any way promoting or encouraging abortion as a method of family planning" and "as requiring that the Title X program

be 'separate and distinct' from any abortion activities of a grantee." 53 Fed. Reg. at 2923 (describing previous HHS guidelines and internal memoranda). The Department nevertheless permitted, and then in guidelines issued in 1981, required, Title X projects to offer "nondirective 'options couns[e]ling' on pregnancy termination (abortion), prenatal care, and adoption and foster care when a woman with an unintended pregnancy requests information on her options, followed by referral for these services if she so requests." *Id.* HHS also permitted funding recipients to maintain Title X services and abortion-related services at "a single site." 52 Fed. Reg. 33,210, 33,210 (Sept. 1, 1987) (discussing prior policy).

In the late 1980s, the Department changed course. HHS issued a notice of proposed rulemaking explaining that its past policy had "not provided clear standards for grantees and HHS personnel," that abortion "'referral' and counseling are clearly covered by the prohibition in section 1008," and that its prior assumption that "referrals for abortion do not indeed 'encourage or promote' abortion" was "unreasonable," as "providing a referral for abortion facilitates the obtaining of [an] abortion." 52 Fed. Reg. at 33,210-11.

In 1988, the Secretary issued a final rule that prohibited Title X projects from promoting, encouraging, advocating, or providing counseling on, or referrals for, abortion as a method of family planning. 53 Fed. Reg. at 2945 (§§ 59.8, 59.10). To prevent programs from evading these restrictions by steering patients toward abortion providers, the regulations placed limitations on the list of providers that a program must offer pregnant patients as part of a required referral for prenatal care. *See id.* (§ 59.8(a)(3)). And to maintain program integrity, the regulations required that grantees keep their Title X-funded projects "physically and financially separate" from all prohibited abortion-related activities. *Id.* (§ 59.9). The Supreme Court upheld these regulations in *Rust*, concluding that they were authorized by Title X, were not arbitrary and capricious, and were consistent with the Constitution. 500 U.S. at 183-203.

In the aftermath of *Rust*, Congress set out to "reverse[] the regulations issued in 1988 and upheld by the Supreme Court in 1991." H.R Rep. No. 102-204, at 1 (1991). Both Houses passed a bill titled the "Family Planning Amendments Act of 1992" that would have codified HHS's 1981

guidelines by conditioning Title X funding on a grantee's promise to provide, "upon request," "nondirective counseling and referrals" concerning specific options, including "termination of pregnancy." S. 323, 102d Cong. § 2 (1991). President Bush vetoed the legislation. S. Doc. No. 102-28 (1992).

In 1993, President Clinton and HHS suspended the 1988 regulations so that the 1981 guidance went back into effect. 58 Fed. Reg. 7455 (Jan. 22, 1993); 58 Fed. Reg. 7462 (Feb. 5, 1993) (interim rule). Three years later, Congress added a rider to its annual HHS appropriations act requiring that any funds provided to Title X projects "shall not be expended for abortions" and that "all pregnancy counseling shall be nondirective." Pub. L. 104-134, tit. II, 110 Stat. 1321, 1321-221 (1996). That rider has appeared in every annual HHS appropriations act since 1996. *E.g.*, Pub. L. No. 115-245, div. B, tit. II, 132 Stat. 2981, 3070-71 (2018).

In 2000, HHS finalized a new rule, which, like the 1981 guidelines and the vetoed Family Planning Amendments Act, required Title X projects to offer and provide upon request "information and counseling regarding" specific options, including "[p]regnancy termination," followed by "referral upon request." 65 Fed. Reg. 41,270, 41,279 (July 3, 2000). The 2000 rule also eliminated the physical-separation requirement in the 1988 regulations. *See id.* at 41,275-76. In adopting these new regulations, HHS acknowledged that the 1988 regulations were "a permissible interpretation of the statute," 65 Fed. Reg. at 41,277, but justified the shift in approaches on the basis of "experience," *id.* at 41,271.

In 2010, Congress enacted the ACA. Included within the Act's "Miscellaneous Provisions" subchapter and titled "Access to therapies," § 1554 provides that "[n]otwithstanding any other provision of [the ACA]," the Secretary "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. Nothing in § 1554 specifically addresses Title X or abortion.

On June 1, 2018, the Secretary issued a notice of proposed rulemaking (NPRM) designed 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." 83 Fed. Reg. 25,502, 25,505. After receiving more than 500,000 comments, the Secretary issued a final rule in March 2019, 84 Fed. Reg. 7714, the challenged provisions of which are materially indistinguishable from the 1988 regulations upheld in *Rust*.

In implementing Title X and especially § 1008, the Rule, like the 1988 regulations, prohibits Title X projects from providing referrals for, or engaging in activities that otherwise encourage or promote, abortion as a method of family planning. 84 Fed. Reg. at 7788-90 (§§ 59.5(a)(5), 59.14(a), 59.16(a)). As the Secretary explained, "[i]f a Title X project refers for, encourages, promotes, advocates, supports, or assists with, abortion as a method of family planning, it is a program 'where abortion is a method of family planning' and the Title X statute prohibits Title X funding for that project." *Id.* at 7759. In the Secretary's view, this is "the best reading" of § 1008, "which was intended to ensure that Title X funds are also not used to encourage or promote abortion." *Id.* at 7777. To prevent evasion of these requirements, the Rule, like the 1988 regulations, imposes restrictions on the list of providers that may be given as part of a required referral for prenatal care for pregnant women. *See id.* at 7789 (§ 59.14(c)(2)). Because § 1008 only addresses abortion "as a method of family planning," the Rule permits referrals for abortion in cases of an "emergency," such as "an ectopic pregnancy." *Id.* (§ 59.14(b)(2), (e)(2)); *see also id.* at 7747 n.76 ("Similarly, in cases involving rape and/or incest, it would not be considered a violation of the prohibition on referral for abortion as a method of family planning if a patient is provided a referral to a licensed, qualified, comprehensive health service provider who also provides abortion . . . .").

The Rule is less restrictive than the 1988 regulations, however, in that it allows, but does not require, "[n]ondirective pregnancy counseling," (§ 59.14(b)(1)(i)), which may include the neutral presentation of information about abortion, provided it does "not encourage, promote or advocate abortion as a method of family planning." 84 Fed. Reg. at 7789 (§ 59.16(a)); *see id.* at 7745-46 (preamble). In the Rule's preamble, HHS explained that in nondirective counseling, "abortion must not be the only option presented" and providers "should discuss the possible risks and side effects to both mother and unborn child of any pregnancy option presented, consistent with the obligation of health care providers to provide patients with accurate information to inform their health care decisions." *Id.* at 7747. In the Department's view, such limited, nondirective counseling—"[u]nlike abortion referral"—"would not be considered encouragement, promotion, support, or advocacy of abortion as a method of family planning" in violation of § 1008. *Id.* at 7745.

