UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE

THE FAMILY PLANNING ASSOCIATION OF MAINE D/B/A MAINE FAMILY PLANNING *et al.*,	)	
Plaintiffs,	)	
v.	)	**Case No. 1:19-cv-00100-LEW**
UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES *et al.*,	)	
Defendants.	)	

DEFENDANTS' REPLY IN SUPPORT OF MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT AND OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND INCORPORATED MEMORANDUM OF LAW

Defendants hereby respond in opposition to Plaintiffs' motion for summary judgment and in support of Defendants' motion to dismiss or, in the alternative, for summary judgment. The reasons for this opposition and reply are set forth in the following memorandum of law.

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INTRODUCTION

In *Rust v. Sullivan*, 500 U.S. 173 (1991), the Supreme Court held that Department of Health and Human Services (HHS) regulations (1988 regulations) prohibiting Title X projects from referring patients for abortion as a method of family planning, and requiring Title X programs to be physically separate from abortion-related activities, were authorized by Title X, were not arbitrary and capricious, and were constitutional. Relying on that holding, HHS issued a new rule in 2019 that is, in all material respects, indistinguishable from the 1988 regulations. *See* 84 Fed. Reg. 7714 (Mar. 4, 2019) (Rule). Notwithstanding *Rust*'s holding, Plaintiffs—Maine Family Planning (MFP) and one of its physicians—bring this suit asserting that the current Rule violates Title X, is arbitrary and capricious, and violates the Constitution. In denying Plaintiffs preliminary injunctive relief, the Court has already rejected these arguments. *See* Decision & Order on Mot. for Prelim. Inj., ECF No. 77 (PI Order). And as Defendants explained in their opening brief, the same result is appropriate on the merits: *Rust* controls, and the Court should enter judgment for the government. *See* Defs.' Mot. to Dismiss & for Summ. J., ECF No. 111 (Defs.' Mot.). Indeed, the en banc Ninth Circuit recently held, as a matter of law, that the Rule is neither contrary to law nor arbitrary and capricious, rejecting many of the same challenges to the Rule that Plaintiffs press here. *See California v. Azar*, 950 F.3d 1067 (9th Cir. 2020).

In their summary judgment brief, Plaintiffs largely double down on their remarkable arguments: that a district court can effectively overrule a Supreme Court decision based on a single clause in an appropriations rider, an obscure provision in the Affordable Care Act (ACA), later Supreme Court cases *reaffirming* that decision, or, most astonishingly, *vetoed* legislation; and that this Court should substitute its judgment for the predictive expertise of the agency charged with administering the Title X program. *See* Pls.' Mot. for Summ. J. & Opp'n to Defs.' Mot. to

Dismiss & for Summ. J., ECF No. 113 (Pls.' MSJ). But they provide no basis for the Court to reach a different result than it did at the preliminary injunction stage. The Court therefore should either dismiss Plaintiffs' complaint or enter summary judgment in favor of Defendants.

ARGUMENT

I. The Court's Disposition of this Case is Controlled by the Administrative Record and *Rust*—Not Plaintiffs' Statement of "Undisputed Material" Facts.

Plaintiffs submit with their motion a "statement of undisputed material facts" spanning more than 50 pages. *See* ECF No. 114 (Pls.' SUMF). This is curious, given that Plaintiffs challenge federal agency action under the Administrative Procedure Act (APA) and, as such, "the traditional Rule 56 standard does not apply." *Bennett v. Murphy*, 166 F. Supp. 3d 128, 139 (D. Mass. 2016). The task of the reviewing court is "not to determine whether a dispute of fact remains," *Boston Redevelopment Auth. v. Nat'l Park Serv.*, 838 F.3d 42, 47 (1st Cir. 2016), but to "apply the appropriate APA standard of review to the agency decision based on the record the agency presents to the reviewing court," *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 743-44 (1985). Contrary to Plaintiffs' contention, Pls.' MSJ at 9, this standard applies to constitutional claims as well. *See, e.g., Chiayu Chang v. USCIS*, 254 F. Supp. 3d 160 (D.D.C. 2017); *Harkness v. Sec'y of Navy*, 858 F.3d 437, 451 n.9 (6th Cir. 2017). The APA provides that claims challenging agency action as "contrary to constitutional right, power, privilege, or immunity" shall be evaluated on a "review [of] the whole record," 5 U.S.C. § 706, and the "presence of a constitutional claim does not alter [this] requirement[]." *Harvard Pilgrim Health Care v. Thompson*, 318 F. Supp. 2d 1, 10 (D.R.I. 2004); *see also, e.g., Pac. Shores Subdivision v. U.S. Army Corps of Eng'rs*, 448 F. Supp. 2d 1, 4 (D.D.C. 2006) (explaining that the "whole record" is the "administrative record that was before the agency decisionmakers at the time they made their decisions").

In accordance with the Local Rules, Defendants are filing simultaneously a response to Plaintiffs' statement of facts, but it is the administrative record, not Plaintiffs' statement of facts, on which the Court must base its inquiry. Defendants respectfully submit that Plaintiffs' statement of facts does not establish any point that is material to the disposition of this case, particularly to the extent that Plaintiffs rely on their statement to bolster claims that, as Defendants have explained previously and reiterate below, are foreclosed by *Rust*.

II. Plaintiffs' Statutory Claims Lack Merit.

Plaintiffs continue to press the argument that the Rule violates Title X and two later-enacted statutory provisions. But as Defendants have explained, the Supreme Court has held that Title X authorizes materially indistinguishable regulations. As the party seeking to override this holding, Plaintiffs "must provide evidence that Congress intended to alter *Rust*'s conclusion that the 1988 Rule was a permissible interpretation of Title X and § 1008." *California*, 950 F.3d at 1085. As was the case before the en banc Ninth Circuit when that court answered the same legal question in favor of the government, Plaintiffs here "fail to do so." *Id*.

