UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE

THE FAMILY PLANNING ASSOCIATION OF MAINE D/B/A MAINE FAMILY PLANNING, on behalf of itself, its staff, and its patients, *et al.*;	)	
Plaintiffs,	)	Case No. 1:19-cv-00100-LEW
v.	)	
UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, *et al.*;	)	
Defendants.	)	

PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Defendants' position in this litigation is both simple and wrong on the law. Defendants insist that because a similar rule was permissible in 1988, their new Rule is *per se* lawful now. On the contrary, both the APA and Plaintiffs' constitutional claims require this Court to examine the effects of the Rule *today*. *Rust v. Sullivan*, 500 U.S. 173 (1991), cannot answer those questions for the Court. And absent *Rust*, Defendants have offered no defense of the arbitrary decision-making giving rise to the Rule, which is a regulation that places unconstitutional burdens on Plaintiffs' rights. The Court should grant Plaintiffs' motion for summary judgment.

I. This Case Must Be Decided Based on the Complete Record.

Defendants are wrong to insist that the Court should disregard Plaintiffs' Statement of Undisputed Material Facts. *See* ECF 122 at 2 ("Defs.' Opp."). This case, which includes both constitutional claims and other claims pursuant to the APA, should be assessed based on the complete record, including the statement of uncontested material facts, ECF 114 ("SUMF"), which is required by Local Rule 56(b).

First, courts routinely consider evidence beyond the administrative record to evaluate constitutional claims. *See, e.g.*, *Webster v. Doe*, 486 U.S. 592, 604 (1988) (holding constitutional claims under APA entitled to discovery). When "boilerplate principles of review serve poorly to address the [constitutional] matter pending before the court," courts review extra-record evidence. *P.R. Pub. Housing Admin. v. U.S. Dep't of Housing & Urban Dev.*, 59 F. Supp. 2d 310, 327-28 (D.P.R. 1999). That principle applies in this case, which includes a due process claim that requires the Court to weigh the benefits against the burdens imposed by the Rule—a fact-intensive inquiry that must account for specific impacts on Plaintiffs. *See* ECF 113 at 30-38 ("Pls.' Mem."). And the cases cited by Defendants to the contrary were decided in the context of whether discovery of

Defendants should be permitted—a question involving policy interests distinct from whether Plaintiffs may submit facts related to *Plaintiffs* for the Court's consideration.[1]

Second, as to the other APA claims, the SUMF largely provides information regarding the administrative record in this Court's required format. Further, while the task of the court in APA cases typically is to "apply the appropriate APA standard of review . . . to the . . . agency decision based on the record the agency presents to the reviewing court," *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 743-44 (1985), supplementation of the administrative record for APA claims is permitted in certain circumstances. *See, e.g.*, *Harkness v. Sec'y of Navy*, 858 F.3d 437, 451 (6th Cir. 2017) (noting supplementation of the administrative record may be appropriate "when the court needs certain 'background information in order to determine whether the agency considered all of the relevant factors" and there is a showing of bad faith).); *see also U.S. v. JG-24*, 478 F.3d 28, 34 (1st Cir. 2007) (noting agency's bad faith as reason to supplement administrative record in reviewing CERCLA claims). Given the issues at hand here—including impacts in Maine, medical and ethics standards, the complex history of a fifty-year-old program, and the agency's egregious disregard of the facts in the record—it is appropriate to supplement with additional information.

II. The Rule Violates the APA Because it is Arbitrary and Capricious.

In asking the Court to find that *Rust* "foreclose[s]" any claims that the Rule is unlawful under the APA, Defs.' Opp. at 3, 11-12, Defendants disregard the well-established standard that an agency must "examine the relevant data" and articulate 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). Defendants cite no cases in their briefs—because none exist—supporting

[1] Even in the context of discovery disputes, Defendants' cited cases note that some constitutional claims justify review of extra-record material. *See Chiayu Chang v. USCIS*, 254 F. Supp. 3d 160 (D.D.C. 2017) (citing cases where courts allowed discovery on constitutional claims); *Harkness v. Sec'y of Navy*, 858 F.3d 437, 451 n.9 (6th Cir. 2017) (recognizing case permitting submission of affidavits by plaintiffs regarding constitutional claims).

the remarkable and patently incorrect principle that once a prior regulation is found not to be arbitrary and capricious, similar rules issued later under different circumstances *de facto* pass muster under the APA. Pls.' Mem. at 11. Instead, the agency is required to consider the current benefits and costs of promulgation, which Defendants largely admit they failed to do here.

