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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

STATE OF CALIFORNIA, by and through ATTORNEY GENERAL XAVIER BECERRA,

Plaintiff,

v.

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

CALIFORNIA'S OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

Date: October 10, 2019
Time: 1:30 p.m.
Dept: Courtroom 5, 17th floor
Judge: Hon. Edward M. Chen

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INTRODUCTION

As the Court is well aware, this case involves Defendants the U.S. Department of Health and Human Services and Secretary Alex Azar's attempt to gut the delivery of services under Title X of the Public Health Service Act, the nation's sole federal program devoted to supporting family planning services. Before Defendants' Rule took effect, Title X made vital preventive reproductive healthcare available to four million low-income patients nationwide, one million of whom were California residents. For decades, well-established Title X regulations and guidance permitted grantees to provide pregnant women with neutral, comprehensive, and medically appropriate counseling and referrals, without contravening the statutory prohibition on use of federal funds for "programs where abortion is a method of family planning." 42 U.S.C. § 300a-6. Despite years of reliance on these rules by grantees and patients, Defendants issued a new Rule that would prevent healthcare providers from giving unbiased, factual information about reproductive care (including abortion) and would require a rigid separation between Title X-funded programs and any program that does provide this information.

Plaintiff the State of California, alongside Essential Access Health, the nonprofit organization that is California's primary Title X grantee, immediately challenged the Rule. After comprehensive briefing of the legal issues, review of the substantial evidence in the record regarding the harm that would be caused by the Rule, and oral argument upon the Plaintiffs' motions, the Court issued a preliminary injunction blocking Defendants from implementing the Rule. Dkt. No. 103, *California v. Azar*, 385 F. Supp.3d 960 (N.D. Cal. 2019) ("PI Order"). As described in more detail in Section IV below, a Ninth Circuit motions panel stayed the PI Order (as well as similar orders issued by district courts in Oregon and Washington), but the court granted rehearing en banc, directing that the motions panel's opinion not be cited as precedent to any court in the Ninth Circuit. The en banc court has scheduled oral argument regarding the stay order for the week of September 23, 2019. Defendants' underlying appeal of the PI Order is fully briefed and remains pending before the Ninth Circuit.

Defendants' motion to dismiss asks this Court to revisit arguments that it has already (correctly) rejected in its PI order. A motion to dismiss is only granted if the complaint's factual allegations do not support a "cognizable legal theory." *Hartmann v. Cal. Dep't of Corr. & Rehab.*, 707 F.3d 1114, 1122 (9th Cir. 2013). Defendants fail to—and cannot—meet that standard. Finally, many of Defendants' arguments challenge this Court's factual findings. Such arguments are inappropriate at the motion to dismiss stage because they involve disputed issues of fact that *cannot* be resolved on a motion to dismiss.

On the merits, Defendants' arguments fail because California has not only asserted "cognizable" legal theories challenging Defendants' Title X Rule, but has demonstrated that it is likely to succeed on those theories, as this Court already concluded. Defendants primarily rely on *Rust v. Sullivan*, 500 U.S. 173 (1991), as justification for their Rule and to defend the lawfulness of their Rule. But, as this Court observed, Congress has foreclosed Defendants' approach by promulgating two statutes postdating the Supreme Court's opinion in *Rust*. PI Order at 26-46. Since 1996, Congress has mandated that all Title X pregnancy counseling "shall be nondirective." That language means what it says: Title X counseling may not direct patients toward or away from any option, be it abortion or childbirth. Congress also enacted Section 1554 of the Affordable Care Act, which prohibits the Secretary from promulgating any regulation that (among other things) interferes with provider–patient communications or impedes access to care. Congress has mandated that Title X counseling focus on the patient's preferences, not those of the Executive Branch. In issuing a preliminary injunction blocking enforcement of the Rule, this Court properly concluded that Defendants likely violated the Administrative Procedure Act (APA) by proceeding in a manner contrary to law, and by failing to adequately explain its abrupt departure from its prior Title X regulations.

Under these circumstances, this Court must deny Defendants' motion to dismiss.

LEGAL AND FACTUAL BACKGROUND

I. LEGAL BACKGROUND

Congress created the Title X program in 1970 to provide support for "voluntary family planning projects which shall offer a broad range of acceptable and effective family planning

methods and services." 42 U.S.C. § 300(a). Section 1008 of Title X prohibits the funding of "programs where abortion is a method of family planning." *Id.* § 300a-6. HHS initially construed this language to allow Title X providers to give neutral, unbiased counseling to pregnant women about their options, including referrals to other providers for prenatal care, adoption, or abortion, so long as no program funds were used for abortions. *See* PI Order at 4; *see also Nat'l Family Planning & Reprod. Health Ass'n, Inc., v. Sullivan*, 979 F.2d 227, 229 (D.C. Cir. 1992) (noting that agency memoranda from the 1970s distinguished between permissible nondirective counseling on abortion and impermissible "directive" counseling). HHS's 1981 regulations required Title X providers to offer pregnant women nondirective options counseling on "pregnancy termination (abortion), prenatal care, and adoption and foster care" followed by referral for these services if requested. 53 Fed. Reg. 2922, 2923 (Feb. 2, 1988).

In 1988, HHS issued new regulations banning Title X programs from providing any type of counseling to pregnant women regarding abortion, including referrals—even in response to a patient request. 42 C.F.R. § 59.8(a)(1) (1989). The regulations also instituted strict physical and financial separation between Title X-funded projects and any activities related to abortion outside of the Title X program. *Id.* § 59.9. The Supreme Court considered the legality of these 1988 regulations in *Rust v. Sullivan*, 500 U.S. 173 (1991). The Court examined the text and legislative history of Title X and determined that the scope of Section 1008's prohibition on "abortion [as] a method of family planning" was ambiguous and that Congress had not spoken "directly to the issues of counseling, referral, advocacy, or program integrity." *Rust*, 500 U.S. at 184. The Court afforded *Chevron* deference to HHS's interpretation of Section 1008, concluding, "we are unable to say that the Secretary's construction of the prohibition in § 1008 to require a ban on counseling, referral, and advocacy [regarding abortion] within the Title X project is impermissible." *Id.* The Court also upheld the separation requirements and rejected constitutional challenges to the regulations. *Id.* at 187-203.

The 1988 regulations, however, were in effect only for a few months and were never fully implemented. PI Order at 7-8; *Nat'l Family Planning*, 979 F.2d at 230. HHS suspended them

entirely in 1993, concluding that they "inappropriately restrict[ed] grantees." 58 Fed. Reg. 7462, 7462 (Feb. 5, 1993).

In the decades after *Rust*, the governing law has changed. Beginning in 1996, Congress has provided additional, specific direction regarding the type of counseling Title X grantees may provide. Since then, in its annual appropriations legislation funding Title X, Congress has mandated that "all pregnancy counseling shall be nondirective." Pub. L. No. 104-134, 110 Stat. 1321, 1321-22 (1996); *see, e.g.*, Pub. L. No. 115-245, Div. B., Tit. II, 132 Stat. 2981, 3070-71 (2018).

In 2000, to help effectuate this new statutory mandate, HHS issued regulations requiring Title X projects to provide pregnant women with "neutral, factual information and nondirective counseling on each of [her] options, and referral on request, except with respect to any option(s) about which the pregnant woman indicates she does not wish to receive such information and counseling." 42 C.F.R. § 59.5(a)(5)(ii) (2000); *see* 65 Fed. Reg. 41270, 41281 (July 3, 2000). The 2000 regulations also required Title X providers' abortion activities to be financially "separate and distinct" from their Title X activities, but allowed shared facilities (such as common waiting rooms, common staff, and a single filing system) so long as costs were properly separated and it was "possible to distinguish between the Title X supported activities and non-Title X abortion-related activities." 65 Fed. Reg. at 41282. The 2000 regulations remained in place for almost two decades, across multiple changes of administration.

