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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 RENEWED MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT** Date: February 20, 2020 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 last year that is, in all material respects, indistinguishable from the 1988 regulations. *See* 84 Fed. Reg. 7714 (Mar. 4, 2019) (Rule). Notwithstanding *Rust*'s holding, Plaintiffs bring this suit asserting that the current Rule, among other things, violates Title X, the Administrative Procedure Act (APA), and the United States Constitution. As Defendants explained in their opening brief, Plaintiffs' claims lack merit. *See* Defs.' Mem. in Opp'n to Pls.' Mots. For Summ. J. & in Support of Renewed Mot. to Dismiss or, in the alternative, for Summ. J. (Defs.' Mot.), ECF No. 167.[1]

In their most recent briefs, Plaintiffs largely double down on the remarkable arguments asserted in their 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. *See* California's Opp'n to Defs.' Mot. to Dismiss or, in the Alternative, for Summ. J & Reply in Supp. of California's Mot. for Summ. J., ECF No. 174 (Cal. Opp'n); Pls.' Reply in Supp. of Mot. for Summ. J & Opp'n to Defs.' Renewed Mot. to Dismiss or, in the Alternative, for Summ. J., *Essential Access v. Azar*, No. 3:19-cv-1184-EMC (N.D. Cal.), ECF No. 142 (EA Opp'n). These arguments fail as a matter of law, and Defendants are entitled to dismissal of Plaintiffs' claims or, alternatively, to entry of summary judgment in their favor.[2]

[1] Unless otherwise indicated, references to electronic filing numbers refer to entries on the docket in *California v. Azar*, No. 3:19-cv-1184-EMC (N.D. Cal.).

[2] In addition to the reasons set forth in Defendants' opening brief and below, Defendants incorporate by reference the arguments contained in the briefing on their initial motion to dismiss,

Defendants respectfully submit, however, that the Court should refrain from ruling on the parties' dispositive motions, given that the *en banc* Ninth Circuit is currently considering the central merits questions presented in this case. It would serve the interests of judicial economy and comity to await that Circuit's decision before deciding the motions presently before the Court, particularly given that the Ninth Circuit has left in place the current stay of this Court's injunction as it considers Defendants' appeal.

ARGUMENT

I. THE COURT SHOULD AWAIT THE NINTH CIRCUIT'S RULING BEFORE CONSIDERING THE PARTIES' ARGUMENTS.

For the reasons Defendants have stated, and as further explained below, Defendants should prevail on all of Plaintiffs' claims. Yet, even if the Court were to disagree, Defendants respectfully submit that it should await a ruling from the Ninth Circuit before addressing the parties' dispositive motions. First, the parties have already expended significant resources in the Court of Appeals. A Ninth Circuit motions panel entered a stay of this Court's preliminary injunction order, *see California v. Azar*, 927 F.3d 1068 (9th Cir. 2019), and then, upon Plaintiffs' request, the *en banc* Ninth Circuit agreed to reconsider that decision, while leaving the stay of this Court's order in place, *see California v. Azar*, No. 19-15974, Order (July 3, 2019); *California v. Azar*, No. 19-15974, Order (July 11, 2019). The parties have now fully briefed the central merits issues in this litigation before the *en banc* Ninth Circuit, which heard oral argument on those merits issues on September 23, 2019.

Moreover, as this Court has already recognized, the forthcoming ruling from the Ninth Circuit is likely to significantly affect further proceedings in this case. *See, e.g.*, Order at 1-2, ECF No. 154. For that reason, the Court set only a "contingent" briefing schedule so that it may rule quickly "when the Ninth Circuit issues its decision." *See* Order at 1, ECF No. 156. The Court also indicated that it may vacate the hearing date "[s]hould the Ninth Circuit not issue an order prior to [the] hearing." *Id.* at 2.

ECF Nos. 136, 145, and in their opposition to Plaintiffs' motions for a preliminary injunction, *see* ECF No. 61 (Defs.' PI Opp'n).