A. The Nondirective Provision

As the Court has already concluded, Plaintiffs' legal argument that the Rule conflicts with an appropriations rider requiring that pregnancy counseling be nondirective fails. *See* PI Order at 30-35; *see also* Defs.' Mot. at 18-24. Rather, that rider reinforces Congress's intent, reflected in § 1008, that "federal funds not be used to 'promote or advocate' abortion as a 'method of family planning,'" *Rust*, 500 U.S. at 195 n.4, and requires only that "options must be provided in a neutral manner," *California*, 950 F.3d at 1088. Plaintiffs concede that the Rule's definition of "nondirective counseling" is consistent with the rider, but contend that the Rule nonetheless "mandate[s] directive counseling in several respects." Pls.' MSJ at 22. Each argument is meritless.

Recognizing that the Rule *permits* "nondirective pregnancy counseling, which may discuss abortion," 42 C.F.R. § 59.14(e)(5), Plaintiffs attack the Rule for not *requiring* that counseling on abortion be presented, upon request, as the sole option to pregnant patients. *See* Pls.' MSJ at 22-23. But Plaintiffs have no standing to object to what *other* providers may do, and a provider's choice to omit counseling about abortion does not specifically "direct" anything. In any event, the Rule's preamble contemplates that any counseling will present more than one option, *see, e.g.*, 84 Fed. Reg. at 7716, and offering childbirth-only counseling or adoption-only counseling would not "direct" a patient to choose that option, so long as the provider did not advise a patient to do so. At most, such counseling would (implicitly) promote that option over the others, but nothing in the appropriations rider prohibits the promotion of childbirth or adoption. *See California*, 950 F.3d at 1088 (rejecting argument that "the term 'nondirective' means the presentation of all options on an equal basis"). Section 1008, by contrast, does prohibit the use of Title X funds "'to promote or advocate' abortion as a 'method of family planning,'" *Rust*, 500 U.S. at 195 n.4, which is why the Rule forbids counseling where "abortion [is] the only option presented," 84 Fed. Reg. at 7747.

Next, Plaintiffs challenge the Rule's allegedly "one-sided referral restrictions," Pls.' MSJ at 23, contending that the Rule's restrictions on abortion referrals are directive when combined with the separate requirement that pregnant patients be referred for prenatal health care. But the prenatal-referral requirement does not direct a decision about abortion—it merely refers women for care while they are pregnant, even if they obtain an abortion later. *See* Defs.' Mot. at 18-19; *see also California*, 950 F.3d at 1090 ("[R]equiring referrals for medically necessary prenatal health care but not for nontherapeutic abortions does not make pregnancy counseling directive."). Had HHS wanted to require "referral[s]" for "[p]renatal care *and delivery*," it knew how to do so, as the 2000 regulations illustrate. 65 Fed. Reg. 41,270, 41,279 (July 3, 2000) (emphasis added).

The Rule here, by contrast, mandates referrals only for "medically necessary prenatal health care." 42 C.F.R. § 59.14(b)(1). In any event, Congress's requirement that "pregnancy counseling" be "nondirective" does not speak to the issue of "referrals," much less require HHS to allow referrals for abortion specifically. And contrary to Plaintiffs' contention, neither Congress nor HHS has "expressly recognized that referrals are part of nondirective counseling." Pls.' MSJ at 23. Rather, the statute upon which Plaintiffs rely (42 U.S.C. § 254c-6(a)(1)) "sheds no light on Congress's intent in enacting the appropriations rider or on the interpretation of its statutory language," *California*, 950 F.3d at 1087, and HHS has consistently used "counseling" and "referral" as distinct terms, including in the 2000 regulations. *See* Defs.' Mot. at 19-20.

Finally, Plaintiffs err in insisting that, under their construction, the nondirective provision is not "an impermissible implied amendment or repeal of § 1008." Pls.' MSJ at 24. Plaintiffs necessarily contend that the nondirective provision eliminated HHS's statutory authority, recognized by the Supreme Court in *Rust*, to issue materially indistinguishable regulations. By definition, that would be repeal of § 1008 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 HHS of that authority would constitute a repeal. That § 1008, combined with the express rulemaking authority granted under § 1006, *implicitly* delegated the same authority is irrelevant under *Chevron*, *see* Defs.' Mot. at 24, particularly in light of the fact that the Supreme Court has already authoritatively construed § 1008 to contain that delegation.

B. Section 1554 of the ACA

Plaintiffs do not dispute that they failed to raise their argument based on § 1554 of the ACA before HHS during the rulemaking process. Rather, they ask the Court to excuse that waiver based on a grab bag of unpersuasive arguments. To start, it is not enough, as Plaintiffs contend, that commenters made generic objections to the substance of (as opposed to the statutory authorization for) the Rule containing language that happened to resemble language in § 1554. Nor is it the case that the waiver doctrine is inapplicable to any argument challenging an agency's "statutory authority to promulgate particular regulations." *See* Pls.' MSJ at 25-26. Rather, as the D.C. Circuit has explained, "failure to raise a particular question of statutory construction before an agency constitutes waiver of the argument in court," notwithstanding the fact a party raised other "technical, policy, or legal arguments before the agency," because "respect for agencies' proper role in the *Chevron* framework requires that the court be particularly careful to ensure that challenges to an agency's interpretation of its governing statute are first raised in the administrative forum." *NRDC, Inc. v. EPA*, 25 F.3d 1063, 1074 (D.C. Cir. 1994).[1] Plaintiffs do not argue that any of the comments they reference actually invoked § 1554, or more importantly invoked that particular statutory provision as a legal bar to the Rule, *see California*, 950 F.3d at 1092 n.23 (noting the "obvious difference between arguing that a regulation violates best medical practices and arguing that a regulation violates a statute"), and thus Plaintiffs' specific argument was "not presented to the agency." *Mazariegos-Paiz v. Holder*, 734 F.3d 57, 62 (1st Cir. 2013).

[1] For similar reasons, Plaintiffs are incorrect to suggest that their waiver should be excused because HHS "analyzed" § 1554 in a "separate rulemaking." Pls.' MSJ at 26. Plaintiffs ignore the fact that HHS, as the largest department in the federal government, is often engaged in dozens of rulemakings across its operating divisions simultaneously, and if it were true that an agency need only be generally aware of a statute for the purposes of the waiver analysis, the requirement that commenters raise their arguments in the relevant rulemaking would be substantially undermined.