In the course of administering Title X, HHS has developed evidence-based guidelines for Title X projects to follow. Most notably, HHS requires providers to adhere to its Centers for Disease Control and Prevention (CDC) Quality Family Planning guidelines, which were developed in collaboration with medical experts to instruct Title X providers to take a "client-centered approach" in which "the client's primary purpose for visiting the service site must be respected." Compl. ¶¶ 35-36. The CDC guidelines also specify that, during counseling, patients should be presented with "a discussion of options and appropriate referrals," which "should be made at the request of the client, as needed." Compl. ¶ 37; *see also* Compl. ¶ 38. In this respect, the guidelines echo the recommendations of several medical associations—such as the American

College of Obstetricians and Gynecologists, the American College of Physicians, and the American Academy of Family Physicians—all of which endorse nondirective options counseling, including referral to appropriate providers. Compl. ¶ 39.

In addition, almost two decades after *Rust*, in 2010, Congress enacted the Patient Protection and Affordable Care Act. Among the Act's provisions is Section 1554, which provides:

> "Notwithstanding any other provision of this Act, the Secretary of [HHS] 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.

II. CALIFORNIA'S TITLE X NETWORK

"California is home to the nation's largest Title X program, which collectively serve[d] more than one million patients annually—over 25% of all Title X patients nationwide." Compl. ¶ 49. This robust network has had "a significant, positive impact on family health and well-being, and by extension the state's overall public health generally." Compl. ¶ 59. Numerous studies demonstrate that California's Title X providers "are clinically effective and succeed in helping individuals and families achieve their desired number and spacing of children." Compl. ¶ 59. The Title X clinics "provide[] a broad range of family planning services, and serve[] as an access point for" "Californians . . . to receive quality sexual and reproductive healthcare." Compl. ¶ 60.

III. THE 2019 RULE

On March 4, 2019, Defendants finalized the Rule at issue here, departing markedly from the regulatory regime that had been in place for more than 25 years. 84 Fed. Reg. 7714 (Mar. 4, 2019). The Rule bans any Title X provider from making any referral of a pregnant patient to a non-Title X provider for an abortion, even in response to the patient's direct request. 42 C.F.R.

§§ 59.5(a)(5); 59.14(a) (2019). It requires providers to refer every pregnant patient for prenatal care, even if the patient has clearly stated her decision to obtain an abortion. *Id.* § 59.14(b)(1). In contrast to the 1988 rule, the new Rule limits the presentation of information about abortion to only doctors or other providers with advanced degrees. *Id.* §§ 59.2; 59.14(b)(1)(i).

The Rule significantly restricts the information a Title X provider may give patients regarding their options when pregnant. In response to a patient's direct request for a referral for an abortion, a provider may offer only a "list of licensed, qualified, comprehensive primary health care providers." 42 C.F.R. § 59.14(b)(1)(ii). The list "may be limited to those that do not provide abortion," but the provider is not required to inform the patient of that fact. *Id.* § 59.14(c)(2). The list may include "some" providers who "provide abortion as part of their comprehensive health care services," but these providers may not account for a "majority" of the providers on the list. *Id.* The list cannot include any women's reproductive health specialists who do not provide "comprehensive health care services." *Id.* Even if a patient specifically asks for information regarding providers who perform abortion, "[n]either the list nor project staff may identify which providers on the list perform abortion." *Id.* The Rule also prohibits providers from doing anything to "promote … or support abortion as a method of family planning," *id.* §§ 59.5(a)(5); 59.14(a), though it does not provide further guidance on what actions constitute promotion or support for abortion. Separately, the Rule eliminates the previous requirement that all family planning methods and services be "medically approved." 84 Fed. Reg. at 7740-41.

In another departure from longstanding policy, the Rule mandates "physical and financial separation" between a Title X program and a facility that engages in "abortion activities." 84 Fed. Reg. at 7715, 7764; *see* 42 C.F.R. § 59.15. The Rule allows Defendants to determine whether a grantee is in compliance with this requirement "based on a review of facts and circumstances." 42 C.F.R. § 59.15. "Factors relevant to this determination … include" the existence of separate waiting, consultation, examination, and treatment rooms, office entrances and exits, phone numbers, email addresses, educational services, websites, personnel, electronic or paper-based healthcare records, and workstations. *Id.*

IV. PROCEDURAL HISTORY

On March 4, 2019, California filed this lawsuit alleging that the new Rule violates the Administrative Procedure Act, 5 U.S.C. §701 *et seq*., and the Fifth Amendment of the U.S. Constitution. Dkt. No. 1 (California's complaint). California alleged that the Rule violates the APA both because it is contrary to statute, namely the nondirective-counseling provision and Section 1554 of the ACA, *see id.* at 41-43, and because it is arbitrary and capricious, *see id*. at 43. California further alleged that the Rule specifically targets and harms women, and subjects individuals to discriminatory treatment based on gender classification and pregnancy. *Id*. at 43-44. Essential Access Health and Dr. Melissa Marshall filed a similar lawsuit (which also asserted other constitutional claims), and the two cases were related. California and the other plaintiffs moved for a preliminary injunction on their APA claims.

On April 26, 2019, this Court issued a detailed 78-page order preliminarily enjoining implementation of the Rule. This Court first concluded that "[t]he record evidence establishes that the irreparable injury, balance of hardships, and public interest factors tip sharply in Plaintiffs' favor." PI Order at 14. This Court made numerous well-supported factual findings establishing that the Rule would "irreparably harm individual patients and public health in California as a whole." *Id*. at 2. Substantial numbers of existing Title X providers are likely to leave the program rather than comply with the Rule's restrictions that compromise the quality of care they provide and violate their ethical obligations. *Id*. at 15-16. Because of these departures, this Court found, Title X patients would have more difficulty obtaining effective methods of birth control, including long-acting reversible contraceptives. *Id*. at 17-18. Reduced access to effective contraceptive options, in turn, would cause an increase in rates of unintended pregnancy and the adverse health outcomes associated with it, including premature birth, stillbirth, and low birth weight. *Id*. at 18. In addition, this Court found that reduced access to Title X-funded screening would likely prevent the diagnosis and early treatment of a variety of illnesses, including breast and cervical cancer, and sexually transmitted infections. *Id*. All these public health harms would lead to direct fiscal harm to California in the form of increased Medi-Cal costs. *Id*. at 18-19.

This Court next determined that the balance of the equities and public interest factors also favored an injunction. *Id*. at 24-25. The Court found that Defendants had "identif[ied] no substantiated harm" that would result from a preliminary injunction, in contrast to the "potentially dire public health and fiscal consequences from the implementation of the [Rule]." *Id.* at 24.

This Court also concluded that California was likely to succeed on the merits of its claims that the Rule is contrary to the nondirective-counseling provision and Section 1554, and that it is arbitrary and capricious in certain respects. *Id*. at 25-74.

Based on its analysis of the "statute, regulations, and industry practice," this Court concluded that the statutory term "'nondirective counseling' … encompasses referrals." *Id*. at 29. Thus, the Rule's "categorical prohibition on providing referrals for abortion … prevents Title X projects from presenting abortion on an equal basis with other pregnancy options," in violation of the nondirective-counseling provision. *Id*. at 33-34. That prohibition, combined with the Rule's "mandate[] that every pregnant patient," even those who have decided to obtain an abortion, "be referred to 'prenatal health care' … pushes patients to pursue one option over another." *Id*. at 34. The Court also held, as counsel for Defendants acknowledged, that the "referral list restrictions in § 59.14(c)(2) stand and fall together with the prohibition on abortion referrals." *Id*.

This Court next held that the Rule likely violated Section 1554 of the ACA. *Id*. at 43-46. This Court rejected Defendants' argument that California had waived its Section 1554 claim, finding that a variety of comments had alerted the Department to the substance of the claim. *Id*. at 36-39. On the merits of the claim, the Court concluded that the Rule would "obstruct patients from receiving information and treatment for their pressing medical needs" and was "squarely at odds with established … standards" of medical ethics. *Id*. at 43-44.

