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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' REPLY IN SUPPORT OF MOTION TO DISMISS** 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

In *Rust v. Sullivan*, 500 U.S. 173 (1991), the Supreme Court held that Department of Health and Human Services (HHS) regulations (1988 regulations) prohibiting Title X projects from, among other things, referring patients for abortion as a method of family planning, and requiring Title X programs to be physically separate from abortion related activities, were authorized by Title X, were not arbitrary and capricious, and were constitutional. Relying on that holding, HHS issued a new rule this year that is, in all material respects, indistinguishable from the 1988 regulations. *See* Compliance with Statutory Program Integrity Requirements, 84 Fed. Reg. 7714 (Mar. 4, 2019) (Rule). Notwithstanding *Rust*'s holding, Plaintiffs bring this suit asserting that the current Rule, *inter alia*, violates Title X, is arbitrary and capricious, and violates the Constitution. As Defendants explained in moving to dismiss Plaintiffs' suits, these claims fail as a matter of law. *See* Defs.' Mem. in Support of Mot. to Dismiss (MTD), ECF No. 136; *Essential Access v. Azar*, No. 19-cv-001195-EMC, MTD, ECF No. 109.

Rather than engage with the arguments asserted in Defendants' motion, Plaintiffs' opposition briefs, *see* Pl.'s Resp. in Opp'n to Defs.' Mot. to Dismiss (Cal. Opp'n), ECF No. 141; *Essential Access v. Azar*, No. 19-cv-001195-EMC, Pls.' Resp. in Opp'n to Defs.' Mot. to Dismiss (EA Opp'n), ECF No. 115, largely double down on the remarkable arguments asserted in Plaintiffs' Complaints: that a district court can effectively overrule a Supreme Court decision based on a single clause in an appropriations rider, an obscure provision in the Affordable Care Act (ACA), or later Supreme Court cases *reaffirming* that decision, and that the Court should substitute its judgment for the predictive expertise of the agency charged with administering the Title X program. These arguments fail as a matter of law, and a motion to dismiss is an appropriate vehicle for resolving Plaintiffs' claims. For the reasons set forth below and in Defendants' opening brief, the Court should dismiss Plaintiffs' Complaints with prejudice.

ARGUMENT

Plaintiffs' Complaints present legal questions that can be resolved on the basis of the pleadings and the publicly available documents included in HHS's administrative record. Because

each claim fails as a matter of law, the Court should grant Defendants' motion to dismiss.

I. PLAINTIFFS' STATUTORY AUTHORITY CLAIMS LACK MERIT.

A. Plaintiffs' Claims Based on the Appropriations Rider Fail.

Plaintiffs' argument that the Rule conflicts with an appropriations rider requiring that pregnancy counseling be nondirective fails for reasons Defendants have explained. *See* MTD at 14-20. By definition, a doctor's *failure* to refer a patient for abortion does not *direct* the patient to do anything. Even indulging Plaintiffs' characterization, "not present[ing] all pregnancy options on an equal basis" is not "directive" counseling. EA Opp'n at 16-17. That is simply a repackaged variant of the First Amendment argument rejected in *Rust* that is even weaker under the appropriations rider. Given the limited, preconceptional nature of the Title X program, "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," *Rust*, 500 U.S. at 200—and especially for that reason, it cannot possibly be understood to direct her to maintain the status quo. No reasonable patient could treat a mere failure to direct a certain course of conduct as an implicit direction not to engage in such conduct, regardless of whether it is medically necessary.

Nor does the Rule's separate requirement that patients be referred for prenatal health care somehow equate to "counseling," much less render "directive" the mere prohibition of abortion referrals. This requirement does not direct a decision about abortion—it merely refers women for necessary care while they are pregnant, even if they obtain an abortion later. *See* MTD at 15. Similarly, the restrictions on the list of providers are consistent with—and further—the nondirective provision by ensuring providers do not "steer clients to abortion or to specific providers because those providers offer abortion as a method of family planning." 84 Fed. Reg. at 7747. HHS's authority to prohibit Title X projects from directly referring clients for an abortion as a method of family planning necessarily includes the authority to take steps to prevent them from doing so indirectly. The rider, moreover, is limited to "pregnancy counseling," a term that does not apply to referrals, let alone with sufficient clarity to repeal § 1008 of the Public Health

Service Act (PHSA) by implication. In this program and more generally, counseling and referrals are distinct. *See* MTD at 15-18.

