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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' OPPOSITION TO PLAINTIFFS' MOTIONS FOR SUMMARY JUDGMENT AND NOTICE OF RENEWED MOTION TO DISMISS OR, IN THE ALTNERNATIVE, 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.

NOTICE OF MOTION AND MOTION

Notice is hereby given that, on February 20, 2020 at 1:30 p.m., before the Honorable Edward M. Chen, in Courtroom 5 of the 17th Floor of the San Francisco Courthouse, Defendants will move the Court to dismiss Plaintiffs' Complaint or, in the alternative, to enter summary judgment for Defendants on all claims asserted by Plaintiffs.

Defendants move pursuant to Rule 12 and Rule 56 of the Federal Rules of Civil Procedure and seek an Order entering final judgment for Defendants on all claims asserted in this action. The basis for this motion is set forth more fully in the accompanying Memorandum of Points and Authorities.

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MEMORANDUM AND POINTS OF AUTHORITIES

INTRODUCTION

Plaintiffs' challenge to the federal regulation at issue is a transparent attempt to evade the Supreme Court's decision in *Rust v. Sullivan*, 500 U.S. 173 (1991). When *Rust* was decided, as now, Title X of the Public Health Service Act (PHSA) authorized the Department of Health and Human Services (HHS) to make grants for family-planning services and issue regulations to implement the statute. Title X is a limited program: It does not fund medical care for pregnant women, and instead narrowly addresses preconception family planning. In addition, Congress directed in § 1008 of the PHSA that "[n]one of the funds appropriated under [the Title X program] shall be used in programs where abortion is a method of family planning." 42 U.S.C. § 300a-6. In accordance with the limited nature of the program and § 1008, HHS in 1988 issued regulations that, among other things, prohibited Title X projects from referring patients for abortion as a method of family planning and required Title X programs to be physically separate from abortion-related activities. 53 Fed. Reg. 2922 (Feb. 2, 1988). In *Rust*, the Supreme Court held that those regulations were authorized by Title X, were not arbitrary and capricious, and were constitutional.

Relying on the Supreme Court's holding in *Rust*, HHS in 2019 issued a final rule that, in the respects challenged here, reinstated the 1988 regulations (which had been rescinded in the interim). 84 Fed. Reg. 7714 (Mar. 4, 2019) (Rule). Plaintiffs make no serious effort to distinguish the Rule from the regulations upheld in *Rust*, and Congress has not amended the statute *Rust* interpreted. Plaintiffs contend, rather, that Congress implicitly and indirectly amended Title X through a clause in an appropriations rider and an obscure provision of the Affordable Care Act (ACA). A unanimous motions panel of the Ninth Circuit correctly rejected Plaintiffs' remarkable position.[1] As the panel explained, Congress did not amend Title X—much less abrogate *sub*

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

silentio a high-profile Supreme Court decision. Plaintiffs, moreover, have waived any challenge based on § 1554 of the ACA because neither they nor anyone else raised this provision during the notice-and-comment process. In light of *Rust*, and for the reasons explained more fully below, Plaintiffs' statutory claims are meritless and should be dismissed.

Plaintiffs likewise cannot show that the Rule is arbitrary and capricious. As the motions panel of the Ninth Circuit recognized, HHS did not act irrationally in adopting regulations implementing its permissible interpretation of § 1008 or in making reasonable predictions using its expertise. The agency thoroughly explained its reasoning and articulated a rational justification for the choices it made—choices the Supreme Court has already upheld in substantial part. Moreover, there is no merit to Essential Access's claim that two provisions of the Rule violate the notice-and-comment requirements of the Administrative Procedure Act (APA).

There is also no merit to Plaintiffs' constitutional claims. *Rust* squarely forecloses Essential Access's contention that the Rule violates the First Amendment. And Essential Access's claim that the Rule is impermissibly vague fails under any conceivable standard, as the Rule is perfectly clear and just as specific as the materially identical provisions sustained in *Rust*. In any event, the Due Process Clause tolerates greater imprecision when government subsidies—rather than penalties—are involved. California, for its part, cannot succeed on its sex discrimination claim, as the Rule does not do not discriminate on the basis of sex, facially or otherwise. Rather, it imposes conditions on the receipt of federal funding through the Title X program, consistent with § 1008 and *Rust*. And, in any event, the Rule is in service of an important government interest—avoiding the use of federal funds to promote or encourage abortion in violation of § 1008—and therefore easily passes constitutional muster.

For these reasons and for the reasons explained below, the Court should deny Plaintiffs' motions for summary judgment and grant Defendants' motion to dismiss or, in the alternative, for summary judgment.

LEGAL AND FACTUAL BACKGROUND

A. Statutory and Regulatory Background

In 1970, Congress enacted Title X of the PHSA to create a limited grant program for certain types of preconception family planning services. *See* Pub. L. No. 91-572, 84 Stat. 1504. The statute authorizes HHS to make grants and enter into contracts with public or private nonprofit entities "to assist in the establishment and operation of voluntary family planning projects which shall offer a broad range of acceptable and effective family planning methods and services (including natural family planning methods, infertility services, and services for adolescents)." 42 U.S.C. § 300(a). It also provides that "[g]rants and contracts made under this subchapter shall be made in accordance with such regulations as the Secretary may promulgate." *Id*. § 300a-4(a).

Section 1008, however, directs that "[n]one of the funds appropriated under this subchapter shall be used in programs where abortion is a method of family planning." 42 U.S.C. § 300a-6. "That restriction was intended to ensure that Title X funds would 'be used only to support *preventive* family planning services, population research, infertility services, and other related medical, informational, and educational activities.'" *Rust v. Sullivan*, 500 U.S. 173, 178-79 (1991) (emphasis added) (quoting H.R. Rep. No. 91-1667, at 8 (1970) (Conf. Rep.)). As a sponsor of § 1008 explained, "the committee members clearly intend that abortion is not to be encouraged or promoted in any way through this legislation." 116 Cong. Rec. 37,375 (1970) (statement of Rep. Dingell).

The Secretary's initial regulations, which remained largely unchanged until the late 1980s, did not provide additional guidance on the scope of § 1008. Instead, they simply required that a grantee's application state that the Title X "project will not provide abortions as a method of family planning." 36 Fed. Reg. 18,465, 18,466 (Sept. 15, 1971). During this period, HHS construed § 1008 and its regulations "as prohibiting Title X projects from in any way promoting or encouraging abortion as a method of family planning" and "as requiring that the Title X program be 'separate and distinct' from any abortion activities of a grantee." 53 Fed. Reg. at 2923 (describing previous HHS guidelines and internal memoranda). The Department nevertheless

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

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

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

In the aftermath of *Rust*, Congress set out to "reverse[] the regulations issued in 1988 and upheld by the Supreme Court in 1991." H.R Rep. No. 102-204, at 1 (1991). Both Houses passed a bill titled the "Family Planning Amendments Act of 1992" that would have codified HHS's 1981 guidelines by conditioning Title X funding on a grantee's promise to provide, "upon request," "nondirective counseling and referrals" concerning specific options, including "termination of

pregnancy." S. 323, 102d Cong. § 2 (1991). President Bush vetoed the legislation. S. Doc. No. 102-28 (1992).

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

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

In 2010, Congress enacted the ACA. Included within the Act's "Miscellaneous Provisions" subchapter and titled "Access to therapies," § 1554 provides that "[n]otwithstanding any other provision of [the ACA]," the Secretary "shall not promulgate any regulation that" (1) "creates any unreasonable barriers to the ability of individuals to obtain appropriate medical care"; (2) "impedes timely access to health care services"; (3) "interferes with communications regarding a full range of treatment options between the patient and the provider"; (4) "restricts the ability of health care providers to provide full disclosure of all relevant information to patients making health care decisions"; (5) "violates the principles of informed consent and the ethical standards of health care professionals"; or (6) "limits the availability of health care treatment for the full duration of a

patient's medical needs." 42 U.S.C. § 18114. Nothing in § 1554 specifically addresses Title X or abortion.