Finally, this Court determined that California was likely to succeed on the merits of its claim that Defendants failed to provide a reasoned explanation for the Rule. This Court observed that the Rule represented a "sharp break from prior policy, without engaging in any reasoned decisionmaking." *Id*. at 2. The Court found that the Rule's physical separation requirement was arbitrary and capricious because Defendants had relied upon "speculative fears of theoretical abuse of Title X funds," while "turn[ing] a blind eye to voluminous evidence documenting the

significant adverse impact the requirement would have on the Title X network and patient health." *Id*. at 49. The Court found other aspects of the Rule arbitrary and capricious as well, including the counseling restrictions, *id*. at 62-63; the requirement that only physicians and advanced practice providers may engage in nondirective pregnancy counseling, *id*. at 64-65; the removal of the requirement that family planning methods be "medically approved," *id*. at 65-66; and Defendants' cost-benefit analysis, *id*. at 67-68.

Based on its analysis of the preliminary injunction factors, the Court concluded that an injunction was warranted to preserve the status quo pending resolution of the litigation. *Id*. at 76.[1] The Court limited the reach of the injunction to California, reasoning that "nearly all the harms [the plaintiffs] document are focused on California." *Id*. at 77.

On May 6, 2019, Defendants filed a motion asking the district court to stay the preliminary injunction pending appeal. Dkt. No. 109. For the first time, Defendants identified two specific provisions that, in its view, were severable and should have been excluded from the preliminary injunction order. *See id*. at 12 (citing 42 C.F.R. §§ 59.5(a)(13), 59.17). This Court denied the stay motion, though it amended its injunction to exclude sections 59.3 and 59.5(a)(13). Dkt. No. 115 at 3-4.

On June 20, 2019, a Ninth Circuit motions panel issued a published opinion granting Defendants' motion for a stay of the preliminary injunction pending appeal (as well as related motions concerning similar preliminary injunctions issued by district courts in Oregon and Washington). *California v. Azar*, 927 F.3d 1068 (9th Cir. 2019). After abbreviated briefing, and no oral argument, the panel concluded that Defendants are "likely to prevail on [their] challenge to the district courts' preliminary injunctions." *Id*. at 1075. The panel further concluded that the "remaining factors also favor a stay pending appeal." *Id.* at 1080. It described the harms the Plaintiffs documented and the district court found likely to occur as "comparatively minor," and

[1] Three other district courts, confronting similar claims, have likewise determined that the Rule violates the APA. *See Oregon v. Azar*, ___ F. Supp. 3d ___, No. 6:19-cv-00317-MC, 2019 WL 1897475, at *7-8 (D. Or. Apr. 29, 2019), *appeal docketed*, No. 19-35386 (9th Cir.); *Washington v. Azar*, 376 F. Supp. 3d 1119, 1130-31 (E.D. Wash. 2019), *appeal docketed*, No. 19-35394 (9th Cir.); *Mayor & City Council of Baltimore v. Azar*, No. 19-cv-01103-RDB, 2019 WL 2298808, at *10 (D. Md. May 30, 2019).

determined that Defendants would be harmed by an injunction because it would be "forced to allow taxpayer dollars to be spent in a manner that it has concluded violates the law." *Id.*

California and the other plaintiffs sought en banc review of the Ninth Circuit's June 20 stay order. In its motion for reconsideration en banc, California argued that the motions panel decision applied incorrect legal standards and improperly failed to defer to the district court's extensive factual findings regarding the harm that would result from implementing the Rule before its legality has been adjudicated. *See* Fed. R. App. P. 35(b)(1)(A).

On July 3, 2019, the Ninth Circuit granted rehearing en banc and directed that the June 20 stay order "shall not be cited as precedent by or to any court of the Ninth Circuit." *California v. Azar*, 927 F.3d 1045, 1046 (9th Cir. 2019). On July 11, 2019, the en banc court specified that although the stay order was no longer binding precedent, it had not been "vacate[d]" and thus it "remains in effect." *California v. Azar*, 928 F.3d 1153, 1155 (9th Cir. 2019). The court also denied plaintiffs' emergency motions for an administrative stay of the stay order pending resolution of the en banc proceedings. *Id.* En banc oral argument is currently set for the week of September 23, 2019. Defendants' underlying appeal of this Court's PI Order remains pending in the Ninth Circuit.[2]

LEGAL STANDARD

A complaint need contain a "short and plain statement of the claim showing that the pleader is entitled to relief," Fed. R. Civ. P. 8(a)(2), not "detailed factual allegations." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Thus, a court should grant a Rule 12(b)(6) motion only if the complaint's factual allegations do not support a "cognizable legal theory." *Hartmann*, 707 F.3d at 1122. California must allege simply "enough facts to state a claim to relief that is plausible on its face." *Twombly*, 550 U.S. at 570. In assessing a complaint under this standard, the court presumes all factual allegations of the complaint to be true and draws all reasonable inferences in favor of the nonmoving party. *Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009).

[2] In a related appeal, Plaintiff-Appellees Planned Parenthood Federation of America, et al., sought emergency reconsideration and full court en banc rehearing, stating that they would pull out of the Title X program on August 19, 2019 without relief. *See* case no. 19-35386, Dkt. No. 126. The Court denied the requested relief on August 16, 2019. *See* case no. 19-35386, Dkt. No. 132.

ARGUMENT

Defendants are wrong to contend that California's claims are not sufficiently viable to overcome a motion to dismiss. This Court previously concluded that California was likely to succeed on the merits of its claims—a standard significantly higher than a 12(b)(6) motion. Defendants' motion is an apparent attempt at an improper motion to reconsider. *See generally* Civil L.R. 7-9(a) (requiring that a party requesting reconsideration first obtain leave of the court before filing a motion for reconsideration); *Nw. Acceptance Corp. v. Lynnwood Equip., Inc.*, 841 F.2d 918, 925-26 (9th Cir. 1988) (motions for reconsideration are not the place for parties to make new arguments); *United States v. Rezzonico*, 32 F. Supp. 2d 1112, 1116 (D. Ariz. 1998) (reconsideration should not be used to ask the Court to rethink what it has already thought).

As further explained below, this Court already properly rejected several of Defendants' regurgitated arguments. And the "law of the case doctrine generally precludes reconsideration of 'an issue that has already been decided by the same court, or a higher court in the identical case.'" *Rocky Mountain Farmers Union v. Corey*, 913 F.3d 940, 951 (9th Cir. 2019). Here, Defendants cannot overcome this doctrine.

I. *RUST* DOES NOT FORECLOSE CALIFORNIA'S CLAIMS

At the outset, Defendants contend that this Court's decision should be reversed because the Supreme Court in *Rust* upheld similar regulations, affording *Chevron* deference to Defendants' interpretation of Section 1008, which the Court deemed ambiguous. Mot. at 10-14. But the question is not whether Defendants' current interpretation of Section 1008 is permissible in a vacuum; the question is whether it is permissible in light of two other statutes enacted since *Rust*: the nondirective-counseling provision and Section 1554 of the ACA. *See Vance v. Hegstrom*, 793 F.2d 1018, 1024 (9th Cir. 1986) (in issuing regulations, "the Secretary may not read [one] subsection … independently of" others). *Rust* thus cannot answer the question of whether the Rule violates these two statutes. PI Order at 26.

Nor does *Rust* foreclose California's arbitrary and capricious claims. As this Court reasoned, "[t]he justifications supporting the 1988 regulations … cannot insulate the Final Rule from review now, almost three decades later." PI Order at 48. The Rule must be evaluated in

light of the current administrative record, the many years of experience under the prior policy, and "the grounds that the agency invoked when it took the action" challenged here, *i.e.*, in the 2019 rulemaking. *Michigan v. EPA*, 135 S. Ct. 2699, 2710 (2015).