Despite the ongoing proceedings before the Ninth Circuit, as well as this Court's prior explanation that it would rule on Plaintiffs' motions only "if the Ninth Circuit issues a decision before" March 4, 2020, *id.*, Plaintiffs continue to insist that the Court should issue a ruling now, before the Ninth Circuit rules. *See* Cal. Opp'n at 31-32; EA Opp'n at 32. The Court should again reject Plaintiffs' request, particularly given that the Ninth Circuit has left the stay of this Court's injunction in place, even though it has been clear since the Rule was published in March 2019 that the physical separation requirement will go into effect on March 4, 2020. After the Ninth Circuit issues its decision, the Court will be in a significantly better position to address Plaintiffs' claims, with additional briefing on the impact of that decision from the parties if the Court sees fit.

At a minimum, if the Court does decide to rule on the parties' cross motions before the Ninth Circuit issues its decision, and if the Court grants Plaintiffs' motions, Defendants respectfully ask the Court to stay the effect of its order pending any further appeal to avoid the need for Defendants to consider seeking emergency appellate relief. Although Plaintiffs fault Defendants for not explaining why such a stay would be appropriate, *see* Cal. Opp'n at 32; EA Opp'n at 33, a stay plainly would be warranted for the same reasons Defendants sought a stay of this Court's preliminary injunction order, *see* Defs.' Mot. to Stay Injunction Pending Appeal, ECF No. 109—and, presumably, for the same reasons the Ninth Circuit has left the current stay in place pending the current appeal.[3]

II. PLAINTIFS CANNOT PREVAIL ON THEIR STATUTORY CLAIMS.

Plaintiffs continue to press the argument that the Rule violates Title X and two later-enacted statutory provisions. But as Defendants have explained, the Supreme Court has held that Title X authorizes materially indistinguishable regulations. Plaintiffs' attempt to show that this authorization has been silently repealed is inconsistent with the text of the relevant statutes and fails to meet the high standard necessary to overcome the presumption against implied repeals.

[3] In addition, for the reasons Defendants explained in their opening brief, if the Court does deem any portion of the Rule to be unlawful, it should sever that portion from the remainder of the Rule and limit any relief to the parties before the Court. *See* Defs.' Opp'n at 37.

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 already addressed at length. *See* Defs.' Mot. at 15-17; Defs.' PI Opp'n at 14-19. Title X plainly authorizes the Rule's restrictions on referrals and counseling. If a program refers patients for, or otherwise promotes, abortion as a method of family planning, then the program is one "where abortion is a method of family planning" and hence is ineligible for funding under § 1008. 42 U.S.C. § 300a-6; *see* 84 Fed. Reg. at 7759. Plaintiffs suggest that § 1008 should be read to merely "prohibit[] Title X funds from being used to pay for abortions," Cal. Opp'n at 10, but even the 2000 regulations concluded that is "not . . . the better reading." 65 Fed. Reg. 41,270, 41,272 (July 3, 2000). After all, when Congress wants to prevent only the funding of abortion, it knows how to do so. *See* Pub. L. No. 96-123, § 109, 93 Stat. 923, 926 (1979) ("[N]one of the funds provided by this joint resolution shall be used to perform abortions."). Section 1008, by contrast, reveals "Congress' intent in Title X that federal funds not be used to 'promote or advocate' abortion as a 'method of family planning.'" *Rust*, 500 U.S. at 195 n.4.

All of this remains true notwithstanding a subsequent appropriations rider providing that Title X funds "shall not be expended for abortions" and that "all pregnancy counseling shall be nondirective." Pub. L. No. 115-245, div. B, tit. II, 132 Stat. 2981, 3070-71 (2018). If anything, that rider reinforces § 1008 by further ensuring that pregnancy counseling is not used to "direct" patients *toward* abortion. Plaintiffs' contrary arguments do not withstand scrutiny. As Defendants have explained, the absence of a referral for an abortion is not "directive" at all, particularly in light of the limited, preconceptional nature of the Title X program. *See* Defs.' Mot. at 15-16; Defs.' PI Opp'n at 18-19. Plaintiffs continue to insist that the requirement that patients be referred for prenatal health care, together with the prohibition on abortion referrals, impermissibly "steers patients toward childbirth." EA Opp'n. at 16. But the prenatal-referral requirement does not direct a decision about abortion—it merely requires providers to refer patients for care while they are pregnant, even if they obtain an abortion later. By contrast, when HHS wants to refer patients for