Like the 1988 regulations, the Rule also requires that Title X projects remain physically separate from any abortion-related activities conducted outside the grant program. 84 Fed. Reg. at 7789 (§ 59.15). As the Secretary explained, "[i]f the collocation of a Title X clinic with an abortion clinic permits the abortion clinic to achieve economies of scale, the Title X project (and, thus, Title X funds) would be supporting abortion as a method of family planning." *Id.* at 7766. And because without physical separation "it is often difficult for patients, or the public, to know when or where Title X services end and non-Title X services involving abortion begin," the Secretary concluded that reinstating this requirement was necessary to avoid "the appearance and perception that Title X funds being used in a given program may also be supporting that program's abortion activities." *Id.* at 7764. Indeed, the Secretary's determination that "the 2000 regulations fostered an environment of ambiguity surrounding appropriate Title X activities" was only reinforced by "the many … public comments that argued Title X should support statutorily prohibited activities, such as abortion." *Id.* at 7721-22; *see id.* at 7728-30.

The Rule also contains a number of provisions that have little to do with § 1008, such as a requirement that Title X projects comply with state and local laws that mandate notification or

reporting of sexual abuse, 84 Fed. Reg. at 7790 (§ 59.17). Given the Rule's breadth, its preamble contains an express severability statement directing 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." *Id.* at 7725.

B. Procedural History

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 its 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 PI Mem.). The Court granted in part Plaintiffs' preliminary injunction motions on April 26, 2019. *See* Order Granting in Part and Denying in Part Plaintiffs' Mots. For Prelim. Inj., ECF No. 103 (PI Order).

The government appealed and sought a stay of the preliminary injunction from this Court and the Ninth Circuit. This Court denied the motion to stay the preliminary injunction on May 8, 2019, while somewhat narrowing the scope of its injunction. ECF No. 115.

A motions panel of the Ninth Circuit issued a unanimous per curiam order on June 20, 2019, staying the preliminary injunction pending appeal. *See California v. Azar*, 927 F.3d 1068 (9th Cir. 2019). It concluded that HHS is likely to prevail on the merits and that the equitable factors cut in the Department's favor. *Id*. at 1075-80. The panel emphasized that the Rule is "reasonable and in accord with § 1008," as confirmed by *Rust*. *Id.* at 1075. It rejected Plaintiffs' arguments that *Rust* no longer applies because of the appropriations rider and § 1554 of the ACA, explaining that "neither statute impliedly amended or repealed § 1008" or is incompatible with the Rule. *Id.* 1075-79. It also concluded that Plaintiffs are unlikely to succeed on their claim that the Rule is arbitrary and capricious. *Id.* at 1079-80.

Plaintiffs moved for *en banc* reconsideration of the panel's stay order, which was granted. *See California v. Azar*, No. 19-15974, Order (July 3, 2019). The *en banc* panel of the Ninth Circuit ordered that the motions panel decision not be cited as precedent, *id.*, though the *en banc* panel later issued an order stating that the panel's stay order had not been vacated, and denied the Plaintiffs' motions for an administrative stay of the stay order, *California v. Azar*, No. 19-15974, Order (July 11, 2019). The *en banc* panel is now in the process of rehearing the question of a stay of the preliminary injunction pending appeal.[3]

Pursuant to this Court's July 9, 2019 denial of Defendants' motion for a stay of proceedings pending appeal to the Ninth Circuit, and Rule 12(b)(6) of the Federal Rules of Civil Procedure, Defendants file the instant motion to dismiss Plaintiffs' suits.

ARGUMENT

To survive a Rule 12(b)(6) motion to dismiss, the plaintiffs' complaint must allege "enough facts to state a claim for relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). The "facial plausibility" standard requires the plaintiff to allege facts that add up to "more than a sheer possibility that a defendant has acted unlawfully." *Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009). In reviewing a Rule 12(b)(6) motion, this Court accepts as true all well-pleaded facts in the complaint, but is not required to accept "allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *In re Gilead Sci. Sec. Litig.*, 536 F.3d 1049, 1055 (9th Cir. 2008). Legal conclusions couched as factual allegations are not entitled to the assumption of truth, *Iqbal*, 556 U.S. at 680, and are therefore insufficient to defeat a motion to dismiss for failure to state a claim, *In re Cutera Sec. Litig.*, 610 F.3d 1103, 1108 (9th Cir. 2010).

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[3] The *en banc* court recently indicated that it would expeditiously issue a ruling on the merits of Defendants' motions to stay the preliminary injunction from this Court and the Courts in Oregon and Washington. Briefing on the appeals of the preliminary injunctions themselves has been completed, and the Ninth Circuit has indicated that oral argument will take place the week of September 23, 2019. Because the issues raised in this case are mostly if not entirely legal in nature, the Ninth Circuit is very likely to issue one or more decisions that will drastically narrow the issues in this case, if not dispose of the litigation entirely. Although Defendants appreciate that the Court denied their motion to stay proceedings, Defendants respectfully suggest that the Court may wish to hold this motion in abeyance for a brief period to await what is likely to be controlling guidance from the Ninth Circuit.

I. THE SUPREME COURT'S DECISION IN *RUST V. SULLIVAN* UPHELD MATERIALLY INDISTINGUISHABLE REGULATIONS.

In *Rust v. Sullivan*, the Supreme Court upheld regulations that implemented § 1008's prohibition on the use of Title X funds "in programs where abortion is a method of family planning," 42 U.S.C. § 300a-6, by "limit[ing] the ability of Title X fund recipients to engage in abortion-related activities" in multiple respects. 500 U.S. 173, 177-78 (1991). Those regulations "broadly prohibit[ed]" Title X projects from "engaging in activities that 'encourage, promote or advocate abortion as a method of family planning,'" and specifically proscribed them from providing either a "referral for," or "counseling concerning," abortion as a method of family planning, "even upon specific request." *Id.* at 179-80. Instead, because "Title X is limited to preconceptional services" and "does not furnish services related to childbirth," the regulations required the projects to "refer every pregnant client 'for appropriate prenatal and/or social services by furnishing a list of available providers that promote the welfare of mother and unborn child.'" *Id.* This list could "not be used indirectly to encourage or promote abortion," such as by (i) "weighing the list of referrals in favor of health care providers which perform abortions," (ii) "including on the list of referral providers health care providers whose principal business is the provision of abortions," (iii) "excluding available providers who do not provide abortions," or (iv) "steering clients to providers who offer abortion as a method of family planning." *Id.* at 180 (quotation marks omitted). Finally, all Title X projects were required to "be organized so that they are 'physically and financially separate' from prohibited abortion activities." *Id.*

The Supreme Court rejected the arguments that these regulations exceeded the Secretary's authority under Title X, were arbitrary and capricious, and violated the First and Fifth Amendments. *Rust*, 500 U.S. at 183-203. The Court first held that the regulations were "plainly allow[ed]" under the "broad directives provided by Congress in Title X in general and § 1008 in particular." 500 U.S. at 184; *see id.* at 184-90. As it observed, "to ensure that Title X funds would 'be used only to support *preventive* family planning services, population research, infertility services, and other related medical, informational, and educational activities,'" Congress mandated in § 1008 that "[n]one of the funds appropriated under this subchapter shall be used in programs

where abortion is a method of family planning." *Id.* at 178-79 (emphasis added). That "broad language" justified both the "ban on [abortion] counseling, referral, and advocacy within the Title X project," *id.* at 184, as well as the requirement "mandating separate facilities, personnel, and records," *id.* at 187.