First, Defendants' theory is not supported by *Rust*, which clearly held only that the meaning of § 1008 was ambiguous—not that it mandated the policy in the 1988 Rule, and certainly not that it could justify restricting abortion counseling and requiring physical separation regardless of circumstances. *Rust*, 500 U.S. at 184 ("[W]e agree with every court to have addressed the issue that the language is ambiguous."); *id.* at 185 ("[T]he legislative history is ambiguous with respect to Congress' intent in enacting Title X and the prohibition of § 1008.").

Second, whether a regulation is arbitrary and capricious turns on whether the agency's rulemaking *process* was lawful, not merely the adequacy of the text or policy articulated in the final rule. *See Citizens Awareness Network v. United States*, 391 F.3d 352 (1st Cir. 2004) (agency's calculus "must fairly account for any benefits lost by modifying existing rules, as well as any advantages expected to be gained."). A case considering a rulemaking process from thirty years ago cannot speak to, much less foreclose, the instant challenge—which concerns the failure to examine circumstances at stake *today* when HHS conducted the rulemaking process at issue.

Third, Defendants' admissions demonstrate that HHS failed to conduct the requisite analysis of the current administrative record, including evidence of the Rule's real-world effects. Defendants concede that HHS gave little or no serious consideration to the costs and problems associated with the Rule, by insisting that HHS's "legal conclusions regarding the proper scope of § 1008" can *per se* "justify HHS's adoption of the Rule, *regardless of what the Rule's effects and costs might be*." Defs.' Opp. at 11 (emphasis added). That is not the law. A regulation is arbitrary

and capricious if the agency "failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *State Farm*, 463 U.S. at 43. An agency may weigh the benefits and costs of a rule (including purported statutory compliance) differently than Plaintiffs would, but at a bare minimum it must correctly characterize those costs before weighing them.[2]

As Plaintiffs have detailed, Pls.' Mem. at 11-21, the Rule is replete with unsupported conclusions, and Defendants have now failed to identify any evidence in the record to the contrary:

1. HHS concluded that "concerns [about medical ethics] were misplaced," Defs.' Opp. at 13, even though not a single organization agreed that the Rule was consistent with medical ethics and nearly every leading medical association and public health policy organization submitted comments making clear that the Gag Rule is incompatible with health care professionals' ethical obligations.[3] Pls.' Mem. at 12. Those commenters alerted HHS that the Rule was inconsistent with medical ethics and the standard of care, and that it would seriously harm the provision of healthcare for American women. *Id*. Defendants' belated argument that these organizations misinterpreted their own ethical standards, Defs.' Opp at 13 n.5, lacks any foundation in the administrative record.

2. HHS's conclusion that the costs of physical separation would average $20,000 to $40,000 for relevant providers is grossly out of line with the evidence provided by *every*

[2] HHS's cursory response to comments setting forth relevant costs cannot cure that its conclusions were unfounded. *See Gresham v. Azar*, 950 F.3d 93, 94 (D.C. Cir. 2020) ("Nodding to concerns raised by commenters only to dismiss them in a conclusory manner is not a hallmark of reasoned decisionmaking.").

[3] Defendants purport to rely upon the "federal and state conscience laws" as justification. Pls.' Mem. at 13. That a provider may ethically assert a religious objection to providing certain information says nothing about whether HHS can require all Title X-providers to withhold such information notwithstanding their medical judgment and the particular needs of their patients. *Id.* at 12. Nor did HHS justify its position on medical ethics at the time of the promulgation of the Rule with reference to the conscience statutes; the Court should accordingly decline to "supply a reasoned basis for the agency's action that the agency itself has not given." *State Farm*, 463 U.S. at 43; *Mayor & City Council of Baltimore v. Azar*, -- F. Supp. 3d. --, 2020 WL 758145, at *9 (D. Md. Feb. 14, 2020).

commenter cited by the parties as discussing costs. Pls.' Mem. at 19. Although Defendants attempt to minimize this discrepancy by noting many grantees would be unaffected and that just "*some* commenters provided much higher cost estimates," Defs.' Opp. at 19 (emphasis added), they continue to cite not a single comment, study, or data point supporting an estimate of $40,000 or less for an abortion-providing grantee to become compliant. SUMF ¶ 81.