(or counsel them about) "[p]renatal care *and delivery*," it knows how to do so, as the 2000 regulations illustrate. 65 Fed. Reg. at 41,279 (emphasis added). And the Rule permits providers to explain that abortion is outside the scope of the program, and that if a patient wants to seek an abortion, she can find information about that elsewhere, but in the meantime, providers can provide her with a list of providers who can offer her care while she is pregnant. *See* 42 C.F.R. § 59.14(e)(5). Providers could also include an express disclaimer that the prenatal-care referral is a general requirement and should not be taken as directing the patient's ultimate decision about her pregnancy. And even if the required prenatal-care referral were somehow directive, that would not justify invalidating the prohibition on abortion referrals. The provisions are contained in different subsections, 42 C.F.R §§ 59.16(a), 59.16(b)(1), which are severable, 84 Fed. Reg. at 7725.

More generally, Plaintiffs' entire argument rests on the implausible theory that in 1996, Congress smuggled into an appropriations rider—which itself provides that Title X funds "shall not be expended for abortions"—an implied repeal of the interpretation of § 1008 in *Rust*, after it had tried and failed to do so expressly, in the vetoed Family Planning Amendments Act of 1992. *See* Defs.' Mot. at 15; Defs.' PI Opp'n at 16-19. Indeed, the Congress responsible for the 1996 appropriations rider declined to enact the Family Planning Amendments Act of 1995, which, like its 1992 predecessor, would have required Title X projects to include "termination of pregnancy" within their "nondirective counseling and referrals." *Compare* H.R. 833, 104th Cong. § 2 (1995), *with* S. 323, 102d Cong. § 2 (1991). "Few principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language," *INS v. Cardoza-Fonseca*, 480 U.S. 421, 442-43 (1987), and that principle alone should put an end to Plaintiffs' arguments.

B. The Rule Does Not Violate Section 1554 of the ACA.

Plaintiffs' Section 1554 claim fails for the reasons explained in Defendants' opening brief. *See* Defs.' Mot. at 17-18; *see also* Defs.' PI Opp'n at 19-23. 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 13-14; EA Opp'n at 23. But merely notifying HHS of *substantive* objections did not give the agency a chance to address the question of *statutory interpretation* that Plaintiffs now raise. HHS plainly did not have an opportunity to apply its expertise in administering the ACA with respect to this issue.

California points out that HHS included the entirety of the ACA in the administrative record, as if that fact somehow relieves commenters of raising specific issues during the rulemaking process. *See* Cal. Opp'n at 14. Yet, the fact that HHS included a copy of the full statute—which spans over 900 pages—does not mean that it considered the particular argument that Plaintiffs make here (but that was not raised in any comments)—*i.e.*, that the Rule violates the obscure "Access to therapies" provision of that voluminous legislation—much less that Plaintiffs' waiver should be excused on that basis. *See Koretoff v. Vilsack*, 707 F.3d 394, 398 (D.C. Cir. 2013) ("[A]gencies have no obligation to anticipate every conceivable argument about why they might lack statutory authority."). Essential Access also 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 24 n.18. But HHS's discussion of Section 1554 in an entirely separate rulemaking is apropos of nothing, and Essential Access ignores that HHS, as one of the largest Executive Departments, 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 substantially undermine the requirement that commenters raise their arguments in the relevant rulemaking. *See Univ. Health Servs., Inc. v. Thompson*, 363 F.3d 1013, 1019 (9th Cir. 2004). That separate rulemaking does show, however, that, when HHS received comments relying on Section 1554 in a different rulemaking, it responded by invoking its authority to administer Section 1554 and provided interpretive arguments in addition to policy ones. *See* 83 Fed. Reg. 57,536, 57,551-52 (Nov. 15, 2018). HHS should have been given the same opportunity here.

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 imposes a condition on 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 Defendants have explained, *see* Defs.' Mot. at 17-18; Defs.' PI Opp'n at 20-23. Plaintiffs ignore the distinction between impeding something and choosing not to subsidize it. *See* 500 U.S. at 201-02. It is also implausible that Congress would have imposed such significant limitations on HHS's authority in Section 1554 without doing do more explicitly. *See Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001).

