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 13 **UNITED STATES DISTRICT COURT**
NORTHERN DISTRICT OF CALIFORNIA

14)	
15	STATE OF CALIFORNIA, by and through)	Case No.: 3:19-cv-01184-EMC
16	ATTORNEY GENERAL XAVIER)	
17	BECERRA,)	RELATED TO
18)	
19	Plaintiff,)	Case No. 3:19-cv-01195-EMC
20)	
21	v.)	
22)	DEFENDANTS' RESPONSE TO
23	ALEX M. AZAR, <i>et al.</i> ,)	THE COURT'S MAY 14, 2020
24)	ORDER
25	Defendants.)	
26)	

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 Defendants submit this response to the Court's May 14, 2020 Order directing the parties to inform the Court how they plan to proceed and what issues remain for the Court to decide in light of the Ninth Circuit's May 8 Order denying Plaintiffs' petitions for rehearing. *See* ECF No. 186.

1 Now that the Ninth Circuit has denied Plaintiffs' petitions for rehearing, Defendants
2 respectfully renew their request for judgment in their favor on Plaintiffs' statutory claims and their
3 claims that the Rule is arbitrary and capricious. In its February 24, 2020 en banc decision, the
4 Ninth Circuit vacated this Court's April 26, 2019 preliminary injunction order, as well as
5 preliminary injunctions entered in similar cases in the Eastern District of Washington and the
6 District of Oregon. *See California v. Azar*, No. 950 F.3d 1067 (9th Cir. 2020) (en banc). The Ninth
7 Circuit held that the challenged Rule is a reasonable interpretation of § 1008 of Title X, does not
8 conflict with the 1996 appropriations rider or other aspects of Title X, and does not implicate the
9 restrictions in § 1554 of the Affordable Care Act. *Id.* at 81.

10 The Court of Appeals further held that Plaintiffs will not succeed on their claims that the
11 Rule is arbitrary and capricious "because HHS properly examined the relevant considerations and
12 gave reasonable explanations." *Id.* at 1105; *see also id.* at 1095-1104. It explained that, even though
13 the administrative record was not before this Court and the other district courts that entered
14 preliminary injunctions, the record on appeal was sufficient to resolve Plaintiffs' claims on the
15 merits and no additional factual development was required. *Id.* at 1803-04 & n.11. Invoking its
16 "power 'to examine the merits of the case' and resolve the legal issue," *id.* at 1803 (quoting *Munaf*
17 *v. Geren*, 553 U.S. 674, 691 (2008)), the Ninth Circuit held that "plaintiffs' claims will not succeed
18 given our resolution of the underlying legal questions," *id.* at 1105 (citing *Munaf*, 553 U.S. at 691);
19 *see also id.* ("Plaintiffs will not prevail on the merits of their legal claims"); *Munaf*, 553 U.S. at
20 692 ("Because the Government is entitled to judgment as a matter of law, it is appropriate to
21 terminate the litigation now.").

22 Because "it is plain that the plaintiff[s] cannot prevail," Defendants are "entitled to
23 judgment" on Plaintiffs' statutory claims and their claims that the Rule is arbitrary and capricious.
24 *Munaf*, 553 U.S. at 619. "Review of a preliminary injunction is not confined to the act of granting
25 the injunction, but extends as well to determining whether there is any insuperable objection, in
26 point of jurisdiction or merits, to the maintenance of the bill, and, if so, to directing a final decree
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1 dismissing it,” *id.* (cleaned up), and that is what the Ninth Circuit did in its en banc decision, *see*
2 *California*, 950 F.3d at 1082-84, 1105.

3 Judgment should also be entered in Defendants’ favor on Plaintiffs’ constitutional claims
4 and Essential Access’s claim that HHS violated the procedural requirements of the Administrative
5 Procedure Act (APA) for the reasons Defendants explained in prior briefing. *See, e.g.*, Defs.’
6 Renewed Mot. for Summ. J., ECF No. 167; Defs.’ Reply in Support of Renewed Mot. for Summ.
7 J., ECF No. 176. Those claims were not before the Ninth Circuit and therefore are not addressed
8 directly in its February 24, 2020 decision. However, the Ninth Circuit’s reasoning strongly
9 suggests that the Rule, like the one at issue in *Rust v. Sullivan*, 500 U.S. 173 (1991), is
10 constitutional. *See, e.g., California*, 950 F.3d at 1093 (noting that *Rust*’s central logic—that the
11 materially indistinguishable 1988 rule “implementing the government’s policy decision to
12 encourage childbirth rather than abortion does not burden or interfere with a client’s health care at
13 all”—“applies equally” to the constitutional claims at issue in *Rust* (and that Plaintiffs assert here)
14 and the statutory claim that the Ninth Circuit decided in the government’s favor); *id.* at 1094
15 (“[T]he Final Rule leaves a grantee ‘unfettered in its other activities’ because it governs solely the
16 scope of the services funding by Title X grants, and doctors and their clients remain free to
17 exchange abortion-related information outside the context of the Title X project.” (quoting *Rust*,
18 500 U.S. at 196)). Indeed, no court in the five long-running challenges to the Rule has ever adopted
19 the meritless constitutional arguments advanced by the various challengers. *See, e.g., Mayor &*
20 *City Council of Baltimore v. Azar*, No. CV RDB-19-1103, 2020 WL 758145, at *14-15 (D. Md.
21 Feb. 14, 2020) (rejecting materially indistinguishable claims under the First and Fifth
22 Amendments); *Family Planning Ass’n of Maine v. HHS*, 404 F. Supp. 3d 286, 314-23 (D. Me.
23 2019) (same). In addition, this Court already rejected Essential Access’s procedural APA argument
24 at the preliminary-injunction stage, *California v. Azar*, 385 F. Supp. 3d 960, 1019-21 (N.D. Cal.
25 2019), and there is no reason to revisit that conclusion.

26 Defendants believe that the Court can resolve Plaintiffs’ remaining claims on the papers
27 already submitted by the parties; however, counsel for Defendants stand ready to participate in
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1 oral argument if the Court believes it would be helpful. Alternatively, in the event that Plaintiffs
2 in either case intend to file a petition for certiorari to the Supreme Court, Defendants would not
3 oppose a stay of proceedings to allow Plaintiffs time to seek further review.
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5 Dated: May 21, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 21, 2020, I electronically filed the foregoing document with the Clerk of the Court, using the CM/ECF system, which will send notification of such filing to the counsel of record in this matter who are registered on the CM/ECF system.

/s/ Bradley P. Humphreys
BRADLEY P. HUMPRHEYS