The Secretary had concluded that if a program promotes, encourages, advocates, provides counseling concerning, or refers for abortion as a method of family planning, then the program is one "where abortion is a method of family planning." *See, e.g.*, 53 Fed. Reg. at 2923, 2933. The Supreme Court agreed that this is, at the very least, a "permissible construction" of § 1008, and rejected the argument that the restrictions were arbitrary and capricious. *See Rust*, 500 U.S. at 183, 186-87. The Court found that the Secretary provided a reasoned analysis for the restrictions, crediting the Secretary's explanation that this interpretation is "more in keeping with the original intent of the statute," even if it constituted a "sharp break from the Secretary's prior construction." *Id.* at 186-87; *see also id.* at 195 n.4 (recognizing "Congress' intent in Title X that federal funds not be used to 'promote or advocate' abortion as a method of family planning"). The Court also credited the Secretary's determination that "prior policy failed to implement properly the statute and that it was 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." *Id.* at 187 (quotation marks omitted).

The Court likewise held that "the Secretary's interpretation of the statute that separate facilities are necessary, expressly in light of the express prohibition of § 1008, cannot be judged unreasonable." *Rust*, 500 U.S. at 190. As the Secretary had explained, the collocation of Title X clinics and abortion clinics would result in the economic reality—or at least the public perception—of taxpayer dollars being used to subsidize abortion as a method of family planning. *See* 53 Fed. Reg. at 2940-41. The Supreme Court concluded that the physical-separation requirement was based on a "permissible construction of the statute," and it deferred to the Secretary's judgment that the requirement was needed to "assure that Title X grantees apply federal

funds only to federally authorized purposes and that grantees avoid creating the appearance that the Government is supporting abortion-related activities." *Rust*, 500 U.S. at 188.

More generally, the Supreme Court drew a clear distinction between impeding abortion and choosing not to subsidize it. *See Rust*, 500 U.S. at 192-203 (rejecting constitutional challenges). The Court first dismissed the objection that the 1988 regulations engaged in viewpoint discrimination by prohibiting "all discussion about abortion as a lawful option … while compelling the clinic or counselor to provide information that promotes continuing a pregnancy to term.'" *Id.* at 192. As the Court explained, the government may "selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way." *Id.* at 192-93. Here, the Secretary had permissibly chosen "to subsidize family planning services which will lead to conception and childbirth," while "declining to 'promote or encourage abortion'" through taxpayer dollars, in a congressionally created program that excluded "abortion as a method of family planning." *Id.* at 193.

Nor, in the Court's judgment, did the regulations "significantly impinge upon the doctor-patient relationship." *Rust*, 500 U.S. at 200. Although the principal dissent insisted that "the legitimate expectations of the patient and the ethical responsibilities of the medical profession demand" that Title X providers furnish their patients "with the full range of information and options regarding their health and reproductive freedom[,] … includ[ing] the abortion option," *id.* at 213-14 (Blackmun, J., dissenting), the majority took a different view. As it explained, the doctor-patient relationship in a Title X project is not "sufficiently all encompassing so as to justify an expectation on the part of the patient of comprehensive medical advice," and hence "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." *Id.* at 200 (majority opinion). Nor did the regulations "require[] a doctor to represent as his own any opinion that he does not in fact hold," as he "is always free to make clear that advice regarding abortion is simply beyond the

scope of the program." *Id.* "In these circumstances," the Court concluded, "the general rule that the Government may choose not to subsidize speech applies with full force." *Id.*

Finally, the Supreme Court held that the "mere decision to exclude abortion-related services from a federally funded *preconceptional* family planning program" could not "impermissibly burden" a woman's right to obtain an abortion. *Rust*, 500 U.S. at 201-02. As the Court explained, "[t]he Government has no constitutional duty to subsidize an activity merely because the activity is constitutionally protected," and thus instead "may validly choose to fund childbirth over abortion." *Id.* at 201. Although "[i]t would undoubtedly be easier for a woman seeking an abortion if she could receive" abortion-related services "from a Title X project," there is no constitutional requirement that "the Government distort the scope of its mandated program" to provide them. *Id.* at 203. "The difficulty that a woman encounters when a Title X project does not provide abortion counseling or referral," for instance, "leaves her in no different position than she would have been if the Government had not enacted Title X." *Id.* at 202. And that was true notwithstanding the claim that "most Title X clients are effectively precluded by indigency and poverty from seeing a health-care provider who will provide abortion-related services," as "even these Title X clients are in no worse position than if Congress had never enacted Title X." *Id.* at 203.

The 1988 regulations upheld by the Supreme Court are materially indistinguishable from—or even more restrictive than—the regulations challenged here. Both prohibit Title X projects from referring pregnant women for—or otherwise encouraging, promoting, or advocating—abortions as a method of family planning, even upon specific request. *Compare Rust*, 500 U.S. at 180, *with* 84 Fed. Reg. at 7788-90 (§§ 59.14(a), 59.16(a)). Both require Title X projects to refer a pregnant woman out of the Title X program for prenatal care. *Compare Rust*, 500 U.S. at 179-80, *with* 84 Fed. Reg. at 7789 (§ 59.14(b)(1)). Both place restrictions on the list of providers given as part of such referral to prevent Title X projects from steering women toward abortion. *Compare Rust*, 500 U.S. at 180, *with* 84 Fed. Reg. at 7789 (§ 59.14(c)). And both mandate that Title X projects remain physically separate from prohibited abortion activities. *Compare Rust*, 500 U.S.

at 180, *with* 84 Fed. Reg. at 7789 (§ 59.15). In fact, the Rule is less restrictive than the 1988 regulations—which prohibited any counseling on abortion as a method of family planning—in that it permits, but does not require, nondirective pregnancy counseling that may include the neutral presentation of information about abortion, so long as the counseling does not encourage or promote that procedure. *Compare Rust*, 500 U.S. at 179, *with* 84 Fed. Reg. at 7789 (§ 59.14(b)(1)(i)); *id.* at 7745-46.

None of this is disputed. The relevant statutory text has not changed. And rather than overrule *Rust* (or even call it into question), the Supreme Court has repeatedly reaffirmed it. *See, e.g.*, *Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2246 (2015); *Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l, Inc.*, 570 U.S. 205, 216-17 (2013). The Secretary therefore acted lawfully in effectively reinstating regulations already upheld by the Supreme Court, and Plaintiffs' suits should be dismissed.

II. PLAINTIFFS' STATUTORY AUTHORITY CLAIMS LACK MERIT.

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

Since its enactment, the Title X statute has broadly mandated in § 1008 that "[n]one of the funds appropriated under this subchapter shall be used in programs where abortion is a method of family planning." 42 U.S.C. § 300a-6. As the Secretary explained, if a program refers patients for—or otherwise promotes, encourages, or advocates—abortion as a method of family planning, then the program, by definition, is one "where abortion is a method of family planning." 84 Fed. Reg. at 7759. The Supreme Court agreed that this is, at the very least, a "permissible construction"; indeed, it is by far the better interpretation of the plain text of § 1008, and the Court itself credited HHS's explanation that this reading is "more in keeping with the original intent of the statute." *Rust*, 500 U.S. at 187.