II. CALIFORNIA SUFFICIENTLY ALLEGES APA SUBSTANTIVE CLAIMS

A. California Sufficiently Alleges a Violation of the Nondirective-Counseling Provision

Every year since 1996, in its Appropriations legislation funding Title X, Congress has included a provision requiring that "all pregnancy counseling shall be nondirective." *See, e.g.*, Pub. L. No. 115-245, Div. B, Tit. II, 132 Stat. 2981, 3070-71 (2018); Pub. L. No. 104-134, 110 Stat. 1321, 1321-22 (1996).

This Court correctly held that the Rule's restrictions on referrals violate this statutory command. PI Order at 26-35. As Defendants have long recognized, in nondirective counseling, "grantees … may not steer or direct clients toward selecting *any option*, including abortion, in providing options counseling." 65 Fed. Reg. at 41273 (emphasis added). As used in this context, the phrase "nondirective counseling" appears to have originated in Defendants' legal memoranda from the 1970s, which drew a "distinction between directive ('encouraging or promoting' abortion) and nondirective ('neutral') counseling on abortion, prohibiting the former and permitting the latter." *Nat'l Family Planning*, 979 F.2d at 229. The Rule itself reflects a similar understanding of the term, explaining that the purpose of nondirective counseling is "to assist the patient in making a free and informed decision." 84 Fed. Reg. at 7747. It entails "the meaningful presentation of options where the [provider] is not suggesting or advising one option over another" but rather "present[s] the options in a factual, objective, and unbiased manner." *Id.* at 7716, 7747.

The Rule does not comply with that text or spirit of that requirement. It prohibits Title X providers from giving any referrals for abortion or information about providers who perform abortions, even for women who affirmatively request it. At the same time, the Rule mandates that Title X providers refer all women—even those who have decided to terminate their pregnancies—to prenatal care. The Rule thus requires Title X providers to direct their patients

away from abortion and toward childbirth. Counseling of that sort is not "nondirective." Indeed, Defendants agree that if "abortion [were] the only option presented" by a provider, that "would violate … the Congressional directive that all pregnancy counseling be nondirective." 84 Fed. Reg. at 7747. The same is true of the Rule's mandate that providers refer all patients for prenatal care and not refer any patients for abortion.

In its stay order, the motions panel concluded that the Ninth Circuit merits panel would likely hold that "referrals do not constitute 'pregnancy counseling.'" *California*, 927 F.3d at 1077. This Court is not bound by that prediction, and should not follow it. *See California*, 927 F.3d at 1046 ("[t]he three-judge panel Order on Motions for Stay Pending Appeal in these cases shall not be cited as precedent by or to any court of the Ninth Circuit"). As this Court explained, "statute, regulations, and industry practice" all confirm that referrals are included within the Act's mandate of nondirective counseling. PI Order at 29.

A neighboring provision of the Public Health Service Act, 42 U.S.C. § 254c-6(a)(1)—which appears to be the "only [other] instance[] in which Congress has used the term 'nondirective counseling,'" PI Order at 29—demonstrates that counseling does include referrals. In Section 254c-6(a)(1), Congress mandated that Defendants make grants to train staff "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" (emphases added). As that formulation indicates, Congress considered "referrals" for other services to be among the "courses of action included in nondirective counseling." Because "a legislative body generally uses a particular word with a consistent meaning in a given context," *Erlenbaugh v. United States*, 409 U.S. 239, 243 (1972), "nondirective counseling" should have a consistent meaning in the two statutes, encompassing referrals. Congress has made clear in several other statutes as well that medical and other professional counseling includes referrals.[3]

[3] *See* 42 U.S.C. § 300ff-33(g)(1)(B)(ii) ("post-test counseling (including referrals for care)" provided to individuals with positive HIV/AIDS test); 38 U.S.C. § 1720D(b)(2)(C) (sexual-trauma counseling includes "referral services"); 42 U.S.C. § 3020e-1(b) (pension counseling encompasses "referral"); 20 U.S.C. § 1161k(c)(4)(A)(iv) (college counseling includes "referrals to … other student services staff").

The Rule also itself repeatedly characterizes referrals as part of counseling. *See* PI Order at 29-30. It acknowledges that Section 254c-6(a)(1) reflects Congress's "intent that postconception adoption information and referrals be included as part of any nondirective counseling in Title X projects." 84 Fed. Reg. at 7733; *see also id.* at 7730 (same). The Rule thus provides that "nondirective pregnancy counseling can include … referrals to adoption agencies." *Id.* at 7730; *see also id.* at 7733-34 ("Title X providers may provide adoption … referral … as part of nondirective postconception counseling."). There is no reason to believe—and Defendants do not contend—that somehow referrals for adoption are part of "nondirective counseling" but referrals for abortion are not. Moreover, as early as 1981, Defendants defined counseling in its Title X Guidelines to include referrals. *See* U.S. Dep't of Health & Human Servs., *Program Guidelines for Project Grants for Family Planning Servs.* § 8.2 (1981) ("Post-examination counseling should be provided to assure that the client … receives appropriate referral for additional services as needed.").

As this Court recognized, "accepted usage within the medical field" also supports the conclusion that "nondirective counseling" includes referrals. PI Order at 30; *see La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 372 (1986) ("technical terms of art should be interpreted by reference to the trade or industry to which they apply"). The "Pregnancy Testing and Counseling" section of HHS's own guidelines advises providers that, during counseling, "'[pregnancy] test results should be presented to the client, followed by a discussion of options *and appropriate referrals.*'" PI Order at 30 (emphasis added). In addition, the guidelines advise that counseling "'should be provided in accordance with recommendations from professional medical associations, such as ACOG [the American College of Obstetricians and Gynecologists] and AAP [the American Academy of Pediatrics].'" *Id.* at 30. Each of these organizations explicitly recommends that referrals be provided as part of counseling. *Id.* at 30-31. The American Medical Association, likewise, advises that a doctor's failure "'to provide any and all appropriate referrals'" as part of counseling a patient would be "'contrary to the AMA's Code of Medical Ethics.'" *Id.* at 31. That accords with common sense: A patient who visits a general

practitioner and receives a diagnosis would naturally expect to receive a referral for follow-up care.

Defendants offer a variety of arguments why the Rule comports with the nondirective-counseling provision, but none is persuasive. *First*, Defendants argue that the "presumption against implied repeals" precludes interpreting the nondirective-counseling provision to have "silently eliminate[d] Title X's authorization for [the Rule's] funding conditions." Mot. at 15. But the presumption against implied repeals has no role to play here. It disfavors an interpretation of a statute that would create an "irreconcilable conflict" with, and thus impliedly repeal, an earlier-enacted statute. *Carcieri v. Salazar*, 555 U.S. 379, 395 (2009). All parties agree that here there is no such conflict between the nondirective-counseling provision and Section 1008.

The question, then, is how best to construe the two provisions in a manner that "harmonize[s]" them, giving effect to each. *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 666 (2007). Neither Defendants nor the motions panel has identified a plausible construction of the nondirective-counseling provision that would harmonize it with their interpretation of Section 1008. California and this Court, by contrast, have offered an interpretation that harmonizes the two statutes: While Section 1008 prohibits Title X funds from being used to pay for abortions, the nondirective-counseling provision requires providers who engage in counseling to provide neutral, factual information regarding any option in which a patient expresses interest, including abortion.

The nondirective-counseling provision clarified an ambiguity that the *Rust* Court identified in Section 1008. *Rust* held that the then-Secretary's interpretation of Section 1008—as prohibiting all counseling regarding abortion—was a "permissible construction of the statute," not that it was the only reasonable interpretation. 500 U.S. at 184 (noting that Section 1008 "does not speak directly to the issues of counseling, referral, advocacy, or program integrity"). That was true in 1991, because Congress had not yet enacted the nondirective-counseling provision. Now it has, and the provision makes clear that counselors in Title X programs may not direct pregnant patients toward or away from any option, but instead must provide neutral, factual

information in response to patient requests. That is not a "repeal" of Section 1008; its prohibition on using Title X dollars to perform abortions remains in place. Rather, Defendants no longer have the authority to interpret Section 1008 to prohibit Title X providers from counseling patients regarding abortion when they request it.