Plaintiffs further argue that, because the Rule is currently in effect and has been "enforced" against MFP, Plaintiffs should now be permitted to "raise all grounds on which the Rule is invalid." Pls.' MSJ at 26. But this lawsuit is not, in fact, a challenge to an agency enforcement action; and indeed, HHS has taken no such action against Plaintiffs, who chose voluntarily to exit the Title X program.[2] Rather, Plaintiffs continue to argue that HHS unlawfully promulgated the Rule and to seek an order "vacating the Rule in its entirety." Am. Compl., Prayer for Relief (b), ECF No. 99. The case law on which Defendants have previously relied—which simply recognizes that waiver doctrine does not prevent a party from raising an argument that it failed to make when the "rule is brought before [a] court for review of *further agency action applying it*," *i.e.*, action beyond mere promulgation of the rule itself, *Koretoff v. Vilsack*, 707 F.3d 394, 399 (D.C. Cir. 2013) (emphasis added)—is thus inapplicable here, and the Court should not excuse Plaintiffs' waiver on this basis.

Waiver aside, Plaintiffs' § 1554 argument is meritless, as Defendants have explained and as the Court has concluded. *See* Defs.' Mot. at 24-27; PI Order at 35-36. The Rule merely limits what the government chooses to fund and thus does not, for example, "create[] any unreasonable barrier" to obtaining health care. Plaintiffs contend that the "plain text" of § 1554 requires their preferred reading, Pls.' MSJ at 27, but ignore the fact that the very text only applies "[n]otwithstanding any other provision of this Act," 42 U.S.C. § 18114, signaling that the provision may implicitly displace otherwise applicable provisions *only in the ACA*. *See* PI Order at 36. Plaintiffs assert various arguments in favor of their expansive reading of § 1554, but none of them make the provision any less of a mousehole or Plaintiffs' theory any less of an elephant—and

[2] Although the Rule has not been applied to MFP, HHS does employ enforcement proceedings with respect to Title X grants. These require, among other things, HHS to provide a grantee notice prior to terminating funding based on noncompliance with applicable regulations, 45 C.F.R. § 75.373, and "an opportunity to object and provide information and documentation challenging the suspension or termination action," *id*. § 75.374.

Congress "does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001). At bottom, as the Supreme Court explained in *Rust*, there is a fundamental distinction between impeding something and choosing not to subsidize it, 500 U.S. at 201-02, and that reasoning disposes of Plaintiffs' argument here, whether it is packaged as a constitutional or statutory claim. *See California*, 950 F.3d at 1094 (relying on *Rust* to reject identical § 1554 argument and find that the Rule's "measures to ensure that government funds are spent for the purposes for which they were authorized does not violate § 1554's restrictions on direct regulation of certain aspects of care").

C. Title X

Notwithstanding *Rust*'s clear holding that the "broad language of Title X plainly allows" regulatory provisions materially indistinguishable from those at issue here, 500 U.S. at 184, Plaintiffs persist in their argument that HHS has "improperly construed" Title X, Pls.' MSJ at 28. Although it is undisputed that Title X has not been amended since *Rust* was decided, Plaintiffs contend that Congress has subsequently "clarified its intent"—apparently to abrogate the Supreme Court's high profile decision in *Rust—sub silentio* and through indirect means. *Id.* Putting aside the implausibility of that argument—and, for that matter, the fact that "the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one," *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 117 (1980)—Plaintiffs' theory fails on its own terms because, as Defendants have explained, Congress *failed* in its attempt to expressly overturn *Rust*. *See* Defs.' Mot. at 5, 27. "Few principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language," *INS v. Cardoza-Fonseca*, 480 U.S. 421, 442-43 (1987); *see*

also California, 950 F.3d at 1095 n.26 (rejecting "arguments that the Final Rule violates Title X" as "not merit[ing] much discussion").

Similarly meritless is Plaintiffs' argument that Congress, by appropriating funds for Title X while the 2000 regulations (and, before that, the substantially similar 1993 guidance) were in effect, implicitly ratified the interpretation embodied in those earlier executive actions (*i.e.*, "requiring nondirective counseling and permitting colocation of Title X and abortion services"). Pls.' MSJ at 30. "[R]atification may be effected through appropriations acts," but the "appropriation must plainly show a purpose to bestow the precise authority which is claimed." *Ex Parte Mitsuye Endo*, 323 U.S. 283, 303 n.24 (1944). Here, the relevant appropriations language—which as discussed above contains a mere six words requiring that pregnancy counseling, if offered, must be nondirective—plainly does not adopt the specific requirements of the 2000 regulations. *Cf. New York v. Sullivan*, 889 F.2d 401, 408 (2d Cir. 1989) (rejecting similar challenge to the 1988 regulations because "the reauthorization of funding [through appropriations] does not imply that Congress was aware of, much less endorsed, every expenditure of funds by the agency"). And even assuming that Congress *had* ratified Plaintiffs' reading of the 2000 regulations, which it has not, "the ratification of one agency policy by Congress does not preclude a change in that policy." *Massachusetts v. HHS*, 899 F.2d 53, 61 (1st Cir. 1990) (en banc), *abrogated on other grounds by Rust*, 500 U.S. 173. So long as Congress does not incorporate the agency interpretation into statute (which has not occurred here), it expresses no "disapproval" (or approval) of an agency's "later decision to rescind the regulation" that had previously been ratified, *Motor Vehicle Mfrs. Ass'n v. State Farm Auto. Ins. Co*, 463 U.S. 29, 45 (1983).

III. The Rule Is Not Arbitrary and Capricious.

Agency action must be upheld in the face of an arbitrary and capricious claim so long as 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." PI Order at 37 (quoting *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016)). HHS did precisely that here. *See id*. at 40 ("[R]equiring physical separation between Title X clinics and abortion clinics is a rational way to administer the Title X federal spending program, given the prohibition against utilization of program funds in programs that offer abortion as a method of family planning."); *id*. at 42 (counseling and referral provisions not arbitrary and capricious because they do not require Title X providers "to misinform or mislead their patients concerning health care options, and the patients should not develop a mistrust of their Title X providers simply because the trail to an abortion provider is not blazed through the Title X program").