On June 1, 2018, the Secretary issued a notice of proposed rulemaking (NPRM) designed to "refocus the Title X program on its statutory mission—the provision of voluntary, preventive family planning services specifically designed to enable individuals to determine the number and spacing of their children." 83 Fed. Reg. 25,502, 25,505. After receiving more than 500,000 comments, the Secretary issued a final rule in March 2019, 84 Fed. Reg. 7714, the challenged provisions of which are materially indistinguishable from the 1988 regulations upheld in *Rust*.

In implementing Title X and especially § 1008, the Rule, like the 1988 regulations, prohibits Title X projects from providing referrals for, or engaging in activities that otherwise encourage or promote, abortion as a method of family planning. 42 C.F.R. §§ 59.5(a)(5), 59.14(a), 59.16(a). As the Secretary explained, "[i]f a Title X project refers for, encourages, promotes, advocates, supports, or assists with, abortion as a method of family planning, it is a program 'where abortion is a method of family planning' and the Title X statute prohibits Title X funding for that project." *Id.* at 7759. In the Secretary's view, this is "the best reading" of § 1008, "which was intended to ensure that Title X funds are also not used to encourage or promote abortion." *Id.* at 7777. To prevent evasion of these requirements, the Rule, like the 1988 regulations, imposes restrictions on the list of providers that may be given at the same time as the required referral for prenatal care for pregnant women. *See* 42 C.F.R. § 59.14(c)(2). Because § 1008 only addresses abortion "as a method of family planning," the Rule permits referrals for abortion in cases of an "emergency," such as "an ectopic pregnancy." *Id.* § 59.14(b)(2), (e)(2); *see also* 84 Fed. Reg. at 7747 n.76 ("Similarly, in cases involving rape and/or incest, it would not be considered a violation of the prohibition on referral for abortion as a method of family planning if a patient is provided a referral to a licensed, qualified, comprehensive health service provider who also provides abortion . . . .").

The Rule is less restrictive than the 1988 regulations, however, in that it allows, but does not require, "[n]ondirective pregnancy counseling," *id.* § 59.14(b)(1)(i), which may include the

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

Like the 1988 regulations, the Rule also requires that Title X projects remain physically separate from any abortion-related activities conducted outside the grant program. 42 C.F.R. § 59.15. As the Secretary explained, "[i]f the collocation of a Title X clinic with an abortion clinic permits the abortion clinic to achieve economies of scale, the Title X project (and, thus, Title X funds) would be supporting abortion as a method of family planning." 84 Fed. Reg. at 7766. And because without physical separation, "it is often difficult for patients, or the public, to know when or where Title X services end and non-Title X services involving abortion begin," the Secretary concluded that reinstating this requirement was necessary to avoid "the appearance and perception that Title X funds being used in a given program may also be supporting that program's abortion activities." *Id.* at 7764. Indeed, the Secretary's determination that "the 2000 regulations fostered an environment of ambiguity surrounding appropriate Title X activities" was only reinforced by "the many . . . public comments that argued Title X should support statutorily prohibited activities, such as abortion." *Id.* at 7721-22; *see also id.* at 7728-30.

The Rule also contains a number of provisions that have little to do with § 1008, such as a requirement that Title X projects comply with state and local laws that mandate notification or reporting of sexual abuse, 42 C.F.R. § 59.17. Given the Rule's breadth, its preamble contains an express severability statement directing that "[t]o the extent a court may enjoin any part of the rule,

the Department intends that other provisions or parts of provisions should remain in effect." 84 Fed. Reg. at 7725.

B. Procedural History

On March 4, 2019, California filed its complaint asserting claims under the APA and the Constitution. *See California v. Azar*, No. 3:19-1184-EMC, Compl., ECF No. 1. Essential Access filed suit the same day asserting substantially similar claims. *See Essential Access Health, Inc. et al. v. Azar*, No. 3:19-cv-01195-EMC, Compl., ECF No. 1. Essential Access moved to relate the two cases, and the Court granted its motion. *See California v. Azar*, No. 3:19-1184-EMC, ECF No. 18. On March 21, 2019, Plaintiffs in both cases moved for a preliminary injunction to block implementation of the Rule. *See California v. Azar*, No. 3:19-cv-1184, ECF No. 26 (Cal. PI Mem.); *Essential Access v. Azar*, No. 3:19-cv-1195, ECF No. 25 (EA PI Mem.). The Court granted in part Plaintiffs' preliminary injunction motions on April 26, 2019. *See California v. Azar*, No. 3:19-1184-EMC, ECF No. 103 (PI Order).

The government appealed and sought a stay of the preliminary injunction from this Court and the Ninth Circuit. This Court denied the motion to stay the preliminary injunction on May 8, 2019, while somewhat modifying the scope of its injunction. *California v. Azar*, No. 3:19-1184-EMC, ECF No. 115.

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

Plaintiffs moved for *en banc* reconsideration of the panel's stay order, which was granted. *See California v. Azar*, No. 19-15974, Order (July 3, 2019). The *en banc* panel of the Ninth Circuit ordered that the motions panel decision not be cited as precedent, *id*., but later clarified that the panel's stay order had not been vacated and denied the Plaintiffs' motions for an administrative stay of the stay order, *California v. Azar*, No. 19-15974, Order (July 11, 2019). The *en banc* panel then scheduled oral argument and instructed the parties to "be prepared to discuss . . . the district courts' preliminary injunction orders on the merits." *California v. Azar*, No. 19-15974, Order (Aug. 1, 2019). The *en banc* panel heard argument on September 23, 2019, which addressed the merits of the preliminary injunction orders.[2] Since then, the *en banc* panel has not lifted the stay.

Pursuant to this Court's January 15 and January 29, 2020 orders setting a briefing schedule in these two related cases, Defendants file the instant opposition to Plaintiffs' motions for summary judgment and renewed motion to dismiss or, in the alternative, for summary judgment.

ARGUMENT

Defendants renew their motion to dismiss the complaint under Rule 12(b)(6) of the Federal Rules of Civil Procedure. Courts should grant a motion to dismiss under Rule 12(b)(6) if the complaint does not contain "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp*., 550 U.S. at 570).

Defendants also oppose Plaintiffs' motions for summary judgment and ask the Court, if it does not dismiss Plaintiffs' claims, to enter summary judgment in Defendants' favor. Summary judgment is appropriate if "there is no genuine dispute as to any material fact and the movant is

[2] The *en banc* panel indicated that it would expeditiously issue a ruling on the merits of Defendants' motions to stay the preliminary injunction from this Court and the Courts in Oregon and Washington. Because the issues raised in this case are mostly if not entirely legal in nature, the Ninth Circuit is very likely to issue one or more decisions that will drastically narrow the issues in this case, if not dispose of the litigation entirely. Defendants also note that the Fourth Circuit is considering the merits of statutory arguments substantially similar to the ones Plaintiffs raise in this case. *See Mayor and City Council of Baltimore v. Azar*, No. 19-1614 (4th Cir.). The Fourth Circuit heard oral argument on September 18, 2019.

entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). For APA claims, "the district judge sits as an appellate tribunal" to resolve issues at summary judgment." *Am. Bioscience v. Thompson*, 269 F.3d 1077, 1083 (D.C. Cir. 2001).[3]

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

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

[3] Because this is an APA case, the Court should reject Plaintiffs' improper attempt to create a new record for the purposes of this litigation by submitting declarations and other materials to bolster their arguments. The APA provides that, "[i]n making the [] determinations [regarding the lawfulness of agency action], the court shall review the whole record," 5 U.S.C. § 706, and the Supreme Court has long held that the whole record is limited to "the full administrative record that was before the Secretary at the time he made his decision," *Citizens to Pres. Overton Park Inc. v. Volpe*, 401 U.S. 402, 420 (1971); *see also Fence Creek Cattle Co. v. U.S. Forest Service*, 602 F.3d 1126, 1131 (9th Cir. 2010).