3. Many commenters pointed to evidence that the Rule would result in major reductions in Title X participation and coverage and thus a substantial diminishment of access to family planning services nationwide. Pls.' Mem. at 13. This evidence was not merely "speculative," as Defendants suggested at the time, 84 Fed. Reg. at 7782, nor did it address a modest "subset" of Title X providers, as they argue now, Defs.' Opp. at 15. In fact, the record included statements from grantees providing nearly half of Title X services affirming that they would leave the program if the Rule went into effect. Pls.' Mem. at 13. And substantial historical data showed that replacement providers were unlikely to be sufficient substitutes in quantity or quality. *Id.*[4] Finally, HHS's purported expectation that supplemental grants will soon "enable grantees to come close to—if not exceed—prior Title X patient coverage" appears increasingly baseless; statistics, generated *after* those supplemental grants, show a nearly 50% decrease in Title X capacity. *Compare* Defs.' Opp. at 16 *with* SUMF ¶ 123; *see also* Brief of *Amicus Curiae* Nat'l Family Planning & Reproductive Health Ass'n, *City of Baltimore v. Azar*, No. 19-1614 at 8-9 (4th Cir. May 1, 2020) (demonstrating HHS's supplemental grants leave needs unmet in large geographic regions).

Nothing in *Rust* excuses HHS's failure to justify these discrepancies through its rulemaking process or "suggests that these considerations should be immaterial to the arbitrary-and-capricious

[4] Plaintiffs have already addressed why Defendants' reliance on a 2011 poll of medical professionals addressing religious objections, their only identified source of "data in the record and input from commenters" on this issue, Defs.' Opp. at 15, is misplaced. Pls.' Mem. at 13-14. That poll does not state anything about Title X participation and does not support Defendants' purported predictions that access would be unaffected. *Id.*

inquiry here." Defs.' Opp. at 12. Defendants' emphasis on the fact that the *Rust* Court did not "expressly engage" with similar claims in its opinion is misplaced; a court is assumed to have based its rulings on a review of the entire record, but silence regarding issues that are *not* directly presented does not establish binding precedent. *See, e.g.*, *Haynes v. McCalla Raymer, LLC*, 793 F.3d 1246, 1249 (11th Cir. 2015); *AFL-CIO v. Chao*, 496 F. Supp. 2d 76, 88 (D.D.C 2007).

Finally, Defendants try to minimize a material difference between the record at issue in *Rust* and the record here—the existence of GAO and OIG reports on which the 1988 Rule and the *Rust* Court relied— by suggesting without support that there is "no indication that *Rust* would have come out differently had the Secretary not relied on the reports." Defs.' Opp. at 12 n.3. To the contrary, in finding that the 1988 Rule was the result of "reasoned analysis," *Rust* reiterated and endorsed the agency's explanation that the 1988 Rule was "promulgated in direct response to the observations in the GAO and OIG reports." 500 U.S. at 188. Having emphasized those findings, the Court then determined that the contemporaneous studies *taken together* with the Secretary's statutory interpretation and policy preference justified the rule. No such studies or contemporaneous analyses exist today, notwithstanding Defendants' admissions that the makeup of the Title X program has changed substantially in the intervening decades. 84 Fed. Reg. 7765.

Accordingly, because *Rust* cannot erase Defendants' obligation to analyze the evidence presented and rely on plausible factual conclusions about that record, the Rule is arbitrary and capricious it should be vacated.