Plaintiffs' arguments to the contrary are mere policy disagreements in the guise of APA claims. Indeed, the en banc Ninth Circuit recently rejected the arguments Plaintiffs assert here, finding that the Rule "is not arbitrary and capricious as a matter of law," *California*, 950 F.3d at 1095 n.27. And although Plaintiffs attempt to distinguish *California* on the basis that it was decided "in a different procedural posture than the motion at hand," Pls.' MSJ at 9 n.1, that court, while deciding a preliminary injunction appeal, invoked its "power 'to examine the merits of the case' and resolve the legal issue." *California*, 950 F.3d at 1083 (quoting *Munaf v. Green*, 553 U.S. 674, 691 (2008)). Even without the certified administrative record, the court determined that the "record before [it was] sufficient to resolve plaintiffs' argument that aspects of the Final Rule are arbitrary and capricious," noting that, as was the case with respect to Plaintiffs' preliminary

injunction motion here, "all public comments made during the rulemaking process are available online and were available to the parties," *id*. at 1084 n.11; *see also id*. at 1083-84.

1. As Defendants have explained, the Rule was the product of reasoned decisionmaking, justified primarily by HHS's determination that the best interpretation of Title X, a statutory regime that HHS administers, required it to re-implement regulatory requirements that the Supreme Court upheld as reasonable and lawful in *Rust*. *See* Defs.' Mot. at 30; *see also* 84 Fed. Reg. at 7714, 7723-24. These legal conclusions regarding the proper scope of § 1008, which HHS amply explained, *see* Defs.' Mot. at 30-36, justify HHS's adoption of the Rule, regardless of what the Rule's effects and costs might be. Even assuming that § 1008 does not *compel* the restrictions at issue here, HHS was entitled to conclude that they were the *best* reading of § 1008 and adopt the interpretation reflected in the Rule for that reason alone. *See Encino Motorcars*, 136 S. Ct. at 2127 (noting that "an agency may justify its policy choice by explaining why that policy 'is more consistent with statutory language' than alternative policies"). It cannot be arbitrary and capricious for an agency to decline to adopt a *worse* reading of an ambiguous statute merely because the better reading of the text comes with practical costs. If the agency reasonably concludes that Congress already made that judgment by using the words that it did, it is entitled to follow Congress's lead, even if its interpretation is not the only permissible reading of the statute. At the very least, the choice between fidelity to the best interpretation of statutory text and practical consequences involves the sort of "value-laden decisionmaking and the weighing of incommensurables" entrusted to federal agencies. *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2571 (2019).

Although Plaintiffs seek to undermine its application here, Pls.' MSJ at 11, *Rust* proves the point. Then, as now, challengers argued (1) that the referral restriction was inconsistent with

medical ethics set forth in "[t]he professional standards of the American Medical Association ('AMA') and the American College of Obstetricians & Gynecologists ('ACOG')," 89-1391 Pet. Br. at 21 n.33, *Rust* (Nos. 89-1391,-1392), 1990 WL 505724; (2) the agency's rule would "compel clinics that Congress sought to create to close their doors," *id*. at 50 n.90; and (3) the Secretary "offered no rebuttal to the comments suggesting that costs" associated with physical separation "would be significant and even prohibitive," 89-1392 Pet. Br. at 31, *Rust* (Nos. 89-1391, -1392), 1990 WL 505760. Yet in holding that the 1988 regulations were not arbitrary and capricious, the Supreme Court felt no need to expressly engage with these claims. *See Rust*, 500 U.S. at 186-90. Instead, it quickly dispatched the plaintiffs' arbitrary-and-capricious claims, concluding that the Secretary, among other things,[3] had "determined that the new regulations are more in keeping with the original intent of the statute," and that such "justifications are sufficient to support the Secretary's revised approach." *Id*. at 187. Plaintiffs disagree with the Secretary's policy judgment and the result in *Rust*, and invoke various considerations in support of their contention that the Rule is arbitrary and capricious, but, at a minimum, the Court's analysis in *Rust* strongly suggests that these considerations should be immaterial to the arbitrary-and-capricious inquiry here.

2. As for Plaintiffs' specific objections, they first attack the Rule's restrictions on abortion counseling and referral, asserting that the Rule "depart[s] from medical ethics" without adequate explanation. *See* Pls.' MSJ at 11-13. But HHS expressly considered and responded to

[3] As Plaintiffs highlight, the Supreme Court also referenced the fact that HHS cited "1982 reports by the General Accounting Office and the Office of the Inspector General" regarding Title X compliance. Pls.' MSJ at 18. But as HHS itself has recognized, those reports "showed only minor compliance problems," 65 Fed. Reg. at 41,272, and the First Circuit *rejected* an arbitrary-and-capricious challenge to the 1988 regulations notwithstanding its conclusion that the "reports provide a very slim reed of support." *Massachusetts*, 899 F.2d at 63. There is thus no indication that *Rust* would have come out differently had the Secretary not relied on the reports—which in any event HHS does not rely on now to "form the basis of any credible analysis of the Title X program," *contra* Pls.' MSJ at 18—in issuing the 1988 regulations.

the comments Plaintiffs reference that argued that the Rule would force providers to violate medical ethics. *See* 84 Fed. Reg. at 7724, 7748; Defs.' Mot. at 33-34. And HHS concluded that those concerns were misplaced, relying on federal and state conscience laws permitting providers to take the same actions required by the Rule, and on *Rust*'s upholding a nearly identical, but more restrictive, version of the referral and counseling restrictions over similar objections. *See* 84 Fed. Reg. at 7724, 7748; *see also* PI Order at 42-43 & n.33.[4]

HHS was not required to adopt the views of any particular commenter, and as even Plaintiffs acknowledge, "HHS was not required to demonstrate that any professional organization supported the Rule." Pls.' MSJ at 12 (quoting *Mayor & City Council of Baltimore v. Azar*, No. 19-cv-1103, 2020 WL 758145, at *10 (D. Md. Feb. 14, 2020)). Given the Secretary's "policymaking discretion" under the APA to disagree with "technocratic expertise" within his own agency, *Dep't of Commerce*, 139 S. Ct. at 2571, he certainly may reject the views of outside professional organizations as well. *See California*, 950 F.3d at 1100 n.31 ("HHS may reasonably decide not to rely on the opinions of outside commenters, even where they claim expertise.").[5]