Plaintiffs do not provide an alternative interpretation of § 1008, under which a program that makes referrals for or otherwise promotes or encourages abortion is not a program "where abortion is a method of family planning." 42 U.S.C. § 300a-6. Instead, Plaintiffs attempt to sidestep the text of § 1008 and the Supreme Court's decision in *Rust* by concluding that the

Secretary's restrictions on abortion referrals and counseling are no longer permissible in light of a clause in an appropriations rider.

That provision—which does not mention abortion, § 1008, referrals, advocacy, or *Rust*—did not silently eliminate Title X's authorization for these funding conditions. Plaintiffs' contrary conclusion cannot be squared with either the text of the rider or the presumption against implied repeals, which requires a "clear and manifest" intent to repeal a statute, *National Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 663 (2007), and "applies with even *greater* force when the claimed repeal rests solely on an Appropriations Act," *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 190 (1978). There is no indication that Congress had any intent—much less a "clear and manifest" one—to eliminate HHS's statutory authorization for these regulations through an appropriations rider that provides that Title X funds "shall not be expended for abortions" and that "all pregnancy counseling shall be nondirective." Pub. L. No. 115-245, div. B., tit. II, 132 Stat. at 3070-71.

Start with the prohibition on abortion referrals. By definition, a doctor's *failure* to refer a patient for an abortion does not *direct* the patient to do anything. As this Court pointed out in its prior Order, PI Order at 33-34, the Rule requires that patients be referred for prenatal health care. However, the existence of that separate requirement does not somehow render "directive" the mere prohibition of abortion referrals. This is especially true given that the prenatal-referral requirement is severable from the abortion-referral prohibition. *See* 84 Fed. Reg. at 7725. But there is no need to sever anything, because a prenatal-care referral likewise does not "direct" a patient to forgo obtaining an abortion—such care is necessary for the health of the mother *while* she is pregnant, as she by definition is at the time of the referral, regardless of whether she *later* chooses to obtain an abortion outside the auspices of Title X. *See, e.g.*, *id.* at 7748, 7761-62; *see also id.* at 7750 (explaining that because "pregnancy may stress and affect extant health conditions," "comprehensive primary health care may be critical to ensure that pregnancy does not negatively impact such conditions"). Similarly, the restrictions on the list of providers are consistent with—and further—the nondirective provision by ensuring that the list is not used to "steer clients to

abortion or to specific providers because those providers offer abortion as a method of family planning." *Id.* at 7747. The Secretary's authority to prohibit Title X projects from directly referring clients for an abortion as a method of family planning necessarily also includes the authority to take steps to prevent them from doing so indirectly.

In any event, the nondirective provision is limited to "pregnancy counseling," a term that does not apply to referrals, let alone with sufficient clarity to repeal § 1008 by implication. In this program and in general, counseling and referrals are distinct. "[P]regnancy counseling" involves providing information about medical options, which is different from referring a patient to a specific doctor for a specific form of medical care. *See, e.g.*, 84 Fed. Reg. at 7716.

That much is clear from Congress's own words on the subject. When Congress wishes to regulate both "counseling" and "referrals" in this area, it knows how to do so. *See, e.g.*, 42 U.S.C. § 300z-10 ("Grants or payments may be made only to programs or projects which do not provide abortions or *abortion counseling or referral*.") (emphasis added); 18 U.S.C. § 248(e)(5) ("The term 'reproductive health services' . . . includes . . . *counselling or referral* services relating to the human reproductive system, including services relating to *pregnancy or the termination of a pregnancy*.") (emphases added).[4] Most notably, when Congress tried (and failed) to overturn *Rust* through the Family Planning Amendments Act, it used language expressly requiring Title X projects to include "termination of pregnancy" within their "nondirective counseling and referrals." *See* S. 323, 102d Cong. § 2 (1991). The appropriations rider later passed in 1996, by contrast, requires only that "pregnancy counseling" be nondirective and says nothing about "referrals," much less referrals for "termination of pregnancy" (or "abortion") specifically.

For its part, HHS has similarly used "counseling" and "referral" as distinct terms in guidance and regulations concerning the limits of Title X funds on abortion-related activities. For example, both its 1981 guidelines and the 2000 regulations used the same formulation as the vetoed

[4] *See also, e.g.*, 42 U.S.C. § 300z-1(a)(4)(B) (defining "necessary services" to include "adoption counseling and referral services") *id.* § 1395w–22(j)(3)(B) (conscience exemption for coverage of "counseling or referral" services through Medicare Advantage managed care plans); *id.* § 1396u–2(b)(3) (same with respect to Medicaid managed care plans).

Family Planning Amendments Act: Title X projects were required to provide "nondirective counseling"—including on "[p]regnancy termination"—"and referral upon request." 65 Fed. Reg. at 41,279 (§ 59.5(a)(5)); *accord* 1981 Guidelines § 8.6; *see also* 53 Fed. Reg. at 2923 (explaining that the 1981 guidelines required providers to furnish "nondirective 'options couns[e]ling'"—including "on pregnancy termination (abortion)"—"followed by referral for these services if [the woman] so requests"). And when HHS eliminated the prohibition on abortion referrals in the 2000 regulations, it viewed the appropriations rider as directly applying only to counseling, not to referrals. *Compare* 65 Fed. Reg. 41,273, *with id.* at 41,275. If it were actually "clear and manifest" that Congress had repealed Title X's authorization to prohibit abortion referrals through the appropriations rider, *Home Builders*, 551 U.S. at 663, then presumably the Department would have said as much in 2000. Instead, HHS responded to the argument that suspension of the 1988 regulations was unlawful by explaining that those regulations were "a permissible interpretation of the statute," but in the agency's view, "not the only permissible interpretation of the statute." 65 Fed. Reg. at 41,277. Instead, "the crucial difference between" the 1988 regulations and the 2000 regulations was "one of experience." *Id.* at 41,271. Despite discussing the directive in the appropriations rider that any "pregnancy counseling in the Title X program be 'nondirective,'" *id.* at 41,273, HHS never concluded that this language required suspension of the 1988 regulations.

Although the Court rejected this distinction based on a provision of the Children's Health Act of 2000, 42 U.S.C. § 254c-6(a)(1), PI Order at 28, Defendants respectfully submit that the Court misinterpreted that statute. Section 254c-6(a)(1) requires the Secretary to make grants to "adoption organizations for the purpose of developing and implementing programs to train the designated staff of eligible health centers in providing adoption information and referrals to pregnant women on an equal basis with all other courses of action included in nondirective counseling to pregnant women." The Court read this as indicating that "referrals" are "included" in nondirective counseling, but the term "included" instead modifies the "other courses of action" potentially addressed in pregnancy counseling—namely, abortion or carrying to term. More fundamentally, contrary to the Court's interpretation, *see* PI Order at 29, a statement in the Rule's

preamble acknowledging that § 254c-6(a)(1) reflects a legislative intent that "adoption information and referrals be included as part of any nondirective counseling," 84 Fed. Reg. at 7733, has no bearing on whether Congress considered referrals to be *a type* of counseling (as opposed to something that merely may occur at the same time as counseling). *See* 42 C.F.R. § 59.14(b)(1) (nondirective pregnancy counseling may occur at the same time as prenatal referral).