That situation—in which a later-enacted statute "give[s] meaning to a previously enacted ambiguity"—does not implicate the canon against implied repeals. *J.E.M. Ag Supply, Inc. v. Pioneer Hi-Bred Int'l, Inc.*, 534 U.S. 124, 146 (2001) (Scalia, J., concurring); *see also Am. Bank & Trust Co. v. Dallas County*, 463 U.S. 855, 872 (1983) (presumption against implied repeals "does not justify the use of an unnecessary construction of the language of an ambiguous [earlier-enacted] statute"). "At the time a statute is enacted, it may have a range of plausible meanings," but "subsequent acts can shape or focus those meanings" without impliedly repealing the earlier statute. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 143 (2000); *see also United States v. Fausto*, 484 U.S. 439, 453 (1988) ("the implications of a statute may be altered by the implications of a later statute" without violating the presumption against implied repeals).

There are several other textual indications that the presumption against implied repeal does not apply. Contrary to Defendants' view (Mot. at 15), the nondirective-counseling provision is not "silent[]" on the question of what type of counseling may occur in Title X programs—it expressly mandates that any counseling be "nondirective." The presumption against implied repeal does not apply when, as here, the later-enacted statute "*expressly*" addresses the question at issue and "the only question is its scope." *Republic of Iraq v. Beaty*, 556 U.S. 848, 861 (2009). The presumption also generally applies only when the earlier-enacted statute addresses "a narrow, precise, and specific subject," and the "later enacted statute cover[s] a more generalized spectrum." *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153 (1976). Here, the later-enacted statute (the nondirective-counseling provision) is more specific: It expressly mandates that Title X programs provide a particular type of counseling, whereas Section 1008 "does not speak directly" to that issue. *Rust*, 500 U.S. at 184.

Home Builders, the principal case upon which Defendants rely (Mot. at 15, 17), is inapposite. The Court there applied the presumption because the respondent's interpretation of

the later-enacted statute would have resulted in the "implicit repeal" of a "statutory mandate" and several other "categorical statutory commands" in the earlier-enacted statute. 551 U.S. at 664; *see id.* at 663-64. Here, as discussed, Section 1008 contains no mandate or command repealed by the nondirective-counseling provision; it simply does not address the type of counseling Title X programs may provide.

Second, Defendants contend that the Rule's prohibition on abortion referrals does not violate the nondirective-counseling provision because "a doctor's *failure* to refer a patient for an abortion does not *direct* the patient to do anything." Mot. at 15. But a doctor does not "direct" a patient to do anything in the sense of "order[ing]" or "command[ing]" them. Webster's New World Dictionary, Third College Edition 389 (1991). Rather, as the Rule acknowledges, and consistent with standard professional understanding of this terminology, Congress used "direct" in the sense of "guide" or "turn or point (a person or thing) toward an object or goal." *Id.*; *see* 84 Fed. Reg. at 7716 (nondirective counseling means "not suggesting or advising one option over another"). The type of counseling laid out in the Rule is not "nondirective" in that sense because it steers patients away from abortion and toward childbirth.

Third, alternatively, Defendants argue that Congress intended an atextual and one-sided definition of "nondirective" in which it means only that providers may not "steer clients *to* abortion," but may steer clients *away from* abortion. Mot. at 15-16 (emphasis added). Defendants cite a statement by Representative Greenwood, a sponsor of the legislation that first enacted the nondirective-counseling provision, noting that providers may not "suggest that a client choose abortion." Mot. at 20 (quoting 141 Cong. Rec. H8250 (Aug. 2, 1995)). But it is undisputed that counselors may not steer patients toward abortion. Representative Greenwood did not say that the legislation allows counselors to direct clients *away from* abortion, which would be at odds with the plain meaning of "nondirective." Moreover, even if the single floor statement supported the Defendants' interpretation (which it does not), this Court could not assume that one legislator's statement reflected the intent of Congress as a whole. *See NLRB v. SW General, Inc.*, 137 S. Ct. 929, 943 (2017). Congress mandated that all counseling be

"nondirective," not "nondirective in the direction of abortion." This Court should rely upon the statutory text.

Fourth, Defendants contend that the Rule does not violate the nondirective-counseling provision because counseling does not encompass referrals. Mot. at 16. This argument overlooks the key textual indication that Congress understands referrals to be included within nondirective counseling. A neighboring provision specifies that "adoption information *and referrals*" should be provided "on an equal basis with *all other courses of action included in nondirective counseling*." 42 U.S.C. § 254c-6(a)(1) (emphases added). Defendants argue that the term "included in nondirective counseling" modifies the term "courses of action," not "referrals." Mot. at 17. That argument "totally ignores the word 'other'," *Garcia v. United States*, 469 U.S. 70, 74 (1984), which makes clear that referrals are also "included in nondirective counseling." *See id.* at 73-74 (concluding that in the statutory phrase "money or other property of the United States," the word "money" is also modified by "of the United States").

Defendants also note that counseling and referral are sometimes referred to separately in certain statutory and regulatory contexts. Mot. at 16-17. But in contexts more closely related to the Rule, Congress and Defendants have indicated that referral *is* included within nondirective counseling. *See supra* at 13-15. And the fact that Congress and the Department sometimes refer to counseling and referral separately is not an indication that counseling does not encompass referrals. As the Supreme Court recently observed, Congress sometimes "list[s]" items separately even though they "have substantial overlap." *Azar v. Allina Health Servs.*, 139 S. Ct. 1804, 1814 n.1 (2019) (reasoning that "many manual instructions surely qualify as guidelines of general applicability" even though the statute listed "manual instructions" and "guidelines of general applicability" separately). That insight aligns with common usage. For example, one might refer to "roads and bridges," but that does not mean that a road ceases to be a road when it crosses a bridge.

Fifth, Defendants argue that this Court's interpretation of the nondirective-counseling provision suggests that the 1996 Congress "resurrected" earlier legislation vetoed in 1992, which Defendants consider unrealistic. Mot. at 19. But, the nondirective-counseling provision is not

simply a reincarnation of the vetoed 1992 legislation, which included a variety of provisions not mirrored in the later appropriations legislation. Moreover, Defendants propose to infer the intent of a later Congress from legislation that an earlier Congress passed but a prior President vetoed, a "hazardous" proposition. *See City of Milwaukee v. Illinois*, 451 U.S. 304, 332 n.24 (1981).

Sixth, Defendants cite the aphorism that Congress does not "hide elephants in mouseholes," Mot. at 19—that is, it normally "does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions." *Whitman v. American Trucking Associations, Inc.*, 531 U.S. 457, 468 (2001). But the nondirective-counseling requirement is hardly vague or an ancillary provision: It is found in the legislation that funds Title X grants, and speaks directly to the question of what type of counseling providers must offer. Indeed, the same legislative history Defendants cite underscores that Congress intended the appropriations legislation in question to impose substantive requirements on the type of counseling that may occur through Title X. *See* 141 Cong. Rec. H8250 (Rep. Greenwood).

Apart from the Rule's referral restrictions, this Court also correctly concluded that its counseling restrictions violate the nondirective-counseling provision. PI Order at 34-35. These restrictions bar providers from doing anything to "encourage," "promote," "support," or "advocate" abortion. *See id.* As this Court concluded, the "murkiness" of these regulatory provisions "is likely to chill discussions of abortion and thus inhibits neutral and unbiased counseling." *Id*. at 35. To the extent these provisions simply restate the statutory command that all counseling be "nondirective"—*i.e.*, that it be objective and factual, and not designed to steer the patient toward any course of action—the provisions are, of course, in compliance with law. But Defendants have not conceded that these vague regulations are simply coextensive with the nondirective-counseling provision itself.[4] Nor have Defendants offered any other clear, noncircular definition of what the provisions mean, forcing "providers desiring to explain the

[4] This Court could interpret these provisions to do nothing more than require providers to comply with the nondirective-counseling mandate. *See Decker v. Nw. Envtl. Def. Ctr.*, 568 U.S. 597, 609 (2013) (court may "adopt a purposeful but permissible reading of the regulation to bring it into harmony with the statute" (internal quotation marks and alterations omitted)).

abortion option" to "walk on eggshells" to avoid a potential transgression. PI Order at 35. That would preclude neutral, unbiased counseling regarding abortion, contrary to Congress's intent.