(quotation marks omitted). Finally, all Title X projects were required to "be organized so that they are 'physically and financially separate' from prohibited abortion activities." *Id.*

The Supreme Court rejected the arguments that these regulations exceeded the Secretary's authority under Title X, were arbitrary and capricious, and violated the First and Fifth Amendments. *Rust*, 500 U.S. at 183-203. The Court first held that the regulations were "plainly allow[ed]" under the "broad directives provided by Congress in Title X in general and § 1008 in particular." 500 U.S. at 184; *see id.* at 184-90. As it observed, "to ensure that Title X funds would 'be used only to support *preventive* family planning services, population research, infertility services, and other related medical, informational, and educational activities,'" Congress mandated in § 1008 that "[n]one of the funds appropriated under this subchapter shall be used in programs where abortion is a method of family planning." *Id.* at 178-79 (emphasis added). That "broad language" justified both the "ban on [abortion] counseling, referral, and advocacy within the Title X project," *id.* at 184, as well as the requirement "mandating separate facilities, personnel, and records," *id.* at 187.

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

preserve the distinction between Title X programs and abortion as a method of family planning." *Id.* at 187 (quotation marks omitted).

The Court likewise held that "the Secretary's interpretation of the statute that separate facilities are necessary, expressly in light of the express prohibition of § 1008, cannot be judged unreasonable." *Rust*, 500 U.S. at 190. As the Secretary had explained, the collocation of Title X clinics and abortion clinics would result in the economic reality—or at least the public perception—of taxpayer dollars being used to subsidize abortion as a method of family planning. *See* 53 Fed. Reg. at 2940-41. The Supreme Court concluded that the physical-separation requirement was based on a "permissible construction of the statute," and it deferred to the Secretary's judgment that the requirement was needed to "assure that Title X grantees apply federal funds only to federally authorized purposes and that grantees avoid creating the appearance that the Government is supporting abortion-related activities." *Rust*, 500 U.S. at 188.

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

Nor, in the Court's judgment, did the regulations "significantly impinge upon the doctor-patient relationship." *Rust*, 500 U.S. at 200. Although the principal dissent insisted that "the legitimate expectations of the patient and the ethical responsibilities of the medical profession

demand" that Title X providers furnish their patients "with the full range of information and options regarding their health and reproductive freedom[,] … includ[ing] the abortion option," *id.* at 213-14 (Blackmun, J., dissenting), the majority took a different view. As it explained, the doctor-patient relationship in a Title X project is not "sufficiently all encompassing so as to justify an expectation on the part of the patient of comprehensive medical advice," and hence "a doctor's silence with regard to abortion cannot reasonably be thought to mislead a client into thinking that the doctor does not consider abortion an appropriate option for her." *Id.* at 200 (majority opinion). Nor did the regulations "require[] a doctor to represent as his own any opinion that he does not in fact hold," as he "is always free to make clear that advice regarding abortion is simply beyond the scope of the program." *Id.* "In these circumstances," the Court concluded, "the general rule that the Government may choose not to subsidize speech applies with full force." *Id.*

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

The 1988 regulations upheld by the Supreme Court are materially indistinguishable from—or even more restrictive than—the regulations challenged here. Both prohibit Title X projects from

referring pregnant women for—or otherwise encouraging, promoting, or advocating—abortions as a method of family planning, even upon specific request. *Compare Rust*, 500 U.S. at 180, *with* 42 C.F.R. §§ 59.14(a), 59.16(a). Both require Title X projects to refer a pregnant woman out of the Title X program for prenatal care. *Compare Rust*, 500 U.S. at 179-80, *with* 42 C.F.R. § 59.14(b)(1). Both place restrictions on the list of providers given as part of, or at the same time as, such referral to prevent Title X projects from steering women toward abortion. *Compare Rust*, 500 U.S. at 180, *with* 42 C.F.R. § 59.14(c). And both mandate that Title X projects remain physically separate from prohibited abortion activities. *Compare Rust*, 500 U.S. at 180, *with* 42 C.F.R. § 59.15. In fact, the Rule is less restrictive than the 1988 regulations—which prohibited any counseling on abortion as a method of family planning—in that it permits, but does not require, nondirective pregnancy counseling that may include the neutral presentation of information about abortion, so long as the counseling does not encourage or promote that procedure. *Compare Rust*, 500 U.S. at 179, *with* 42 C.F.R. § 59.14(b)(1)(i)); 84 Fed. Reg. at 7745-46.

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

II. PLAINTIFFS' STATUTORY AUTHORITY CLAIMS LACK MERIT.

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

explanation that this reading is "more in keeping with the original intent of the statute." *Rust*, 500 U.S. at 187.

As Defendants have explained, Plaintiffs' arguments that this holding no longer applies, and that the challenged provisions of the Rule are no longer permissible in light of a six-word clause in an appropriations rider and an ancillary provision of the ACA, cannot be squared with either the text of those later-enacted provisions or the presumption against implied repeals. *See California v.* Azar, No. 3:19-cv-1184, Defs.' Mot. to Dismiss at 14-25, ECF No. 136 (Defs.' MTD). Plaintiffs' claims that the Rule is contrary to law are thus foreclosed, and Defendants submit that the Court should reject Plaintiffs' statutory claims for the reasons set forth in Defendants' motion to dismiss. At the very least, given that the Ninth Circuit is currently reviewing these very questions on appeal, Defendants respectfully request that the Court await the Ninth Circuit's guidance before issuing a ruling on the parties' current dispositive motions.

A. The Appropriations Rider Does Not Supplant *Rust*.

Plaintiffs argue that the appropriations rider requiring that all pregnancy counseling offered in a Title X program be "nondirective" also requires that counseling on abortion be treated *equally* as counseling on carrying the child to term or adoption. *See* EA MSJ at 25-27. Defendants acknowledge the Court reached a similar conclusion in granting Plaintiffs' motion for a preliminary injunction. As Defendants explained in their motion to dismiss, however, when Congress wants pregnancy options to be treated on an "equal basis," or for nondirective counseling to address specific options, it knows how to say so explicitly, and it did not do so here. *See* Defs.' MTD at 18-19; *see also California*, 927 F.3d at 1077 (explaining that "[n]ondirective counseling does not require equal treatment of all pregnancy options[.]").

The rest of Plaintiffs' arguments regarding the nondirective provision lack merit for reasons Defendants have previously explained. *See* Defs.' MTD at 14-20. To summarize, a doctor's *failure* to refer a patient for abortion does not *direct* the patient to do anything. Even indulging Plaintiffs' characterization, a scenario in which "options available to a pregnant patient are not presented on an equal basis" does not constitute "directive" counseling. EA MSJ at 26.

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* Defs.' 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 by implication. In this program, and more generally, counseling and referrals are distinct. *See* Defs.' MTD at 15-18.

In addition, California errs by insisting that its construction of the nondirective provision is not foreclosed by *Rust*. Cal. MSJ at 34. 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."). Put

differently, 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. Section 1554 of the ACA Does Not Supplant *Rust*.