Ultimately, "HHS examined the relevant considerations arising from commenters citing medical ethics and rationally articulated an explanation for its conclusion." *California*, 950 F.3d

[4] Contrary to Plaintiffs' suggestion, *see* Pls.' MSJ at 12-13, ethical standards have not changed in any relevant sense since the Supreme Court decided *Rust*. *See* 89-1391 Pet. Br. at *21 n.33, *Rust* (Nos. 89-1391,-1392), 1990 WL 505724 (contending that the 1988 rule's prohibition on abortion referrals was inconsistent with medical ethics because "[t]he professional standards" of the AMA and ACOG "require doctors to provide full, unbiased information about and referral for all medical alternatives, . . . even for those treatment options they are unwilling or unable to provide").

[5] In any event, Plaintiffs have not even identified "an opinion from the AMA's *Code of Medical Ethics* directly addressing abortion," *California*, 950 F.3d at 1102 n.34, much less any medical code stating that compliance with abortion-referral restrictions in the context of a federally funded preconception family planning program is unethical. Indeed, particularly given that the Rule expressly allows providers to advise patients on the limits of the Title X program, it is difficult to see how a provider could violate the AMA's code, which prohibits only "withholding information *without [a] patient's knowledge* or consent." 84 Fed. Reg. at 7745 (emphasis added).

at 1103. And although it is not necessary to uphold the Rule, it is worth noting that HHS's analysis has been starkly confirmed by the operation of the Rule since it went into effect nearly a year ago. The majority of incumbent providers have remained in the program without any apparent ethical sanction, demonstrating that neither those providers nor their state regulators believe compliance with the Rule violates medical ethics. *See, e.g.*, *HHS Issues Supplemental Grant Award to Title X Recipients* (Sept. 30, 2019);[6] *see also California*, 950 F.3d at 1099 n.30. And Plaintiffs have not identified any evidence that any provider (much less a provider participating in a federally funded family-planning program) has been disciplined by a body with actual authority over medical ethics (as opposed to their preferred professional organizations) for failing to provide an abortion referral upon demand—not in the time since the Rule has been in effect, or in any other context. Indeed, such discipline would be quite surprising given that the majority of States (and the federal government) prohibit abortion referrals (or even abortion counseling) in various publicly funded programs, while still others at least permit medical providers to refuse to do so under their conscience laws—many of which apply regardless of whether the provider even has a religious or moral objection to abortion referrals. *See, e.g.*, Defs.' Mot. at 33; Weldon Amendment, Pub. L. No. 115-245, § 507(d)(1), 132 Stat. 2891, 3118 (Sept. 28, 2019) (no funds appropriated for, among other agencies, HHS "may be made available to a Federal agency or program, or to a State or local government, if" it "subjects any institutional or individual health care entity to discrimination on the basis that the health care entity does not . . . refer for abortions").

Relatedly, because HHS reasonably concluded that the referral and counseling restrictions do not force Title X grantees to violate medical ethics, Plaintiffs cannot override that reasoned

[6] *Available at* https://www.hhs.gov/about/news/2019/09/30/hhs-issues-supplemental-grant-awards-to-title-x-recipients.html.

determination by contending that purported ethical conflicts would drive incumbent providers out of the program and "result in a major reduction in Title X participation and coverage." Pls.' MSJ at 13. Once again, HHS specifically and thoroughly addressed comments asserting that some providers might choose to leave the Title X program as a result of the Rule. *See* Defs.' Mot. at 34-35; 84 Fed. Reg. at 7766, 7780-82; *see also California*, 950 F.3d at 1098-1101 (describing HHS's analysis). In short, HHS reasonably concluded that the comments about the Rule's potential effects on *a subset of* the existing provider network did not establish that the Rule would reduce Title X services *as a whole*. Instead, HHS exercised its expert judgment to project that, while any calculation of future program participation would be inherently speculative, it did not ultimately anticipate "a decrease in the overall number of facilities offering services." 84 Fed. Reg. at 7782. This was in part due to its predictions, based on data in the record and input from commenters, that new providers previously discouraged from joining the program would replace any withdrawing providers. *Id*. at 7744, 7780-781 & n.139. In addition, HHS noted that in many areas a withdrawal of some providers would not be a problem because "there are already competing applicants to serve the same region" who could expand their services with additional grant money. *Id*. at 7766.

Plaintiffs disagree with HHS's weighing of these considerations, but as the en banc Ninth Circuit recently made clear, the judgment was ultimately HHS's to make:

> HHS's predictive judgments about the Final Rule's effect on the availability of Title X services are entitled to deference. *See Trout Unlimited*, 559 F.3d at 959. Here, the predictions concern matters squarely within HHS's "field of discretion and expertise." *BNSF Ry. Co.*, 526 F.3d at 781 (quoting *Wis. Pub. Power*, 493 F.3d at 260). As the agency tasked with implementing the grant program, HHS is in the best position to anticipate the behavior of grantees and prospective grantees. HHS reasonably considered the evidence before it, where "complete factual support" for any prediction was "not possible or required," *Nat'l Citizens Comm. for Broad.*, 436 U.S. at 814, such that its decision "remained 'within the bounds of reasoned decisionmaking,'" *Dep't of Commerce*, 139 S. Ct. at 2569 (quoting *Baltimore Gas & Elec. Co. v. Nat. Res. Def. Council, Inc.*, 462 U.S. 87, 105 (1983)). Although the commenters opposing the Final Rule provided numerous expert declarations

> elaborating their gloomy assumptions about the future behavior and activities of current and future Title X grantees, at bottom such future-looking "pessimistic" predictions and assumptions are "simply evidence for the [agency] to consider," *Dep't of Commerce*, 139 S. Ct. at 2571, and are not entitled to controlling weight. HHS need not produce "some special justification for drawing [its] own inferences and adopting [its] own assumptions." *Id*. Although plaintiffs . . . have reached a different conclusion, we consider only whether the agency examined the relevant considerations and laid a reasonably discernable path.