C. California's "Excess of Statutory Authority" Claim Lacks Merit.

California only half-heartedly defends its claim that the Rule violates Title X itself, largely relying on its arguments with respect to the appropriations rider and Section 1554. *See* Cal. Opp'n at 27-38. For the reasons Defendants have explained, however, there can be no doubt that the Rule is a permissible interpretation of Title X in light of *Rust*, *see* Defs.' Mot. at 18; Defs.' Defs.' PI Opp'n at 23-24, and California does not actually contend (nor could it) that the Title X statute has changed since 1992. Further, for the first time, California now defends its claim that the Rule violates Title X by pointing to certain bookkeeping and compliance requirements the Rule imposes on Title X funding recipients. Cal. Opp'n at 28. California did not raise this argument in its opening brief, so the argument is waived. *See Williams v. Cnty of Alameda*, 26 F. Supp. 3d 925, 397 n.4 (N.D. Cal. 2014) (citing cases). In any event, California fails to explain how these common-sense provisions are inconsistent with Title X's purpose, which, of course, they are not. HHS has ample authority under the statute to take steps to require Title X grant applicants to demonstrate their ability to comply with relevant regulations and avoid misuse of funds. *See* 84 Fed. Reg. at 7752-54. California cannot prevail on its claim.[4]

[4] California also appears to suggest that the Rule it challenges is somehow contrary to Title X because some district courts have concluded that HHS lacked authority under various federal statutes to promulgate a completely different rule that strengthens protections for the conscience rights of health care entities. *See* Cal. Opp'n at 28. California's argument fails as a matter of both fact and logic. Those decisions, even if correct, say nothing about the scope of Title X, nor do they (or could they) call into question the Supreme Court's decision in *Rust*.

III. PLAINTIFFS' ARBITRARY AND CAPRICIOUS CLAIMS FAIL.

Plaintiffs cannot establish that HHS acted irrationally in promulgating the Rule for all the reasons Defendants have already explained. *See* Defs.' Mot. at 19-28; Defs.' PI Opp'n at 24-33. Accordingly, Plaintiffs' claims that HHS acted arbitrarily and capriciously should be dismissed, or judgment should be entered in Defendants' favor.

Plaintiffs again 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 than) 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 15-16; EA Opp'n at 2, 5-6, 8-9. *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 the comments received and the approach taken in past rules, and ultimately "reaffirm[ed the] reasoned determination" it made in 1988. 84 Fed. Reg. at 7724. On this point, *Fox* requires no more; "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 also reassert their grab-bag of other objections to the referral restrictions in the Rule. They argue that HHS ran afoul of its own Quality Family Planning (QFP) guidelines, which were developed when the 2000 regulations were in place. *See* Cal. Opp'n at 16-17, 24; EA Opp'n at 9 n.10. But, as Defendants have explained, HHS acknowledged that it was departing from its prior approach under the 2000 regulations and stated the reasons why, which is sufficient for the purposes of the APA. *See* Defs.' Mot. at 21. Nor can Plaintiffs show that HHS acted unreasonably

in restricting nondirective pregnancy counseling to physicians and advance practice providers, or that HHS failed to address alleged additional costs on patients. *See* Defs.' PI Opp'n at 22; *see also* Cal. Opp'n. at 24-25; EA Opp'n. at 12.

Plaintiffs' argument regarding medical ethics fares no better. *See* Cal. Opp'n at 19; EA Opp'n at 8, 10. HHS expressly addressed Plaintiffs' concerns in the preamble and explained why the Rule is consistent with medical ethics. *See* 84 Fed. Reg. at 7724, 7748. Notably, if Plaintiffs' view of medical ethics were correct, it is unclear why Congress and many States—California included—have excluded abortion referrals in various publicly funded programs. *See, e.g.*, Cal. Health & Safety Code § 124180(b) ("No grant funds may be expended for abortions, abortion referrals, or abortion counseling."); *see also, e.g.*, 42 U.S.C. § 300z-10(a); States' Amicus Br. at 8-9, ECF No. 59-1. And the overwhelming majority of Title X providers have remained in the program after the Rule went into effect, which is compelling real-world evidence that these providers recognize that the Rule is consistent with their ethical obligations. *See, e.g.*, HHS Issues Supplemental Grant Awards to Title X Recipients (Sept. 30, 2019), https://www.hhs.gov/about/news/2019/09/30/hhs-issues-supplemental-grant-awards-to-title-x-recipients.html.