Plaintiffs further err by insisting that their construction of the nondirective provision is not foreclosed by *Rust*. Cal. Opp'n at 11-12; *see also* EA Opp'n at 20-22. Plaintiffs do not dispute that, in *Rust*, the Supreme Court held that § 1008 authorizes HHS to issue materially indistinguishable regulations, but contend that the nondirective provision eliminated that authority. By definition, that would be a repeal of § 1008 (and an abrogation of *Rust*) in relevant respect. *See Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 664 n.8 (2007) ("Every amendment of a statute effects a partial repeal to the extent that the new statutory command displaces earlier, inconsistent commands."). Had § 1008 *explicitly* delegated HHS authority "to prohibit Title X projects from referring their patients for abortion as a method of family planning," no one would dispute that subsequent legislation stripping the Department of that authority would constitute a repeal. That § 1008, combined with the express rulemaking authority granted under § 1006 of the PHSA, *implicitly* delegated the same authority is irrelevant under *Chevron*.

B. Plaintiffs Fail to State a Claim Based on Section 1554 of the ACA.

Plaintiffs' Section 1554 claim fails for the reasons explained in Defendants' opening brief. *See* MTD at 20-24. To start, Plaintiffs do not deny that they failed to raise their Section 1554 argument before HHS, but instead ask the Court to excuse that waiver because others made generic objections containing language that happened to resemble language in Section 1554. *See* Cal. Opp'n at 21-22; EA Opp'n at 19-20. But merely notifying HHS of *substantive* objections did not give the agency a chance to address a question of *statutory interpretation*. HHS plainly did not have an opportunity to apply its expertise in administering the ACA with respect to this issue.

Essential Access adds that HHS "specifically discussed Section 1554 in a concurrent rulemaking," suggesting that "Defendants cannot profess to have been unaware of Section 1554." *See* EA Opp'n at 20 n.13. But HHS's discussion of Section 1554 in an entirely separate rulemaking is apropos of nothing, and Essential Access ignores that HHS, as an agency, is often engaged in multiple rulemakings across its various operating divisions. If Essential Access's point were

relevant, and if an agency need be only generally aware of a statute for the purposes of a waiver analysis, it would undermine any requirement that commenters raise their arguments in the relevant rulemaking. *Cf. Universal Health Servs., Inc. v. Thompson*, 363 F.3d 1013, 1019 (9th Cir. 2004) ("[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." (emphasis added)).

In any event, Plaintiffs' Section 1554 argument is meritless, which is presumably why none of the 500,000-plus comments on the proposed Rule raised it. The Rule merely limits what the government chooses to fund and thus does not "create," "impede," "interfere with," "restrict," "violate," or "limit" anything. *See* 42 U.S.C. § 18114. As the Supreme Court explained in *Rust*, there is a fundamental distinction between impeding something and choosing not to subsidize it, and that reasoning disposes of Plaintiffs' claim. *See* 500 U.S. at 201-02; MTD at 22-23. Moreover, it is implausible that Congress would have imposed such significant limitations on HHS's authority in one of the ACA's "Miscellaneous Provisions." *See Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001) ("Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions.").

C. California's "Excess of Statutory Jurisdiction" Claim Is Meritless.

California continues to press its argument that the Rule allegedly exceeds Defendants' authority under the Title X. Cal. Opp'n at 24-25. But California merely restates its prior claims, attempting to bootstrap its "statutory jurisdiction" argument onto the nondirective provision and Section 1554. Cal. Opp'n at 24-25 (insisting that the interpretation upheld in *Rust* can no longer be reconciled with Congress's later directives). Whatever arguments California may have with respect to the nondirective provision and Section 1554—which, as Defendants have shown, must ultimately fail—there is no dispute that nothing relevant in the Title X statute has changed since the Supreme Court upheld the 1988 regulations in *Rust*. Thus, California has no plausible argument that the Rule at issue here somehow violates the Title X statute.

II. PLAINTIFFS' ARBITRARY-AND-CAPRICIOUS CLAIMS FAIL.

Plaintiffs cannot establish that HHS acted irrationally in promulgating the Rule for all the reasons set out in Defendants' opposition to Plaintiff's preliminary injunction motion, *see* ECF No. 61 ("PI Opp.") at 24-34, and in Defendants' motion to dismiss, *see* MTD at 25-29. Accordingly, Plaintiffs' claims that HHS acted arbitrarily and capriciously should be dismissed.