California, 950 F.3d at 1100. And while the APA does not require agency predictions to come true, the majority of Title X grantees have remained in the program since the referral restriction took effect and HHS has used the funds relinquished from the departing ones to issue supplemental awards it "expects . . . will enable grantees to come close to—if not exceed—prior Title X patient coverage." *Supplemental Grant Awards*; *see California*, 950 F.3d at 1099 n.30.

Plaintiffs' related contention that HHS did not adequately consider the impact of the counseling and referral provisions on abortion access similarly falls flat. *See* Pls.' MSJ at 16-17. As HHS explained in response to commenters' concerns that the Rule would deprive women of information about "where to obtain" an abortion, Congress, through § 1008, "expressly restricted [HHS] from funding Title X projects where abortion is a method of family planning." 84 Fed. Reg. at 7746. Because "the purpose of Title X is not to provide such information," *id.*, and *Rust* has settled that the government need not fund abortion-related information and services outside the scope of the congressionally created program, *see, e.g.*, Defs.' Mot. at 38-39, HHS can hardly have acted arbitrarily and capriciously by not devoting more attention to the impact of the Rule on abortion access. And in any event, HHS recognized that information remains available outside the Title X project, 84 Fed. Reg. at 7746 which, as the Court has noted, mitigates any concerns about patients' ability to "find [their] way to available abortion services," PI Order at 43.

Finally, Plaintiffs contend that the counseling and referral provisions are somehow impermissible because HHS "disregarded the 2014 QFP," Pls.' MSJ at 15, referring to a 2014

publication containing clinical recommendation for providing quality family planning services in accordance with then-existing regulatory requirements. They are wrong, however, to suggest that HHS was not entitled to "ignore portions of the QFP." *Id*. HHS continues to expect Title X providers to follow QFP guidelines to the extent they are consistent with the Rule. But to the extent those guidelines might conflict with the Rule, HHS was entitled to depart from them for the same reasons it was entitled to depart from the 2000 regulations. 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. To change course, HHS needed only acknowledge that it was doing so and provide a reasoned explanation, which it did. *See supra* p. 11; Defs.' Mot. at 35-36; *California*, 950 F.3d at 1102 n.33 (dismissing argument based on "guidelines in the QFP [as] meritless, because these guidelines were based on the 2000 Rule, and are superseded by the Final Rule"). The Court has previously rejected Plaintiffs' argument, *see* PI Order at 45, and should do so again in light of its conclusion that HHS adequately explained its change in position with respect to the best interpretation of § 1008. *See id*. at 36-45.

In all events, HHS reasonably concluded that the counseling and referral provisions were necessary to comply with the best reading of Title X and other policy objectives regardless of the costs. *See*, *e.g.*, 84 Fed. Reg. at 7783. Plaintiffs apparently disagree, but the APA allows the Secretary to engage in that type of "value-laden decisionmaking and the weighing of incommensurables," *Dep't of Commerce*, 139 S. Ct. at 2571.

3. Plaintiffs' overlapping attacks on the physical separation requirement fare no better. *First*, they contend that HHS did not provide a "reasoned explanation" for instituting the requirements, *see* Pls.' MSJ at 17-18, but as discussed above and in the opening brief, *see supra* p. 11; Defs.' Mot. at 30-32, that is simply not the case. HHS reasonably determined that its existing

regulations were too lax about the degree of separation between a Title X program and activities in which abortion is a method of family planning, and that the best reading of § 1008 "require[s] clear physical separation between Title X projects and places 'where' abortion is offered as a method of family planning." 84 Fed. Reg. at 7765. As the en banc Ninth Circuit concluded in rejecting the same argument, HHS "examined the relevant considerations" and "provided a reasoned analysis for adopting" the separation requirement. *California*, 950 F.3d at 1097; *see also id*. at 1097-1100 (crediting the agency's rationale that "physical separation would more effectively implement § 1008," and finding both that "HHS could reasonably conclude that the physical separation requirements could help minimize the appearance that the government is funding abortion as a method of family planning," and that HHS did reasonably conclude that "'flexibility in the use of Title X funds under the 2000 [Rule]' allowed grantees to use Title X funds to 'build infrastructure that can be used for [prohibited] purposes'"). Indeed, Plaintiffs' assertion that in light of the Rule, MFP must depart the program and "close 11 to 15, or all 17, satellite clinics because there is no feasibly means of developing an abortion network untethered from Title X" only confirms the legitimacy of HHS's concerns. Decision & Order on Mot. to Amend Order at 2, ECF No. 84; *see also* Pls.' MSJ at 35.

Second, Plaintiffs quibble with HHS's assessment of compliance costs for existing providers. Although Plaintiffs contend that the Department's assessment of the costs of complying with the physical separation requirement was "neither correct nor consistent with the evidence in the record," Pls.' MSJ at 19, in actuality, HHS thoroughly explained its calculation of these costs. In particular, it relied on a Congressional Research Service report to conclude that only about 10% of clinics offer abortion as a method of family planning and estimate that only about 20% of Title X providers had "their Title X services and abortion services . . . currently collocated." 84 Fed.

Reg. at 7781. Thus, HHS predicted the vast majority of providers would not need to incur any costs to comply and the remaining providers could comply without incurring large costs. As Plaintiffs point out, *see* Pls.' MSJ at 19, some commenters provided much higher cost estimates, and HHS considered these submissions and adjusted its own estimate upward in response to those concerns. *See* 84 Fed. Reg. at 7781-82. Fundamentally, however "HHS was not required to accept the commenters' 'pessimistic' cost predictions," *California*, 950 F.3d at 1101, and the agency noted that those commenters did not "provide sufficient data to estimate these effects across the Title X program," 84 Fed. Reg. at 7781. Moreover, HHS acknowledged the uncertainty in its estimate of costs and that individual providers may have different circumstances that may affect their options and the resulting costs of compliance. *See id*. at 7782. Accordingly, HHS explained that compliance would be assessed on a case-by-case basis, and it would help providers come to solutions to comply with the physical separation requirement. *See id*. at 7766-67, 7781.