Plaintiffs' § 1554 claims fail for the reasons Defendants explained in their motion to dismiss. *See* Defs.' MTD at 20-24. To start, the argument is waived because it is settled that "a party's failure to make an argument before the administrative agency in comments on a proposed rule bar[s] it from raising that argument on judicial review." *Universal Health Servs., Inc. v. Thompson*, 363 F.3d 1013, 1019 (9th Cir. 2004). Here, it is undisputed that none of the 500,000-plus comments HHS received even invoked this statutory provision, much less argued that it eliminated HHS's authority to adopt requirements materially indistinguishable from ones upheld by the Supreme Court. This Court previously concluded that Plaintiffs "have raised at least a serious question" as to waiver because "[t]he record suggests that commenters raised issues pertaining to Section 1554 with sufficient clarity to provide notice to HHS," PI Order at 37, even though "these comments did not explicitly reference Section 1554," *id.* at 38. Preservation, however, requires that the "specific argument" advanced must "be raised before the agency, not merely the same general legal issue." *Koretoff v. Vilsack*, 707 F.3d 394, 398 (D.C. Cir. 2013) (per curiam).

The omission of any mention of § 1554 in the comments is unsurprising, as nothing in § 1554 abrogates Title X's authorization for the Rule. *See Rust*, 500 U.S. at 187. 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 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."). That is particularly true given that § 1554 applies "[n]otwithstanding any other provision of *this Act*," 42 U.S.C. § 18114 (emphasis added), signaling that this provision may implicitly displace otherwise-applicable provisions *in the ACA*. That language does not, however, indicate that Congress meant to implicitly repeal *other, pre-existing statutes* such as § 1008 of the PHSA, especially since the ACA is littered with "notwithstanding" clauses that use the common phrase "notwithstanding any other provision of law." *E.g.*, 42 U.S.C. § 18032(d)(3)(D)(i); *see Family Planning Ass'n of Maine v. U.S. Dep't of Health & Human Servs.*, 404 F. Supp. 3d 286, 309 (D. Me. 2019); *see also Digital Realty Tr., Inc. v. Somers*, 138 S. Ct. 767, 777 (2018) ("When Congress includes particular language in one section of a statute but omits it in another, this Court presumes that Congress intended a difference in meaning." (cleaned up)).

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

California contends that the Rule is "contrary to the purpose" of Title X and—without citing any particular provision of Title X with which the Rule is purportedly in conflict—that the Rule is thus "in excess of statutory authority." Cal. MSJ at 34-35. This claim is plainly foreclosed by *Rust*, which held that materially indistinguishable regulations were permissible under Title X. *See supra* Part I.[4] Because there is no dispute that nothing relevant in the Title X statute has changed since *Rust*, any argument that the current Rule somehow violates the Title X statute is wholly without merit.

[4] In its preliminary injunction motion, California briefly referenced "[o]ther aspects of the Final Rule" that it believes "run counter to Congressional language and purpose," Cal. Mot. for Prelim. Inj. at 14, Cal. ECF No. 26. California does not reprise that "argument" in its summary judgment motion, which is in any event meritless for the reasons set forth in Defendants' motion to dismiss, *see* Defs.' MTD at 25, so the Court need not consider it here.

III. THE RULE IS NOT ARBITRARY AND CAPRICIOUS.

Agency action must be upheld in the face of an APA claim if the agency "examine[s] the relevant data and articulate[s] a satisfactory explanation for its action[,] including a rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (citation omitted). Under this deferential standard of review, "a court is not to substitute its judgment for that of the agency . . . and should uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 513-14 (2009) (citations omitted); *see also Alaska Oil & Gas Ass'n v. Jewell*, 815 F.3d 544, 554 (9th Cir. 2016) ("arbitrary and capricious" standard establishes a "high threshold" for setting aside agency action, which is "presumed valid and is upheld if a reasonable basis exists for the decision"). The Rule—the major components of which have already been upheld by the Supreme Court—easily satisfies this deferential review—for the reasons Defendants previously explained, *see, e.g.*, *California v. Azar*, No. 3:19-cv-1184, Defs.' Opp'n to Plaintiffs' Mot. for Prelim. Inj. at 24-34, ECF No. 61 (Defs.' PI Opp'n); Defs.' MTD at 25-29, and for the additional reasons discussed below. This Court should therefore deny Plaintiffs' motions for summary judgment with respect to their APA claims, and grant Defendants' motion to dismiss or, in the alternative, for summary judgment.

A. The Referral and Counseling Restrictions Are Reasonable.

HHS reasonably adopted the prohibitions on promoting and referring for abortion because they implement the best reading of § 1008—namely, that a program that refers patients for, or promotes, abortion as a method of family planning is by definition a program "where abortion is a method of family planning." *See* 84 Fed. Reg. at 7759. The Supreme Court held in *Rust* that such "justifications are sufficient to support the Secretary's revised approach," 500 U.S. at 187, which is "plainly allow[ed]" by Title X, *id.* at 184. That conclusion remains true today, and HHS adequately explained its reasons for adopting the Rule. Plaintiffs' contrary arguments lack persuasive force.

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

Further, Plaintiffs' specific arguments in their most recent brief regarding the referral and counseling restrictions all fail. First, Plaintiffs assert that HHS failed to explain what Plaintiffs allege is a departure from the 2000 regulations with respect to Defendants' interpretation of the nondirective provision. Cal. MSJ at 12-13; EA MSJ at 16-17. But contrary to Plaintiffs' claim, and as Defendants have explained, HHS never concluded in the 2000 regulations that the nondirective provision *required* suspension of the 1988 regulations. For HHS, the "crucial difference between" the 1988 regulations and the 2000 regulations was simply "one of experience." 65 Fed. Reg. 41,270, 41,271 (July 3, 2000) (2000 regulations). Thus, there was no reversal of position as to HHS's interpretation of the nondirective provision—which HHS continues to recognize requires that all pregnancy counseling that is offered be nondirective, *see, e.g.*, 84 Fed. Reg. at 7733—and therefore no need for any additional explanation than what exists in the Rule's (lengthy) preamble.

More generally, HHS clearly acknowledged that the 2000 regulations required Title X projects to provide abortion referrals and nondirective counseling on abortion, and HHS explained at length the reasons for the changes in the Rule. *See* 84 Fed. Reg. at 7716, 7758-59. Under the APA, agencies must acknowledge a change in position and provide a reasoned explanation for that change. *See Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125-26 (2016). They need not—as Plaintiffs would have it—address every statement or rationale underpinning the prior policy.

HHS acknowledged differences between the 2000 regulations and the Rule and explained the reasons for the change. Nothing more is required by the APA. *See id.* at 2126. Indeed, in *Encino*, the Court explicitly acknowledged that "an agency may justify its policy choice by explaining why that policy "is more consistent with statutory language" than alternative policies." *Id.* at 2127.

Plaintiffs similarly err in suggesting that Defendants acted arbitrarily and capriciously because of alleged tension between the Rule and Quality Family Planning (QFP) guidelines, referring to a 2014 publication containing clinical recommendations for providing quality family planning services. Cal. MSJ at 13-15, 29-30; EA MSJ at 30-31. HHS continues to expect Title X providers to follow QFP guidelines to the extent they are consistent with the Rule. To the extent that those guidelines might conflict with the Rule, HHS acknowledged that it was departing from its prior approach under the 2000 regulations, and the QFP guidelines in place at the time of the Rule did not (and indeed could not) substantively go beyond the 2000 regulations. *See, e.g.*, 84 Fed. Reg. at 7715.