III. The Rule is Contrary to Law

As detailed in Plaintiffs' opening brief, the Rule also is unlawful because it violates statutes that were enacted after *Rust* was decided: (1) the Nondirective Counseling Mandate, which has been included in the Title X appropriations bill every year since 1996; and (2) Section 1554 of the

Affordable Care Act. *See* Pls.' Mem. at 21-28. The Rule also is contrary to Congress's intent when it enacted Title X, as clarified by Congress itself in the wake of *Rust*. *Id.* at 28-30.

Defendants' characterization of Plaintiffs' statutory claims as an attempt to "override" *Rust* is inherently flawed. Defs.' Opp. at 3. Plaintiffs' construction in no way contravenes *Rust*, and indeed is consistent with that precedent. *Rust* held only that § 1008 of Title X is ambiguous and that the interpretation in the 1988 Rule was permissible—not that its interpretation was required. *Id.* "[W]hile the views of subsequent Congresses cannot override the unmistakable intent of the enacting one[,] . . . such views are entitled to significant weight . . . particularly so when the precise intent of the enacting Congress is obscure." *Seatrain Shipbuilding Corp. v. Shell Oil Co.*, 444 U.S. 572, 596 (1980); *Gaskell v. Harvard Co-op. Soc.*, 3 F.3d 495, 501 (1st Cir. 1993) (relying in part on subsequent amendment to determine Congress's intent as to definition of a statutory term); *Operation Rescue Nat'l v. United States*, 975 F. Supp. 92, 104–05 (D. Mass. 1997), *aff'd*, 147 F.3d 68 (1st Cir. 1998) (evaluating subsequent legislative history, including proposed legislation); *Succar v. Ashcroft*, 394 F.3d 8, 32 (1st Cir. 2005) (using subsequent legislative history to "determine whether there is a clearly expressed intention by the Congress which is contrary to the plain language of the statute"). Thus, "the meaning of one statute may be affected by other Acts, particularly where Congress has spoken subsequently and more specifically to the topic at hand." *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000).

Accordingly, the meaning of § 1008—which the *Rust* Court found unclear—can and must be read as affected by the subsequent acts of Congress that speak to the issues at hand. Each of those subsequent Congressional actions renders the Rule contrary to law.

1. <u>The Nondirective Counseling Mandate</u>. Defendants agree that the Nondirective Counseling Mandate requires pregnancy options to be presented to Title X patients "in a neutral

manner." Defs.' Opp. at 3. At the same time, however, Defendants concede that the Gag Rule's restrictions on abortion counseling could "(implicitly) promote" childbirth and adoption over abortion. *Id.* at 4. Defendants' admission only further demonstrates that the Gag Rule does not provide the neutral, unbiased, and patient-directed counseling that nondirective counseling necessarily entails. *See* Pls.' Mem. at 22.

Defendants' attempt to separately justify the Rule's one-sided referral restrictions—which ban abortion referrals while simultaneously *requiring* prenatal referrals even for a patient who neither wants nor needs prenatal care—fares no better. Defendants' position that a "prenatal referral requirement does not direct a decision about abortion," even when given to a patient who has asked for an abortion referral and indicated that they do not want to continue their pregnancy, Defs.' Opp. at 4, lacks basis. And Defendants still utterly fail to explain how or why prenatal care is "necessary" for a patient who will terminate her pregnancy. *Id.* Defendants' continued insistence that referrals are not a form of counseling also falls short. This Court has already recognized that there is no bright line between counseling and referrals. ECF No. 77 at 33.[5]

Finally, Plaintiffs do not claim the Nondirective Counseling Mandate "repeals" § 1008, nor that this subsequent mandate "eliminate[s] HHS's statutory authority, recognized by the Supreme Court in *Rust.*" Defs.' Opp. at 5. As explained in Plaintiffs' opening brief, when two statutes can be read consistently—as the Nondirective Counseling Mandate and the ambiguous § 1008 can be under Plaintiffs' interpretation—the Court must read them together. Pls.' Mem. at 24; *United States v. Arif*, 897 F.3d 1, 7 (1st Cir. 2018). One does not repeal the other under such circumstances.

[5] Putting aside whether handing patients a written list of providers is a form of counseling—which it is, *see, e.g.*, 42 U.S.C. § 254c-6(a)(1), (a)(2)(B)(ii)—individualized counseling discussions about pregnancy options often include conversation about which providers are the best option for the specific patients. There is no textual or record support for the view that this part of such counseling sessions could be carved out from the Nondirective Counseling Mandate.