As the en banc Ninth Circuit concluded, HHS adequately supported its estimate, explaining that it expected providers to "seek out lower costs options, such as shifting abortion services to distinct facilities rather than constructing new ones." *California*, 950 F.3d at 1101 (citing 84 Fed. Reg. at 7781-82). And after analyzing the costs, HHS determined that "compliance with statutory program integrity provisions is of greater importance." 84 Fed. Reg. at 7783. There is no basis for the Court to second-guess that policy judgment under the APA.

Third, Plaintiffs contend that HHS failed to account for the "reliance interests" engendered by providers, like MFP, that have "developed over the course of decades in facilities shared with abortion providers under the current regime." Pls.' MSJ at 20. But as this Court has previously recognized, reliance "is a two-way street," PI Order at 38, and HHS can hardly be faulted for reinstating regulatory requirements that had already been upheld by the Supreme Court. Given

the "black letter provision that '[n]one of the funds appropriated under [Title X] shall be used in programs where abortion is a method of family planning," *id*. at 38 (quoting 42 U.S.C. § 300a-6), Defendants did not act "irrationally when they concluded that the current state of affairs validates their concern over mission drift in the Title X program and suggests the need for course correction," *id*. at 39, notwithstanding any reliance interests Plaintiffs may profess. *See also California*, 950 F.3d at 1099 (rejecting argument that separation requirement would "upset the reliance interests of providers who have incurred costs relying on HHS's previous regulations" because, among other things, HHS reasonably concluded that "the separation requirements would have only 'minimal effect on the majority of current Title X providers'").

Finally, Plaintiffs argue that HHS failed to account for the harm that the separation requirement would cause to existing Title X networks and the provision of abortion services. Pls.' MSJ at 20-21. Plaintiffs made the same argument with respect to the counseling and referral provisions, and it fails for the same reasons: HHS's "predictive judgments about the Final Rule's effect on the availability of Title X services are entitled to deference," and, here, HHS "reasonably considered the evidence before it" and made a decision that "remained 'within the bounds of reasoned decisionmaking.'" *California*, 950 F.3d at 1100; *see supra* pp. 14-16.

IV. Plaintiffs' Constitutional Claims Are Meritless.

"With respect to fundamental constitutional rights," this case presents the purely legal question of whether Plaintiffs, "as Title X grantee or patients, . . . are *fundamentally entitled* under existing law to provide or receive abortion services, referrals, and education at Title X clinics." PI Order at 27 (emphasis in original). As the Court has noted, "[t]his specific question has been answered before, by the Supreme Court, and not in Plaintiffs' favor." *Id*. In light of *Rust*, the Court can easily dispose of Plaintiffs' constitutional claims.

A. The Rule Does Not Violate Plaintiffs' Patients' Due Process Rights

As the Court has previously recognized, Plaintiffs' argument that the Rule violates any "right to choose abortion before viability," Pls.' MSJ at 31, is a request that the Court "ignore binding precedent that only the Supreme Court, or an act of Congress, can undo." PI Order at 51. The Court correctly refused to do so in denying Plaintiffs a preliminary injunction, and Plaintiffs provide no basis to alter that calculus here.

1. Contrary to Plaintiffs' assertion, their case is not "materially different" from the one before the Supreme Court in *Rust*, Pls.' MSJ at 31, in which the Court concluded that the same substantive funding conditions "place[] no governmental obstacle in the path of a woman who chooses to terminate her pregnancy." 500 U.S. at 201. Plaintiffs highlight that *Rust* involved a facial challenge, but as this Court has noted, *Rust* only "characterized the challenge to the 1988 Rule as facial" because, as here, *see supra* p. 7, "the regulations had not yet been applied." PI Order at 50 n. 42. Plaintiffs do not explain why this distinction "lessens the precedential impact of *Rust*." *Id*. Whether Plaintiffs' challenge is characterized as "facial" or "as-applied," *Rust* supplies the relevant standard and the answer to the relevant legal question: "the regulations do not impermissibly burden a woman's Fifth Amendment rights." *Rust*, 500 U.S. at 201.

Plaintiffs fare no better in contending that *Rust*'s constitutional holding "was limited to the 1988 gag rule"—*i.e.*, not the physical separation requirement—and that *Rust* involved a "very different" evidentiary record. Pls.' MSJ at 32. To the contrary, the Supreme Court broadly held that the 1988 "*regulations* do not impermissibly burden a woman's Fifth Amendment rights," *Rust*, 500 U.S. at 201 (emphasis added), even though "[t]he undisputed record below ma[de] clear that at least 50% of Title X clinics lack the resources" to comply with the separation requirements, Pet. Br. at 29, *Rust* (No. 89-1391), 1990 WL 505724. *See also Massachusetts*, 899 F.2d at 59

("Appellees submitted numerous affidavits stating that the [1988] regulations would require many clinics to either give up their Title X funding or to terminate family planning services altogether." (discussing physical separation requirement)). Moreover, Plaintiffs fail to explain why the due process analysis in *Rust* does not equally dispose of their challenge to the physical separation requirement: "It would undoubtedly be easier for a woman seeking an abortion" if Plaintiffs could use Title X funds to maintain their abortion services through economies of scale, "but the Constitution does not require that the Government distort the scope of its mandated program in order" for Plaintiffs to do so. *Rust*, 500 U.S. at 203.

2. Next, Plaintiffs emphasize that they are pursuing an unconstitutional conditions claim and that "the relevant inquiry" is whether the Rule "affect[s] 'protected conduct outside the scope' of the Title X program." Pls.' MSJ at 32. Once again, however, *Rust* has already resolved that issue in the government's favor:

> By requiring that the Title X grantee engage in abortion-related activity separately from activity receiving federal funding, Congress has, consistent with our teachings . . . , not denied it the right to engage in abortion-related activities. Congress has merely refused to fund such activities out of the public fisc, and the Secretary has simply required a certain degree of separation from the Title X project in order to ensure the integrity of the federally funded program.

Rust, 500 U.S. at 198. Critically, the Rule, like the 1988 regulations, "govern solely the scope of the Title X project's activities" and "leave the grantee unfettered in its other activities." *Id*. at 196, 198-99. Plaintiffs fail to explain how the Rule differs from its 1988 counterpart in this respect.