B. California Sufficiently Alleges a Section 1554 Claim

This Court correctly held that the Rule likely violates Section 1554 of the ACA, 42 U.S.C. § 18114, demonstrating that, at a minimum, California sufficiently alleges a Section 1554 claim. As outlined in California's complaint, the Rule's restrictions on abortion referrals violate several of the Section 1554 provisions. Compl. ¶¶ 209, 150-151, 152-162, 176-181, 182-188. By flatly prohibiting a Title X-funded provider from informing a patient about facilities that provide abortions, the Rule "interferes with" communications about one particular "treatment option[]." 42 U.S.C. § 18114(3). Similarly, it "restricts" providers from making a "full disclosure of all relevant information to patients making health care decisions." *Id.* § 18114(4). There can be no question that a referral for an abortion provider is "relevant information" to a pregnant woman who seeks to terminate her pregnancy.

The Rule also creates an "unreasonable barrier[] to the ability" of Title X patients to obtain abortions, 42 U.S.C. § 18114(1), and "impedes timely access" to abortion for Title X patients, *id.* § 18114(2). That is especially so because not only does the Rule prohibit abortion referrals, it also includes several related provisions that appear specifically designed to keep patients in the dark regarding where they may be able to obtain an abortion, even if they have already elected to pursue that option. For instance, even if a client specifically requests a referral to an abortion provider, a Title X provider may (at most) offer a list of "comprehensive primary health care providers … some, but not the majority of which, also provide abortion," yet "[n]either the list nor project staff may identify which providers on the list perform abortion." 42 C.F.R. § 59.14(c)(2). Providers who specialize in reproductive care but do not provide comprehensive care may not be included, even if they are the highest quality, most convenient, or most affordable providers. *Id.* And the list "may be limited to those that do not provide abortion." *Id.* That approach forces patients to investigate on their own which of the listed providers (if any) perform abortions, creating an "unreasonable barrier" and "imped[ing] timely access" to abortion.

The Rule's prohibition on abortion referrals is also, as this Court concluded, "squarely at odds with established ethical standards and therefore Section 1554(5)." PI Order at 44. HHS's own guidelines recognize that "[r]eferral" for "follow-up care should be made at the request of the client, as needed." *Id*. The Rule prohibits providers from complying with that guidance: It prohibits abortion referrals for patients who want one, and mandates referrals to prenatal care for patients who do not want such care.

None of the contrary arguments advanced by Defendants are persuasive.

First, Defendants argue that "plaintiffs have waived any challenge to the Rule under §1554" by failing to object on this ground at the administrative level. Mot. at 21-22. But Defendants do not dispute that many commenters brought the substance of these issues to its attention. That is sufficient. "Plaintiffs need not state their claims in precise legal terms, and need only raise an issue 'with sufficient clarity to allow the decision maker to understand and rule on the issues raised.'" *Nat'l Parks & Conserv. Ass'n v. Bureau of Land Mgmt.*, 606 F.3d 1058, 1065 (9th Cir. 2010); *see also, e.g.*, *Idaho Sporting Congress, Inc. v. Rittenhouse*, 305 F.3d 957, 966 (9th Cir. 2002) (plaintiffs need not "incant … magic words" or cite specific legal authority).[5]

As this Court observed, although no commenters referenced Section 1554 specifically, "numerous comments use[d] identical or substantially identical language to Section 1554 to describe how the Final Rule would impede access to care." PI Order at 37. Commenters objected to the Rule on the ground that it would "ban Title X providers from giving women full information about their health care options" (*Id.*); would "prevent Title X providers from sharing complete and accurate medical information necessary to ensure that their patients are able to … obtain timely care" (*Id.*); and would "limit[] how Title X providers can discuss and/or counsel on the full range of sexual and reproductive health care options with their patients" (*Id.*). Commenters also noted that the Rule would "require[] physicians to disregard their Code of

[5] The motions panel stated that it "seems likely" that a challenge to the Rule under Section 1554 had been waived, but the panel ignored these Ninth Circuit cases, and relied instead on a D.C. Circuit case that is not on point. *See California*, 927 F.3d at 1078.

Medical Ethics" and would violate "ethical and professional standards around informed consent." *Id*. at 38.

Second, Defendants assert that the Rule does not violate Section 1554 because "it simply limits what the government chooses to *fund* through the Title X grant program." Mot. at 22. But the plain text of Section 1554 states categorically that the Secretary "shall not promulgate any regulation" that has the described effects; it does not say that the Secretary shall not promulgate such a regulation except in the course of establishing grant criteria. The Rule undoubtedly is a "regulation," and for the reasons just described, for Title X patients, it has the types of effects that Section 1554 prohibits.

Third, Defendants content that the Supreme Court's holding in *Rust* that the 1988 regulation did not violate the First Amendment or due process clause, 500 U.S. at 200-203, defeats the plaintiffs' Section 1554 claim because it is "substantively the same as" those constitutional claims. Mot. at 22. That argument is mistaken because, as this Court observed, "[t]he statutory mandates of Section 1554 are far more specific than the constitutional requirement asserted in *Rust*." PI Order at 42.

The Court held in *Rust* that the challenged regulation did not unlawfully burden a patient's right to obtain an abortion because the patient was "in no different position than she would have been if the Government had not enacted Title X." 500 U.S. at 202. In enacting Section 1554, however, Congress made the policy choice to constrain Defendants' regulatory authority *even though* patients may have no underlying constitutional right to government-funded medical care. Patients may have no constitutional right to (for instance) "timely access to health care services" or information "regarding a full range of treatment options," 42 U.S.C. § 18114(2)-(3), yet Section 1554 nonetheless prohibits Defendants from promulgating any regulation that impedes or interferes with that access and information. Moreover, as this Court noted, the Rule "go[es] far beyond anything in the 1988 regulations," and "[u]nlike in *Rust*," its referral restrictions threaten to "misdirect[] … unsuspecting patients" who seek information regarding abortion, making them "*worse* off" than if they had never visited a Title X provider. PI Order at 43.

Fourth, Defendants argue that the Rule does not require providers to violate standards of medical ethics because "not referring for or promoting abortion is consistent with medical ethics, as evidenced by the many federal conscience statutes giving medical providers . . . that option." Mot. at 23. Even if that were correct, it would not save the Rule from violating Section 1554, because it would still interfere with communications between the patient and provider and restrict access to care. *See supra* at 6; 42 U.S.C. § 18114(1)-(4). At any rate, the premise of the argument is flawed: Even if medical providers with certain religious beliefs may in certain circumstances obtain an exemption from an otherwise applicable ethical standard, that does not mean other providers need not follow it. Moreover, it is not at all clear that ethical standards allow a provider, based on religious beliefs, to refuse to provide information relevant to a patient's request without making "other arrangements" to ensure that the patient receives the requested information. 65 Fed. Reg. at 41273-74 (citing 42 U.S.C. § 300a-7(d)).

Fifth, echoing its argument regarding the nondirective-counseling provision, Defendants contend that canons of statutory construction counsel against this Court's interpretation of Section 1554. Mot. at 23-24. Here too, Defendants' position lacks merit. Citing the canon that "'the specific governs the general,'" Defendants assert that "Title X's specific delegation of authority to the Secretary to adopt the Rule" should prevail over "the general directives in § 1554." *Id*.. But Title X contains no "specific delegation" of authority to enact the challenged provisions of the Rule. The statute "does not speak directly to the issues of counseling, referral, advocacy, or program integrity;" it is "ambiguous" on these topics. *Rust*, 500 U.S. at 184. Section 1554 is the more specific statute in this context because it expressly places conditions on Defendants' regulatory authority.