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 3-8. 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 were being 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; *see also* Defs.' Mot. at 22-25.

Plaintiffs' remaining objections to the Rule cannot render it arbitrary and capricious. As to the removal of the "medically approved" requirement, *see* Cal. Opp'n at 26-27; EA Opp'n at 11,

Plaintiffs largely ignore that Congress established the standard of "acceptable and effective," and—while Plaintiffs cite to various commenters who disagreed with the proposal to remove the "medically approved" requirement—HHS was not obliged to displace Congress's language with the preference of commenters in promulgating the Rule. HHS addressed commenters' concerns and reasonably explained why it was taking a different approach. *See* 84 Fed. Reg. at 7732, 7740-41.

Similarly, while Plaintiffs clearly disagree as a policy matter with the Rule's requirement that Title X projects "offer either comprehensive primary health services onsite or have a robust referral linkage program with primary health providers who are in close physical proximity to the Title X site," 42 C.F.R. § 59.5(a)(12), they fail to show the Rule is either unreasonable or contrary to Title X in that respect, *see* Defs.' Mot. at 25-26. Nor do Plaintiffs' concerns regarding the impact on rural health care go beyond mere conjecture, given that HHS generally accounts for the geographic distribution of services when making grant decisions. *Id.* at 26. Moreover, contrary to California's suggestion, *see* Cal. Opp'n at 27, HHS did specifically address commenters' concerns regarding the definitions in 42 C.F.R. § 59.2, *see* 7734-35, 7751-52. California appears to fault HHS for setting up any requirements for the receipt of federally funded services that would not apply when individuals obtain services outside of a Title X program, but California wholly fails to explain how doing so could be objectionable.

Finally, Essential Access reiterates its objection to the Rule's reporting requirements. *See* EA Opp'n at 13. Yet, HHS addressed Essential Access's concern regarding added administrative burden and reasonably concluded that the burden was justified to promote transparency and to "ensure that Title X projects are achieving the goals of the program and expending grant funds properly." 84 Fed. Reg. at 7750. The APA requires nothing more.[5]

[5] Essential Access limits its defense of its notice-and-comment claim to a footnote. *See* EA Opp'n at 12 n.12. Its arguments fail for the reasons Defendants have already explained, *see* Defs.' Mot. at 28-29; Defs.' PI Opp'n at 34-36, and for the reasons this Court concluded that Essential Access's claim is unlikely to succeed, *see* Order at 74, ECF No. 103.

IV. PLAINTIFFS' CONSTITUTIONAL CLAIMS LACK MERIT.

A. Dr. Marshall's First Amendment Claim Lacks Merit.

Although Essential Access does not dispute that *Rust* remains good law, it contends that *Rust* "declined to resolve" the question of whether "traditional relationships such as that between doctor and patient should enjoy protection under the First Amendment" in the context of a government-subsidized health care program. EA Opp'n at 26. But the Supreme Court still rejected the First Amendment challenge because the 1988 "regulations do not significantly impinge upon the doctor-patient relationship." *Rust*, 500 U.S. at 200. Essential Access suggests that the nondirective provision and Section 1554 have altered the nature of the Title X program, such that what was true in 1988—*i.e.*, that "the doctor-patient relationship established by the Title X program [is not] sufficiently all encompassing so as to justify an expectation on the part of the patient of comprehensive medical advice" and that "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.*—is no longer true today. *See* EA Opp'n at 26-27. But this vastly overstates the import of those provisions and their impact on the Title X program, which remains fundamentally the same as it was when *Rust* was decided. The 1988 regulations did not prohibit Title X participants from providing any "post-conception counseling" whatsoever, *id.* at 27, but allowed them to "provide counseling . . . regarding any of a wide range of family planning and other topics, save abortion," *Rust*, 500 U.S. at 209 (Blackmun, J., dissenting), and in fact required them to give pregnant patients "information necessary to protect the health of mother and unborn child," 53 Fed. Reg. 2922, 2945 (Feb. 2, 1988) (§ 59.8(a)(2)). Thus, 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 latches onto slight linguistic differences between the 1988 regulations and the Rule, pointing out that the former required participants in Title X projects to refer for "*appropriate* prenatal care *and/or* social services." EA Opp'n at 27. 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 ignores the 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 of the limited nature of the doctor-patient relationship in a Title X project. *See Rust*, 500 U.S. 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." EA Opp'n at 27. 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 referrals for abortion are beyond the scope of the program. *See Rust*, 500 U.S. at 200. Dr. Marshall also may provide counseling regarding abortion so long as that counseling is nondirective.