Plaintiffs devote significant space in their brief to arguing that the Rule imposes an undue burden in limiting the access of its patients to their "fundamental right to abortion." Pls.' MSJ at 34. Ultimately, however, they cannot avoid *Rust*'s central conclusion that the failure to subsidize a constitutional right is not the same as imposing an impermissible burden on the exercise of that right. "Within far broader limits than [Plaintiffs] are willing to concede, when the Government

appropriates public funds to establish a program it is entitled to define the limits of that program." *Rust*, 500 U.S. at 194. This element of "federal spending" is the "essential ingredient" in this case, which "steers" it out of the "undue burden analysis" Plaintiffs seek to invoke." PI Order at 51 n.43. *Rust* remains good law and is controlling in this case. And in all events, even if this Court were to disagree, it must leave to the Supreme Court the prerogative of overruling its prior precedents. *See id*. at 51 (citing *United States v. Jimenez-Banegas*, 790 F.3d 253 (1st Cir. 2015)).

B. The Rule Does Not Violate Equal Protection

Plaintiffs do not press their (meritless, *see* Defs.' Mot. at 39-40) claim that the Rule constitutes sex discrimination. *See* Am. Compl. ¶ 237. Instead, Plaintiffs contend that the Rule violates equal protection to the extent it "discriminates against patients based on their exercise of a fundamental right," namely the "right to access previability abortion." Pls.' MSJ at 39. But this is simply a rehash of Plaintiffs' meritless due process claim, and it fails for the same reason: the Rule does not unconstitutionally interfere with anyone's right to access previability abortion.

"[T]he constitutional test applicable to government abortion-funding restrictions is . . . the ordinary rationality standard." *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 273 (1993). Plaintiffs do not attempt to distinguish *Bray* or the many other cases applying rational basis review to equal protection challenges to abortion-funding restrictions. *E.g.*, *Maher v. Roe*, 432 U.S. 464, 478-79 (1977); *Harris v. McRae*, 448 U.S. 297, 323 (1980). And the cases on which Plaintiffs do rely provide no support for the contention that a limitation on the use of federal funds to support abortion is nonetheless subject to "heightened scrutiny." *See, e.g.*, Pls.' MSJ at 39 (citing *Skinner v. Okla. ex rel. Williamson*, 316 U.S. 535 (1942), which applied strict scrutiny to a state law that provided for "habitual criminals" to be forcibly sterilized). In short, if a particular funding restriction "does not place an undue burden on a woman's ability to make an abortion

decision," then "there is no need to resolve whether it remains a fundamental right for an equal protection analysis." *Greenville Women's Clinic v. Bryant*, 222 F.3d 157, 173 (4th Cir. 2000).

Were Plaintiffs' position correct, every statute or regulation that imposes funding conditions that fail to subsidize abortion—including the regulation at issue in *Rust*—would also discriminate against "pregnant patients seeking abortion," Pls.' MSJ at 39, and be subject to heightened scrutiny. That, of course, is not the law, as *Rust* itself demonstrates. Plaintiffs' challenge to the Rule's funding conditions is subject to rational basis review, and it easily satisfies that standard because HHS engaged in reasoned decisionmaking, as explained above and in the opening brief. *See supra* pp. 10-20; Defs.' Mot. at 29-36.

C. The Rule Does Not Violate the First Amendment

Although Plaintiffs do not dispute that *Rust* remains good law, they contend that the decision "left open the question of whether the patient-provider relationship . . . is entitled to First Amendment protection even within a government-funded program." Pls.' MSJ at 42-43. *Rust* did not, however, leave open the question of whether the same restrictions at issue here impermissibly interfere with that relationship, explicitly holding that the 1988 regulations "do not significantly impinge upon the doctor-patient relationship." 500 U.S. at 200. Then, as now, "the doctor-patient relationship established by the Title X program [is not] sufficiently all encompassing so as to justify an expectation on the part of the patient of comprehensive medical advice," and Title X providers are "always free to make clear that advice regarding abortion is simply beyond the scope of the program." *Id.* Plaintiffs' attempt to distinguish *Rust* on this basis is unconvincing. *See* PI Order at 56 (noting that Plaintiffs had not "identif[ied] a meaningful way in which the Final Rule differs from the 1988 Regulations for purposes of a First Amendment inquiry").

Nor has subsequent case law undermined *Rust*'s conclusion on this point (or any other). *Contra* Pls.' MSJ at 43-44. As this Court has determined, the cases on which Plaintiffs rely, "[f]ar from detracting from the force of *Rust*," "bolster and reaffirm the applicability of the Supreme Court's reasoning to the facts of this case." PI Order at 55. Plaintiffs rely primarily on *Legal Services Corp. v. Velazquez*, 531 U.S. 533 (2001) and *National Institute of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018) (*NIFLA*). But *Velazquez* expressly reaffirmed *Rust*, 531 U.S. at 540-41; and *NIFLA* arose outside the context of government subsidization of speech and thus, understandably, did not even mention *Rust* given the settled rule that "if a party objects to a 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); *see also id.* at 216-17 (reaffirming *Rust*); PI Order at 54-55 & ns.46 & 47.

CONCLUSION

For these reasons, and those set forth in their opening brief, Defendants respectfully request that the Court grant Defendants' motion to dismiss or, in the alternative, for summary judgment; deny Plaintiffs' motion for summary judgment; and enter judgment in Defendants' favor.[7]

Dated: April 30, 2020

Respectfully submitted,

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[7] If the Court ultimately disagrees with Defendants and decides to award Plaintiffs summary judgment with respect to any of their claims, the scope of relief should be limited. Defendants dispute that the remedy of vacatur is proper in this case, *see* Pls.' MSJ at 3, and submit, as they have previously argued, that any remedial order—including vacatur—should be limited to Plaintiffs only. *See* Defs.' Mem. in Opp'n to Pls.' Mot. for Prelim. Inj. at 45-50, ECF No. 48.

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CERTIFICATE OF SERVICE

I hereby certify that on April 30, 2020, I electronically filed the foregoing document 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/ R. Charlie Merritt
R. CHARLIE MERRITT