Turning to the Rule's provision addressing counseling, this provision *allowing* Title X projects to provide "*nondirective* pregnancy counseling," 84 Fed. Reg. at 7789 (§ 59.14(b)(1)(i)) (emphasis added), is entirely consistent with the appropriation rider's requirement that "all pregnancy counseling shall be nondirective." The Court, however, took issue with the prohibition on promoting or encouraging abortion, reasoning that it "is likely to chill discussions of abortion and thus inhibits neutral and unbiased counseling." PI Order at 35. Yet, it is not clear how promoting or encouraging abortion could possibly be consistent with the nondirective counseling requirement itself, let alone with the dictates of § 1008.

In granting Plaintiffs' motions for a preliminary injunction, the Court concluded that, in requiring that pregnancy counseling be "nondirective," Congress also mandated that counseling on abortion be treated equally as counseling on carrying the child to term or adoption. But when Congress wants pregnancy options to be treated on an "equal basis," it knows how to say so. *See* 42 U.S.C. § 254c-6(a)(1) (requiring grants for programs for "to train the designated staff of eligible health centers in providing adoption information and referrals to pregnant women on an equal basis with all other courses of action included in nondirective counseling to pregnant women"). The same is true when Congress wishes nondirective counseling to address specific options, as confirmed by the vetoed Family Planning Amendments Act. *See* S. 323, 102nd Cong. § 2 (requiring "nondirective counseling and referral on request" regarding (A) "prenatal care and delivery"; (B) "infant care, foster care, or adoption services"; and (C) "pregnancy termination"). Here, Congress simply required that "all pregnancy counseling shall be nondirective," and that narrow directive does not require "equal" treatment between childbirth and abortions—particularly where Congress previously excluded "programs where abortion is a method of family planning"

from receiving funding, thus making clear that the Secretary has authority "to subsidize family planning services which will lead to conception and childbirth," while "declining to 'promote or encourage abortion'" through taxpayer dollars. *Rust*, 500 U.S. at 193.

Finally, if there were any doubt as to whether the appropriations rider implicitly and indirectly eliminated the Secretary's authority under Title X to issue the counseling and referral restrictions here, ordinary interpretive principles would make clear that it did not. Plaintiffs' claim rests on the remarkable conclusion that, in passing the appropriations rider, the 1996 Congress—the same Congress that passed the Coats-Snowe Amendment, barring governments from discriminating against providers that refuse, among other things, to refer for abortion, 42 U.S.C. § 238n—resurrected the vetoed Family Planning Amendments Act in different form, while simultaneously ordering that Title X funds "shall not be expended for abortions." Put differently, Congress would have needed to abrogate a high-profile Supreme Court decision; after it had tried and failed to do so expressly; in a clause that does not mention abortion, pregnancy, referrals, advocacy, § 1008, or *Rust*; and in a manner that was so subtle in effecting this transformational change that not even HHS recognized what had happened when it issued its 2000 regulations, concluding that it was permitted (but not required) to provide for abortion counseling and referrals.

Such a construction of the appropriations rider is implausible on its face and contrary to fundamental principles of statutory interpretation. Congress is presumed neither to implicitly repeal prior legislation—especially through appropriations riders—nor to "hide elephants in mouseholes," *Whitman v. American Trucking Association, Inc.* 531 U.S. 457, 468 (2001), yet, in granting Plaintiffs' preliminary injunction motions, the Court determined that the 1996 Congress did both. The far more likely explanation—suggested by the accompanying directive in the rider that Title X funds "shall not be expended for abortions"—is that the 1996 Congress was concerned about abuses that had occurred under the 1981 regulations, which HHS had essentially reinstated in 1993, and wanted to ensure that Title X projects did not use pregnancy counseling to push their clients toward abortion. *See* 53 Fed. Reg. at 2924 (noting that under the 1981 guidelines, "the practice o[f] nondirective counseling has been the subject of widespread abuse, with many

providers foregoing any balanced discussion of options in favor of pressuring women, particularly teenagers, into obtaining abortions").

Indeed, far from an attempt to abrogate *Rust*, the appropriations rider was a compromise measure offered in response to an effort to defund the Title X program—an effort driven in part by concerns that Title X clinics were pressuring teenagers to obtain abortions. *See* 141 Cong. Rec. H8248-62 (Aug. 2, 1995); *see also id.* at H8260 (Rep. Waldholtz) (relaying recent anecdote of a 16-year-old at a Planned Parenthood clinic). Accordingly, a sponsor of the rider promised that under this legislation, "not a penny of [Title X] funds can be used to provide abortion services" and "[c]ounselors in these programs may not suggest that a client choose abortion." *Id.* at H8250 (Rep. Greenwood). At a minimum, this history undercuts the notion that the appropriations rider was simply a variant of the Family Planning Amendments Act.

Rejecting this conclusion, the Court concluded that "*Rust* . . . held that HHS's 1988 rule was one permissible interpretation, not the only permissible interpretation." PI Order at 27 (citing *Rust*, 500 U.S. at 184). Respectfully, however, that reasoning acknowledges that, before 1996, Title X had at a minimum delegated authority to the Secretary to issue the regulations at issue. The Court nonetheless concluded that the appropriations rider had stripped that authority away. The congressional elimination of a statutory delegation of authority is by definition a repeal, whether that delegation was an explicit or implicit one. *See Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837, 844 (1984) (statutory ambiguity constitutes an "implicit" "legislative delegation to an agency"); *see also Home Builders*, 551 U.S. at 664 n.8 ("It does not matter whether [an] alteration is characterized as an amendment or a partial repeal. Every amendment of a statute effects a partial repeal to the extent that the new statutory command displaces earlier, inconsistent commands, and we have repeatedly recognized that implied amendments are no more favored than implied repeals." (collecting cases)). But there is no evidence that Congress intended to repeal or amend the Title X provision or the Supreme Court's interpretation of it in *Rust*. Accordingly, Plaintiffs' claim must fail.

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

Plaintiffs' claims based on section 1554 of the ACA fare no better. Captioned "Access to therapies" and located in the ACA's "Miscellaneous Provisions" subchapter, § 1554 provides that, "[n]otwithstanding any other provision of [the ACA]," the Secretary "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. Again, there is nothing in this language suggesting that Congress had any intent—let alone a "clear and manifest" one—to erase the Secretary's pre-existing authority to adopt regulations that are materially indistinguishable from (if not less restrictive than) the ones upheld in *Rust*.

At the outset, Plaintiffs have waived any challenge to the Rule under § 1554. It is settled that "a party's failure to make an argument before the administrative agency in comments on a proposed rule bar[s] it from raising that argument on judicial review." *Universal Health Servs., Inc. v. Thompson*, 363 F.3d 1013, 1019 (9th Cir. 2004). And it is undisputed that none of the 500,000-plus comments HHS received even invoked this statutory provision, much less argued that it eliminated the Department's authority to adopt requirements materially indistinguishable from ones upheld by the Supreme Court.

This Court previously concluded that Plaintiffs "have raised at least a serious question" as to waiver because "[t]he record suggests that commenters raised issues pertaining to Section 1554 with sufficient clarity to provide notice to HHS," PI Order at 37, even though "these comments did not explicitly reference Section 1554," *id.* at 38. Preservation, however, requires that the

"specific argument" advanced must "be raised before the agency, not merely the same general legal issue." *Koretoff v. Vilsack*, 707 F.3d 394, 398 (D.C. Cir. 2013) (per curiam).