Plaintiffs' primary response to Defendants' arguments that their arbitrary and capricious claims should be dismissed is procedural—*i.e.,* that the Court should not dispose of Plaintiffs' claims under Rule 12(b)(6). *See* Cal. Opp'n at 25-26; EA Opp'n at 23. But the Court need not wait until summary judgment to rule in Defendants' favor. Defendants' justifications for the Rule are set forth in the preamble, which is subject to judicial notice. And "[a] district court reviewing an agency action under the APA's arbitrary and capricious standard does not resolve factual issues." *Akpan v. Cissna*, 288 F. Supp. 3d 155, 163 (D.D.C. 2018). Rather, "the entire case on review is an action of law and can be resolved on the agency record in the context of a motion to dismiss under Rule 12(b)(6)." *Id.* (quotation omitted). The Rule, moreover, is based primarily on Defendants' best reading of § 1008, as blessed by the Supreme Court in *Rust*. The procedural posture of the litigation is therefore no hurdle to Defendants' motion.

Substantively, Plaintiffs assert that HHS has failed to justify its departure from the 2000 regulations with respect to the Rule's prohibition on providing referrals for abortion. Plaintiffs, however, all but ignore that the Supreme Court already approved of HHS's reasoning in *Rust*, concluding that (1) Title X authorizes HHS to prohibit abortion "counseling, referral, and advocacy within the Title X project," *Rust*, 500 U.S. at 184; and (2) HHS's interest in ensuring compliance with its interpretation of section 1008 justified referral and counseling requirements similar to (though more restrictive) those in the Rule, *id*. at 184-91. *Rust* is also fully consistent with *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502 (2009), upon which Plaintiffs rely. *See* Cal. Opp'n at 26; EA Opp'n at 24-25. *Fox* confirms that when an agency changes position, it must "ordinarily . . . display awareness that it *is* changing position" and show that "there are good reasons for the new policy." 556 U.S. at 515. Here, HHS discussed those interests, comments received, and the

approach taken in past rules, ultimately "reaffirm[ing the] reasoned determination" it made in 1988. 84 Fed. Reg. at 7724. On this point, *Fox* requires no more, *see* PI Opp'n at 25-26; "it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency *believes* it to be better, which the conscious change of course adequately indicates." *Fox*, 556 U.S. at 515.

Plaintiffs further argue that HHS acted arbitrarily and capriciously by instituting the physical and financial separation requirements, allegedly with no evidence of any actual problem to be addressed. Cal. Opp'n at 26-27; EA Opp'n at 25-26. Yet, even the 2000 regulations Plaintiffs prefer required some financial separation, and although Plaintiffs may disagree with HHS's policy judgment to require further separation, HHS adequately explained that such requirements were necessary to address the risk and perception that Title X funds would be commingled with other funds and used for other prohibited purposes (such as to build infrastructure or otherwise indirectly support Title X projects' abortion business), depriving the public of the statutorily-mandated assurance that taxpayer dollars are not being used to fund projects where abortion is a method of family planning. *See* 84 Fed. Reg. at 7764-66, 7773.

Plaintiffs go on to claim that HHS did not adequately consider reliance interests and consequences of the Rule, *see* Cal. Opp'n at 27; EA Opp'n at 27-28, pointing to investments made over many years by existing Title X providers, which Plaintiffs claim will be "upended by the new physical separation requirement." As Defendants have explained, HHS reasonably concluded that the physical separation requirement was necessary to prevent the use of Title X funds for abortion, confusion over the appropriate use of Title X funds, and the use of Title X funds to build infrastructure that could be used for such prohibited purposes. *See* MTD at 27. HHS also adequately considered possible reliance interests. *See id.* And any such "reliance harm is one that [Plaintiffs] played a role in developing, likely understanding all-the-while that the pendulum could eventually reverse course," *Family Planning Ass'n v. U.S. Dep't of Health & Human Servs.*, --- F. Supp. 3d. ---, 2019 WL 2866832, at *19 (D. Me. July 3, 2019). Plaintiffs may disagree with HHS's policy decision, but they cannot establish that HHS acted unreasonably.

Essential Access also claims that Defendants inadequately considered the possibility that the Rule would "drive providers out of the Title X network." EA Opp'n at 29. But grantees should not be able to use threats of departure from a program to veto otherwise permissible and reasoned policy judgments. Here, HHS concluded that the Rule would "contribute to more clients being served, gaps in service being closed, and improved care." 84 Fed. Reg. at 7723; *see also id*. at 7780-81. And in all events, HHS concluded that "compliance with statutory program integrity provisions is of greater importance" than the "cost" of departing from the status quo, 84 Fed. Reg. at 7783, and the APA does not permit courts to second-guess that eminently reasonable judgment.