Next, Plaintiffs assert that the Rule is arbitrary and capricious because Plaintiffs find lacking HHS's explanation of the Rule's consistency with medical ethical requirements. *See* Cal. MSJ at 27-29; EA MSJ at 30. HHS, however, considered precisely this concern and explained at length why, properly understood, the Rule is consistent with medical ethical obligations, as well as multiple Supreme Court decisions and other legal authorities. *See* 84 Fed. Reg. at 7724, 7748. Among other reasons, HHS explained that *Rust* upheld a nearly identical, but stricter, version of the counseling and referral restrictions, which it would not have done had that rule "required the violation of medical ethics, regulations concerning the practice of medicine, or malpractice liability standards." 84 Fed. Reg. at 7748. HHS also pointed to the many federal conscience statutes that give medical providers the option of not referring for, or promoting, abortion as evidence that neither Congress, nor the medical providers with conscience objections, believe that not referring for, or promoting, abortion violates medical ethics. *See* 84 Fed. Reg. at 7748; *see also id*. at 7716, 7746-47 (discussing statutes); 7780-81 (discussing medical providers with conscience objections

to counseling on, or referring for, abortion). Plaintiffs may disagree as a matter of policy with HHS's decision, but Plaintiffs cannot show that HHS's decision was unreasonable.

Plaintiffs also question HHS's decision to restrict nondirective pregnancy counseling to physicians and advance practice providers (APPs). For instance, Essential Access claims it is "difficult to identify any rational reason for HHS" to impose this requirement. EA MSJ at 19; *see also* Cal. MSJ at 16. But HHS sensibly required that those who use federal funds to provide counseling concerning a medical condition (pregnancy) "receive at least a graduate level degree in the relevant medical field and maintain a federal or State-level certification and licensure to diagnose, treat, and *counsel* patients." 84 Fed. Reg. at 7728 (emphasis added).

Finally, Plaintiffs do not advance their claims by rehashing these same arguments under the rubric of allegedly imposing additional costs on patients. *See, e.g.*, EA MSJ at 21-25. Plaintiffs' real objections are to HHS's policy decision, rather than to whether HHS adequately weighed any such alleged costs. But that policy decision is, of course, not Plaintiffs' to make. As to the actual weighing of costs and benefits, the principle that "a court is not to substitute its judgment for that of the agency" is "especially true when the agency is called upon to weigh the costs and benefits of alternative polic[i]es." *Consumer Elecs. Ass'n v. FCC*, 347 F.3d 291, 303 (D.C. Cir. 2003) (citation omitted). And here, of course, HHS did consider potential costs and benefits to patients, but merely reached a different conclusion than the one Plaintiffs would have preferred. *See* 84 Fed. Reg. at 7745-46.

B. The Separation Requirement Is Reasonable.

Plaintiffs fare no better in arguing that the Rule's physical separation requirement is arbitrary and capricious, and Plaintiffs' arguments are in significant tension with *Rust*. 500 U.S. at 187. As an initial matter, Defendants disagree with this Court's prior conclusions regarding the physical separation requirements, as Defendants have already explained, and Defendants incorporate here by reference their prior discussion of the Court's analysis. *See* Defs.' MTD at 26-29. Plaintiffs' remaining arbitrary and capricious arguments, which largely mirror those that they asserted in their prior briefs, are unconvincing.

Plaintiffs contend, first, that HHS failed to rationally explain alleged conflicts between the separation requirements and the factual findings on which HHS based the 2000 Rule. *See* Cal. MSJ at 17; EA MSJ at 12-14. Not so. The 2000 regulations already mandated financial separation, 84 Fed. Reg. at 7715; 65 Fed. Reg. at 41,276, and HHS reasonably determined that physical separation also is warranted to address the risk that taxpayer funds will be used to fund or promote abortion—the same rationale approved in *Rust*.

Plaintiffs disagree with that conclusion, and they point to statements in the preamble to the 2000 regulations that they allege support their position. Cal. MSJ at 17; EA MSJ at 13-14. Yet, the Supreme Court held in *Rust* that HHS's judgement about how best to comply with § 1008 was a reasonable basis for the same requirement Plaintiffs challenge here. 500 U.S. at 187. As in *Rust*, HHS justified its policy by explaining that the prior regulations "failed to implement properly the statute." *Id.* And HHS considered and discussed reliance interests, comments received, and the previous approaches, including the one in the 2000 regulations, ultimately "reaffirm[ing the] reasoned determination" it made in 1988. 84 Fed. Reg. at 7724. There is therefore no merit to the claim that HHS's 2000 factual findings somehow undermine the current Rule, or that the Rule is otherwise arbitrary and capricious.

Contrary to Plaintiffs' claims, *see* Cal. MSJ at 22-23; EA MSJ at 14-15, Defendants also took into account the relevant reliance interests when promulgating the challenged Rule, as Defendants have already explained at length. *See* Defs.' MTD at 27-28; Defs.' PI Opp'n at 30-31. Although Plaintiffs describe how grantees have operated in the past, and point to various comments expressing a different view than the one the agency adopted, HHS's consideration included all of the points that Plaintiffs now raise in their briefs, and HHS reasonably explained why it was departing from past practice. Similarly, although California disputes it, *see* Cal. MSJ at 20-27, HHS also considered the effects on public health and patients, and explained that public health would benefit from the Rule, which would "contribute to more clients being served, gaps in service being closed, and improved client care." 84 Fed. Reg. at 7723. HHS therefore acted lawfully, as affirmed in *Rust*.

Plaintiffs also argue that HHS underestimated compliance costs that the proposed rule may impose, and underestimated—in Plaintiffs' view—the potential withdrawals of Title X grantees from the program and resulting disruption. *See* Cal. MSJ at 20-22; EA MSJ at 20-24. As Defendants have explained previously, however, 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*, 463 U.S. at 43.

Plaintiffs rely extensively on comments in the record supporting their position. Yet, nothing in the APA requires an agency to defer to the views of any particular commenter over the agency's own. Rather, the agency must consider significant comments and provide a reasoned response. *See Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1203 (2015). Having considered the Rule's effects, HHS concluded that the Rule was warranted to comply with Title X notwithstanding those predicted costs and effects. In the agency's judgment, "compliance with statutory program integrity provisions"—namely, the best reading of § 1008—was "of greater importance" than "cost." 84 Fed. Reg. at 7783. That decision was not irrational simply because plaintiffs disagree with HHS's predictive judgments or ultimate conclusion that the benefits outweighed the costs. *See* Defs.' MSJ at 27-28. Plaintiffs also apparently disagree with HHS's weighing of the effects of the separation requirement on patients, *see* Cal. MSJ at 23-27; EA MSJ

at 21-22, but HHS clearly considered that issue and explained why patients would not be harmed, *see, e.g.*, 84 Fed. Reg. at 7782. HHS therefore met its obligation to provide a reasoned basis for its decision.

C. Plaintiffs' Remaining Arbitrary and Capricious Arguments Lack Merit.

Plaintiffs also argue that various other ancillary provisions of the Rule are arbitrary and capricious. These arguments amount to nothing more than an impermissible attempt to substitute Plaintiffs' views for those of the agency. *See, e.g.*, *Nat'l Wildlife Fed'n v. U.S. Army Corps of Eng'rs*, 384 F.3d 1163, 1180 (9th Cir. 2004) ("Our judicial role is not to second-guess the decisions of the agency, but to determine whether, on the administrative record, the agency's actions were arbitrary and capricious, an abuse of discretion, or contrary to law.").

Plaintiffs first contend that the Rule will degrade care because it removes the requirement that a Title X project provide "medically approved" family planning methods and allows entities to offer only a single method or a limited number of family planning methods. Cal. MSJ at 29-30; EA MSJ at 18. But HHS addressed these concerns by explaining that, even if individual service sites might offer a limited number of family planning methods, each Title X project, as a whole, must "provide[] a broad range of family planning methods and services, including contraception and natural family planning." 84 Fed. Reg. at 7732; *see also* 42 C.F.R. § 59.5(a)(1) ("A participating entity may offer only a single method or a limited number of methods of family planning as long as the entire project offers a broad range of such family planning methods and services.").