The omission of any mention of § 1554 in the comments is unsurprising, as nothing in § 1554 abrogates Title X's authorization for the Rule. *See Rust*, 500 U.S. at 187. None of the Rule's provisions violates § 1554 because the Rule does not create, impede, interfere with, restrict, or violate anything. Instead, it simply limits what the government chooses to *fund* through the Title X grant program. As the Supreme Court explained in *Rust*, the Secretary's decision "to fund childbirth but not abortion 'places no governmental obstacle in the path of a woman who chooses to terminate her pregnancy,'" but simply "leaves her in no different position than she would have been if the Government had not enacted Title X." *Rust*, 500 U.S. at 201-02. And that is true even if "most Title X clients are effectively precluded by indigency and poverty from seeing a health-care provider who will provide abortion-related services" outside of the Title X program. *Id.* at 203. Although repackaged as a statutory argument, Plaintiffs' argument that the restrictions on referrals and counseling violate § 1554 is substantively the same as the constitutional arguments rejected in *Rust*.

For similar reasons, Defendants respectfully disagree with this Court's reasoning that the counseling and referral restrictions do not comport with providers' ethical obligations and therefore violate § 1554. *See* PI Order at 44-45. As Defendants explained, *Rust* upheld a nearly identical, but stricter, version of the counseling and referral restrictions, which it would not have done had the rule "required the violation of medical ethics, regulations concerning the practice of medicine, or malpractice liability standards." 84 Fed. Reg. at 7748. Indeed, in the face of a dissent arguing that the restrictions violated doctors' ethical responsibilities, *Rust*, 500 U.S. at 213-14 (Blackmun, J., dissenting), the Court explained that "[n]othing in [the regulations] requires a doctor to represent as his own any opinion that he does not in fact hold," *id.* at 200 (majority opinion). Given the limited nature of the program, the Court noted that the doctor-patient relationship in a Title X program is not "sufficiently all encompassing so as to justify an

expectation on the part of the patient of comprehensive medical advice." *Id.* And because Title X "does not provide post conception medical care . . . 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." *Id.* Regardless, a doctor "is always free to make clear that advice regarding abortion is simply beyond the scope of the program." *Id.* The present Rule gives providers that same option. *See* 42 C.F.R. § 59.14(e)(5) (provider may tell pregnant woman that "the project does not consider abortion a method of family planning and, therefore, does not refer for abortion"). And, even more, the Rule expressly allows providers to offer nondirective counseling on abortion specifically. *See id.* § 59.16(a).

HHS also explained that Congress presumes that not referring for or promoting abortion is consistent with medical ethics, as evidenced by the many federal conscience statutes giving medical providers (who likewise believe they are not violating medical ethics by not counseling or referring for abortion) that option. *See* 84 Fed. Reg. at 7748; *see also id.* at 7716 (discussing statutes), 7746-47 (same); 7780-81 (discussing medical providers with conscience objections to counseling on or referring for abortion). If a doctor's failure to refer for abortion is actually a violation of medical ethics, it is unclear why "[f]ederal and State conscience laws, in place since the early 1970s, have protected the ability of health care personnel to not assist or refer for abortions in the context of HHS funded or administered programs (or, under State law, more generally)." *Id.* at 7748. That view is entirely reasonable. Indeed, new Title X grantees that provide family planning services recently challenged the abortion-referral requirement in the 2000 regulations on the basis of statutory and constitutional protections for religious beliefs. *See Obria Group, Inc. v. HHS*, No. 19-905 (C.D. Cal.) (voluntarily dismissed June 13, 2019); *Vita Nuova, Inc. v. Azar*, No. 19-532 (N.D. Tex.) (filed July 3, 2019).

Again, even if this were a closer question, settled rules of statutory construction would dispose of Plaintiffs' theory. If Title X's specific delegation of authority to the Secretary to adopt the Rule somehow conflicted with the general directives in § 1554, "[i]t is a commonplace of

statutory construction that the specific governs the general." *NLRB v. SW Gen., Inc.*, 137 S. Ct. 929, 941 (2017). And more fundamentally, it is implausible that Congress tucked away an implied repeal of Title X's authorization for the Rule (and a silent abrogation of a high-profile Supreme Court precedent) in the mousehole of § 1554. *See supra* Pt. I.B.1.a.iii. That is particularly true given that § 1554 applies "[n]otwithstanding any other provision of *this Act*," 42 U.S.C. § 18114 (emphasis added), signaling that this provision may implicitly displace otherwise-applicable provisions *in the ACA*. That language does not, however, indicate that Congress meant to implicitly repeal *other, pre-existing statutes* such as § 1008 of the PHSA, especially since the ACA is littered with "notwithstanding" clauses that use the common phrase "notwithstanding any other provision of law." *E.g.*, 42 U.S.C. § 18032(d)(3)(D)(i); *see Family Planning Ass'n of Maine v. U.S. Dep't of Health & Human Servs.*, No. 1:19-cv-00100-LEW, 2019 WL 2866832, at *17 (D. Me. July 3, 2019); *see also Digital Realty Tr., Inc. v. Somers*, 138 S. Ct. 767, 777 (2018) ("When Congress includes particular language in one section of a statute but omits it in another, this Court presumes that Congress intended a difference in meaning." (cleaned up)). And had Congress taken the dramatic step of implicitly repealing a controversial aspect of Title X in § 1554, one would expect that at least one of the more than 500,000 comments on the proposed Rule would have mentioned it.

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

California contends that the Rule "exceeds Defendants' authority under the Title X statute, which requires that grants for Title X programs 'shall offer a broad range of acceptable and effective family planning methods and services' and a 'comprehensive program of family planning services.'" Cal. Compl. ¶ 214 (quoting 42 U.S.C. §§ 300(a), 300a(a)). But none of the provisions California quotes mentions abortion, and all of them predate *Rust*, which held that the Secretary's physical and financial separation requirements, as well as the abortion counseling, referral, and advocacy restrictions, were permissible under Title X. *See supra* Part I. California's argument consequently fails.

In its preliminary injunction motion, California also briefly referenced "[o]ther aspects of the Final Rule" that it believes "run counter to Congressional language and purpose," Cal. PI Mem. at 14, specifically, (1) the provision prohibiting the use of Title X funds to "build infrastructure for purposes prohibited with these funds, such as support for the abortion business of a Title X grantee or subrecipient," 42 C.F.R. § 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 family planning methods 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. With respect to the other two modest changes, California does not attempt to explain how they "directly contradict[] Title X's purposes," Cal PI Mem. at 14, and—of course—they do not. As discussed below, HHS cogently explained each of these provisions in the Final Rule.

III. 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—for the reasons Defendants previously explained in response to Plaintiffs' preliminary injunction motions, *see* PI Opp'n at 24-34, and for the additional reasons discussed below. This Court should therefore dismiss Plaintiffs' APA claims.