As to the evaluation of cost, HHS, which administers the Title X program, is best situated to consider the potential effects on that program and it expressly did so. *See* 84 Fed. Reg. at 7781-82. Although commenters "provided extremely high cost estimates based on assumptions that they would have to build new facilities" to comply with the physical-separation requirement, HHS reasonably anticipated "that entities will usually choose the lowest cost method to come into compliance," such as "shift[ing] their abortion services" to one of their multiple "distinct facilities." *Id.* at 7781. And in any event, HHS "acknowledg[ed] that there is substantial uncertainty regarding the magnitude of the[] effects" of the physical-separation requirement, and provided an "estimate" of "an average" that was "an increase from [the] averaged estimate . . . in the proposed rule." *Id.* at 7781-82. Thus, in 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 and capricious' standard is narrow and a court is not to substitute its judgment for that of the agency.").[1]

[1] Essential Access initially asserted that HHS failed to follow appropriate notice-and-comment procedures when promulgating the Rule. *See* Compl. ¶¶ 211-15; EA PI Mem. at 19-21. In ruling on Plaintiffs' motions for preliminary injunction, this Court concluded that Essential Access is unlikely to prevail on that claim. *See* PI Order at 74. Essential Access "decline[s] to re-litigate" the claim in its opposition to Defendants' motion to dismiss. EA Opp'n at 30 n.15.

III. PLAINTIFFS CANNOT PREVAIL ON THEIR CONSTITUTIONAL CLAIMS.

A. Dr. Marshall's First Amendment Claim Fails.

In *Rust*, the Supreme Court expressly considered the contention that the 1988 regulations contravened 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. And *Rust* rejected it. *Id*. at 192-200. The Supreme Court has not overruled *Rust*, but rather has recently reaffirmed it. *See Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2246 (2015); *Agency for Int'l Devel. v. All. For Open Soc'y Int'l, Inc.*, 570 U.S. 205, 213 (2013). Even if other Supreme Court decisions had called *Rust* into question—which they do not—*Rust* would continue to bind this Court, as only the Supreme Court has "the prerogative of overruling its own decisions." *See Rodriguez de Quijas v. Shearson/Am. Exp., Inc.*, 490 U.S. 477, 484 (1989).

Essential Access's various attempts to distinguish *Rust* fail, and its First Amendment claim likewise should be dismissed. As Essential Access acknowledges, the Supreme Court rejected the First Amendment challenge in *Rust* because the 1988 "regulations do not significantly impinge upon the doctor-patient relationship." *Id.* at 200. Although Essential Access attempts to distinguish the Rule from the 1988 regulations, the same is true here.

First, Essential Access latches onto slight linguistic differences between the 1988 regulations and the Rule, pointing out that the 1988 regulations required participants in Title X projects to refer for "*appropriate* prenatal care *and/or* social services." EA Opp'n at 30 (emphasis in original). And Essential Access claims that the arguably broader discretion permitted by that requirement distinguishes the Rule from the regulations at issue in *Rust*. *Id*. at 30-31. Putting aside the trivial nature of this supposed distinction, this argument utterly ignores the Supreme Court's

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Essential Access's notice-and-comment claim thus should be dismissed for the reasons Defendants have explained. *See* MTD at 29-39.

explanation and reasoning in *Rust*. The amount of discretion a doctor may exercise is beside the point. As the Supreme Court explained, the 1988 regulations presented no First Amendment concerns because 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. Further, Essential Access is simply incorrect that the prohibition on abortion referrals "eliminates any opportunity for a doctor to express her true medical judgment." Cal. Opp'n at 31. As in *Rust*, health care providers, like Dr. Marshall, are free to inform their patients that prenatal referral is a requirement of the Title X program, or that directive counseling and referrals for abortion are beyond the scope of the program. *See Rust*, 500 U.S. at 200.

Essential Access also tries to show that the relationship between providers and patients under the Rule is somehow broader than it was in *Rust*, because the Rule allows some post-conception counseling and requires Title X providers to have robust referral linkages with primary health providers. *See* EA Mem. at 31. These reeds are too slim to lean on. The requirement that Title X programs have robust primary care linkages exists precisely because Title X is a limited, preconception program, *see* 84 Fed. Reg. at 7747, undercutting Essential Access's argument. Further, under the 1988 regulations, Title X projects were permitted to engage in postconception counseling and referrals, so long as they did not counsel on or refer for abortion. But even putting that aside, the purpose and scope of the Title X program has not changed since *Rust*, and therefore the nature of the doctor-patient relationship under Title X remains the same—it is not "sufficiently all encompassing" to justify an expectation of comprehensive medical advice. As in *Rust*, "the general rule that the Government may choose not to subsidize speech applies with full force." *Rust*, 500 U.S. at 200..