And with regard to the removal of the "medically approved" requirement in particular, Plaintiffs' complaint is with Congress, not HHS: "When Congress specified what family planning methods and services Title X projects must provide, Congress directed that the methods and services be 'acceptable and effective'; it did not specify that they be 'medically approved.'" 84 Fed. Reg. at 7732 (quoting 42 U.S.C. § 300(a)). HHS addressed this issue directly, *see id*. at 7732, 7740-41, and explained that the "medically approved" language had not proved useful in practice, *see id*. at 7732 (explaining the difficulty of enforcing the "medically approved" requirement). This

response was an adequate justification for returning to the text of the statute, which requires that any family planning services be "acceptable and effective," and which HHS rationally concluded would "sufficiently ensure[]" that Title X clients receive appropriate services. *Id.*[5]

Next, California challenges the provision of the Rule that requires Title X projects to "offer either comprehensive primary health services onsite or have a robust referral linkage with primary health providers who are in close physical proximity to the Title X site in order to promote holistic health and provide seamless care." 42 C.F.R. § 59.5(a)(12). California contends that HHS did not adequately consider comments opposing that requirement, *see* Cal. MSJ at 30, but the preamble to the Rule clearly belies California's argument, *see* 84 Fed. Reg. 7787-88. California further contends that "mandating increased primary care" is contrary to Title X. Cal. MSJ at 30. But as HHS explained in the Rule, this provision strikes an appropriate balance between focusing Title X funds on their core purpose—"preventive care and preconception family planning"—while also ensuring, through the promotion of "robust referral networks," that clients "have ready access to non-Title X health care services that they need, including treatment for health conditions that are not provided by Title X and for postconception care (other than abortion as a method of family planning)." 84 Fed. Reg. at 7733. It is curious for California to raise this argument—essentially, that HHS cannot tell Title X projects to refer for medical services outside the Title X program—when their argument regarding the nondirective provision hinges on the contention that HHS *must* require Title X projects to refer patients for abortion services necessarily performed outside the Title X program. *See, e.g.*, Cal. MSJ at 15 (criticizing the Rule for allowing "a provider to omit information about abortion"). In any event, California does not identify any specific provision of Title X with which this provision of the Rule is inconsistent, nor explain how the fact that the Rule

[5] Essential Access also has no standing to object that *other* providers might offer family planning methods and services that it would not itself offer. *See, e.g.*, EA MSJ at 18. The Rule leaves Essential Access—and all other grantees—free to decide which methods and services to offer so long as project grantees meet the statutory and regulatory requirements—primarily, that each project offer a broad range of methods (including natural family planning and contraception).

requires Title X projects to have a system for providing referrals for necessary medical care outside the auspices of the program to patients who need it somehow undermines Title X.

California's concerns are further unfounded because the Rule does not impose an absolute requirement that a project offer either comprehensive primary health services onsite or have linkages to primary health providers in close proximity. *See* 42 C.F.R. § 59.5(a)(12). It instead reflects Congress's expectation that "Family Planning Services under Title X generally are most effectively provided in a general health setting." 84 Fed. Reg. at 7749 (quoting S. Rep. No. 63, 94 Cong., 1st Sess. 65-66 (1975)). HHS also accounts for the geographic distribution of services when making grant decisions. *See, e.g.*, Announcement of Availability of Funds for Title X Family Planning Services Grants, Notice at 49-50.[6]

California also accuses HHS of somehow imposing a "illogical differential standard to minors seeking services" with respect to encouragement of family participation based on income in § 59.2 and § 59.5(a)(14). Cal. MSJ at 30-31. That is incorrect. Section 59.5(a)(14) is a clarification that "family participation is encouraged for all patients, including, but not exclusive of minors in the final rule." 84 Fed. Reg. at 7751. The relevant portion of § 59.2 provides more specific guidance as to how and when family participation should be encouraged with respect to unemancipated minors, 42 C.F.R. § 59.2. It should be unsurprising—and it is certainly reasonable—that HHS would address the circumstances under which such minors qualify for participation in the Title X program on a confidential basis and on the basis of their own resources, given that Title X is a program geared toward low-income individuals. California also argues that HHS did not consider the concerns of commenters regarding parental involvement, but that claim is belied by HHS's specific discussion of those concerns in the preamble to the Rule. *See, e.g.*, 84 Fed. Reg. at 7734-35, 7751-52.

Finally, Essential Access quibbles with the Rule's requirements for additional information in grant applications and periodic reporting. *See* EA MSJ at 20 (citing § 59.5(a)(13)). However,

[6] https://www.hhs.gov/opa/sites/default/files/FY2019-FOA-FP-services-amended.pdf.

HHS specifically addressed the concern of additional administrative burden to which Essential Access objects, and explained that it was reasonable to promote additional transparency regarding the use of federal funds. *See* 84 Fed. Reg. at 7750. These common sense compliance requirements in the Rule cannot render it arbitrary and capricious.

* * *

In sum, the Secretary of HHS engaged in "value-laden decisionmaking and the weighing of incommensurables under conditions of uncertainty," and it is not for courts to "second-guess the Secretary's weighing of risks and benefits" or "to ask whether his decision was the best one possible or even whether it was better than the alternatives." *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2571 (2019) (cleaned up). For all the reasons above, and for those given in Defendants' opposition to Plaintiffs' motions for preliminary injunctions and Defendants' motion to dismiss, Plaintiffs cannot prevail on their claim that HHS acted arbitrarily or capriciously.

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

Essential Access claims that the NPRM provided no notice with respect to two of the Rule's provisions. *See* EA Compl. ¶¶ 211-15. This Court already concluded that Essential Access is unlikely to prevail on this claim, *see* PI Order at 74, and the Court should now dismiss it, or enter summary judgment in Defendants' favor on that claim, for the same reasons. A "final regulation that varies from the proposal, even substantially, will be valid as long as it is 'in character with the original proposal and a logical outgrowth of the notice and comments.'" *Hodge v. Dalton*, 107 F.3d 705, 712 (9th Cir. 1997) (citation omitted). To determine whether notice was adequate, courts ask whether a complaining party should have anticipated that a requirement might be imposed, and whether a new round of notice and comment would provide the first opportunity for interested parties to offer comments that could persuade the agency to modify its rule. *Envt'l Def. Ctr. v. EPA*, 344 F.3d 832, 851 (9th Cir. 2003). Plaintiffs received sufficient notice under this standard.

First, as to the requirement in § 59.14(b)(1)(ii) that the list provided to patients include only "licensed, qualified, comprehensive primary health care providers," EA PI Mem. at 20, HHS could

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

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

V. PLAINTIFFS CANNOT PREVAIL ON THEIR CONSTITUTIONAL CLAIMS.

The Supreme Court in *Rust* held that the counseling, referral, advocacy, and program integrity provisions of the 1988 regulations (1) did not violate the First Amendment rights of program participants; (2) did not improperly condition funding on the relinquishment of a constitutional right; and (3) did not violate a woman's Fifth Amendment right to choose abortion. *See* 500 U.S. at 192-203. Essential Access nevertheless claims that the Rule both violates Dr. Marshall's First Amendment rights and is unconstitutionally vague, and California claims that the Rule violates equal protection. These constitutional arguments fail.

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

Essential Access contends that the Rule "violates Dr. Marshall's First Amendment right to free speech because it impermissibly interferes with the provider-patient relationship and communications, and requires her to espouse opinions that she does not hold as her own—namely, that a referral for prenatal care is necessary or appropriate for a woman who has decided to terminate her pregnancy." EA PI Mem. at 21; *see also* EA Compl. ¶¶ 216-22. This claim is foreclosed by *Rust*.