Defendants respectfully submit that, in granting Plaintiffs' motions for a preliminary injunction, the Court incorrectly concluded that HHS's reliance on the fact that the abortion-referral requirement in the 2000 regulations violated federal conscience laws did not justify the referral restrictions and prohibition on promoting abortion. The agency merely relied on these statutes as a reason the Rule "does not *require* Title X projects to provide any nondirective counseling, information, or referral for abortion." 84 Fed. Reg. at 7746 (emphasis added). The agency's reason for prohibiting abortion referrals was, in fact, based on the best reading of § 1008—which is that a program that refers patients for abortion as a method of family planning or otherwise promotes, encourages, or advocates for abortion as a method of family planning is a program "where abortion is a method of family planning." *See id.*

The physical-separation requirement likewise is not arbitrary and capricious, and Plaintiffs' argument to the contrary is in significant tension with *Rust*. 500 U.S. at 187. This Court discounted HHS's determination that physical separation was necessary to address the risk and perception that taxpayer funds will be used to fund abortion—the same rationale approved in *Rust*—as "speculative" and failed to credit the evidence provided by HHS. PI Order at 49. Respectfully, the Court's analysis is not responsive to HHS's reasoning, which was that the prior regulations "failed to implement properly *the statute*." 500 U.S. at 187 (emphasis added). This reasoning was accepted in *Rust* and should be accepted here as well. *See Arent v. Shalala*, 70 F.3d 610, 616 (D.C. Cir. 1995 (citing *Rust* as an example of a situation in which "what is permissible under *Chevron* is also reasonable under *State Farm*").

Rust held that HHS's predictive judgment about how best to comply with § 1008 was a reasonable basis for the same requirement, 500 U.S. at 187. As in *Rust*, HHS justified its policy with the explanation that the prior regulations "failed to implement properly the statute." *Id.* And

HHS amply discussed and considered the reliance interests, comments received, and the previous approaches, ultimately "reaffirm[ing the] reasoned determination" it made in 1988. 84 Fed. Reg. at 7724. While Plaintiffs may not agree with HHS's conclusion that subsidizing abortion through collocation of Title X clinics and abortion clinics would violate § 1008, Plaintiffs cannot demonstrate that HHS's conclusion that physical collocation would impermissibly subsidize abortion was arbitrary and capricious, *see* 84 Fed. Reg. at 7764.

Defendants disagree with this Court's prior conclusion that a more detailed justification for reinstating the physical-separation requirement was necessary in light of engendered reliance interests. PI Order at 47-57. The conclusion that physical separation was necessary to prevent the use of Title X funds for abortion was a conclusion affirmed in *Rust* and adequately explained in the Rule. *See International Rehab. Sciences Inc. v. Sebelius*, 688 F.3d 994, 1001 (9th Cir. 2012) ("change[s] in policy" are permissible so long as the agency provides a rational explanation) (emphasis omitted). And HHS adequately considered possible reliance interests, including the Rule's likely effect on incumbent Title X providers and patients, *see* 84 Fed. Reg. at 7780-82. *See also id.* at 7766 (predicting that "overall, the final rule will contribute to more clients being served, gaps in services being closed, and improved client care that better focuses on the family planning mission of the Title X program"); *see also id.* (noting that "[c]ommenters' insistence that requiring physical and financial separation would increase the cost of doing business only confirms the need for such separation" to avoid "supporting abortion as a method of family planning").

The Court also erred in concluding that the Rule is arbitrary and capricious because HHS underestimated the compliance costs for incumbent Title X grantees, crediting Plaintiffs' own predictions of the effect on the Title X network instead. PI Order 59-60. HHS, which administers the Title X program, is best situated to consider the potential effects on that program, and expressly did so, considering the compliance costs on providers and the possibility that some incumbent providers might withdraw from the program. HHS simply made a different judgment than plaintiffs, which it of course was permitted to do. *See Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) ("The scope of review under the 'arbitrary

1 and capricious' standard is narrow and a court is not to substitute its judgment for that of the
2 agency.").
3 In particular, HHS considered the assertion of commenters that some providers may
4 withdraw from Title X, but predicted that the Rule may encourage new providers, previously
5 deterred from participating in the program by the abortion-referral requirement in the 2000
6 regulations, to enter the program. *See* 84 Fed. Reg. at 7780. As HHS explained, it "expects that
7 honoring statutory protections of conscience in Title X may increase the number of providers in
8 the program," *id.*, and it pointed to data showing that a substantial number of medical
9 professionals—and especially those "who work full-time serving poor and medically-underserved
10 populations"—would limit the scope of their practice if conscience protections were not put in
11 place, *id.* at 7781 n.139. Indeed, soon after the district court enjoined the Rule, new providers filed
12 suit to enjoin the 2000 regulations out of a desire to participate in the Title X program. *See Obria*,
13 No. 19-905 (C.D. Cal.); *Vita Nuova*, No. 19-532 (N.D. Tex.). Accordingly, HHS reasonably did
14 not "anticipate that there will be a decrease in the overall number of facilities offering services."
15 84 Fed. Reg. at 7782.
16 Nothing in the APA requires an agency to defer to the views of any particular commenter
17 over the agency's own views. Rather, the agency must consider significant comments and provide
18 a reasoned response. *See Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1203 (2015). Having
19 considered the Rule's effects on incumbent Title X providers, HHS concluded that the Rule was
20 necessary to comply with Title X, notwithstanding those predicted costs. That decision was not
21 arbitrary and capricious simply because Plaintiffs disagree with HHS's predictive judgments or
22 ultimate conclusion that the benefits outweighed the costs. To the contrary, an agency's predictive
23 judgments "are entitled to particularly deferential review." *Trout Unlimited v. Lohn*, 559 F.3d 946,
24 959 (9th Cir. 2009); *see also BNSF Ry. Co. v. Surface Transp. Bd.*, 526 F.3d 770, 781 (D.C. Cir.
25 2008) (Kavanaugh, J.) ("We owe substantial deference to an agency's predictive judgments.")
26 (cleaned up). And in any event, the district court cited no authority for the extraordinary
27
28

proposition that an agency administering a competitive grant program must either accede to the wishes of a subset of current grantees or identify in advance those entities who will take their place.

Finally, the Court was incorrect to conclude that other provisions of the Rule are arbitrary and capricious: (1) the provision requiring that pregnancy counseling be provided by medical professionals who are licensed with a relevant graduate degree (including physician assistants and nurse practitioners), 84 Fed. Reg. at 7787-89 (§§ 59.2, 59.14(b)(i)); (2) the elimination of the confusing and redundant requirement that family planning methods and services be "medically approved" (in favor of the statutory requirement that they be "acceptable and effective"), *id.* at 7787 (§ 59.5(a)(1)); and (3) the cost-benefit analysis performed under Executive Order 12866. *See* PI Order at 64-74. In each instance, the Court rejected HHS's stated rationale by dismissing it as unexplained, unreasoned, or unsupported, when the Court simply disagreed with HHS's reasons and conclusions. HHS, however, articulated its reasons, explicitly considered and responded to contrary views, yet adopted a different approach and explained its reasons for doing so. *See* 84 Fed. Reg. at 7728 n.41 (categories of healthcare professionals permitted to give non-directive counseling); *id.* at 7741 & n.70 (removal of "medically approved" requirement); *id.* at 7732, 7740-7741 (same); *id.* at 7775 (cost-benefit analysis). HHS, therefore, acted reasonably.