2. Section 1554 of the ACA. The Rule violates the clear terms of § 1554 because it "creates [] unreasonable barriers" to healthcare, "impedes timely access" to healthcare, "interferes with communications regarding a full range of treatment options between the patient and the provider," and "restricts the ability of health care providers to provide full disclosure of all relevant information to patients making health care decisions." 42 U.S.C. § 18114; Pls.' Mem. at 25.

Unable to dispute that the Rule harms healthcare access, Defendants argue the claim is waived because Plaintiffs did not point to § 1554 during the rulemaking process. Defs.' Opp. at 6-8. But Defendants fail to address that "the waiver rule does not apply to preclude argument where the scope of the agency's power to act is concerned." *Sierra Club v. Pruitt*, 293 F. Supp. 3d 1050, 1061 (N.D. Cal. 2018). And issue exhaustion is a prudential doctrine applied flexibly with the goals of permitting the agency to develop its reasoning in response to challenges and preventing litigants from "sandbagging" the agency. *Hispanic Affairs Project v. Acosta*, 901 F.3d 378, 389-91 (D.D.C. 2018). As Plaintiffs have explained, HHS was demonstrably aware of § 1554 when it considered the Rule and it had ample opportunity to address these issues. Pls.' Mem. at 26.

Finally, Defendants incorrectly argue that § 1554 is limited to the ACA and does not apply to other government-funded programs—§ 1554 clearly states that HHS "shall not promulgate *any* regulation" that impedes healthcare access in the enumerated ways. Pls.' Mem. at 27.[6]

3. Title X. Events following *Rust* have demonstrated that the Rule is beyond the bounds of HHS's regulatory authority under Title X itself. After *Rust* found Congress's intent ambiguous with respect to § 1008, Congress expressly clarified that it had never intended to limit abortion counseling in the first place. Pls.' Mem. at 29. Congress then ratified HHS's longstanding

[6] Defendants emphasize language from § 1554 stating the provision applies "[n]otwithstanding any other provision of this Act." Defs.' Opp. at 7. That language makes clear only that § 1554 supersedes any contrary provisions of the ACA. It does not speak to the general reach of § 1554, nor does it constrain the provision's application in any respect.

policies—which required nondirective counseling and permitted colocation of Title X and abortion services—by leaving the statute intact without any revision to § 1008 over the following decades. And Congress continually expressed this choice as it effectively reenacted Title X yearly by appropriating funds for the program. *See* Pls.' Mem. at 30. Unlike in the cases cited by Defendants, Defs.' Opp. at 9, the Title X annual appropriations language has consistently and directly addressed the controversy at hand for decades. *See, e.g.*, Continuing Appropriations Act, 2019, Pub. L. 115-245, 132 Stat. 2981, 3070-81 (2018) (requiring that "all pregnancy counseling shall be nondirective"). "It is well established that when Congress revisits a statute giving rise to a longstanding administrative interpretation without pertinent change, the 'congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is one intended by Congress." *Commodity Futures Tr. Comm'n v. Schor*, 478 U.S. 833, 846 (1986).

IV. The Rule Imposes an Unconstitutional Condition in Violation of Plaintiffs' Patients' Fundamental Right to Choose Abortion before Viability

Defendants do not dispute that the Rule conditions funding on MFP shuttering abortion services at 17 clinics, eliminating 85% of the abortion clinics in Maine, and that the resulting increased travel distances would present a substantial obstacle for Plaintiffs' patients and could prevent some from being able to access abortion altogether. Pls.' Mem. at 35-38. Under these uncontroverted facts, the Rule is unlawful because it imposes an "undue burden" on Plaintiffs' patients' access to previability abortion, that is, because the burdens imposed by the Rule outweigh any benefits conferred. *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2300, 2309 (2016).