In *Rust*, the Supreme Court expressly considered the contention that the 1988 "regulations violate the First Amendment by impermissibly discriminating based on viewpoint because they prohibit all discussion about abortion as a lawful option—including counseling, referral, and the provision of neutral and accurate information about ending a pregnancy—while compelling the clinic or counselor to provide information that promotes continuing a pregnancy to term." 500 U.S. at 192 (citation omitted); *see also id*. at 192-200. And the Court rejected it. *Id.* at 192-200. As the Court explained, the 1988 regulations simply "refus[ed] to fund activities, including speech, which are specifically excluded from the scope of the project funded[,]" and the Constitution generally permits "the Government [to] choose not to subsidize speech[.]" *Id.* at 194-95, 200. In other words, Dr. Marshall remains free to refer for abortion outside the Title X project, but she cannot require the government to pay her for doing so—a physician "employed by [a Title X] project may be prohibited in the course of his project duties from counseling abortion or referring for abortion." *Id.* at 193-94.

Essential Access nevertheless insists that the Rule violates the First Amendment because: (1) "*Rust* expressly did not reach the question of whether the 'traditional relationships such as that between doctor and patient should enjoy protection under the First Amendment from Government regulation, even when subsidized by the Government; and (2) it did not reach that question because it concluded that the 1988 regulations did not 'require a doctor to represent as his own any opinion that he does not in fact hold'"; and (3) "that is exactly what the Final Rule requires providers like Dr. Marshall to do" because it "demands that providers make referrals to prenatal care that they

do not believe are appropriate." EA PI Mem. at 22 (quoting *Rust*, 500 U.S. at 200).

This argument fails. The regulations upheld in *Rust* likewise prohibited Title X providers from making abortion referrals and required Title X providers to refer patients for prenatal care, and Plaintiffs make no attempt to distinguish those regulations from the Rule. *See supra* pp. 9-10. Moreover, Plaintiffs' description of the question "not reach[ed]" in *Rust* is misleading. EA PI Mem. at 22. The Court's point was not that the plaintiffs in *Rust* failed to sincerely believe in the abortion-related speech they wished to engage in within the Title X program; obviously, they did. Rather, the Court's conclusion that the regulations did not violate the plaintiffs' First Amendment rights followed from the basic structure of the Title X program, specifically: (1) "the doctor-patient relationship established by the Title X program [was not] sufficiently all encompassing so as to justify an expectation on the part of the patient of comprehensive medical advice"; (2) "a doctor's silence with regard to abortion cannot reasonably be thought to mislead a client into thinking that the doctor does not consider abortion an appropriate option for her"; and (3) "[t]he doctor is always free to make clear that advice regarding abortion is simply beyond the scope of the program." *Rust*, 500 U.S. at 200. All of this remains true under the Final Rule, and Plaintiffs never contend otherwise. Accordingly, as in *Rust*, "the general rule that the Government may choose not to subsidize speech applies with full force." *Id.*

Essential Access also implies that recent precedent—*National Institute of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018) (*NIFLA*), and *Janus v. American Federation of State, County, & Municipal Employees*, 138 S. Ct. 2448 (2018)—calls *Rust* into question. EA PI Mem. at 21-22. But neither decision has anything to do with *Rust*. *NIFLA* did not address government *subsidization* of speech at all, but a law purporting to *compel* certain pregnancy clinics to provide particular notices. *See* 138 S. Ct. at 2368-78. *Janus*, likewise, invalidated an Illinois fee scheme that *compelled* public employees to subsidize speech with which they disagreed. *See* 138 S. Ct. at 2459-86. Understandably, neither decision even mentions *Rust* given the settled rule that, as a general matter, "if a party objects to the condition on the receipt of federal funding, its recourse is to decline the funds," even "when the objection is that a condition may affect the recipient's

exercise of its First Amendment rights." *Agency for Int'l Devel. v. All. For Open Soc'y Int'l, Inc.*, 570 U.S. 205, 214 (2013) (collecting cases); *see also id.* at 216-17 (reaffirming *Rust*). And even if those decisions could plausibly be read as calling *Rust* into question—which they cannot—*Rust* would still be binding here. *See Rodriguez de Quijas v. Shearson/Am. Exp., Inc.*, 490 U.S. 477, 484 (1989) ("If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions."). Dr. Marshall's First Amendment claim must be dismissed or, alternatively, judgment on that claim should be entered in Defendants' favor.

B. Essential Access's Vagueness Claim Lacks Merit.

Essential Access also cannot prevail on its claim that the Rule is unconstitutionally vague. *See* EA Compl. ¶¶ 223-26; EA PI Mem. at 22-25. The Rule does not impose any penalties but instead sets conditions on government funding. And "when the Government is acting as patron rather than as sovereign, the consequences of imprecision are not constitutionally severe." *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 589 (1998). Accordingly, the Supreme Court has upheld even "opaque" funding provisions that "could raise substantial vagueness concerns" had "they appeared in a criminal statute or regulatory scheme[.]" *Id.* at 588; *see also Planned Parenthood of Cent. & N. Ariz. v. Ariz.*, 718 F.2d 938, 948 (9th Cir. 1983) ("Our tolerance should be even greater in a case, such as the one before us, where the consequence of noncompliance with the enactment is not a civil penalty, but merely reduction of a government subsidy.").

The Rule easily clears this lenient vagueness standard. Plaintiffs' vagueness argument boils down to a claimed confusion about when and how to apply the Rule in certain hypothetical situations. *See* EA PI Mem. at 23-25. But this argument does not get out of the starting gate: Because Plaintiffs mount a facial challenge, "speculation about possible vagueness in hypothetical situations not before the Court will not support a facial attack on a [regulation] when it is surely valid in the vast majority of its intended applications[.]" *Hill v. Colorado*, 530 U.S. 703, 733 (2000)

(citation omitted); *cf. Rust*, 500 U.S. at 195 (rejecting argument about hypothetical application of rule because the cases under review "involve only a facial challenge to the regulations, and we do not have before us any application by the Secretary to a specific fact situation"). Indeed, even for criminal statutes, "a core of meaning is enough to reject a vagueness challenge, leaving to future adjudication the inevitable questions at the [regulatory] margin." *Trustees of Ind. Univ. v. Curry*, 918 F.3d 537, 541 (7th Cir. 2019). And like the Title X grantee in *National Family Planning & Reproductive Health Association v. Gonzales*, 468 F.3d 826 (D.C. Cir. 2006), Plaintiffs have "within [their] grasp an easy means for alleviating the alleged uncertainty[,]" namely, to "inquire of HHS exactly how the agency proposes to resolve any of the" purported ambiguities. *Id*. at 831.[7] Thus, even if the Rule, in hypothetical applications, could possibly give rise to borderline situations, that does not render it impermissibly vague as a facial matter.

In any event, the Rule does provide guidance on the hypothetical applications raised by Plaintiffs. *See* EA PI Mem. at 23-25. First, the Rule's restriction on "encourag[ing], promot[ing] or advocat[ing] for abortion," *id.* at 23 (alterations in original), gives providers fair notice of prohibited conduct. Section 59.14 of the Rule explains that if a pregnant woman "requests information on abortion and asks the Title X project to refer her for an abortion[,]" a provider may "offer[] her nondirective pregnancy counseling, which may discuss abortion, but [may] neither refer[] for, nor encourage[] abortion." 84 Fed. Reg. at 7789. Because permission to "discuss abortion" includes a discussion of recovery time for a medical abortion, Dr. Marshall could provide such information. EA PI Mem. at 23.[8] Also, notably, under the 2000 regulations that Essential

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[7] HHS specifies in the preamble that contacting it about how to implement the program in compliance with the Rule is encouraged. *See* 84 Fed. Reg. at 7766. Even where this process does not resolve a grantee's concern, there are procedures available to obtain clarity. *See* 42 C.F.R. § 59.10 (referencing 45 C.F.R. Part 75, which addresses remedies for noncompliance, and referencing the appeal procedures found in 45 C.F.R. Part 16). Thus, a grantee can work with the program to resolve concerns, and if there is an impasse leading to remedial action, a grantee may take appeals that can eventually proceed to federal district court.