For all the reasons above, and for the reasons Defendants explained in their opposition to Plaintiffs' motions for preliminary injunctions, Plaintiffs cannot prevail on their claim that HHS acted arbitrarily or capriciously.

IV. ESSENTIAL ACCESS'S NOTICE-AND-COMMENT CLAIM IS MERITLESS.

Essential Access claims that the NPRM provided no notice with respect to two of the Rule's provisions. *See* Compl. ¶¶ 211-15; EA Mem. at 19-21. This Court already concluded that Essential Access is unlikely to prevail on this claim, *see* PI Order at 74, and the Court should now dismiss it for the same reasons. A "final regulation that varies from the proposal, even substantially, will be valid as long as it is 'in character with the original proposal and a logical outgrowth of the notice and comments.'" *Hodge v. Dalton*, 107 F.3d 705, 712 (9th Cir. 1997) (citation omitted). To determine whether notice was adequate, courts ask whether a complaining

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party should have anticipated that a particular requirement might be imposed, and whether a new round of notice and comment would provide the first opportunity for interested parties to offer comments that could persuade the agency to modify its rule. *Envt'l Def. Ctr. v. EPA*, 344 F.3d 832, 851 (9th Cir. 2003). Plaintiffs received sufficient notice under this standard.

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

Second, any claim of inadequate notice with respect to the requirement that nondirective pregnancy counseling come from physicians or APPs cannot be sustained. EA PI Mem. at 20. As Defendants have explained, the question of which types of providers and/or staff may engage with and provide information to patients was presented, HHS received comments objecting to those proposed restrictions, and HHS adopted a *less restrictive* approach in response. *See* PI Opp'n at 33.

V. PLAINTIFFS CANNOT PREVAIL ON THEIR CONSTITUTIONAL CLAIMS.

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. Essential Access nevertheless claims that the Rule both violates Dr. Marshall's First Amendment rights and is unconstitutionally vague, and California claims that the Rule violates the Due Process Clause of the Fifth Amendment. These constitutional arguments fail.

A. 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 PI Mem. at 21; *see also* EA Compl. ¶¶ 216-22. This claim is foreclosed by *Rust*.

In *Rust*, the Supreme Court expressly considered 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 PI 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 v. American Federation of State, County, & Municipal Employees*, 138 S. Ct. 2448 (2018)—calls *Rust* into question. EA PI 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."). Dr. Marshall's First Amendment claim must be dismissed.

B. Essential Access's Vagueness Claim Lacks Merit.

Essential Access also cannot prevail on its claim that the Rule is unconstitutionally vague. *See* EA Compl. ¶¶ 223-26; EA PI 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. *See* EA PI 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.[5] Thus, even if the Rule, in hypothetical applications, could possibly give rise to borderline situations, that does not render it impermissibly vague as a facial matter.

[5] HHS specifies in the preamble that contacting it about how to implement the program in compliance with the Rule is encouraged. *See* 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.

In any event, the Rule does provide guidance on the hypothetical applications raised by Plaintiffs. *See* EA PI 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 PI Mem. at 23.[6]

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 places her life in imminent peril to a provider of abortions or abortion-related services[,]" and

[6] 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.

explained that "we do not read the regulations to bar abortion referral or counseling in such circumstances." 500 U.S. at 195.

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

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

C. California's Due Process Claim Lacks Merit.

The Court should also dismiss California's claim that the Rule violates the Due Process Clause's equal protection guarantee. When faced with a claim of discrimination on the basis of sex, courts assess (i) whether the classification is facially based upon sex and, if not, (ii) whether there are other factors—such as the purpose of the law or the existence of a disparate impact—that demonstrate an invidious intent to discriminate on the basis of sex. *See Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 274 (1979). With regard to "this second inquiry, impact provides an important starting point, but purposeful discrimination is the condition that offends the Constitution." *Id.* (citations omitted). Sex-based distinctions are subject to intermediate scrutiny, meaning that the distinction must be substantially related to an important governmental interest. *Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142, 150 (1980). All other distinctions that do not target a protected class or burden a fundamental right are subject to rational-basis review. *Heller v. Doe*, 509 U.S. 312, 319–20 (1993). Under this standard, "a classification must be upheld . . . if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *Id.* at 320 (citation omitted).

California contends that the Rule is unlawful because it "specifically targets and harms women." Cal. Compl. ¶ 223. But the Rule does not discriminate on the basis of sex, facially or otherwise. The Rule imposes certain requirements on the receipt of federal funds through the Title X grant program, consistent with § 1008. Thus, the Rule does not treat men more favorably, and, indeed, there are no sex-based distinctions in the Rule at all. To the degree California's argument is that women will be disproportionately affected by the Rule—that flows from the fact that the challenged Rule relates to abortion and only women can become pregnant. If the challenged Rule constituted sex discrimination for those reasons, then every statute or regulation touching abortion—including the regulations at issue in *Rust*—would discrimination against (or in favor of) women. But that is not the law.

In *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263 (1993), the Supreme Court explained that "the constitutional test applicable to government abortion-funding restrictions is not

the heightened-scrutiny standard that our cases demand for sex-based discrimination, but the ordinary rationality standard." *Id.* at 273 (citations omitted); *see also id.* at 272-73 ("[O]ur cases deal specifically with the disfavoring of abortion, and establish conclusively that it is not *ipso facto* sex discrimination."). Accordingly, rational basis review is the appropriate test, and the Rule easily clears that low hurdle. It satisfies this "lowest level of scrutiny," *United States v. Dumas*, 64 F.3d 1427, 1429 (9th Cir. 1995), because it is rationally related to legitimate government interests, *Lyng v. Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am., UAW*, 485 U.S. 360, 370 (1988). Indeed, avoiding the use of federal funds to promote or encourage abortion is an important government interest, as the Supreme Court recognized in *Rust*, 500 U.S. at. 192-93. For the same reasons, and given the important government interest at stake, the Rule would also satisfy intermediate scrutiny if it were to apply.

CONCLUSION

For the foregoing reasons, the Court should dismiss these suits.

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CERTIFICATE OF SERVICE

I hereby certify that on July 30, 2019, I electronically filed the foregoing document with the Clerk of the Court, using the CM/ECF system, which will send notification of such filing to the counsel of record in this matter who are registered on the CM/ECF system.

/s/ Bradley P. Humphreys
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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

RELATED TO

Case No.: 3:19-cv-01195-EMC

[PROPOSED] ORDER

ESSENTIAL ACCESS HEALTH, INC.;
MELISSA MARSHALL, M.D.,

Plaintiffs,

v.

ALEX AZAR II, Secretary of U.S. Department of Health and Human Services; U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES; DOES 1-25,

Defendants.

The Court, having considered Defendants' motion to dismiss, Plaintiffs' oppositions, and the entire record in these related cases, hereby orders as follows:

IT IS HEREBY ORDERED that Defendants' motion is GRANTED. Plaintiffs' complaints in these related cases are hereby dismissed with prejudice.

IT IS SO ORDERED.

Dated:

The Honorable Edward M. Chen
United States District Judge