Defendants argue that "it is implausible that Congress tucked away an implied repeal of Title X's authorization for the Rule … in the mousehole of § 1554." Mot. at 24. Just as these canons had no role to play in interpreting the nondirective-counseling provision, *supra* at 19, they are inapplicable here as well. Section 1554 did not effectuate an "implied repeal;" it simply cabined in certain respects Defendants' regulatory discretion, clarifying an issue on which Title X is silent. And Section 1554 is not a mousehole; it is an opening of commensurate size with the

statutory question of Defendants' authority to impose the challenged provisions of the Rule. Congress enacted it alongside other significant new consumer protections, such as Section 1557's nondiscrimination provision. *See* 42 U.S.C. § 18116. As one commentator noted shortly after it was enacted, Section 1554 is "[a]n important provision for consumers" because it "prohibits the Secretary of HHS from promulgating regulations that adversely affect access" to care. E. Kinney, *Administrative Law Protections in Coverage Expansions for Consumers Under Health Reform*, 7 J. Health & Biomedical L. 33, 46 (2011). That is the essence of California's argument here.

Finally, Defendants argue that because Section 1554 states that its provisions apply "[n]otwithstanding any other provision of *this Act*," it does not "implicitly repeal *other, pre-existing statutes* such as § 1008." Mot. at 24. The "notwithstanding" clause means that Section 1554 "override[s] conflicting provisions" of law only within the ACA. *Cisneros v. Alpine Ridge Group*, 508 U.S. 10, 18 (1993). As discussed, however, here there is no conflict with any provision of Title X, so the "notwithstanding" clause has no role to play and the categorical restrictions on Defendants' regulatory authority contained in Section 1554 apply directly. Defendants interpret Section 1554 as though it cabined its authority in rulemaking only "under this Act" or "in enforcing this Act." But that is not what the text says. When Congress means to restrict rulemaking authority only under a particular statute or section, it knows how to do so. *See, e.g.*, 42 U.S.C. § 13257(b)(2) ("The Secretary shall not promulgate a rule under this subsection" absent certain conditions); 25 U.S.C. § 3307(d) (restricting the effect of "[r]egulations issued pursuant to this subchapter"). Congress here enacted a broader provision to protect patients from precisely the kind of harm the Rule will cause.

C. California Sufficiently Alleges Defendants Exceeded their Statutory Jurisdiction

Defendants argue that "*Rust* forecloses California's 'Excess of Statutory Jurisdiction' Claim." Mot. at 24-25. As explained above, Congress changed the legal landscape beginning in 1996, when it first enacted annual appropriations legislation that clarified that pregnancy counseling within the Title X program must be nondirective. Then, in 2010, Congress specified in Section 1554 that Defendants have no authority to issue regulations that create barriers to

access to healthcare, interfere with provider's ability to discuss a full range of treatment options, or that violate medical ethics. In light of these statutory changes, the agency interpretation of Section 1008 that was upheld in *Rust* (including a blanket prohibition on presenting factual referral information about abortion), can no longer be reconciled with Congress' directives. In fact, Defendants demonstrated their need to harmonize Section 1008 and the nondirective counseling mandate when they promulgated the 2000 regulations. 65 Fed. Reg. 41270, 41272-74 (July 3, 2000).

III. CALIFORNIA SUFFICIENTLY ALLEGES AN APA ARBITRARY AND CAPRICIOUS CLAIM

California has alleged facts sufficient to support its cause of action that the Rule should be set aside because it is arbitrary and capricious, including as to the following subsections of the Rule identified in Defendants' motion to dismiss: (1) the counseling and referral restrictions; (2) the physical separation requirement; (3) Defendants' cost benefit analysis; (4) the physician or advanced practitioner requirement; and (5) the removal of the "medically approved requirement."

Under the APA, courts shall "hold unlawful and set aside" an agency action that is "arbitrary [and] capricious." 5 U.S.C. § 706(2)(A). A rule is arbitrary and capricious if it *inter alia* "runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). And, where an agency departs from a prior policy, like here, a more "detailed justification" is necessary where there are "serious reliance interests" at stake or the new policy "rests upon factual findings that contradict those which underlay its prior policy." *F.C.C. v. Fox Television Stations*, 556 U.S. 502, 515; *see also State Farm*, 463 U.S. at 47-51 (holding that a new administration's rule change was arbitrary and capricious where agency failed to address prior factual findings).

In general, this Court correctly held that parts of the Rule are arbitrary and capricious, and that the Supreme Court's holding that the 1988 regulations did meet the APA's criteria for reasoned decision-making does not apply to the Rule. PI Order at 46-73. This alone demonstrates that California has sufficiently alleged an arbitrary and capricious claim.

Further, Defendants do not argue that California has failed to plead facts sufficient to state a claim. In fact, they do not discuss the sufficiency of the facts pled in the Complaint *at all*. Mot. at 25-29. This demonstrates that Defendants' motion to dismiss must fail. Because Defendants' motion is entirely premised on merits arguments (i.e. not the pleadings), and rests upon detailed factual issues, Defendants' argument in favor of dismissal of California's arbitrary and capricious cause of action is inappropriate at this stage of the proceedings. *ASARCO, LLC v. Union Pac. R. Co.*, 765 F.3d 999, 1009 (9th Cir. 2014) (holding that ambiguity about "a fact issue [] cannot be resolved on a motion to dismiss"). Whether or not the Rule is "counter to the evidence before [Defendants]" can only be resolved upon review of the evidence, in this case, the entire administrative record. *State Farm*, 463 U.S. at 43. As such, Defendants have not shown that California's arbitrary and capricious claim should be dismissed at this stage, as opposed to adjudicated on the merits.

If the Court decides to look beyond the pleadings and reach the merits of any of Defendants' arguments, the motion to dismiss should still be denied because Defendants fail to demonstrate that California's claim should be dismissed.

First, regarding the counseling requirement, this Court properly held Defendants had not adequately justified its decision to adopt the restrictions on abortion counseling, including referrals. PI Order at 62-63. Defendants argue that the Rule's reason for prohibiting abortion referrals was because the prior rule violated § 1008, based upon Defendants *brand-new* "best reading" of that section. Mot. at 26. But the Supreme Court has already held in *Rust* that § 1008 "does not speak directly to the issues of counseling [and] referral." 500 U.S. at 184. Further, this rationale is inadequate to meet the APA's standard. Even if Defendants' interpretation is a permissible one—which it is not—Defendants still fails to provide a "detailed justification" to support their new interpretation. *F.C.C.*, 556 U.S. at 515.

Second, Defendants argue that the physical-separation requirement is not arbitrary and capricious because Defendants determined that the physical separation requirement was necessary to avoid the "risk and perception" of improper commingling of funds or use of Title X funds for impermissible purposes, and that prior regulations failed to properly implement § 1008. But there

is no evidence or a "detailed justification" to support its new interpretation, let alone any evidence that there is any comingling of funds at any Title X project. *F.C.C.*, 556 U.S. at 515. While agencies may adopt rules to prevent potential problems before they arise, those predictive judgments must "be based on some logic and evidence, not sheer speculation." *Sorenson Commc'ns Inc. v. FCC*, 755 F.3d 702, 708-09 (D.C. Cir. 2014) (finding arbitrary and capricious an FCC regulation designed to deter fraud where there was "no evidence of fraud"); *see also Nat'l Fuel Gas Supply Corp. v. FERC*, 468 F.3d 831, 841 (D.C. Cir. 2006) (Kavanaugh, J.) (vacating FERC order where agency had "provided no evidence of a real problem"). Here, again, Defendants have offered only speculation.