Essential Access next argues that "[s]ubsequent decisions shed light on the question left open by *Rust*—whether speech made in the context of the doctor-patient relationship 'should enjoy protection under the First Amendment from Government regulation, even when subsidized by the

Government.'" EA Opp'n at 31 (quoting *Rust*, 500 U.S. at 200). Essential Access relies almost exclusively on *National Institute of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018) (*NIFLA*), but that case is inapposite for the reasons Defendants have explained. *See* MTD at 32. Namely, *NIFLA* did not address government subsidization of speech at all, *see NIFLA*, 138 S. Ct. at 2368-78, and it does not even mention *Rust*, which is controlling here, *see* MTD at 33. Essential Access also points to *Legal Services Corp. v. Velazquez*, 531 U.S. 533 (2001), but *Velazquez* reaffirmed *Rust*, *see* 531 U.S. at 540-41, distinguishing it from the facts of that case, which undercuts any suggestion that the Rule violates the First Amendment.

B. Essential Access's Vagueness Claim Fails.

Essential Access's vagueness claim also fails, largely for the reasons set forth in Defendants' opening brief. Once again, Essential Access does not grapple with Defendants' arguments, instead looking past them to contend that courts apply the vagueness analysis "more strictly" when "First Amendment rights are at stake." EA Opp'n at 33. That argument ignores, however, the fundamental point that this case arises in "the context of selective subsidies"—not an exercise of the government's coercive regulatory authority—and that, as such, the "consequences of imprecision are not constitutionally severe," even when the First Amendment is involved. *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 589 (1998) (addressing vagueness claim under First and Fifth Amendments); *see also Planned Parenthood of Cent. & N. Ariz. v. Arizona*, 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 a reduction of a government subsidy.").

Essential Access seems to acknowledge, based on *Finley*, that it faces an uphill battle, but still argues that it has plead sufficient facts to survive a motion to dismiss. *See* EA Opp'n at 34. Not so. Essential Access's claim turns on an exclusively legal question, and it cannot show that the Rule is unconstitutionally vague—particularly given that the plaintiffs in *Rust* raised similar vagueness arguments, which the Supreme Court did not even bother to address. *See* MTD at 36.

Despite the fact that "speculation about possible vagueness in hypothetical situations not before the Court will not support a facial attack on a [regulation]," MTD at 34 (quoting *Hill v. Colorado*, 530 U.S. 703, 733 (2000)), Essential Access continues to rely on hypothetical applications of the Rule to plead its vagueness claim. Essential Access offers no reason why the hypotheticals it offers render the Rule impermissibly vague as a facial matter, particularly where, as Defendants have shown, Essential Access is able to "inquire of HHS exactly how the agency proposes to resolve any of the" purported ambiguities. *Nat'l Family Planning & Reprod. Health Ass'n v. Gonzales*, 468 F.3d 826, 831 (D.C. Cir. 2006); *see* MTD at 34 & n.5.

In any event, as explained in Defendants' motion to dismiss, the Rule does provide guidance on the hypothetical applications Essential Access describes. For example, Essential Access takes issue with the Rule's emergency care exception, arguing that it "does not specify whether [an abortion] referral is allowed when a pregnancy presents a risk to the patient's health other than an imminent emergency." EA Opp'n at 33. But the provision in the Rule authorizing (indeed, requiring) Title X providers to refer patients to "an appropriate provider of medical services needed to address" a situation requiring "emergency care," 42 C.F.R. § 59.14(b)(2), provides a clear safe harbor to grantees to refer women to abortion providers as needed to address medical emergencies that place a patient's life in danger. *See Rust*, 500 U.S. at 195 (declining to read analogous 1988 regulations in a way that would prevent a Title X project from "refer[ring] a woman whose pregnancy places her life in imminent peril to a provider of abortions or abortion-related services").