Ignoring the burdens the Rule would impose on Mainers, Defendants rest their opposition entirely on *Rust*. But the due process holding in *Rust* is readily distinguishable for several reasons:

First, *Rust* expressly stated that an as-applied challenge to the 1988 Rule was not foreclosed. 500 U.S. at 201-02. Defendants' contention that there is no distinction between a facial

challenge and the as-applied challenge brought here, Defs.' Opp. at 21, is contrary to both black-letter law, *see McCullen v. Coakley*, 573 U.S. 464, 485 n.4, and to *Rust* itself, 500 U.S. at 201-02.

Second, the Supreme Court did not "broadly" determine that any part of the 1988 Rule could withstand constitutional scrutiny no matter the circumstances, as Defendants suggest. Defs.' Opp. at 21. *Rust*'s due process holding analyzed only a facial challenge to the *gag rule*. 500 U.S. at 202 ("The difficulty that a woman encounters when a Title X project *does not provide abortion counseling or referral* leaves her in no different position than she would have been if the Government had not enacted Title X.") (emphasis added). And *Rust*'s holding was contingent on a finding that plaintiffs had not offered facts showing protected conduct was curtailed, *AID v. All. For Open Soc. Int'l Inc.*, 570 U.S. 205, 217 (2013), while here the record contains detailed and uncontested evidence that implementation of the Rule would shutter 85% of abortion clinics in Maine. SUMF ¶¶ 124-25. Defendants cite no support for their radical view that the Supreme Court intended to address facts or claims that were neither presented to nor considered by the Court.

Finally, Defendants are wrong to insist that the "federal spending" component in this case automatically eliminates any need for constitutional analysis under the undue burden standard. Defs.' Opp. at 22-23. On the contrary, the well-established purpose of the unconstitutional conditions doctrine is to protect constitutional rights in just such circumstances, to ensure that the government does impose a requirement indirectly through "a condition on the receipt of federal funds" that would be unconstitutional if "enacted as a direct regulation." *AID*, 570 U.S. at 213.

V. The Rule Violates the Equal Protection Clause

Because the Rule discriminates against the class of pregnant patients seeking to exercise their fundamental right to previability abortion, heightened scrutiny applies. *City of Cleburne Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985). Defendants urge the Court to apply rational

basis review, predicated on their incorrect characterization of this claim as a challenge to the government's "fail[ure] to subsidize abortion." Defs.' Opp. at 24. But Plaintiffs have never suggested that Title X funds can or should be used for abortion. Rather, Plaintiffs challenge the Rule's imposition of disparate treatment for pregnant patients with respect to care that is *outside the scope of Title X altogether* (and thus not eligible for Title X funding in any event).[7]

Under the Rule, even though *both* prenatal care and abortion services fall outside the ambit of the Title X program, only patients seeking abortion are singled out and denied critical information. *See* Pls.' Mem. at 40. Where, as here, a government restriction reaches beyond the scope of government-funded activities, it is constrained by the Equal Protection Clause and heightened scrutiny applies to discrimination on the basis of a fundamental right. *Id.* The Rule cannot come close to meeting that heightened burden. *Id.* at 41-42.

VI. The Rule Violates the First Amendment

Defendants' characterizations aside, Supreme Court precedent developed post-*Rust* has established that the patient-provider relationship is a "traditional sphere of free expression" entitled to paramount protection under the First Amendment. Pls.' Mem. at 42-43. Thus, the Gag Rule's content- and viewpoint-based discrimination is subject to heightened scrutiny, which the Rule cannot survive. *Id*. Moreover, Defendants nowhere address Plaintiffs' as-applied First Amendment claims, which are readily distinguishable from the facial challenge in *Rust*. *See supra* Part IV.

VII. CONCLUSION

For the foregoing reasons, the Court should grant summary judgment for Plaintiffs.

[7] For this reason, Defendants' cases are distinguishable, either because they address challenges to abortion funding restrictions, Defs.' Opp. at 23, or since they do not address restrictions that impinge on a fundamental right. *Id.* at 24.

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Respectfully submitted,

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**Admitted Pro Hac Vice*

CERTIFICATE OF SERVICE

I hereby certify that on the 29th day of May, 2020, I filed a copy of the above document with the Clerk of Court through the ECF system, which automatically sent a Notice of Electronic Filing to all counsel of record.

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