Defendants further argue that the holding in *Rust v. Sullivan* supports its determination that the physical separation requirement is necessary. Mot. at 26-27. This misinterprets *Rust*'s holding. *Rust* expressly held that Section 1008 "does not speak directly" to "program integrity," so the physical separation requirement is not required for compliance. 500 U.S. at 184. Defendants cite no authority for the proposition that they may adopt a policy with substantial costs and no apparent benefit where the underlying statute is ambiguous and does not mandate that approach. A "reasoned analysis" is still required. *Id*. at 187. And *Rust* is also distinguishable on the facts. *See supra* at 22, 24.

Third, Defendants argue that the Rule is not arbitrary and capricious because Defendants are "best situated to consider . . . the compliance costs of providers. . . ." Mot. at 27. Again, this assertion is based upon mere speculation and lacks any evidentiary basis. Defendants failed to provide the required detailed justification, in light of the reliance interests of providers who must comply with the changes in the Rule.

While Defendants argue that new providers will enter the Title X program, the only evidence cited are lawsuits filed by providers *after* this Court enjoined the Rule. Mot. at 28. Under the APA, the court must consider the lawfulness of the agency's Rule based on the evidence before the agency *before* they promulgated their rule. *See* 5 U.S.C. § 706; *Citizens to Pres. Overton Park Inc. v. Volpe*, 401 U.S. 402, 420 (1971) (court to consider the "administrative record that was before the Secretary at the time he made his decision"). Further, determination of

whether compliance costs were accurately assessed and whether providers entering the Title X program will make up for the providers leaving the program is a fact-based determination that is inappropriate for adjudication at this time.

Fourth, Defendants argue that they acted reasonably in enacting the pregnancy counseling requirement and eliminating the medically necessary requirement. Mot. at 29. But Defendants again fail to offer any evidence to support their interpretation of the statute. Such conclusory statements are insufficient to meet the APA's arbitrary and capricious standard.

IV. CALIFORNIA SUFFICIENTLY ALLEGES A VIOLATION OF THE CONSTITUTION

California pleads facts sufficient to establish that the Rule violates the Equal Protection Clause. The Equal Protection component of the Fifth Amendment prohibits the federal government from denying equal protection of the laws. Defendants' Rule violates the Clause by singling out and harming women by (1) "command[ing] medical professionals to provide incomplete and misleading information to women" and (2) "delaying and potentially frustrating [women's] attempts to obtain time-sensitive care." PI Order at 2. In so doing, the Rule creates a constitutionally impermissible gender-based classification. *See Caban v. Mohammed*, 441 U.S. 380 (1979) (sex-based law that permit unwed mother, but not unwed father to block adoption of a child was unconstitutional); *Arce v. Douglas*, 793 F.3d 968, 977 (9th Cir. 2015) (challenged statute and/or its enforcement "unconstitutional if its enactment or the manner in which it was enforced were motivated by a discriminatory purpose").

Defendants argue that the Rule does not discriminate of the basis of sex because it imposes requirements on the receipt of federal funds—regardless of gender. This is a distinction without a difference. The Rule's specific requirements target women for adverse treatment in several ways. For example, the Rule's "gag" provision only applies to women in need of counseling and referrals for abortion services. *See* Compl. ¶¶ 223-225, 145-149, 176-181. The Rule's referral list prohibitions uniquely affect a woman's ability to seek time-sensitive medical care. In the context of women's health decisions, and in particular with respect to a woman's decision about whether to carry to full term or terminate a pregnancy, obtaining complete and honest health care information and access to a full range of services is important *and* urgent. Compl. ¶ 179.

Because the Rule creates a gender-based classification by singling out women's healthcare for adverse action in the Title X program, i.e. by targeting healthcare exclusively used by women and making it harder for women to obtain full and complete information about their healthcare needs, Defendants must demonstrate an "exceedingly persuasive justification" for the Rule. *United States v. Virginia*, 518 U.S. 515, 531 (1996); *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982). The Supreme Court has "repeatedly recognized that neither federal nor state government acts compatibly with the equal protection principle when a law . . . denies to women, simply because they are women, full citizenship stature—equal opportunity to aspire, achieve, participate in and contribute to society based on individual talents and capacities." *Virginia*, 518 U.S. at 532 (court must "carefully inspect[] official action that closes a door or denies opportunity to women"). In such instances, the government must meet a "demanding" standard of review. *Id.* at 533. The government must show "at least that the [challenged] classification serves important government objectives and that the discriminatory means employed are substantially related to the achievement of those objectives.'" *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1690 (2017); *see also Nevada Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 728-29 (2003) ("heightened scrutiny" analysis requires that the government's justification not rely on overbroad generalizations about women). Defendants cannot meet this rigorous standard, particularly given the arbitrary and capricious nature of their rulemaking. *See supra* at 25-28.

Defendants primarily rely on *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263 (1993) for the proposition that the rational basis standard applies. Mot. at 37-38. *Bray* is entirely distinct from the instant matter. There, the Court was faced with a statutory interpretation issue: whether 42 U.S.C. § 1985(3) provided a federal cause of action against private persons obstructing access to abortion clinics. 506 U.S. at 266. In answering that question, the Court held that plaintiffs had not demonstrated that "class-based, invidiously discriminatory animus lay behind" the individual protestors' action and had failed to show that the protestors interfered with rights that are protected against private and official encroachment. *Id*. at 268. In contrast, this Court is faced with a constitutional cause of action—as opposed to a statutory claim—and plaintiff is challenging the conduct of governmental actors, not private protestors.

Moreover, contrary to Defendants' suggestions, this Rule goes well beyond merely disfavoring abortion. Defendants have promulgated a Rule that "directly compromise[s] providers' ability to deliver effective care [to women] and coerce[s] [providers] to obstruct and delay [female] patients with pressing medical needs." PI Order at 15. As a direct result of the Rule, there will be "'contraceptive deserts' where women in need of Title X-funded contraceptive services will be unable to find an affordable, well-qualified provider within their county." *Id*. at 17. Thus, the Rule has implications beyond abortion and funding; by singling out women's healthcare, it will directly harm women because of their unique reproductive healthcare needs. *See also Lawrence v. Texas*, 539 U.S. 558, 583 (2003) (O'Connor, J., concurring) ("While it is true that the law applies only to conduct, the conduct targeted by this law is conduct that is closely correlated with being homosexual. Under such circumstances, [the] law is targeted at more than conduct. It is instead targeted toward gay persons as a class."). Defendants have not provided an exceeding persuasive justification, particularly given the administrative record. *See* PI Order at 49 ("HHS relied on speculative fears" "to justify" Rule).

Further, even if the standard of review was rational basis—which it is not—the Rule still fails. There is no rational relationship between seeking to disfavor abortion by reducing women's access to Title X services. As this Court previously held, Title X will lead to a lack of contraceptive access. Such diminished access is more likely to increase unwanted and unplanned pregnancies.

Indeed, as the Complaint alleges, the decisionmaking process upon which this Rule rests demonstrates Defendants' animus toward women and women's healthcare needs. The Rule fits within the overall context of Defendants' "deliberate effort to limit women's access to the full range of reproductive healthcare, including abortion care." Compl. ¶ 8. In formulating the Rule, Defendants deliberately failed to solicit input from leading healthcare experts, while soliciting the input of proponents of the Rule who lacked in-depth expertise on reproductive healthcare issues. *Id*. ¶ 79. For these reasons, California's equal protection claim should not be decided on a motion to dismiss.

CONCLUSION

California respectfully requests that the Court deny Defendants' motion to dismiss.

Dated: August 21, 2019

Respectfully Submitted,

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CERTIFICATE OF SERVICE

Case Name: **State of California v. Azar** No. **3:19-cv-01184-EMC**

I hereby certify that on August 20, 2019, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

CALIFORNIA'S OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

I certify that **all** participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on August 20, 2019, at Oakland, California.

Kelinda Crenshaw	/s/ Kelinda Crenshaw
Declarant	Signature

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