Essential Access also asserts that the Rule's restriction on provider actions that "encourage, promote or advocate abortion as a method of family planning," EA Opp'n at 33 (quoting 42 C.F.R. § 59.16), renders the Rule unconstitutionally vague. Essential Access neglects to mention, however, that under the 2000 regulations it seeks to preserve, "the funding of abortion or activities that promote or encourage abortion with Title X funds has been and will continue to be prohibited." Standards of Compliance for Abortion-Related Services in Family Planning Service Projects, 65 Fed. Reg. 41,270, 41,271 (July 3, 2000). In other words, both the 2000 regulations and the

challenged Rule permit nondirective counseling—including on abortion—while simultaneously prohibiting any counseling that promotes or encourages abortion. *Compare id*. at 41,273 (2000 regulations) (Title X providers "may not steer or direct clients toward selecting any option, including abortion, in providing options counseling"), *and id*. (2000 regulations) (noting that under the pre-1988 regulations, providers "were not permitted to provide options counseling that promoted abortion or encouraged patients to obtain abortion"), *with* 84 Fed. Reg. at 7746 (Rule) ("Title X projects and service providers must be careful that nondirective counseling related to abortion does not diverge from providing neutral, nondirective information into encouraging or promoting abortion as a method of family planning.").

Indeed, the Rule provides significant guidance on how a provider could offer nondirective counseling "without encouraging, promoting, advocating, or referring for abortion." EA Opp'n at 33-34; *see* 42 C.F.R. § 59.16(b) (providing eight examples to illustrate what is permissible and what is prohibited); 84 Fed. Reg. at 7747 (offering "guidance on the requirement of nondirective pregnancy counseling"). Essential Access has yet to explain why the Rule's continuation of that approach violates the Constitution, especially when Congress itself has imposed similar limitations elsewhere, *see, e.g.*, 42 U.S.C. § 300z-10(a) ("grants may be made only to projects or programs which do not advocate, promote, or encourage abortion").

C. California's Due Process Claim Fails.

California doubles down in its opposition on the remarkable claim that the Rule constitutes unconstitutional sex discrimination. Cal. Opp'n at 28-30. This argument is foreclosed not only by *Rust* itself, but also by the Supreme Court's subsequent instruction 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." *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 273 (1993). California asserts that *Bray* addressed "a statutory interpretation issue," not "a constitutional cause of action." Cal. Opp'n at 29. But in concluding that "government abortion-funding restrictions [are not judged by] the heightened-scrutiny standard that our cases demand for sex-based discrimination," the Court

necessarily concluded that abortion-funding restrictions *do not involve* sex discrimination. And *Bray* does not stand alone. *See Harris v. McRae*, 448 U.S. 297, 322-23 (1980) (federal law providing reimbursement under Medicaid for medically necessary services generally but not for all medically necessary abortions not predicated on a suspect classification); *Maher v. Roe*, 432 U.S. 464, 470-71 (1977) (rejecting claim that welfare regulation providing funds for childbirth but not for nontherapeutic abortions discriminated against a suspect class).

California's remaining arguments in support of this claim are likewise plainly incorrect. California asserts the Rule contains sex-based classifications because of women's "unique reproductive healthcare needs" and because it allegedly "single[s] out women's healthcare." *See* Pl.'s Opp'n at 30. But this is just a restatement of the position that the Supreme Court has rejected in the cases discussed above and must fail for the same reasons. California also claims that there is not even a rational basis for the Rule. But California presents only an inaccurate caricature of the Rule—arguing that there "is no rational relationship between seeking to disfavor abortion by reducing women's access to Title X services." *See* Cal. Opp'n at 30. The Rule, of course, does not limit women's access to Title X services; it merely ensures that those services are provided in accordance with § 1008. Moreover, as Defendants have explained, avoiding the use of federal funds to promote or encourage abortion is an important government interest, *see* Defs.' MTD at 38; *Rust*, 500 U.S. at 192-93. The Rule therefore easily satisfies rational basis review and would even pass heightened scrutiny if it were to apply.

Finally, California's bare allegation that HHS acted with animus cannot save its claim from dismissal. *See* Compl. ¶¶ 8, 79; Cal. Opp'n at 30. HHS was clear regarding its intent in the preamble to the Rule: to ensure that Title X funds are not used in programs where abortion is a method of family planning, consistent with § 1008. *See* 84 Fed. Reg. at 7715. HHS also sought comment on the proposed rule through a notice-and-comment process open to the public, *see* Compliance with Statutory Program Integrity Requirements, 83 Fed. Reg. 25,502, 25,502 (June 1, 2018), fatally undercutting California's accusation that HHS "deliberately failed to solicit input from leading healthcare experts," Cal. Opp'n at 30.

CONCLUSION

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

Dated: September 4, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 4, 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.

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