Essential Access also again attempts to rely on the Supreme Court's recent decision in *National Institute of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018) (*NIFLA*) to undermine the applicability of *Rust* to this case. *See* EA Opp'n at 27-28. As Defendants have explained, however, *NIFLA* is inapposite because it did not address government *subsidization* of speech and did not even mention *Rust*, which remains binding here. Defs.' Mot. at 31-32.

Finally, Essential Access argues that *Rust* is simply beside the point because Dr. Marshall "alleges both facial and as-applied constitutional challenges here." EA Opp'n at 28. But Essential Access cannot avoid summary judgment by merely using the words "as-applied" like some sort of talisman. To start, Essential Access fails to acknowledge that APA cases, like this one, should be decided exclusively on the administrative record. *See, e.g.*, *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 743-44 (1985). Even as to constitutional claims, Defendants are aware of no Ninth Circuit decision recognizing an exception to the general rule that cases brought under the APA must be reviewed on the administrative record, and many district courts have rejected requests to create such an exception. *See, e.g.*, *Jiahao Kuang v. U.S. Dep't of Defense*, 2019 WL 293379, at *2-3 (N.D. Cal Jan. 23, 2019); *Moralez v. Perdue*, 2017 WL 2264855, at *3 (E.D. Cal. May 24, 2017).

Moreover, Rule 56(d) of the Federal Rules of Civil Procedure offers relief to a litigant who, faced with a summary judgment motion, shows the court by affidavit or declaration that "'it cannot present facts essential to justify its opposition.'" *Michelman v. Lincoln Nat'l Life Ins. Co.*, 685 F.3d 887, 899 (9th Cir. 2012) (quoting Fed. R. Civ. P. 56(d)). Yet Essential Access's summary judgment opposition includes no such affidavit or declaration. The Court should therefore reject Essential Access's argument that more facts are required to evaluate its claim. Even so, given the Supreme Court's holding in *Rust*, which opined on the limited nature of the doctor-patient relationship in a Title X project, no set of facts regarding how the Rule applies to Dr. Marshall could allow her to establish a First Amendment violation.

B. Essential Access's Vagueness Claim Lacks Merit.

Essential Access's vagueness claim also fails, largely for the reasons Defendants have already explained. Defs.' Opp'n at 32-35; Defs.' PI Opp'n at 38-42. Essential Access does not grapple with Defendants' arguments, instead looking past them to contend that courts apply the vagueness analysis "strictly" when "First Amendment rights are at stake." EA Opp'n at 29. That argument ignores, however, the fundamental point that this case arises in "the context of selective subsidies"—not in 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).