[8] Additionally, in requiring that a Title X project provide assurance "satisfactory to the Secretary" that it is not encouraging, promoting, or advocating for abortion, the Rule provides four specific examples of "[t]he types of documentary evidence that might be required" to demonstrate

Access earlier attempted to preserve via an injunction, the funding of abortion or activities that promote or encourage abortion with Title X funds" was also prohibited, *see* 65 Fed. Reg. at 41,271, and Essential Access does not claim that it those regulations were unconstitutionally vague.

Second, Section 59.14's "emergency care" exception is clear. *Contra id.* at 23-34. That section does not prohibit referral for abortion other than "as a method of family planning," 42 C.F.R. § 59.14, and the emergency-care provision does not exclude abortion providers. Instead, the exception simply provides that "[i]n cases in which emergency care is required, the Title X project shall only be required to refer the client immediately to an appropriate provider of medical services needed to address the emergency." *id*. The Rule discusses emergencies so that grantees have a clear safe harbor that they may (indeed, must) use to refer women in emergency situations. In certain emergency cases, referral to an abortion provider would be proper, and an abortion provider could be considered an "appropriate provider of medical services." *Id.* In discussing an analogous provision in the 1988 regulations, *Rust* rejected a "claim that the regulations would not, in the circumstance of a medical emergency, permit a Title X project to refer a woman whose pregnancy places her life in imminent peril to a provider of abortions or abortion-related services[,]" and explained that "we do not read the regulations to bar abortion referral or counseling in such circumstances." 500 U.S. at 195.

Third, § 59.15's physical and financial separation requirements are sufficiently clear. EA Mem. at 24-25. *Rust* upheld a similar requirement allowing HHS to determine whether such objective integrity and independence exist based on a review of facts and circumstances and a list of factors relevant to this determination. 500 U.S. at 180-81. As in the 1988 regulations, the current Rule empowers the Secretary to determine whether the requisite independence exists by reference to "the existence of separate accounting records and separate personnel, and the degree of physical separation of the project from facilities for prohibited activities." *Id*. at 181. Moreover, § 59.15

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such assurance, and states that "[t]o the extent that additional documentation is required by the Secretary at a later date, future guidance will be communicated to grantees." 84 Fed. Reg. at 7758.

provides a clear list of factors relevant to the determination of whether a Title X project has objective integrity and independence from prohibited activities. *See* 42 C.F.R. § 59.15(a)-(d). HHS has also explained that it "welcomes regular interaction with grantees and subrecipients, should they have questions" as to these requirements and has made available project officers "to help grantees successfully implement the Title X program in compliance with both the statute and the regulation." 84 Fed. Reg. at 7766. And HHS has delayed requiring compliance with the physical separation requirements until March 2020 to "give grantees and subrecipients time to make arrangements to comply with [the requirements] if they choose to seek Title X funds (or to participate in a Title X project) and also [separately] offer abortions as a method of family planning." *Id*. It is also notable that Essential Access has already filed plan for compliance with the Rule, and that plan has been approved, *see* EA MSJ at 9, further, and fatally, undercutting its argument that it does not know how to comply with the Rule's requirements.

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

C. California's Equal Protection Claim Lacks Merit.

The Court should also dismiss or enter judgment in Defendants' favor on California's claim that the Rule violates equal protection. Although California contends that the Rule is unlawful because it "specifically targets and harms women," Cal. Compl. ¶ 223, the Rule does not discriminate on the basis of sex, facially or otherwise. The Rule imposes certain requirements on

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

In *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263 (1993), the Supreme Court explained that "the constitutional test applicable to government abortion-funding restrictions is not the heightened-scrutiny standard that our cases demand for sex-based discrimination, but the ordinary rationality standard." *Id.* at 273 (citations omitted); *see also id.* at 272-73 ("[O]ur cases deal specifically with the disfavoring of abortion, and establish conclusively that it is not *ipso facto* sex discrimination."). Because the Rule's changes are based on the abortion-funding restriction in § 1008, rational basis review is the appropriate test, and the Rule easily clears that low hurdle. It satisfies this "lowest level of scrutiny," *United States v. Dumas*, 64 F.3d 1427, 1429 (9th Cir. 1995), because it is rationally related to legitimate government interests, *Lyng v. Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am., UAW*, 485 U.S. 360, 370 (1988). Indeed, avoiding the use of federal funds to promote or encourage abortion is an important government interest, as the Supreme Court recognized in *Rust*, 500 U.S. at. 192-93. For the same reasons, and given the important government interest at stake, the Rule would also satisfy intermediate scrutiny if it were to apply.

VI. THE COURT SHOULD AWAIT GUIDANCE ON THE MERITS FROM THE NINTH CIRCUIT.

Defendants should prevail on all of Plaintiffs' claims for the reasons explained above and in Defendants' prior briefs. However, even if there were any doubt, or if the Court were to believe that Plaintiffs' arguments have merit, the Court should await guidance from the Ninth Circuit before ruling.

As this Court already acknowledged, the forthcoming ruling from the *en banc* Ninth Circuit is likely to provide substantial, if not dispositive, guidance to this Court and the parties in resolving the central merits issues of this case. *See, e.g.*, *California v. Azar*, No. 3:19-cv-1184, Order Denying Pl.'s Mot. to Bifurcate Issues and Set Summary Adjudication Schedule 1-2, ECF No. 154. Defendants respectfully submit that this Court should await the Ninth Circuit's guidance before ruling on the parties' current dispositive motions. At a minimum, if the Court does issue a ruling in Plaintiffs' favor, Defendants ask that the Court stay the effect of its order pending appeal to avoid the need for Defendants to consider seeking emergency appellate relief.

Finally, if the Court does declare any portion or portions of the Rule to be unlawful, it should sever that portion or portions from the remainder of the Rule. In determining whether severance is appropriate, courts look to both the agency's intent and whether the regulation can function sensibly without the excised provision(s). *MD/DC/DE Broadcasters Ass'n v. FCC*, 236 F.3d 13, 22 (D.C. Cir. 2001). Here, the intent of the agency is clear: the Rule provides that "[t]o the extent a court may enjoin any part of the rule, the Department intends that other provisions or parts of provisions should remain in effect." 84 Fed. Reg. at 7725. Nor is there any functional reason why the entire Rule must fall if the Court agrees with Plaintiffs' attacks on particular provisions. The Rule is lawful for the reasons Defendants have explained. But if the Court decides otherwise, it should limit its relief to only the specific provision(s) of the Rule that it determines to be unlawful.

CONCLUSION

For the foregoing reasons, the Court should deny Plaintiffs' summary judgment motions and dismiss these suits or, in the alternative, enter summary judgment in Defendants' favor.

Dated: February 3, 2020

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CERTIFICATE OF SERVICE

I hereby certify that on February 3, 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.

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

STATE OF CALIFORNIA, by and through ATTORNEY GENERAL XAVIER BECERRA, Plaintiff, v. ALEX M. AZAR, in his OFFICIAL CAPACITY as SECRETARY of the U.S. DEPARTMENT of HEALTH & HUMAN SERVICES; U.S. DEPARTMENT of HEALTH & HUMAN SERVICES, Defendants.	Case No.: 3:19-cv-01184-EMC **RELATED TO** Case No.: 3:19-cv-01195-EMC **[PROPOSED] ORDER**

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

The Court, having considered Defendants' motion to dismiss or, in the alternative, for summary judgment, Plaintiffs' opposition, and the entire record in these related cases, hereby orders as follows:

IT IS HEREBY ORDERED that Defendants' motion is GRANTED.

IT IS SO ORDERED.

Dated:

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The Honorable Edward M. Chen
United States District Judge