Moreover, although Essential Access continues to assert that certain aspects of the Rule are insufficiently explained, Defendants addressed each of Essential Access's arguments in their opening brief. *See* Defs.' Opp'n. at 32-35. The Rule is sufficiently clear, and 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).[6]

C. California Cannot Prevail on Its Equal Protection Claim.

California's latest brief cannot save its equal protection claim. To start, California lacks standing to assert this claim based, because California itself would not be injured by any alleged sex discrimination. At best, California's theory of standing rests on the doctrine of *parens patriae*, but a state "'does not have standing as *parens patriae* to bring an action against the Federal government,'" *see Sierra Forest Legacy v. Sherman*, 646 F.3d 1161, 1178 (9th Cir. 2011) (citation omitted).[7]

Furthermore, California's 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) (citation omitted). California asserts that *Bray* addressed a "statutory interpretation issue." Cal. Opp'n at 30. But, in concluding that "government abortion-funding restrictions [are not judged by] the heightened-scrutiny standard that our cases demand for sex-based discrimination," *Bray*, 506 U.S. at 273, the Court necessarily concluded that abortion-funding restrictions do not involve sex discrimination.[8]

California's equal protection claim must be analyzed under the framework established in *Bray* because it challenges a Rule that prohibits federal funds to be used to refer for abortion as a method of family planning. California continues to claim that the Rule is unlawful because it

[6] As with Dr. Marshall's First Amendment claim, Essential Access cannot save its vagueness claim simply by alleging an as-applied challenge. *See supra* Part IV.A; *see also* EA Opp'n at 31 (claiming Defendants failed to address "Plaintiffs' as-applied vagueness challenge").

[7] Article III standing is a jurisdictional question that the Court must address before proceeding to the merits of California's claim regardless of when it is raised. *See City of Los Angeles v. Cnty of Kern*, 581 F.3d 841, 845 (9th Cir. 2009).

[8] *Bray*, moreover, does not stand alone. In both *Harris v. McRae*, 448 U.S. 297 (1980), and *Maher v. Roe*, 432 U.S. 464 (1977), the Supreme Court indicated that the government's decision not to provide funding for abortion survived constitutional scrutiny because a rational relationship existed between the challenged action and a legitimate government interest. *See Harris*, 447 U.S. at 324-25; *Maher*, 432 U.S. at 478-51. California similarly tries to distinguish those cases as limited to mere statutory interpretation. But, as in *Bray*, those decisions necessarily rejected California's argument that heightened scrutiny should apply.

allegedly treats women differently from men, Cal. Opp'n at 28-29, but that was also true in the cases discussed above. California argues, in essence, that the Rule is unconstitutional because women will be disproportionally affected by the Rule, but that sort of disparate-impact theory is not cognizable, *see Washington v. Davis*, 426 U.S. 229, 239 (1976). As Defendants have explained, if the Rule were to constitute sex discrimination because it creates abortion-related funding restrictions, then every statute or regulation relating to abortion would discriminate on the basis of sex. That cannot be the law. *Cf. Geduldig v. Aiello*, 417 U.S. 484, 496 n.20 (1974) ("While it is true that only women can become pregnant it does not follow that every legislative classification concerning pregnancy is sex-based classification . . . .").

California suggests, finally that it should be entitled to discovery, and thus the Court should not yet address its claim. *See* Cal. Opp'n at 28. As Defendants have explained, however, California's constitutional claim fails as a legal matter and cannot be saved through mere speculation that it may uncover evidence of "invidious, gender-based discrimination." *Id.*; *see also* Defs.' Mem. at 35-36. And as explained above, this APA challenge to agency action—including the constitutional claims that are in any event foreclosed by Supreme Court precedent—is appropriately decided solely on the administrative record. *See supra* Part IV.A. Moreover, even putting that aside, California has offered nothing more than "vague assertions that discovery will produce needed, but unspecified, facts," which is insufficient to fend off a motion for summary judgment. *Naoko Ohno v. Yuko Yasuma*, 723 F.3d 984, 1013 n.29 (9th Cir. 2013). While California obviously disagrees with HHS's policy decision, California does not identify anything specific that could justify burdensome civil discovery.

CONCLUSION

This Court should await a decision from the Ninth Circuit before ruling on the parties' motions. However, if the Court is inclined to rule before the Ninth Circuit issues a decision, the Court should dismiss these suits or, in the alternative, enter summary judgment in Defendants' favor.

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CERTIFICATE OF SERVICE

I hereby certify that on February 12, 2020, I electronically filed the foregoing document with the Clerk of the Court, using the CM/ECF system, which will send notification of such filing to the counsel of record in this matter who are registered on the CM/ECF system.

/s/ Bradley P. Humphreys
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